

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

A CAB, LLC; AND A CAB SERIES,  
LLC,

Appellants,

v.

MICHAEL MURRAY; AND  
MICHAEL RENO, INDIVIDUALLY  
AND ON BEHALF OF ALL OTHERS  
SIMILARLY SITUATED,

Respondents.

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) Supreme Court No. 77050

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Electronically Filed  
Aug 05 2020 03:48 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**APPENDIX TO  
APPELLANTS OPENING BRIEF  
VOLUME I of LII**

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Appeal from the Eighth Judicial District Court  
Case No. A-12-669926-C

HUTCHISON & STEFFEN, PLLC

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11	Plaintiffs' Response in Opposition to Defendants' Motion to Strike First Amended Complaint and Counter-Motion for a Default Judgment or Sanctions Pursuant to EDCR 7.60(b), filed 04/11/2013	II	AA000202-AA000231
24	Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Claim for Relief, filed 08/28/2015	IV	AA000651-AA000668
23	Plaintiffs' Response in Opposition to Defendants' Motion for Declaratory Order Regarding Statue of Limitations, filed 08/28/2015	IV	AA000600-AA000650
172	Plaintiffs' Response in Opposition to Defendants' Motion for Dismissal of Claims on an Order Shortening Time, filed 10/17/2018	XLVI	AA009289-AA009297
8	Plaintiffs' Response in Opposition to Defendants' Motion Seeking Reconsideration of the Court's February 8, 2013 Order Denying Defendants' Motion to Dismiss, filed 03/18/2013	I	AA000181-AA000187
154	Plaintiffs' Response to Defendants' Ex-Parte Motion to Quash Writ of Execution on an OST and Counter-Motion for Appropriate Judgment Enforcement Relief, filed 09/24/2018	XLIV	AA008919-AA008994
109	Plaintiffs' Response to Defendants' Motion in Limine to Exclude Expert Testimony, filed 01/12/2018	XXX, XXXI	AA006002-AA006117
184	Plaintiffs' Response to Special Master's	XLVII	AA009665-

	Motion for an Order for Payment of Fees and Contempt, filed 11/26/2018		AA009667
115	Plaintiffs' Supplement in Connection with Appointment of Special Master, filed 01/31/2018	XXXII	AA006239-AA006331
144	Plaintiffs' Supplement in Reply and In Support of Entry of Final Judgment Per Hearing Held June 5, 2018, filed 07/13/2018	XLI, XLII	AA008416-AA008505
146	Plaintiffs' Supplement in Reply to Defendants' Supplement Dated July 18, 2018, filed 08/03/2018	XLII	AA008576-AA008675
107	Plaintiffs' Supplement in Support of Motion for Partial Summary Judgment, filed 01/09/2018	XXX	AA005833-AA005966
75	Plaintiffs' Supplement to Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed 02/23/2017	XX	AA003847-AA003888
156	Plaintiffs' Supplemental Response to Defendants' Ex-Parte Motion to Quash Writ of Execution on an OSt, filed 09/27/2018	XLIV	AA009009-AA009029
46	Reply in Support of Defendants' Motion for Reconsideration, filed 03/24/2016	VII, VIII	AA001237-AA001416
170	Reply in Support of Defendants' Motion for Reconsideration, Amendment, for New Trial, and for Dismissal of Claims, filed 10/16/2018	XLV	AA009272-AA009277
58	Reply in Support of Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statue of Limitation and Opposition to Counter Motion for Toll of Statue of Limitations and for an Evidentiary Hearing, filed 12/28/2016	XI	AA002179-AA002189

111	Reply in Support of Defendants' Motion in Limine to Exclude the Testimony of Plaintiffs' Experts, filed 01/19/2018	XXXI	AA006180-AA001695
178	Resolution Economics' Application for Order of Payment of Special Master's Fees and Motion for Contempt, filed 11/05/2018	XLVII	AA009553-AA009578
187	Resolution Economics' Reply to Defendants' Opposition and Plaintiffs' Response to its Application for an Order of Payment of Special Master's Fees and Motion for Contempt, filed 12/03/2018	XLVII	AA009690-AA009696
100	Response in Opposition to Defendant's Motion for Summary Judgment, filed 12/14/2017	XXVII, XXVIII	AA005372-AA005450
31	Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' First Claim for Relief, filed 09/28/2015	V	AA000807-AA000862
3	Response in Opposition to Defendants' Motion to Dismiss, filed 12/06/2012	I	AA000016-AA000059
33	Response in Opposition to Defendants' Motion to Dismiss and for Summary Judgment Against Plaintiff Michael Murray, filed 10/08/2015	V	AA000870-AA000880
34	Response in Opposition to Defendants' Motion to Dismiss and for Summary Judgment Against Plaintiff Michael Reno, filed 10/08/2015	V	AA000881-AA000911
212	Second Amended Notice of Appeal, filed 03/06/2019	L	AA010285-AA010288
22	Second Amended Supplemental Complaint, filed 08/19/2015	III	AA000582-AA000599
130	Second Supplemental Declaration of Class Counsel, Leon Greenberg, Esq., filed	XXXIV	AA007015-AA007064

	05/18/2018		
213	Special Master Resolution Economics' Opposition to Defendants Motion for Reconsideration of Judgment and Order Granting Resolution Economics Application for Order of Payment of Special Master's Fees and Order of Contempt, filed 03/28/2019	LI	AA010289-AA010378
78	Supplement to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed 05/24/2017	XXI	AA004024-AA004048
79	Supplement to Defendants' Opposition to Plaintiffs' Motion to Bifurcate Issue of Liability of Defendant Creighton J. Nady From Liability of Corporate Defendants or Alternative Relief, filed 05/31/2017	XXI	AA004049-AA004142
72	Supplement to Order For Injunction Filed on February 16, 2017, filed 02/17/2017	XIX	AA003777-AA003780
129	Supplemental Declaration of Class Counsel, Leon Greenberg, Esq., filed 05/16/2018	XXXIV	AA006981-AA007014
38	Transcript of Proceedings, November 3, 2015	VI	AA001002-AA001170
66	Transcript of Proceedings, February 8, 2017	XVII	AA003549-AA003567
70	Transcript of Proceedings, February 14, 2017	XIX	AA003755-AA003774
77	Transcript of Proceedings, May 18, 2017	XX, XXI	AA003893-AA004023
83	Transcript of Proceedings, June 13, 2017	XXII	AA004223-AA004244
101	Transcript of Proceedings, December 14, 2017	XXVIII	AA005451-AA005509

105	Transcript of Proceedings, January 2, 2018	XXIV	AA005720- AA005782
114	Transcript of Proceedings, January 25, 2018	XXXI	AA006203- AA006238
117	Transcript of Proceedings, February 2, 2018	XXXII	AA006335- AA006355
122	Transcript of Proceedings, February 15, 2018	XXXII, XXXIII	AA006427- AA006457
137	Transcript of Proceedings, filed July 12, 2018	XXXVI, XXXVII	AA007385- AA007456
215	Transcript of Proceedings, September 26, 2018	LI	AA010385- AA010452
216	Transcript of Proceedings, September 28, 2018	LI, LII	AA010453- AA010519
175	Transcript of Proceedings, October 22, 2018	XLVI	AA009304- AA009400
189	Transcript of Proceedings, December 4, 2018	XLVIII	AA009701- AA009782
190	Transcript of Proceedings, December 11, 2018	XLVIII	AA009783- AA009800
192	Transcript of Proceedings, December 13, 2018	XLVIII	AA009813- AA009864

## **CERTIFICATE OF SERVICE**

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **APPENDIX TO APPELLANTS OPENING BRIEF VOLUME I of LII** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Leon Greenberg, Esq.  
Dana Sniegocki, Esq.  
Leon Greenberg Professional Corporation  
2965 S. Jones Blvd., Ste. E3  
Las Vegas, NV 89146  
Telephone: (702) 383-6085  
Facsimile: (702) 385-1827  
[leongreenberg@overtimelaw.com](mailto:leongreenberg@overtimelaw.com)  
[Dana@overtimelaw.com](mailto:Dana@overtimelaw.com)

*Attorneys for Respondents*

DATED this 5<sup>th</sup> day of August, 2020.

*/s/ Kaylee Conradi*

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An employee of Hutchison & Steffen, PLLC

## CIVIL COVER SHEET

A - 1 2 - 6 6 9 9 2 6 - C

Clark County, Nevada

XXVII I

Case No. \_\_\_\_\_  
(Assigned by Clerk's Office)**I. Party Information**

Plaintiff(s) (name/address/phone): Michael P. Murray, 3555  
Stober Blvd., Apt. 111, Las Vegas, NV 89103, Michael  
Reno, 811 E. Bridger Avenue, #363, Las Vegas, NV 89101  
Attorney (name/address/phone):  
Leon Greenberg, 2965 S. Jones Blvd., Suite E-4, Las Vegas,  
NV 89146, 702-383-6085

Defendant(s) (name/address/phone): A Cab Taxi Service, LLC, 3730  
Pama Lane, Las Vegas, NV 89120

Attorney (name/address/phone):  
Unknown

**II. Nature of Controversy** (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

Real Property	Torts	
<input type="checkbox"/> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> <b>Title to Property</b> <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> <b>Condemnation/Eminent Domain</b> <input type="checkbox"/> <b>Other Real Property</b> <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> <b>Negligence</b> <input type="checkbox"/> Negligence - Auto <input type="checkbox"/> Negligence - Medical/Dental <input type="checkbox"/> Negligence - Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence - Other	<input type="checkbox"/> <b>Product Liability</b> <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> <b>Intentional Misconduct</b> <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> <b>Employment Torts</b> (Wrongful termination) <input type="checkbox"/> <b>Other Torts</b> <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ <input type="checkbox"/> <b>Summary Administration</b> <input type="checkbox"/> <b>General Administration</b> <input type="checkbox"/> <b>Special Administration</b> <input type="checkbox"/> <b>Set Aside Estates</b> <input type="checkbox"/> <b>Trust/Conservatorships</b> <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> <b>Other Probate</b>	<input type="checkbox"/> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> <b>Breach of Contract</b> <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> <b>Civil Petition for Judicial Review</b> <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> <b>Appeal from Lower Court</b> (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> <b>Civil Writ</b> <input type="checkbox"/> Other Special Proceeding <input checked="" type="checkbox"/> <b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment - Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input checked="" type="checkbox"/> Other Civil Matters

**III. Business Court Requested** (Please check applicable category; for Clark or Washoe Counties only.)

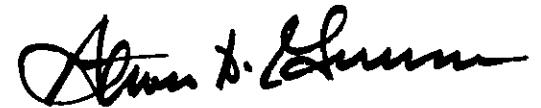
- |   |  |   |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88   | <input type="checkbox"/> Investments (NRS 104 Art. 8)        | <input type="checkbox"/> Enhanced Case Mgmt/Business  |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90)  | <input type="checkbox"/> Trademarks (NRS 600A)               |   |

October 8, 2012

Date

Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

**COMP**

LEON GREENBERG, ESQ., SBN 8094  
DANA SNIEGOCKI, ESQ., SBN 11715  
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[dana@overtimelaw.com](mailto:dana@overtimelaw.com)

Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

A-12-669926-C

MICHAEL MURPHY and MICHAEL  
RENO, Individually and on  
behalf of others similarly  
situated,

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC and  
A CAB, LLC,

Defendants.

Case No.:

Dept.: XXVIII

**COMPLAINT**

**ARBITRATION EXEMPTION  
CLAIMED BECAUSE THIS IS  
A CLASS ACTION CASE**

MICHAEL MURPHY and MICHAEL RENO, Individually and on  
behalf of others similarly situated, by and through their  
attorney, Leon Greenberg Professional Corporation, as and  
for a Complaint against the defendants, state and allege,  
as follows:

**JURISDICTION, PARTIES AND PRELIMINARY STATEMENT**

1. The plaintiffs, MICHAEL MURPHY and MICHAEL RENO,  
(the "individual plaintiffs" or the "named plaintiffs")

1 are residents of the State of Nevada and during all  
2 relevant times were residents of Clark County, Nevada, and  
3 all plaintiffs are current employees of the defendants.

4 2. The defendants A CAB TAXI SERVICE LLC and A CAB,  
5 LLC, (hereinafter referred to as "A CAB" or "defendants")  
6 are limited liability companies or corporations existing  
7 and established pursuant to the laws of the State of  
8 Nevada with their principal place of business in the  
9 County of Clark, State of Nevada and conduct business in  
10 Nevada.

#### 11 **CLASS ACTION ALLEGATIONS**

12 3. The plaintiffs bring this action as a class  
13 action pursuant to Nev. R. Civ. P. §23 on behalf of  
14 themselves and a class of all similarly situated persons  
15 employed by the defendants in the State of Nevada.

16 4. The class of similarly situated persons consists  
17 of all persons employed by defendant in the State of  
18 Nevada during the applicable statute of limitations  
19 periods prior to the filing of this Complaint continuing  
20 until date of judgment, such persons being employed as  
21 Taxi Cab Drivers (hereinafter referred to as "cab drivers"  
22 or "drivers") such employment involving the driving of  
23 taxi cabs for the defendants in the State of Nevada.

24 5. The common circumstance of the cab drivers giving  
25 rise to this suit is that while they were employed by  
26 defendants they were not paid the minimum wage required by  
27 Nevada's Constitution, Article 15, Section 16 for many or  
28 most of the days that they worked in that their hourly

1 compensation, when calculated pursuant to the requirements  
2 of said Nevada Constitutional Provision, did not equal at  
3 least the minimum hourly wage provided for therein.

4       6. The named plaintiffs are informed and believe,  
5 and based thereon allege that there are at least 200  
6 putative class action members. The actual number of class  
7 members is readily ascertainable by a review of the  
8 defendants' records through appropriate discovery.

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

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

18       9. A class action is superior to other available  
19 methods for the fair and efficient adjudication of the  
20 controversy. Due to the typicality of the class members'  
21 claims, the interests of judicial economy will be best  
22 served by adjudication of this lawsuit as a class action.  
23 This type of case is uniquely well-suited for class  
24 treatment since the employers' practices were uniform and  
25 the burden is on the employer to establish that its method  
26 for compensating the class members complies with the  
27 requirements of Nevada law.

28       10. The individual plaintiffs will fairly and

1 adequately represent the interests of the class and have  
2 no interests that conflict with or are antagonistic to the  
3 interests of the class and have retained to represent them  
4 competent counsel experienced in the prosecution of class  
5 action cases and will thus be able to appropriately  
6 prosecute this case on behalf of the class.

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

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

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

26 13. The named plaintiffs repeat all of the  
27 allegations previously made and bring this First Claim for  
28 Relief pursuant to Article 15, Section 16, of the Nevada

1 Constitution.

2 14. Pursuant to Article 15, Section 16, of the Nevada  
3 Constitution the named plaintiffs and the class members  
4 were entitled to an hourly minimum wage for every hour  
5 that they worked and the named plaintiffs and the class  
6 members were often not paid such required minimum wages.

7 15. The named plaintiffs seek all relief available to  
8 them and the alleged class under Nevada's Constitution,  
9 Article 15, Section 16 including appropriate injunctive  
10 and equitable relief to make the defendants cease their  
11 violations of Nevada's Constitution and a suitable award  
12 of punitive damages.

13 16. The named plaintiffs on behalf of themselves and  
14 the proposed plaintiff class members, seek, on this First  
15 Claim for Relief, a judgment against the defendants for  
16 minimum wages, such sums to be determined based upon an  
17 accounting of the hours worked by, and wages actually paid  
18 to, the plaintiffs and the class members, a suitable  
19 injunction and other equitable relief barring the  
20 defendants from continuing to violate Nevada's  
21 Constitution, a suitable award of punitive damages, and an  
22 award of attorney's fees, interest and costs, as provided  
23 for by Nevada's Constitution and other applicable laws.

24 **AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA**  
25 **REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED**  
26 **PLAINTIFFS**  
**AND THE PUTATIVE CLASS**

27 17. Plaintiffs repeat and reiterate each and every  
28 allegation previously made herein.

1        18.     The named plaintiffs bring this Second Claim for  
2 Relief against the defendants pursuant to Nevada Revised  
3 Statutes § 608.040 on behalf of themselves and those  
4 members of the alleged class of all similarly situated  
5 employees of the defendants who have terminated their  
6 employment with the defendants.

7        19.     The named plaintiffs have been separated from  
8 their employment with the defendants and at the time of  
9 such separation were owed unpaid wages by the defendants.

10       20.     The defendants have failed and refused to pay the  
11 named plaintiffs and numerous members of the putative  
12 plaintiff class who are the defendants' former employees  
13 their earned but unpaid wages, such conduct by such  
14 defendants constituting a violation of Nevada Revised  
15 Statutes § 608.020, or § 608.030 and giving such named  
16 plaintiffs and similarly situated members of the putative  
17 class of plaintiffs a claim against the defendants for a  
18 continuation after the termination of their employment  
19 with the defendants of the normal daily wages defendants  
20 would pay them, until such earned but unpaid wages are  
21 actually paid or for 30 days, whichever is less, pursuant  
22 to Nevada Revised Statutes § 608.040.

23       21.     As a result of the foregoing, the named  
24 plaintiffs seek on behalf of themselves and the similarly  
25 situated putative plaintiff class members a judgment  
26 against the defendants for the wages owed to them and such  
27 class members as prescribed by Nevada Revised Statutes §  
28 608.040, to wit, for a sum equal to up to thirty days

1 wages, along with interest, costs and attorneys' fees.

2 WHEREFORE, plaintiffs demand the relief on each cause  
3 of action as alleged aforesaid.

4 Plaintiffs demand a trial by jury on all issues so  
5 triable.

6 Dated this 8th day of October, 2012.

7

8 Leon Greenberg Professional Corporation

9

10 By: /s/ Leon Greenberg

11 LEON GREENBERG, Esq.  
12 Nevada Bar No.: 8094  
13 2965 South Jones Blvd- Suite E4  
14 Las Vegas, Nevada 89146  
15 (702) 383-6085

16

Attorney for Plaintiff

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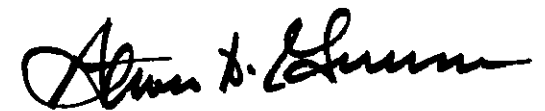
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CLERK OF THE COURT

**MDSM**  
Esther C. Rodriguez, Esq.  
Nevada Bar No. 6473  
RODRIGUEZ LAW OFFICES, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
702-320-8400  
[info@rodriguezlaw.com](mailto:info@rodriguezlaw.com)  
*Attorneys for Defendant A Cab, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL MURPHY and MICHAEL RENO,  
Individually and on behalf of others similarly  
situated,

Case No.: A-12-669926-C  
Dept. No. XXVIII

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC and A CAB, LLC,

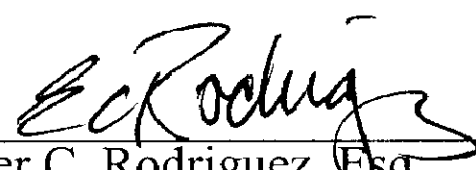
Defendants.

**DEFENDANT'S MOTION TO DISMISS COMPLAINT**

Defendant A Cab, LLC, by and through its attorney of record, ESTHER C. RODRIGUEZ, ESQ., of RODRIGUEZ LAW OFFICES, P.C., and pursuant to NRCP 12(b)(1) and (5), hereby respectfully moves this Honorable Court to dismiss the claims for relief in Plaintiffs' Complaint. This Motion is based upon the pleadings and papers on file, the attached Memorandum of Points and Authorities, and any oral argument that may be entertained at the hearing of this Motion.

DATED this 15 day of November, 2012.

**RODRIGUEZ LAW OFFICES, P.C.**


  
\_\_\_\_\_  
Esther C. Rodriguez, Esq.  
Nevada Bar No. 6473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that Defendant will bring the foregoing Motion on for hearing before this Court on the 17 day of JANUARY, 2012, or as soon thereafter as counsel may be heard. 9 : 0 0 AM

DATED this 15 day of November, 2012.

**RODRIGUEZ LAW OFFICES, P. C.**

  
\_\_\_\_\_  
Esther C. Rodriguez Esq.  
Nevada State Bar No. 006473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**POINTS AND AUTHORITIES**

**I.**

**FACTUAL BACKGROUND**

1. Plaintiffs are taxicab drivers who allege they were entitled to an hourly minimum wage for every hour that they worked, and that they were often not paid such required minimum wages. (Plaintiffs' Complaint ¶ 14.)

2. Plaintiffs brought their First Claim for Relief pursuant to Article 15, Section 16, of the Nevada Constitution, which did not eliminate the current and long-standing exemptions to the minimum wage and overtime laws for various categories of workers in Nevada, more specifically, taxicab and limousine drivers. (Plaintiffs' Complaint ¶ 13 and 14.)<sup>1</sup>

3. Plaintiffs brought their Second Claim for Relief pursuant to NRS 608.040 which falls under the jurisdiction of the Nevada Labor Commissioner. NRS 608.180 (Plaintiffs' Complaint ¶ 18.)

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<sup>1</sup>Many of the arguments contained in this motion mirror the arguments recently before this Court in Defendants' Motion to Dismiss in Thomas v. Nevada Yellow Cab Corporation, et al., case number A-12-661726-C, which motion was granted on August 30, 2012.

II.

**LEGAL ARGUMENT**

A. **Legal Standard.**

Pursuant to NRCP 12(b)(1) and (5), a defendant may move to dismiss a Complaint on the basis that the Court lacks subject matter jurisdiction and that it fails to state a claim upon which relief can be granted. The Court is to treat all well-pled factual allegations as true for purposes of the Motion to Dismiss. Conclusory allegations, or those that depend upon “information and belief” are not, however, entitled to the same treatment. See *Hale v. Burkhardt*, 104 Nev. 632, 764 P.2d 866 (1988).

B. **Taxicab Drivers are Exempt from Nevada’s Minimum Wage Statutes.**

Nevada Revised Statutes § 608.250 states in pertinent part:

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest.
2. The provisions of subsection 1 do not apply to:

(e) **Taxicab and limousine drivers.**

In this case, Plaintiffs’ action is being brought under the Nevada Constitution § 16 which was amended in 2006 to provide for annual adjustments in the minimum wage. Defendant submits that **taxicab and limousine drivers are exempt** from the minimum wage statute, and that the amendment did not explicitly or implicitly change or repeal any exemptions to the minimum wage law that had been in place in Nevada for over 30 years.

C. **When There is no Express Repeal, the Presumption is Against Finding an Implied Repeal.**

The Nevada Supreme Court strongly disfavors implied repeal. “Where express terms of repeal **are not used**, the presumption is always against an intention to repeal an earlier statute ...” *Lemberes v. State*, 97 Nev. 492, 499, 634 P.2d 1219, 1223 (1981). Finding an implied repeal is a

1 “practice [that] is heavily disfavored, and we will not consider a statute to be repealed by  
2 implication unless there is no other reasonable construction of the two statutes.” *Washington v.*  
3 *State*, 117 Nev. 735, 739, 30 P.3d 1134, 1170 (2001), citing *State v. Economy*, 61 Nev. 394, 398,  
4 130 P.2d 264, 266 (1942); *Thorpe v. Schooling*, 7 Nev. 17-18 (1871). Such a construction will not  
5 be made “unless there is no other reasonable construction of the two statutes.” *Id.* Even with  
6 respect to alleged implied repeal of a statute by constitutional provision, as here, “[i]mplied repeal  
7 of one law through enactment of another does not occur, save when one is irreconcilably repugnant  
8 to the other, or by some other means intent to abrogate the earlier law is made evident.”  
9 *Mengelkamp v. List*, 88 Nev. 542, 546, 501 P.2d 1032, 1034 (Nev. 1972), citing *Thorpe v.*  
10 *Schooling*, 7 Nev. 15 (1871).

11 When determining whether there is an implied repeal, specific provisions prevail over  
12 general provisions. *Lemberes*, 97 Nev. At 499, 643 P.2d at 1223 (“[T]he special statute ... will  
13 prevail over the general one.”), citing *Rannow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133,  
14 146 (1937).

15 In this case, since NRS 608.250 specifically addresses the issue concerning the exemption of  
16 taxicab drivers from Nevada’s wage and overtime laws, it prevails, and there can be no finding of  
17 implied repeal. Any mention of the existing exemptions was specifically omitted from the language  
18 of the Amendment and cannot be implied to mean that the exemptions would be supplanted or  
19 repealed, and therefore, Plaintiffs’ Complaint should be dismissed with prejudice.

20 Although not binding upon this Court, persuasive authority is found in the decision of the  
21 United States District Court of Nevada, in *Lucas v. Bell Trans.*, 2009 WL 2424557 (D. Nev. 2009).

22 Prior to the addition of section 16 to Article 15 of the Constitution, minimum wage  
23 obligations in the state were governed solely by Nevada Wage and Hour Law (“NWHL”) as  
24 contained in NRS 608.250. This statute provides that the state’s labor commissioner “shall, in  
25 accordance with federal law, establish by regulation the minimum wage which may be paid to  
26 employees[,]” and “shall prescribe increases to the minimum wage in accordance with those  
27 prescribed by federal law.” The NWHL further contained, and still contains, providing **exceptions**  
28 to certain employees, including **taxicab and limousine drivers**, from the minimum wage protection

1 prescribed by the labor commissioner. NRS 608.250.2(e).

2 Article 15, section 16 was added to the state's constitution as the result of a ballot initiative  
3 passed by the state's citizenry in 2006. The intent behind the initiative was to provide for a  
4 minimum wage greater than what then was prescribed under the NWHL; i.e., greater than the  
5 federal minimum wage. Hence, at the time of the ballot initiative, the federal minimum wage was  
6 \$5.15 per hour. The constitutional amendments increased the minimum wage to \$6.15 per hour for  
7 employees who did not provide health benefits to their employees, and they provided for an annual  
8 automatic increase equal to the greater of an increase in the federal minimum wage or the cost of  
9 living as measured by the Consumer Price Index.

10 While neither the ballot initiative nor the resulting constitutional amendments made any  
11 express reference to the NWHL, the intent clearly was to revise the minimum wage portions of the  
12 NWHL, not supplant the **entire** minimum wage statute and corresponding **exceptions**.  
13 Consequently, all other minimum wage provisions contained in the NWHL survive the  
14 constitutional amendments, at least to the extent that those provisions are not in conflict and  
15 otherwise can be harmonized with the constitutional amendments. Notably, the constitutional  
16 amendments do not speak to removing the minimum wage **exceptions** provided under NRS  
17 680.250(e), including the **exceptions** for **taxicab and limousine drivers**. As the federal district  
18 court observed in *Lucas v. Bell Trans.*, 2009 WL 2424557 (D. Nev. 2009), this omission is  
19 significant because it weakens any argument that the constitutional amendments conflict with, and  
20 therefore voids, the continued application of the statutory **exceptions** provided under the NWHL.  
21 See *Lucas*, at 20 (the [a]mendment[s]' definition of "employee" is not necessarily in conflict with  
22 NRS 608.250. The NRS 608.250 [**exceptions** and the [a]mendment[s]' definition of "employee"  
23 can happily co-exist.")

24 **D. Plaintiffs' Second Claim for Relief Must be Dismissed for Failure to State a Claim**  
25 **upon which Relief can be Granted.**

26 Plaintiffs' second claim for relief does not present a private cause of action and must be  
27 dismissed for failure to state a claim upon which relief can be granted and lack of jurisdiction over  
28 the subject matter.

1 NRCP 12(b)(1) and (5) state in pertinent part:

2 Every defense, in law or fact, to a claim for relief in any pleading,  
3 whether a claim, counterclaim, cross-claim, or third-party claim, shall  
4 be asserted in the responsive pleading thereto if one is required,  
5 except that the following defenses may at the option of the pleader be  
6 made by motion: (1) *lack jurisdiction over the subject matter*, (2) lack  
of jurisdiction over the person, (3) insufficiency of process, (4)  
insufficiency of service of process, (5) *failure to state a claim upon*  
*which relief can be granted*, ...

7 In this instance, Plaintiffs' recourse is to pursue any alleged claim for unpaid wages through  
8 Nevada's Labor Commissioner. Plaintiffs have brought their second claim pursuant to NRS  
9 608.040. Complaint ¶ 18. "The Labor Commissioner or the representative of the Labor  
10 Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced."  
11 **NRS 608.180.** Plaintiffs' have not pursued their claims through the appropriate forum, and this  
12 Court does not have jurisdiction to hear this claim.

13 **III.**

14 **CONCLUSION**

15 Based upon the foregoing points and authorities, Defendant A CAB, LLC respectfully  
16 requests this Honorable Court to enter an Order granting Defendant's Motion to Dismiss.

17 DATED this 15 day of November, 2012.

18 **RODRIGUEZ LAW OFFICES, P. C.**

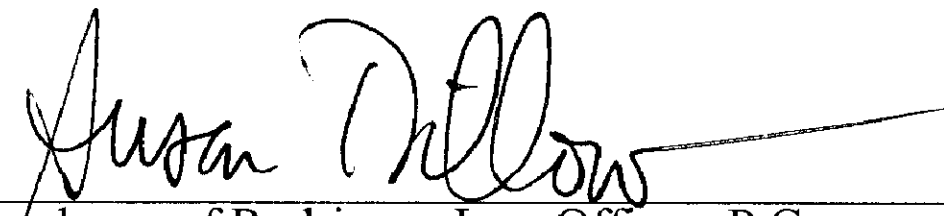
19 

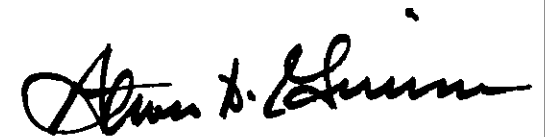
20 Esther C. Rodriguez, Esq.  
21 Nevada State Bar No. 006473  
22 10161 Park Run Drive, Suite 150  
23 Las Vegas, Nevada 89145  
24 *Attorneys for Defendant A Cab, LLC*  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** a true and correct copy of the foregoing **Motion to Dismiss** was served by placing same, postage prepaid, in the U.S. Mail this 15 day of November, 2012 to:

Leon Greenberg, Esq.  
Leon Greenberg Professional Corporation  
2965 South Jones Boulevard, Suite E4  
Las Vegas, Nevada 89146  
*Counsel for Plaintiff*

  
An Employee of Rodriguez Law Offices, P.C.



CLERK OF THE COURT

**OPPM**

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Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL MURRAY, and MICHAEL	)	Case No.: A-12-669926-C
RENO, Individually and on	)	
behalf of others similarly	)	Dept.: I
situated,	)	
	)	
Plaintiffs,	)	RESPONSE IN OPPOSITION TO
	)	DEFENDANTS' MOTION TO
vs.	)	DISMISS
	)	
A CAB TAXI SERVICE LLC, and A	)	
CAB, LLC,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

Plaintiffs, by and through their attorney, Leon Greenberg Professional Corporation, submit this memorandum of points and authorities in response to defendants' Motion to Dismiss Complaint.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**SUMMARY OF RESPONSE**

**Defendants Ignore the Express, and Independent, Requirements Of Nevada's Constitution and the Supremacy of the Same**

Defendants erroneously assert plaintiffs' claims for unpaid minimum wages pursuant to Nevada's Constitution, Article 15, Section 16, (the "Nevada Constitution") requires an "implicit repeal" of NRS 608.250(2)(e) and no such implicit repeal is properly found.

1 Plaintiffs' claims do not require any such implicit repeal as NRS  
2 608.250(2)(e), by its express language, only exempts taxi drivers  
3 from the minimum wage provisions of NRS 608.250(1). The plaintiffs  
4 make no claim under NRS 608.250(1) and their exclusion from the  
5 minimum wage requirements imposed by that statute is irrelevant.  
6 Their claim is grounded directly, and solely, upon the rights  
7 independently conferred to them by Nevada's Constitution, which have  
8 not, and cannot, be abrogated by NRS 608.250(2)(e) or any other  
9 Nevada statute.

10 Even if defendants were correct, and plaintiffs' claims under  
11 Nevada's Constitution require an implicit repeal of NRS  
12 608.250(2)(e), such a repeal has occurred. This is because Nevada's  
13 Constitution, by conferring upon Nevada employees a broad and  
14 unqualified right to a minimum wage, has effected a revision of the  
15 entire subject of minimum wages in Nevada. See, *State ex rel. Nevada*  
16 *Orphan Asylum v. Hallock*, 16 Nev. 373, 378 (1882) (Constitutional  
17 amendment that addresses subject displaces prior statute) and  
18 *Western Realty Co. v. Reno*, 172 P.2d 158, 165 (Nev. Sup. Ct.  
19 1946) (Later enactment that "revises the whole subject-matter" at  
20 issue will repeal a prior statute). See, also, *Board of Retirement*  
21 *v. Superior Court*, 101 Cal. App. 4th 1062, 1068 (Cal. Ct. App.  
22 2002) (Holding a statute is implicitly repealed by a constitutional  
23 amendment when the latter "constitute[s] a revision of the entire  
24 subject.")

25 **Defendants' Argument that N.R.S. 608.040 Presents**  
26 **"No Private Cause of Action" Has Already Been Rejected**

27 Last year Judge Barker of this Court rejected the arguments  
28 made by defendants and expressly held that a private cause of action

1 exists under N.R.S. 608.040 for the collection of unpaid overtime  
2 wages. Ex. "A." More recently, this issue was brought before this  
3 Department's attention, and was disposed of in the same fashion as  
4 Judge Barker did. See, Ex. "B." It should also be noted that a  
5 panel of the Nevada Supreme Court, in a unpublished opinion which  
6 cannot be viewed as precedent or cited as legal authority under  
7 S.C.R. § 123, copy at Ex. "C," p. 4-5, has expressly stated that  
8 employees may bring a private cause of action to enforce N.R.S.  
9 608.040.<sup>1</sup>

#### 10 ARGUMENT

#### 11 **I. NEVADA'S CONSTITUTION SETS FORTH AN INDEPENDENT** 12 **LEGAL REQUIREMENT FOR THE PAYMENT OF MINIMUM WAGES** 13 **TO WHICH NRS 608.250(2)(E) IS INAPPLICABLE**

#### 14 **A. Plaintiffs' Claim for Minimum Wages is Brought Directly** 15 **Under Nevada's Constitution, Not NRS 608.250, and Defendants** 16 **Seek to Have the Court Examine Only That Irrelevant Statute**

17 Defendants' motion reviews Nevada's minimum wage statute, NRS  
18 608.250(1), and the exemption for taxi drivers to such statute set  
19 forth in NRS 608.250(2)(e). They then observe that "taxicab and  
20 limousine drivers are exempt from the minimum wage statute." The  
21 exemption of taxi drivers from NRS 608.250(1), pursuant to NRS  
22 608.250(2)(e), is irrelevant to what the Nevada Constitution's  
23 Minimum Wage Amendment, Article 15, Section 16, (the "Nevada  
24 Constitution") requires, as a Nevada statute cannot modify the  
25 obligations imposed by Nevada's Constitution.

26 Plaintiffs' complaint makes no claim for minimum wages under  
27 NRS 608.250 and their exemption from that statute's minimum wage  
28

---

<sup>1</sup> Plaintiff does not cite the Ex. "C" opinion as legal  
authority and acknowledges this Court is free to wholly disregard  
its analysis.

1 requirements is wholly irrelevant. Plaintiffs' first claim for  
2 relief is brought pursuant to Nevada's Constitution, which sets  
3 forth its own specified minimum wage rates. That same provision of  
4 Nevada's Constitution, at subsection B thereof, confers upon an  
5 employee a right to "bring an action against his or her employer in  
6 the courts of this State" for "all remedies available under the law  
7 or in equity" that are "appropriate to remedy any violation" of such  
8 constitutional provision. Plaintiffs' first claim for relief, both  
9 substantively and procedurally, is completely derived from, and  
10 controlled by, the terms of Nevada's Constitution. It has no  
11 relationship whatsoever to NRS 608.250.

12 Rather than recognize the issue is not what Nevada's *statutes*  
13 impose as a minimum wage obligation, but what its *constitution*  
14 requires, defendants seek to have the Court examine the wrong issue.  
15 According to the defendants, this Court need only examine the  
16 statutory obligation imposed by NRS 608.250(1) and it should simply  
17 assume the Nevada Constitution imposes no separate, independent,  
18 minimum wage obligation. There is no basis for such assumption,  
19 which is clearly contrary to the language of the Nevada  
20 Constitution. Nor do defendants explain why or how the Nevada  
21 Constitution can, or should be, read to *not* impose its own minimum  
22 wage obligation that exists completely separate, and apart, from  
23 that imposed by NRS 608.250(1).

24 **B. The Nevada Constitution Creates Minimum Wage Requirements**  
25 **That are Independent of, and Unconcerned With, the**  
**Requirements Of NRS 608.250(1) and its Exemptions**

26 Defendants contend that the Nevada Constitution provides for  
27 "annual automatic increase equal to the greater of an increase in  
28 the federal minimum wage or the cost of living as measured by the

1 Consumer Price Index." Defendants' Motion to Dismiss Complaint, p.  
2 5. In making such statement, defendants seek to have the Court  
3 adopt the view that the *only* thing the Nevada Constitution commanded  
4 in respect to the minimum wage was an increase in its amount.  
5 Defendants cite no authority for this proposition and such a  
6 conclusion is contrary to the express language of the Nevada  
7 Constitution, which does not refer anywhere to raising the amount of  
8 the minimum wage *otherwise required* under Nevada law. Instead it  
9 expressly imposes its own independent minimum wage requirements in  
10 its very first sentence:

11 Nevada Constitution, Article 15, Section 16

12 Payment of minimum compensation to employees.

13 A. Each employer shall pay a wage to each employee of not less  
14 than the hourly rates **set forth in this section.** (Emphasis  
provided)

15 The Nevada Constitution does not reference the pre-existing  
16 minimum wage set forth in NRS 608.250(1), much less discuss how it  
17 is merely "raising" such minimum wage as defendants claim. It  
18 refers solely to the requirements **of this section** meaning the  
19 minimum wage expressly set forth in Nevada's Constitution, such  
20 minimum wage being specified at \$5.15 or \$6.15 an hour and subject  
21 to a number of requirements and future increases as set forth in  
22 that same constitutional section.

23 The Nevada Legislature had the power to address minimum wage  
24 issues, both before and after the Nevada Constitution's amendment  
25 imposed certain minimum wage requirements. The legislature  
26 exercised that power and enacted certain minimum wage standards (NRS  
27 608.250(1)) and exceptions thereto (NRS 608.250(2)) prior to the  
28 Nevada constitutional amendment coming into force. Its decision to

1 do so is irrelevant to this case. Defendants do not, and cannot,  
2 argue that the Nevada Legislature can now, by the enactment of a  
3 mere statute, override any of the provisions of Nevada's  
4 Constitution. The legislature, being unable to override the Nevada  
5 Constitution after its amendment, surely cannot create exceptions to  
6 the minimum wage otherwise required by such constitutional amendment  
7 through statutes enacted *prior* to the effective date of the  
8 amendment.

9 Defendants' argument would have merit if Nevada's Constitution  
10 read "Each employer shall pay a wage to each employee [to whom the  
11 minimum wage law of Nevada is applicable] of not less than the  
12 hourly rates set forth in this section." The foregoing bracketed  
13 language, if it were actually present in the Nevada Constitution,  
14 would have, as defendants claim, merely raised the minimum wage for  
15 those employees already subject to NRS 608.250(1). Such words,  
16 being absent, mandates an application of Nevada's Constitution by  
17 its express language, which requires payment of "a wage to each  
18 employee of not less than the hourly rates set forth in this  
19 section." The only exceptions to the required payment set forth in  
20 "this section" of Nevada's Constitution are in subparts B and C  
21 thereof. Those exceptions are for certain employees subject to  
22 union negotiated collective bargaining agreements, or who are under  
23 18 years of age and are trainees or employed by a non-profit,  
24 circumstances not relevant to this case.

25 The conclusion the minimum wages required by Nevada's  
26 Constitution are not limited by NRS 608.250(2) was arrived at in a  
27 detailed and well reasoned opinion by then Nevada Attorney General,  
28 later United States District Court Judge, and current Nevada

1 Governor, Brian Sandavol. Ex. "D," Opinion 2005-04. The analysis  
2 utilized in that opinion looked to the precise language of the  
3 Nevada Constitution, specifically its imposition of a minimum wage  
4 as specified in that "section" of the Nevada Constitution and its  
5 failure to make any mention of NRS 608.250.

6 The conclusion reached by the Attorney General in Opinion 2005-  
7 04 is well supported by precedent. There is no ambiguity in the  
8 Nevada Constitution's directive that "each employer shall pay to  
9 each employee a wage of not less than the hourly rates set forth in  
10 this section" of the Constitution. Absent ambiguity, the Nevada  
11 Constitution's language must be applied pursuant to its plain  
12 meaning. See, *Nevadans for Nevada v. Beers*, 142 P.3d 339, 347 (Sup.  
13 Ct. Nev. 2006). The command that every employer "shall pay" to  
14 "each employee" at least the wage specified by such section must be  
15 given mandatory application by this Court to every employee except  
16 those the Nevada Constitution, itself, excludes. See, *State ex rel.*  
17 *State Bd. of Equalization v. Baks*, 148 P.3d 717, 724 (Nev. Sup. Ct.  
18 2006) ("By using the mandatory term 'shall,' the Constitution  
19 clearly and unambiguously requires that the methods used for  
20 assessing taxes throughout the state must be 'uniform.'") See, also  
21 *Nevada Mining Association v. Erdoes*, 26 P.3d 753, 759 (2001) (Sup.  
22 Ct. Nev. 2001) (Nevada Supreme Court is "not free to presume"  
23 Constitutional provision means "anything other" than what it says).

24 The Nevada Constitution creates its own wholly independent  
25 minimum wage requirements that exist in tandem with the requirements  
26 of NRS 608.250(1). There is no conflict between the two schemes.  
27 Nevada's minimum wage statute, NRS 608.250(1), requires certain  
28 minimum wage payments and provides, at NRS 608.250(2), for certain

1 exceptions to NRS 608.250(1)'s requirements. Nevada's Constitution  
2 requires a different, and potentially higher,<sup>2</sup> minimum wage payment  
3 and subjects such requirement to a different group of exceptions.  
4 An employee may be covered by just the Nevada Constitution, as are  
5 the plaintiffs, by both NRS 608.250(1) and the Nevada Constitution,  
6 or neither.

7       The Nevada Constitution, at subpart B, provides that "All of  
8 the [minimum wage pay] provisions of this section, or any part  
9 hereof, may be waived in a bona fide collective bargaining agreement  
10 [a "CBA"]...." The Nevada minimum wage statute contains no such  
11 exemption at NRS 608.250(2) in respect to the minimum wage  
12 requirements of NRS 608.250(1). This means that plaintiffs, if they  
13 were employed under a CBA that waived the Nevada Constitution's  
14 minimum wage requirements, would also be exempt from the Nevada  
15 statutory minimum wage by virtue of NRS 608.250(2), since they are  
16 taxi cab drivers. Yet other Nevada workers, such as janitors, may  
17 work under a CBA that waives the Nevada Constitution's minimum wage  
18 requirements, but those workers are still subject to Nevada's  
19 statutory minimum wage since janitors are not among the workers  
20 exempted by NRS 608.250(2) and Nevada's statutory minimum wage does  
21 not provide for any waiver of its provisions by a CBA.

22       Subpart "C" of the Nevada Constitution similarly illustrates  
23 the dual and not completely overlapping minimum wage standards  
24

---

25       <sup>2</sup> Nevada's Constitution only assures an increased minimum wage  
26 for the employees it specifies who are *not* provided access to health  
27 insurance. For employees receiving such health insurance, the  
28 minimum wage currently required by Nevada's Constitution is the same  
as the federal minimum wage, such federal minimum wage also being  
the wage set by the Nevada Labor Commissioner for the purposes of  
NRS 608.250(1).

1 created by Nevada's Constitution and NRS 608.250. Such subpart  
2 expressly exempts from the Nevada Constitution's minimum wage  
3 requirements certain persons under 18 years of age employed by non-  
4 profits and trainees. Those persons are not exempted from the  
5 requirements of NRS 608.250(1) by NRS 608.250(2) and as a result  
6 possess a statutory, but not Nevada Constitutional, minimum wage  
7 right.

8 The existence of dual, non-conflicting, and independent, duties  
9 imposed by both a statute and a state constitution covering the same  
10 subject matter, has been found proper. See, *Kaysser v. McNaughton*,  
11 57 P.2d 927, 930 (Sup. Ct. Cal. 1936) (Finding that repeal of  
12 constitutional amendment did not automatically repeal statute  
13 covering same subject matter as both a statute and constitution can,  
14 and do, impose independent liabilities over the same subject  
15 matter).

16 **C. The Nevada Constitution Has Implicitly Repealed the Taxi**  
17 **Driver Minimum Wage Exemption in NRS 608.250(2)(e)**

18 **1. An Implicit Repeal Has Occurred Because the**  
19 **Nevada Constitution has Revised the "Whole**  
20 **Subject Matter" of Minimum Wages in Nevada**

21 Assuming, *arguendo*, that an "implicit repeal" analysis of NRS  
22 608.250(2) is required, such an implicit repeal has been effectuated  
23 by the Nevada Constitution. As held by the Attorney General in  
24 Opinion 2005-04, voters are presumed to have known the status of  
25 Nevada's existing minimum wage law when they approved the Nevada  
26 Constitutional Amendment and "it is ordinarily presumed that 'where  
27 a statute is amended, provisions of the former statute omitted from  
28 the amended statute are repealed.'" citing *McKay v. Board of*

1 *Supervisors*, 730 P.2d 438, 442 (1986).<sup>3</sup> Attorney General Opinion  
2 2005-04 expressly holds the Nevada Constitution has implicitly  
3 repealed all of the occupational exemptions contained in NRS  
4 608.250(2). *See, also, State ex rel. Nevada Orphan Asylum*, 16 Nev.  
5 at 378 (Constitutional amendment that addresses subject displaces  
6 prior statute).

7 The conclusion of the Nevada Attorney General that Nevada's  
8 Constitution has implicitly repealed the provisions of N.R.S.  
9 608.250(2) is strongly supported by precedent from both Nevada and  
10 other jurisdictions. As stated in *Eureka County Bank Habeas Corpus*  
11 *Cases*, 126 P. 655, 676 (Nev. Sup. Ct. 1912):

12 In the case of *Bartlet et al. v. King, Executor*, 12 Mass.  
13 537, 7 Am. Dec. 99, the rule applicable to this case was  
14 stated as follows: A subsequent statute, revising the  
15 whole subject-matter of a former one, and evidently  
16 intended as a substitute for it, although it contains no  
17 express words to that effect, must, on the principles of  
18 law, as well as in reason and common sense, operate to  
19 repeal the former.' This court has heretofore twice quoted  
20 with approval the rule as above declared in the *Bartlet*  
case, and it is supported by abundant authority from other  
courts. *Thorpe v. Schooling*, 7 Nev. 15; *State v. Rogers*,  
10 Nev. 319; *Mack v. Jastro*, 126 Cal. 130, 58 P. 372;  
*State Board of Health v. Ross*, 191 Ill. 87, 60 N.E. 811.)  
*See, also*, 26 Am. & Eng. Ency. Law, 2d ed. 731, and  
authorities cited in note 4." (*Union Trust Co. v.*  
*Trumbull*, 137 Ill. 146, 27 N.E. 24.)

21 In the event an "implicit repeal" of NRS 608.250(2)(e) is  
22 necessary for plaintiffs to proceed on their claim under the Nevada  
23 Constitution, such a repeal has been effectuated. The Nevada  
24 Constitution indisputably acted to revise "the whole subject matter"  
25 of minimum wages in Nevada. It did so by creating minimum wage  
26 standards that were beyond the legislature's power to modify. Its

---

27 <sup>3</sup> The same rules are utilized to determine whether statutes or  
28 constitutional amendments repeal previously enacted statutes. *Nevada*  
*Mining Association*, 26 P.3d at 753.

1 provisions, not being subject to limitation by the legislature after  
2 their approval by the electorate, must also have operated as a  
3 matter of "reason and common sense" to repeal any claimed  
4 limitations on their scope set forth in Nevada's previously existing  
5 minimum wage statute.

6           **2. Defendants' Argument that No Implicit Repeal Has**  
7           **Occurred is Based Upon a Misreading of the Applicable**  
8           **Precedents and an Overturned Precedent**

9           Defendants cite a number of cases for the general, and  
10 irrelevant, proposition that a repeal of a statute by another  
11 statute is not to be lightly implied and should only be found when  
12 there is an irreconcilable conflict, or an express intent to repeal  
13 is found. As already discussed, no conflict exists between the  
14 independent minimum wage requirements of NRS 608.250 and the Nevada  
15 Constitution. Nor is a repeal, either express or implied, of NRS  
16 608.250(2)(e), necessary for the plaintiffs to maintain their claim  
17 under Nevada's Constitution. In any event, an implicit repeal would  
18 have to found based upon the "whole subject matter" doctrine and the  
19 complete revision of minimum wage standards effectuated by the  
20 Nevada Constitution.

21           Defendants ignore the "whole subject matter" rule. Instead  
22 they attempt to rely upon the holding in *Lemberes v. State*, 634 P.2d  
23 1219, 1223 (1981), citing *Ronnow v. City of Las Vegas*, 65 P.2d 133,  
24 146 (1937), as to how the "specific" versus "general" language of  
25 statutes should be weighed when conducting an implicit repeal  
26 analysis. Unfortunately for defendants, *Lembres*, even if it was  
27 relevant, which it is not, has been overruled. See, *Funches v.*  
28 *State*, 944 P.2d 775, 779 (Nev. Sup. Ct. 1998) (Expressly overruling  
*Lemberes's* holding that the evidence rule involved in *Lemberes* and

1 *Funches* was controlled exclusively by the "specific" and not  
2 "general" statute at issue). Indeed, *Funches*, in overruling  
3 *Lemberes* and applying both the "general" and "specific" statutes to  
4 the evidence issue before it, supports the conclusion that both NRS  
5 608.250 and the Nevada Constitution should be applied pursuant to  
6 their plain language in the harmonious, and non-conflicting, fashion  
7 proposed by plaintiffs. That would mean NRS 608.250(2)'s exemptions  
8 should apply only to the requirements of NRS 608.250(1) and the  
9 Nevada Constitution should be applied pursuant to its own expressed  
10 terms and limitations.

11 Plaintiffs' proposed "tandem" application of NRS 608.250 and  
12 the Nevada Constitution is strongly supported by a proper reading of  
13 *Ronnow's* "general" versus "specific" statutory analysis. Defendant  
14 represents the rule of *Ronnow* as always requiring application of the  
15 "specific" over the "general" statute. That is untrue, and the  
16 actual rule, as stated in *Laird v. State Public Employees Retirement*  
17 *Board*, 639 P.2d 1171, 1173 (Nev. Sup. Ct. 1982), is "Where a general  
18 and a special statute, each relating to the same subject, are in  
19 conflict **and they cannot be read together**, the special statute  
20 controls." (emphasis provided). As explained, *supra*, NRS 608.250(2)  
21 and the Nevada Constitution, by their express language, are not in  
22 conflict and each involves completely separate, and independent,  
23 minimum wage obligations. The Court must also be mindful, as  
24 observed by *Laird*, that "when statutes are in conflict, the one more  
25 recent in time controls over the provisions of an earlier  
26 enactment." *Id.* Accordingly, if there is a conflict between the  
27 requirements of the Nevada Constitution and NRS 608.250 the Nevada  
28

1 Constitution, as the latter enactment, is controlling.<sup>4</sup>

2 **D. Defendants Rely Upon a Single Unpublished**  
3 **United States District Court Decision**

4 Defendants ignore the afore discussed Nevada Attorney General's  
5 Opinion. The only case upon which they rely is an unpublished  
6 decision by a United States District Court Judge, *Lucas v. Bell*  
7 *Transportation*, 2009 U.S. Dist. LEXIS 72549, (D. Nev. June 23,  
8 2009).<sup>5</sup> Such decision is not binding precedent and, because it is  
9 clearly erroneous, cannot guide this Court.

10 The decision in *Lucas* never discusses the Nevada Constitution's  
11 express language stating it is imposing upon each employer an  
12 obligation "to pay a wage to each employee of not less than the  
13 hourly rates **set forth in this section.**" (Emphasis provided). *Lucas*  
14 simply assumes, without discussion of such language or any analysis  
15 of whether the Nevada Constitution imposes its own, co-extensive,  
16 minimum wage requirement, that "[t]he focus of the Amendment was the  
17 actual minimum wage." *Id.* p. 23. It then goes on to conduct only  
18 an "implied repeal" analysis and erroneously concludes no such  
19 repeal was established because "...this Court cannot conclude that  
20 there is no other reasonable construction of the Amendment than that  
21 it repealed NRS 608.250." *Id.*

22 The error in *Lucas* is twofold. First, it ignores the express  
23 and unambiguous language of both the Nevada Constitution and NRS

---

24 <sup>4</sup> The Nevada Constitution would also be controlling even if not  
25 enacted later in time since a constitutional provision always  
26 displaces any conflicting statute.

27 <sup>5</sup> Defendant also references the decision of this Court in *Thomas*  
28 *v. Nevada Yellow Cab*, A-12-661726-C, August 30, 2012, which simply  
stated it agreed with the holding of *Lucas* and engaged in no  
independent analysis of the legal issues presented.

1 608.250(2). The Nevada Constitution makes no reference to NRS  
2 608.250 and expressly states it is imposing its own specified  
3 minimum wage obligation. The exemptions set forth in NRS 608.250(2)  
4 are expressly limited to the minimum wage obligations imposed by NRS  
5 608.250(1), it does not state its exemptions apply to "all minimum  
6 wages" required by any Nevada law.<sup>6</sup> *Lucas* made the Nevada  
7 Constitutional Amendment into an amendment of NRS 608.250(1),  
8 transforming the Nevada Constitution's minimum wage requirements  
9 into a mere modification of an existing statute and subject to the  
10 exemptions to such statute set forth in NRS 608.250(2). It gives no  
11 explanation of how the Nevada Constitution is properly treated as a  
12 mere amendment of NRS 608.250 when it does not discuss that statute  
13 and it imposes its own clear, and self-executing, minimum wage  
14 standards. In transforming the Nevada Constitutional Amendment into  
15 a mere modification of NRS 608.250(1), which in turn was subject to  
16 the limitations imposed by NRS 608.250(2), *Lucas* acted in derogation  
17 of a fundamental principle of law: That a constitutional provision  
18 supercedes, and cannot be modified by, any legislative enactment,  
19 except when the constitutional provision itself confers that power  
20 upon the legislature. No such power is granted to the Nevada  
21 Legislature by the Nevada Constitutional provision at issue in this  
22 case.

23 The second error committed by *Lucas* is that it engaged solely  
24 in an "implied repeal" analysis, and an erroneous one at that,  
25 without considering how NRS 608.250 and the Nevada Constitution are  
26

---

27 <sup>6</sup> The relevant language of NRS 608.250(2) states: "The  
28 provisions of subsection 1 [NRS 608.250(1)] do not apply to..."

1 not in conflict and act in tandem within their defined spheres of  
2 authority, as discussed, *supra*. *Lucas* assumes either NRS 608.250  
3 was repealed or if it was not repealed it controls the otherwise  
4 clear and unambiguous language of the Nevada Constitution. Contrary  
5 to the conclusion of *Lucas*, a failure by the Nevada Constitution to  
6 expressly or implicitly repeal NRS 608.250(2) is irrelevant. The  
7 Nevada Constitution requires all employers pay the minimum wage  
8 specified by that "section" of the Nevada Constitution to all  
9 employees as specified therein. It also grants employees a broad  
10 right to seek relief for its violations. It is entirely self-  
11 executing and refers to no Nevada statutes. The most "reasonable  
12 construction" of the Nevada Constitution, one not even considered by  
13 *Lucas*, is that it imposes its own independent minimum wage  
14 obligations pursuant to its express and unambiguous language,  
15 irrespective of whether it effectuated a repeal of NRS 608.250(2)  
16 and is, in any event, not subject to such statute.

17  
18 **II. DEFENDANTS' ARGUMENT THAT NO PRIVATE CAUSE OF ACTION EXISTS**  
**UNDER N.R.S. 608.040 HAS TWICE BEEN REJECTED BY THIS COURT**

19 Twice this year, this Court has addressed the issue of whether  
20 N.R.S. 608.040 (and other sections of Chapter 608) contains a  
21 private cause of action. In *Phelps v. MC Communications*, Case No. A-  
22 11-634965-C, The Honorable Judge David Barker of Dept. 28 of the  
23 Eighth Judicial District Court stated,

24 "the Court holds that the Nevada Supreme Court, in *Baldonado v.*  
25 *Wynn Las Vegas, LLC*, 124 Nev. 951, 964 (FN33) (2008), held that  
26 NRS 608.140 expressly recognizes a civil enforcement action to  
27 recoup unpaid wages. Defendants' argument that compensation  
28 under NRS 608.018 is not a component of wages and is not  
otherwise recoverable under the *Baldonado* determination on NRS  
608.140 is unpersuasive and currently unsupported by Nevada  
precedential authority..."

"This Court has determined that a private cause of action does exist under both NRS 608.018 and 608.040 for the recovery of unpaid overtime compensation." (Emphasis added).

See, Ex. "A," December 9, 2011 Decision of Hon. David Barker. More recently, the Honorable Judge Kenneth Cory of this Department issued a similar decision. In *Valdez v. Cox Communications, et al.*, Case No. A-09-597433-C, the defendant argued that the plaintiff's claims under both N.R.S. 608.018 and 608.040 should be dismissed because such statutes did not provide for a private cause of action. In his decision, Judge Cory stated,

"The provisions of N.R.S. § 608.140 providing for the recovery of attorney's fees in certain actions brought to recover unpaid wages make no sense to the Court if there is no private right of action under the circumstances presented in this case. Although plaintiff argues that *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951(2008) should be read to expressly resolve this issue against Sierra, the Court declines to apply *Baldonado* in that fashion as it is not persuaded by a footnote that has no precedential effect."

See, Ex. "B," August 6, 2012 Decision of Hon. David Barker.

Defendants have provided no authority holding such statute is void of a private right of action. Plaintiff submits the decisions in both *Phelps* and *Valdez* should be given significant persuasive weight in this Court, as they are the only decisions to come from this Court addressing the direct issue defendant now raises in its motion.

## CONCLUSION

WHEREFORE, defendants' motion should be denied in its entirety.

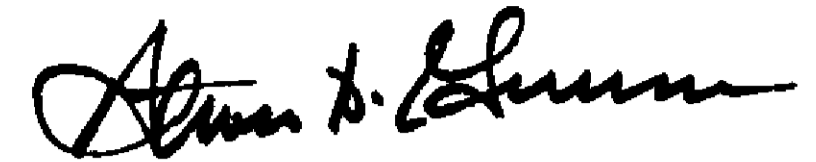
Dated this 6<sup>th</sup> day of December, 2012.

Leon Greenberg Professional Corporation

By: /s/ Leon Greenberg  
LEON GREENBERG, Esq. NSB 8094  
Attorney for Plaintiff  
2965 South Jones Blvd- Suite E4  
Las Vegas, Nevada 89146  
(702) 383-6085

# EXHIBIT "A"

ORIGINAL



CLERK OF THE COURT

1 LEON GREENBERG, ESQ. NSB #8094  
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13 (702) 259-7704 (fax)

14 Attorneys for Plaintiffs

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

14 MICHAEL PHELPS, individually and  
15 on behalf of others similarly situated,

16 Plaintiffs,

17 vs.

18 MC COMMUNICATIONS, INC., JOHN  
19 WEHRMAN and ROBERT HAYES,

20 Defendants.

Case No.: A-11-634965-C

Dept No.: 18

**ORDER**

21 This matter having come before the Court on the defendants' motion to dismiss for a  
22 failure by the plaintiff to have a private cause of action to enforce his claim for unpaid  
23 overtime wages alleged to be owed to him pursuant to N.R.S. § 608.018, such motion  
24 having come before the Court for oral argument on October 27, 2011, with Anthony Hall,  
25 Esq., arguing on behalf of defendants in support of such motion, and Leon Greenberg, Esq.,  
26 arguing on behalf of plaintiff in opposition to such motion, and after due consideration of  
27 the arguments, briefs and papers submitted by counsel for the parties, and the record of  
28 these proceedings;

[illegible]

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1 Submitted by:

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3 LEON GREENBERG PROFESSIONAL  
4 CORP.

5

6 Leon Greenberg, Esq.

7 Nevada Bar No. 8094

8 2965 S. Jones Boulevard - Ste. E-4

9 Las Vegas, Nevada 89146

10 Tel (702) 383-6085

11 Attorney for the Plaintiff

12

13

14 Approved as to Form:

15

16

17 Anthony L. Hall, Esq.

18

19

20 */s/ Anthony Hall* by Leon Greenberg  
21 with approval

22

23 Holland & Hart LLP

24

25 9555 Hillwood Drive, Second Floor

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27 Las Vegas, Nevada 89134

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Tel (702) 669-4600

Attorney for Defendants

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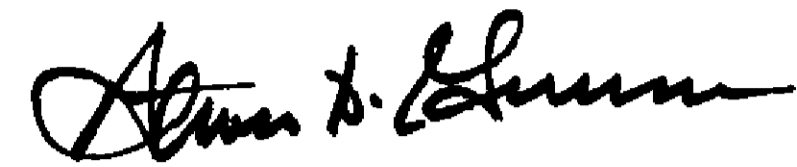
29

# EXHIBIT “B”

1     **ORD**

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08/06/2012 06:12:18 PM

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3     Dana Sniegocki, NSB 11715  
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CLERK OF THE COURT

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11    (702) 259-7704 (fax)

10   Attorneys for Plaintiffs

11                   **DISTRICT COURT**

12                   **CLARK COUNTY, NEVADA**

13     JOSEPH VALDEZ, individually and	)	<b>Case No.: A-09-597433-C</b>
14     on behalf of all others	)	<b>Dept. No. I</b>
15     similarly situated,	)	ORDER DENYING DEFENDANTS'
16                                   Plaintiff,	)	MOTION TO DISMISS
17     v.	)	
18     COX COMMUNICATIONS LAS VEGAS,	)	
19     INC., VIDEO INTERNET PHONE	)	
20     INSTALLS, INC., QUALITY	)	
21     COMMUNICATIONS, INC., and	)	
22     SIERRA COMMUNICATIONS, CO.,	)	
23                                   Defendants.	)	
24     -----X	)	

23         This matter having come before the Court on the defendant  
24     Sierra Communications Services, Inc.'s ("Sierra's") motion to  
25     dismiss under Nev. R. Civ. P. 12(c) for a failure by the  
26     plaintiff to have a private cause of action to enforce his  
27     claim for unpaid overtime wages alleged to be owed to him  
28     pursuant to N.R.S. § 608.018, and additional damages pursuant

1 to N.R.S. § 608.040, such motion having come before the Court  
2 for oral argument on July 11, 2012, with Howard E. Cole, Esq.,  
3 arguing on behalf of defendant Sierra in support of such  
4 motion, and Leon Greenberg, Esq., arguing on behalf of  
5 plaintiff in opposition to such motion, and after due  
6 consideration of the arguments, briefs and papers submitted by  
7 counsel for the parties, and the record of these proceedings;

8 **THE COURT FINDS:**

9 ~~Sierra's motion is predicated upon the argument that~~  
10 neither of the statutory claims made by the plaintiff in this  
11 case, under N.R.S. § 608.018 for unpaid overtime compensation,  
12 and under N.R.S. § 608.040 for damages arising from a failure  
13 to pay all wages due to a discharged or quitting employee, are  
14 enforceable by a private lawsuit in this Court. Sierra argues  
15 no private right of action exists to enforce such claims and  
16 they can only be heard and determined by the Nevada Labor  
17 Commissioner.


18 The Court finds that it agrees with the reasoning of  
19 Judge George in *Buenaventura v. Champion Drywall, Inc. of*  
20 *Nevada, et al.*, No. 2:10-cv-00377-LDG (RJJ), 2011 WL 1071760,  
21 at \*3 (D. Nev. March 21, 2011) and Judge Barker in *Phelps v.*  
22 *MC Communications, et al*, A-11-634965-C (Dec. 13, 2011). The  
23 provisions of N.R.S. § 608.140 providing for the recovery of  
24 attorney's fees in certain actions brought to recover unpaid  
25 wages make no sense to the Court if there is no private right  
26 of action under the circumstances presented in this case.  
27 Although plaintiff argues that *Baldonado v. Wynn Las Vegas,*  
28 *LLC*, 124 Nev. 951(2008) should be read to expressly resolve

1 this issue against Sierra, the Court declines to apply  
2 *Baldonado* in that fashion as it is not persuaded by a footnote  
3 that has no precedential effect. Accordingly, the Court  
4 determines that Sierra's motion should be denied.

5 Recognizing, as it must on a motion to dismiss, all  
6 factual allegations in the plaintiff's complaint as true and  
7 drawing all inferences in plaintiff's favor for the purpose of  
8 deciding this motion, it is hereby


9 ORDERED, that defendants' motion to dismiss is denied.

10 IT IS SO ORDERED this 3 day of August,  
11 2012.

12  
13   
14 HONORABLE JUDGE KENNETH CORY  
DISTRICT COURT, CLARK COUNTY  
15

15 Submitted by:

16 Dated: 7/30/12

17   
18 Leon Greenberg  
Dana Sniegocki  
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23 Approved as to form and content

24 Dated: 7/30/12

25 By: /s/Howard E. Cole  
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26 Lewis and Roca, LLP  
3993 Howard Hughes Pkwy, Suite 600  
27 Las Vegas, NV 89109

28 Attorneys for Defendant Sierra Co.

# EXHIBIT “C”

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN CSOMOS, INDIVIDUALLY  
AND ON BEHALF OF A CLASS OF ALL  
SIMILARLY SITUATED PERSONS,  
Appellant,  
vs.  
VENETIAN CASINO RESORT, LLC,  
Respondent.

No. 55203

**FILED**

SEP 19 2011

TRACEE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Ingerson*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in an employment action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Steven Csomos complains that while he was employed as a server at the Venetian Casino Resort, his employer improperly kept a portion of the service charges assessed as a required gratuity on room service customers. In his first amended complaint, Csomos asserted eight claims for relief labeled: 1) breach of contract, 2) unpaid wages after termination of employment under NRS 608.040, 3) wrongful interference with prospective economic advantage, 4) conversion, 5) unjust enrichment, 6) fraud, 7) quantum meruit, and 8) relief for damages sustained as a third-party contract beneficiary.

The district court granted summary judgment to the Venetian on the first two claims and dismissed the remaining claims asserted in the amended complaint as insufficient. Csomos timely appeals, and we affirm.

I. Facts and proceedings below

Csomos worked for the Venetian as an In Suite Dining (ISD) server, providing room service to guests at the Venetian hotel. The

Venetian hired Csomos, and similar employees, as at-will employees. As an ISD server, Csomos would deliver a bill with the room service order. The bill included a 17%-18% service charge and advised that gratuity was included. However, the bill included a line allowing customers to enter an additional gratuity, if they wished.

The Venetian distributes ISD service charges to Venetian employees. It divides the charges among various employees, including servers, assistant servers, bartenders, and sales agents. Although Csomos received service charge monies every pay period, he did not know the exact percentage that ISD servers received.

Csomos sued the Venetian after leaving its employ. He originally filed a two-count class action complaint, alleging breach of contract and a claim under NRS 608.040 for unpaid wages due after termination of employment. Both claims alleged that the Venetian kept a portion of the service charge that Csomos and others were entitled to receive under contract or as wages. Csomos then served the Venetian with a request for production of documents, requesting all documents relating to Csomos's employment and the distribution of service fees. Months later, Csomos filed an amended complaint, adding six more causes of action including wrongful interference with prospective economic advantage, conversion, unjust enrichment, fraud, quantum meruit, and relief for damages sustained as a third-party contract beneficiary. He filed the amended complaint without moving for leave to amend.

In response to Csomos's amended complaint, the Venetian filed a combined motion to strike or dismiss with prejudice, and for summary judgment (combined motion). In its motion, the Venetian first argued that the amended complaint should be stricken because Csomos

needed, but lacked, leave to amend under NRCP 15(a). Next, the Venetian argued that the six new claims failed to state claims upon which relief could be granted under NRCP 12(b)(5). Finally, the Venetian moved for summary judgment on Csomos's two original claims of breach of contract and violation of NRS 608.040, asserting that Csomos had no contractual or statutory entitlement to service fees, and that Csomos failed to exhaust his administrative remedies before the Labor Commission.

Csomos opposed the Venetian's combined motion, claiming he properly filed the amended complaint. In addition, Csomos argued in his opposition that he sufficiently pleaded all claims and needed discovery to develop them more fully.

The district court granted the Venetian's combined motion. In doing so, the district court did not specifically address Csomos's filing of an amended pleading without formal leave of court. However, it granted summary judgment to the Venetian on Csomos's two original claims, finding that there was no contract or legal duty to provide Csomos with service charges. It further concluded that the new claims sought to be added by the amended complaint did not identify independent facts beyond the first complaint, meriting their dismissal. This appeal followed.

## II. Discussion

### Breach of contract claim

Summary judgment is appropriate if, after viewing the record before the district court in the light most favorable to the nonmoving party, "no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (quoting NRCP 56(c)). This court

applies de novo review to a district court's summary judgment determination. Id.

This court held in Baldonado v. Wynn Las Vegas, 124 Nev. 951, 194 P.3d 96 (2008), that at-will employees do not have contractual rights to continued employment and that an employer of an at-will employee can prospectively change the terms and conditions of employment, with the employee's assent to those changes being implicit in his or her continuing to work for the employer. Further, an implied contract cannot be formed if there is an appropriate disclaimer. Id. at 966, 194 P.3d at 106.

Csomos was an at-will employee and the Venetian requires employees to sign documents acknowledging this and disavowing any implied contracts. The Venetian never agreed to give Csomos or other employees a specific percentage of the service charges. Csomos received at least some service charges during each pay period, along with his hourly pay. Therefore, the district court correctly granted summary judgment on the basis that there can be no breach of contract claim when there was no evidence of a contract, express or implied, between Csomos and the Venetian, or its breach. At most, the Venetian promised to pay Csomos an unspecified share of the room service charges, which his affidavit admits it did; further, as an at-will employee, this arrangement was not fixed but changeable at will.

#### NRS 608.040 claim

The Venetian contends that there is no private cause of action under NRS 608.040 to recover service fees, citing Baldonado. However, Baldonado only applies to NRS 608.160. 124 Nev. at 961, 194 P.3d at 102. Some labor laws expressly create private rights of action to obtain unpaid

wages or other benefits. Id. at 964 n.33, 194 P.3d at 104 n.33. Although NRS 608.040, which assesses penalties for failure to pay a discharged employee, does not have explicit language authorizing a private cause of action, NRS 608.140 allows for assessment of attorney fees in a private cause of action for recovery of wages. It is doubtful that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. See Fierle v. Perez, 125 Nev. \_\_\_, \_\_\_, 219 P.3d 906, 915-16 (2009) (statutes should be interpreted in a manner to avoid conflict with other related statutes). The legislative scheme is consistent with a private cause of action for employees and the Legislature enacted the statute to protect employees, supporting a private cause of action under NRS 608.040.

However, viewing the record in the light most favorable to Csomos, there is nothing in the record to support Csomos's argument that the Venetian is keeping any of the service charges. The Venetian provided affidavits confirming that 100% of the service charges are paid to employees and that the hourly pay rate of ISD servers is not reduced based on service charges received. Csomos and his former co-worker, Mary Montag, both admit they were never told by anyone that the Venetian withheld any portion of the service charge. Csomos did not provide any paystubs or other evidence to show a genuine issue of material fact regarding the alleged withholding of wages by the Venetian. Therefore, the district court correctly granted summary judgment on this claim as well.

Csomos did not have leave to amend his first complaint

Csomos did not amend his complaint until almost four months after the Venetian's answer and did not move to amend. Both NRCP 15(a)

and the Eighth Judicial District Court Rule 2.30 (EDCR) required leave from the district court for Csomos to amend the pleadings. The amended complaint fell outside the 20-day window for leave to amend as a matter of right under NRCP 15(a); EDCR 2.30 only allows for amendments as a matter of right or by court order. Csomos maintains he somehow secured telephonic permission from the judge's assistant to file his amended complaint, but the record does not include an order or stipulation to support this. Without an order permitting Csomos to amend the complaint, his unilateral filing of an amended complaint was improper. Therefore, his claims of wrongful interference with prospective economic advantage, conversion, unjust enrichment, fraud, quantum meruit, and relief for damages sustained as a third-party contract beneficiary are not properly before this court.

Even accepting arguendo that Csomos properly relied on telephonic permission, amendment is not appropriate when the amendment would be futile. Reddy v. Litton Industries, Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); see Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (adopting Reddy, 912 F.2d 291, regarding leave to amend and futile claims). Csomos acknowledged in his sworn affidavit that the Venetian did not promise him a specified percentage of ISD fees and that he always received some of those fees. Csomos could not allege conversion, unjust enrichment, fraud, or quantum meruit without a disappointed contract or other right to the fees, which his sworn affidavit contradicts. See Aldabe v. Adams, 81 Nev. 280, 285, 402 P.2d 34, 37 (1965), overruled on other grounds by Siragusa v. Brown,

114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998). Therefore, any leave to amend for those claims would be futile. For these reasons, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.  
Cherry  
Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

cc: Hon. Jessie Elizabeth Walsh, District Judge  
William F. Buchanan, Settlement Judge  
Leon M. Greenberg  
Fox Rothschild, LLP  
Eighth District Court Clerk

# EXHIBIT “D”



3 of 10 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA

OPINION No. 2005-04

*2005 Nev. AG LEXIS 4*

March 2, 2005

**SYLLABUS:**

[\*1]

BALLOTS; LABOR COMMISSIONER; WAGES: Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in *NRS 608.250*, the statutory exclusions from overtime compensation and the provisions of *NRS 608.250* relied upon in *NRS 608.018*, would stand as enacted for purposes of the overtime compensation law.

**REQUESTBY:**

Michael Tanchek, Nevada Labor Commissioner  
Office of the Labor Commissioner  
Department of Business and Industry  
675 Fairview Drive, Suite 226  
Carson City, Nevada 89701

**OPINIONBY:**

BRIAN SANDOVAL, Attorney General; PATRICIA PALM GASPARINO, Deputy Attorney General, Civil Division

**OPINION:**

As the Nevada Labor Commissioner, you are requesting an opinion regarding the potential effect of the amendment to the Nevada Constitution as proposed by the initiative placing Question No. 6, "Raise the Minimum Wage for Working Nevadans Act," on the 2004 General Election Ballot. Your questions concern the consequences of such an amendment upon Nevada's existing statutory framework for minimum [\*2] wage and overtime compensation benefits. Notwithstanding the recent introduction of Assembly Bill 87 in the current session of the Nevada Legislature, the issues and conclusions of this opinion should be shared with appropriate legislative committees for consideration of prudent anticipatory statutory amendments to current laws that will be impacted by any passage of Question No. 6 amending the Nevada Constitution.

GENERAL BACKGROUND INFORMATION

Currently under *NRS 608.250*, certain employees in private employment are entitled to minimum wages at a rate to be established by the Nevada Labor Commissioner in accordance with federal law. Nevada's overtime compensation statute, *NRS 608.018*, incorporates select provisions of the minimum wage law at *NRS 608.250* to delineate which employees are excluded from entitlement to statutory overtime compensation. Complimenting these Nevada laws, the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C.A. § 201 *et seq.*, sets forth the minimum wage and overtime compensation benefits [\*3] required by federal law. n1 Under the FLSA, the general minimum wage rate is set at \$ 5.15 per hour. 29 U.S.C.A. § 206(a)(1) (1998). In accordance therewith, the Nevada Labor Commissioner has also set Nevada's general minimum wage rate at \$ 5.15 per hour. *NAC 608.110(1)*.

n1 Although states remain free to enact their own laws governing minimum wages and overtime benefits, compliance with state legislation will not excuse noncompliance with the FLSA. 29 U.S.C.A. § 218(a) (1998); *Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1246 (Alaska 1979).

Ballot Question No. 6, which is aimed at raising Nevada's minimum wage rate, stemmed from an initiative petition. See Nev. Const. art. 19, § 2 (reserving to the people the power to propose, by initiative petition, amendments to the constitution, and to enact or reject them at the polls); *Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas*, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) [\*4] (discussing the initiative power). The initiative proposes to amend Article 15 of the Nevada Constitution to add the following section addressing minimum wages:

*Sec. 16. Payment of minimum compensation to employees. A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents (\$ 5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents (\$ 6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over \$ 5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 [\*5] of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.*

*B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in [\*6] a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of*

*this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.*

*C. As used in this section, "employee" means any person who is employed by an employer as defined herein [\*7] but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period of not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

*D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.*

#### Compilation of Ballot Questions 2004, Question No. 6, § 3.

A majority of Nevada voters voting on Question No. 6 in the 2004 general election approved the proposed constitutional amendment. However, before the proposed amendment can become effective, the Secretary of State must resubmit the question for its approval by the voters in the 2006 general election. [\*8] If a majority of the 2006 general election voters also approve the proposed amendment, it will become part of the Nevada Constitution upon certification of the election results. Nev. Const. art. 19 § 2(4); NRS 295.035.

#### QUESTION ONE

Would the provisions of NRS 608.250 through NRS 608.290 be voided by the successful passage of the proposed amendment?

#### ANALYSIS

Neither the arguments for or against the initiative's passage nor the text of the proposed constitutional amendment refer directly to the existing minimum wage statutes. See Compilation of Ballot Questions 2004, Question No. 6. Even so, the primary focus of the initiative is on raising the current Nevada minimum wage of \$ 5.15 per hour, which wage is established pursuant to the statutory scheme. Thus it unmistakably appears that the voters intended for the proposed amendment to transform the existing statutory framework for minimum wages. The extent of the transformation that would actually be affected depends upon the extent of conflict between the proposed amendment and the existing statutes.

A constitutional [\*9] amendment, ratified subsequent to the enactment of a statute, is controlling on any point covered in the amendment. *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 378 (1882). Further, ratification of a constitutional amendment will render void any existing law that is in conflict with the amendment. Op. Nev. Att'y Gen. 08 (May 19, 1908); see also 16 AM. JUR. 2d *Constitutional Law* § 68 (1979) (if there is a conflict between a statute and a subsequently adopted constitutional provision, the statute must give way). We now consider the relevant statutory provisions in turn.

#### NRS 608.250

#### Responsibility for Wage Calculation

*NRS 608.250* governs the minimum wage for private employment and provides as follows:

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by [\*10] federal law, unless he determines that those increases are contrary to the public interest.

2. The provisions of subsection 1 do not apply to:

(a) Casual babysitters,

(b) Domestic service employees who reside in the household where they work.

(c) Outside salespersons whose earnings are based on commissions.

(d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year.

(e) Taxicab and limousine drivers.

(f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

This statute's provisions for calculation of the minimum wage and the responsibility therefor are completely covered by and conflict [\*11] with the corresponding provisions of the proposed amendment. First, like *NRS 608.250*, the proposed amendment provides a comprehensive minimum wage calculation method which is applicable to private employment. *See Proposed Amendment, § 16(A),(C)* (setting forth a minimum wage calculation applicable to "any . . . entity that may employ individuals or enter into contracts of employment").

Second, obvious conflict is revealed when comparing the competing methods of wage calculation. Specifically, *NRS 608.250(1)* requires that the Labor Commissioner, "in accordance with federal law, establish . . . the minimum wage" and "prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest." By the terms of these provisions, the minimum wage rate cannot be higher than the federal minimum wage rate (which is currently \$ 5.15 per hour). However, the proposed amendment sets the minimum wage rate at either \$ 5.15 or \$ 6.15 per hour, depending upon whether an employer provides sufficient health benefits. The proposed [\*12] amendment also vests the Governor or a state agency designated by him with the responsibility of publishing adjustments to the minimum wage and requires those adjustments to be based upon increases in the federal minimum wage or increases in the Consumer Price Index not to exceed 3% per year, whichever is greater. *See Proposed Amendment, § 16(A)*.

Based on this overlapping and contradictory coverage, the existing statutory provisions would not survive the proposed amendment. Instead, the proposed amendment would supplant and repeal by implication the provisions of *NRS 608.250* for wage calculation and the responsibility therefor.

#### Exclusions Based on Employee Type

Also apparent from a comparison of the proposed amendment and statute is the disagreement on the issue of which

employees are entitled to minimum wages. *NRS 608.250(2)* sets forth various exclusions from the statutory minimum wage entitlement for certain types of employees, *i.e.*, casual babysitters, domestic service employees who reside in the household where they work, etc. However, *NRS 608.250* [\*13] does not provide any exclusion which is based on an employee's age, n2 the nonprofit status of an employer, or training periods of employment. In contrast, the proposed amendment does not exclude from its minimum wage coverage the types of employees listed at *NRS 608.250(2)*, except to the extent that those types of employees may also be "under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen).

n2 Previously, *NRS 608.250* expressly allowed for a minimum wage for minors that was eighty-five percent of the minimum wage for adults; however, the pertinent statutory language was deleted in 2001 when the statute was amended to allow the Labor Commissioner to establish prevailing wages in accordance with federal law. *See* 2001 Nev. Stat., ch. 90, § 9, at 564-65. Cf. *NAC 608.110(2)* (setting forth a lesser minimum wage for employees under age eighteen).

[\*14]

The effect of the proposed amendment on the *NRS 608.250* exclusions is controlled by two presumptions. First, the voters should be presumed to know the state of the law in existence related to the subject upon which they vote. *Op. Nev. Att'y Gen.* 153 (December 21, 1934). Second, it is ordinarily presumed that "where a statute is amended, provisions of the former statute omitted from the amended statute are repealed." *McKay v. Board of Supervisors*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986). In keeping with these presumptions, the people, by acting to amend the minimum wage coverage and failing to include the statutory exclusions in the proposed amendment, are presumed to have intended the repeal of the existing exclusions so that the new minimum wage would be paid to all who meet its definition of "employee." Accordingly, the proposed amendment would effect an implied repeal of the exclusions from minimum wage coverage at *NRS 608.250(2)*.

## NRS 608.260

### Civil Court Remedies for Evasion of Minimum Wage Laws

Each competing minimum wage scheme provides a complete [\*15] civil court remedy for evasion of its requirements. *See NRS 608.260* (stating, in part, "The employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage."); *compare* Proposed Amendment, § 16(B) (an employee may bring an action against his employer in the courts of this state and shall be entitled to all appropriate remedies available under the law or in equity, including back pay, damages, reinstatement or injunctive relief, and if prevailing, shall be entitled to reasonable attorney's fees and costs). As the proposed amendment has completely covered the topic of a civil court remedy, providing for even greater relief, its remedy would supplant and repeal by implication the existing civil remedy provision at *NRS 608.260*.

## NRS 608.270(1) and NRS 608.290(2)

### Administrative Enforcement of Minimum Wage Laws

*NRS 608.270(1)(a)* states that the "Labor Commissioner shall . . . administer and enforce the provisions of *NRS 608.250* [\*16] ." In addition, *NRS 608.290(2)* provides with regard to violations of *NRS 608.250* that "in addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than \$ 5,000 for each such violation." The presumptive partial repeal of *NRS 608.250* notwithstanding, legal authority suggests that the proposed amendment would serve to modify these statutes as necessary to effectuate their continued use in enforcing the new minimum wage law.

The proposed amendment is silent with respect to the administrative enforcement authority of the Labor Commissioner and his imposition of administrative sanctions. Where, as here, "express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy [between the laws] as to preclude the presumption, or the [new law] revises the whole subject-matter of the former. [Citations omitted.]" *Ronnow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133, 145 (1937). [\*17] [Text altered.] The statutes in question here are consistent with the basic provisions of the proposed amendment.

The minimum wage changes proposed by Question No. 6, though materially different in wage outcome, applicability and civil court remedy, essentially create a new method of calculating the wage rate and do not attempt to alter the underlying current statutory basis for administrative enforcement of the new wage by the Labor Commissioner. By providing for a higher minimum wage and a more extensive civil court remedy, the people intended to strengthen an employee's ability to assert his right to the minimum wage. The current administrative enforcement jurisdiction of the Labor Commissioner is well-suited to serve this general purpose, and it merely strengthens what the proposed amendment seeks to guaranty. *See Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) (statutes must be interpreted consistently with their general purposes); *see also Rogers v. Heller*, 117 Nev. 169, 176 n.17, 18 P.3d 1034, 1038 n.17 (2001) (recognizing that rules of statutory construction apply [\*18] to constitutional provisions).

The current minimum wage statutes evidence the Legislature's clear intent that the Labor Commissioner should enforce Nevada's minimum wage law and impose administrative sanctions for violations thereof. Additionally, *NRS 607.160(1)(a)(2)* provides that "the Labor Commissioner . . . shall enforce *all labor laws* of the State of Nevada . . . the enforcement of which is not specifically and exclusively vested in any other officer, board or commission." [Emphasis added.] *NRS 607.160(3) -- (6)* contemplate the Labor Commissioner will impose administrative penalties and pursue administrative and civil actions for violation of Nevada's labor laws. Further, *NRS 607.170(1)* allows the Labor Commissioner to prosecute claims and commence actions to collect wages for any person who is unable to afford counsel.

The intent behind the administrative enforcement provisions at *NRS 608.270(1)(a)* and *NRS 608.290(2)*, *i.e.*, that the Labor Commissioner shall enforce the state's [\*19] minimum wage law, is likely to prevail despite the specific references to *NRS 608.250* in *NRS 608.270(1)(a)* and *NRS 608.290*. *McKay*, 102 Nev. at 650, 730 P.2d at 443 (the intent behind a law will prevail over the literal sense of the words used in the law). However, given the specific references to *NRS 608.250* in *NRS 608.270(1)(a)* and *NRS 608.290*, it is conceivable that a court of law could find the Legislature intended the existing enforcement statutes apply only to the minimum wage as calculated under *NRS 608.250*, and not recognize the amendment to the Nevada Constitution as merely augmenting the statutes establishing the Labor Commissioner's pre-amendment administrative enforcement authority. If so, the intent behind existing statutes would be upset by allowing them to stand as enforcement tools for the new law, and the statutes should be treated as repealed. [\*20] *See City and County of San Francisco v. County of San Mateo*, 896 P.2d 181, 195 (Cal. 1995) (Mosk, J., concurring) (existing statutes must be treated as repealed if the intent behind them would be thwarted by allowing them to stand in the face of a constitutional amendment). On the other hand, the more likely and appropriate conclusion is that the proposed amendment would modify these enforcement statutes to allow for the Labor Commissioner's enforcement of the new minimum wage law. *Cf. Perry v. Consolidated Special Tax Sch. Dist. No. 4*, 103 So. 639, 642 (Fla. 1925) (recognizing that previous statutory provisions, as modified by constitutional amendment, are sufficient to effectuate new constitutional provisions so that new provisions may be enforced even though they are not contained in or contemplated by present statutes).

*NRS 608.270(1)(a), (2), NRS 608.280, and NRS 608.290(1)*

#### Criminal Enforcement of Minimum Wage Laws

*NRS 608.270(1)(a)* and (2) establish that the district attorneys will prosecute [\*21] violations of *NRS 608.250* and, for the willful failure to do so, will be subject to a misdemeanor conviction and removal from office. In addition, *NRS 608.280* requires the Attorney General to prosecute willful violations of *NRS 608.270*. Finally, *NRS 608.290(1)* also

makes the violation "of *NRS 608.250* or any regulation adopted pursuant thereto" a misdemeanor. For the same reasons given in the preceding section of this opinion (addressing the proposed amendment's effect upon the Labor Commissioner's administrative enforcement authority), it is also likely that a court would find that the proposed amendment only modifies, rather than repeals, the existing criminal enforcement statutes. In short, by enacting these criminal statutes the Legislature plainly intended that criminal sanctions would be used as a tool to enforce the state minimum wage law. Although, as with the provisions discussed in the preceding section, it is possible that a court could determine that the Legislature's intent [\*22] is ambiguous with respect to application of the criminal enforcement statutes to the new minimum wage law. After considering this risk, the reasonable and fair conclusion is that the legislative intent behind the existing provisions is consistent with using these provisions to enforce the new minimum wage law. The criminal enforcement statutes are also consistent with the proposed amendment's apparent purpose of strengthening an employee's ability to collect minimum wages. The people, by presumption, were aware of the law's provisions when voting in favor of the proposed amendment. *See Op. Nev. Att'y Gen. 153* (December 21, 1934). As both the initiative and the proposed amendment are silent as to repeal of the criminal enforcement provisions, these provisions are likely to survive as modified to effectuate their continued use as an enforcement tool for the new minimum wage law. *See Ronnow v. City of Las Vegas, 57 Nev. at 332, 365, 65 P.2d 133, 145 (1937).*

#### CONCLUSION TO QUESTION ONE

If the proposed constitutional amendment is approved at the 2006 general election as established by certified election results, it would supplant and [\*23] repeal by implication the wage calculation and coverage provisions of *NRS 608.250* and the civil remedy of *NRS 608.260*. *NRS 608.270(1)* and *NRS 608.290(2)* would likely be found to have been modified as necessary to effectuate the Labor Commissioner's enforcement of the new minimum wage. The criminal enforcement provisions of *NRS 608.270(1)(b)* and (2), *NRS 608.280*, and *NRS 608.290(1)* also would likewise be found to be modified to allow for their continued use in enforcing the new minimum wage law.

#### QUESTION TWO

Would the passage of the proposed amendment require the payment of the minimum wage to those types of employees currently excluded under *NRS 608.250(2)*?

#### ANALYSIS

As discussed in response to Question One above, the proposed amendment does not contain any of the exceptions to coverage currently set forth at *NRS 608.250(2)* [\*24]. The only exception under the proposed amendment is for employees who are "under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen). In light of this, the exclusions under *NRS 608.250* are repugnant to the proposed amendment, the plain wording of which requires payment of the minimum wage regardless of whether an employee is currently excluded under *NRS 608.250(2)*. Consequently, the proposed amendment would effect an implied repeal of the exclusions set forth at *NRS 608.250* from minimum wage coverage.

#### CONCLUSION TO QUESTION TWO

The proposed amendment would require payment of the new minimum wage to employees who are currently excluded under *NRS 608.250(2)* from entitlement to minimum wages, unless those employees fall outside the amendment's definition of a protected "employee."

#### QUESTION [\*25] THREE

Does the language of Section 16(B) of the proposed amendment specifically and exclusively vest the enforcement of the minimum wage provisions with the courts, so as to preempt the enforcement jurisdiction of the Labor

Commissioner?

#### ANALYSIS

Your question alludes to the language of *NRS 607.160(1)(a)(2)*, which states, "The Labor Commissioner . . . shall enforce all labor laws of the State of Nevada . . . the enforcement of which is not specifically and exclusively vested in any other officer, board or commission." As discussed in response to Question One above, the provisions of *NRS 607.160* and *NRS 607.170*, as well as the provisions under *NRS 608.270(1)(a)* and *NRS 608.290(2)*, demonstrate the Legislature's intent that the Labor Commissioner enforce Nevada's minimum wage law, even as amended or supplanted by the instant initiative. Therefore, the proposed amendment would likely only modify the existing statutes as needed for such enforcement. The proposed amendment's civil remedy [\*26] at section 16(B) would supplant the existing statutory civil remedy at *NRS 608.260*, but this would have no additional affect on the existing statutes providing for the Labor Commissioner's enforcement jurisdiction in other areas.

Moreover, section 16(B) of the proposed amendment provides, in relevant part, that an employee "may bring an action against his or her employer in the courts of this State to enforce the provisions of this section." [Emphasis added.] The use of the word "may" in this context indicates that the remedy is intended to be permissive and it does not indicate exclusivity of the remedy. *D'Angelo v. Gardner*, 107 Nev. 704, 721 n.11, 819 P.2d 206, 217 n.11 (1991); *Ewing v. Fahey*, 86 Nev. 604, 608, 472 P.2d 347, 350 (1970). Indeed, the analogous provision currently set forth in *NRS 608.260* states that an "employee may . . . bring a civil action," and this remedy coexists with other statutes providing for enforcement by the Labor Commissioner. Thus the proposed amendment's civil remedy at section [\*27] 16(B) does not specifically and exclusively vest authority elsewhere or divest the Labor Commissioner of all of his jurisdiction.

#### CONCLUSION TO QUESTION THREE

Section 16(B) of the proposed amendment does not interfere with all of the enforcement jurisdiction of the Labor Commissioner. It is likely that authority not specifically in contradiction to the amendment would survive a legal challenge.

#### QUESTION FOUR

Would preemption of *NRS 608.250* have any effect on the statutory exclusions from entitlement to overtime compensation set forth in *NRS 608.018*?

#### ANALYSIS

The overtime compensation statute, *NRS 608.018*, should not be affected by the proposed amendment, even though it partially relies on *NRS 608.250*.

*NRS 608.018* provides, in relevant part:

1. Except as otherwise provided in this section, an employer shall pay one and one-half times an employee's regular wage rate whenever an employee works:

(a) More than 40 hours in any scheduled week of work; or

(b) More than 8 hours in [\*28] any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

2. The provisions of subsection 1 do not apply to:

(a) Employees who are not covered by the minimum wage provisions of *NRS 608.250*;

(b) Employees who receive compensation for employment at a rate not less than one and one-half times the minimum rate prescribed pursuant to *NRS 608.250*;

....

(d) Salesmen earning commissions in a retail business if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions;

....

(k) Drivers of taxicabs or limousines;

(l) Agricultural employees; . . . . n3

n3 The provisions of *NRS 608.018* do not refer to, rely on, or parallel the provisions of *NRS 608.250* and would not be affected by the repeal of the *NRS 608.250* scheme for minimum wage. Furthermore, it should be noted that *NRS 608.180* -- *608.195* provide for civil and criminal enforcement and remedies for violations of *NRS 608.018*. This enforcement scheme is unrelated to the topic of minimum wage and would likewise remain unaffected by the proposed amendment.

[\*29]

As set forth above, *NRS 608.018(2)(a)* incorporates by reference the standard for minimum wage entitlement in *NRS 608.250*. By this, *NRS 608.018(2)(a)* excludes from entitlement to statutory overtime compensation those employees who are also not entitled to minimum wages. *NRS 608.250(2)* sets forth a list of employees who are not entitled to minimum wages, including casual babysitters, taxicab and limousine drivers, and certain domestic service employees, outside salespersons, employees engaged in agriculture and severely handicapped persons. *NRS 608.250(2)(a) -- (f)*.

The exclusions at *NRS 608.250(2)(d)* (for employees "engaged in agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor") and in *NRS 608.250(2)(e)* (for "taxicab and limousine drivers") are also subsumed in other corresponding statutory exclusions from overtime compensation. In particular, *NRS 608.018(k)* [\*30] and (l) set forth exclusions which are at least as broad as those at *NRS 608.250(2)(d)* and (e) and which do not depend on or refer to *NRS 608.250*. Accordingly, any question as to the continuing validity of *NRS 608.250(2)* cannot affect the lack of entitlement to statutory overtime compensation for taxicab and limousine drivers or for agricultural employees.

On the whole, the exclusions from statutory overtime coverage, as incorporated from *NRS 608.250(2)*, are complimentary to the exclusions under the FLSA's overtime compensation provisions. n4 Hence, it is apparent that the Legislature intended to enact state overtime compensation law that was generally consistent with federal law on the same topic and to exclude from statutory overtime compensation the types of employees identified at *NRS 608.250(2)*. This intent should be respected regardless of changes in the law on the distinct subject matter of minimum wages.

n4 See, e.g., 29 U.S.C.A. § 213(a)(1) (1998) (addressing outside salespersons); 29 U.S.C.A. § 213(a)(6) (1998) (addressing employees employed in agriculture); 29 U.S.C.A. §§ 213(a)(7), 214(c) (1998) (addressing handicapped workers); 29 U.S.C.A. § 213(a)(15) (1998) (addressing casual babysitters and those engaged in domestic service).

[\*31]

Moreover, *NRS 608.018(2)(a)* does not depend on the aspects of *NRS 608.250* that offend the proposed amendment, *i.e.*, the provisions for minimum wage calculation and entitlement. Because the subject of the proposed amendment is the minimum wage and not entitlement to overtime compensation, *NRS 608.018(2)(a)* does not conflict with the organic provisions of the proposed amendment. Therefore, *NRS 608.018(2)(a)*, which incorporates the identification of types of employees found in *NRS 608.250(2)*, would survive the limited repeal of *NRS 608.250(2)* specific to its exclusion from minimum wage coverage for the same types of employees.

In contrast, the exclusions from statutory overtime entitlement set forth at *NRS 608.018(2)(b)* and (d) rely on the calculation of the minimum wage under *NRS 608.250*. Subsection (2)(b) expressly does so, excluding from overtime compensation "employees [\*32] who receive compensation for employment *at a rate not less than one and one-half times the minimum rate prescribed pursuant to NRS 608.250.*" [Emphasis added.] Subsection 2(d) excludes "salesmen earning commissions in a retail business *if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions.*" [Emphasis added.]

The apparent intent behind *NRS 608.018(2)(b)* and (d) was to exclude from overtime compensation employees and certain salesmen who earned as a regular rate at least one and one-half times the minimum rate set by the Labor Commissioner -- a rate that is limited by the rate provided by federal law. *See NRS 608.250(1)*. In enacting *NRS 608.018(2)(b)* and (d), the Legislature could not have anticipated that overtime compensation would be required even though an employee earned more than one and one-half times the rate under federal law and *NRS 608.250*. Incorporation of the wage calculation at [\*33] *NRS 608.250* into *NRS 608.018* reflects the Legislature's determination as to the proper balance of state interests. Amending or supplanting *NRS 608.018(2)(b)* or (d) with the higher minimum wage rate of the proposed amendment would prove more costly for employers and would frustrate the apparent intent of the Legislature to tie this variable in the overtime calculation to the federal minimum wage. n5 For this reason, and even more so because the proposed amendment is not concerned with overtime compensation, it would not effect a repeal or modification of these overtime compensation exclusions linked to *NRS 608.250*.

n5 For example, the current minimum wage rate is \$ 5.15 per hour. This rate multiplied by one and one-half equals \$ 7.73 per hour. Thus under *NRS 608.018(2)(b)* and (d), statutory overtime compensation is required until an employee or salesman with sufficient commissions earns at least \$ 7.73 per hour. Under the proposed amendment, assuming no adequate insurance is provided, the minimum wage would be initially set at \$ 6.15 per hour. This rate multiplied by one and one-half equals \$ 9.23 per hour. If the calculation from the proposed amendment were incorporated into *NRS 608.018(2)(b)* and (d), then an employee would be entitled to statutory overtime compensation until he earned \$ 9.23 per hour.

[\*34]

The rule that all statutes in force and not inconsistent with the new constitutional provisions shall continue until amended or repealed by the Legislature seems particularly apt here. *See 16 AM. JUR. 2d Constitutional Law* § 67. Under this rule, the minimum wage calculation provisions of *NRS 608.250*, as incorporated into *NRS 608.018(2)(b)* and (d), should continue for the purpose of requiring the Labor Commissioner to establish a wage rate to be used in determining entitlement to statutory overtime compensation under *NRS 608.018(2)(b)* and (d).

#### CONCLUSION TO QUESTION FOUR

Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in *NRS 608.250*, the statutory exclusions from overtime compensation and the provisions of *NRS 608.250* relied upon in *NRS 608.018*, would [\*35] stand as enacted for purposes of the overtime compensation law.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawAgency RulemakingRule Application & InterpretationGeneral

OverviewGovernmentsLegislationExpirations, Repeals & SuspensionsGovernmentsLegislationInitiative & Referendum

  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

MICHAEL MURPHY and MICHAEL RENO,  
Individually and on behalf of others similarly  
situated,

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC and A CAB, LLC,

Defendants.

Case No.: A-12-669926-C  
Dept. No. I

Hearing: January 17, 2013  
Time: 9 a.m.

**DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT**

Defendant A Cab, LLC, by and through its attorney of record, ESTHER C. RODRIGUEZ, ESQ., of RODRIGUEZ LAW OFFICES, P.C., hereby files this Reply in Support of Its Motion To Dismiss Complaint.

**I. POINTS AND AUTHORITIES**

**A. Plaintiffs' Arguments Are in Contradiction to Each Other.**

Plaintiffs' arguments contained in their *Response in Opposition to Defendants' Motion to Dismiss* (hereinafter "*Response*") are the twofold and in complete contradiction to each other:

Argument #1. There is no need for an implicit repeal, as the Constitution and the Nevada Revised Statutes can be read in tandem with no conflict between the two schemes. *Response*, 7:24-26.

Argument # 2. There has been an implicit repeal as the Constitution has replaced the NRS; the Constitution indisputably acted to revise the whole subject matter of minimum wages in

1 Nevada. *Response*, 10:23-25.

2 Plaintiffs first argue that Plaintiffs “make no claim under NRS 608.250(1)[the minimum  
3 wage statute] and their exclusion from the minimum wage requirements imposed by that statute is  
4 irrelevant.” *Response*, 2:3-5. In the same breath, Plaintiffs then state they are claiming payment of  
5 minimum wage as conferred by the amendments to the Nevada Constitution. In its amendments,  
6 the Legislature did not divest the Nevada Labor Commissioner of its regulatory authority over  
7 minimum wage. NRS 608.250 still stands as the law that the Labor Commissioner shall establish  
8 and regulate the minimum wage in private employment:

9 “Except as otherwise provided in this section, the Labor  
10 Commissioner shall, in accordance with federal law, establish by  
11 regulation the minimum wage which may be paid to employees in  
12 private employment within the State. The Labor Commissioner shall  
13 prescribe increases in the minimum wage in accordance with those  
14 prescribed by federal law, unless the Labor Commissioner determines  
15 that those increases are contrary to the public interest.” NRS  
16 608.250(1)

17 The same statute then proceeds to state without ambiguity, these provisions do not apply to  
18 taxicab drivers. NRS 608.250(2)(e). For the Plaintiffs to argue that they are making no claim under  
19 these provisions which establish and regulate the minimum wage in the State of Nevada is simply  
20 not true. The referenced Constitutional Amendment, specifically states: “The Governor or the State  
21 agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the  
22 adjusted rates, which shall take effect the following July 1.” Nevada Constitution, Article 15,  
23 Section 16(A). That “State agency” is Nevada’s Labor Commissioner. Plaintiffs are seeking to  
24 circumvent the laws and regulations by a loophole that simply does not exist.

25 Plaintiffs then state the Constitution has in fact repealed NRS 608.250(2)(e). *Response*, 10-  
26 12. For this proposition, Plaintiffs erroneously rely upon three cases that find an implicit repeal  
27 when a constitutional amendment has revised the entire subject.<sup>1</sup> By the Plaintiffs’ own citations  
28 and references these three cases indicate that the implicit repeal is assumed when the amendment

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<sup>1</sup> Plaintiffs rely upon *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 378 (1882); *Western Realty Co. v. Reno*, 172 P.2d 158, 165 (1946); *Board of Retirement v. Superior Court*, 101 Cal. App. 4<sup>th</sup> 1062, 1068 (Cal. Ct. App. 2002).

1 has clearly replaced the entire subject matter of the statute.

2 This is not the case with the Nevada Constitutional amendment pertaining to minimum  
3 wage. The amendment merely addressed an increase of the minimum wage greater than what then  
4 was prescribed under the NWHL; i.e., greater than the federal minimum wage. Neither the ballot  
5 initiative nor the resulting constitutional amendments made any express reference to the NWHL.  
6 The intent and the resulting amendments were to revise the minimum wage portions of the NWHL,  
7 not supplant the **entire** minimum wage statute and corresponding **exceptions**. The constitutional  
8 amendments specifically do not address removing the minimum wage **exceptions** provided under  
9 NRS 680.250(e), including the **exceptions** for **taxicab and limousine drivers**. “Where express  
10 terms of repeal **are not used**, the presumption is always against an intention to repeal an earlier  
11 statute ...” *Lemberes v. State*, 97 Nev. 492, 499, 634 P.2d 1219, 1223 (1981). <sup>2</sup>

12 Plaintiffs argue that if the implicit repeal analysis is required, the Constitutional  
13 amendments have in fact done so by completely revising the “whole subject matter” of minimum  
14 wages in Nevada.<sup>3</sup> The only supporting authority for this argument is the opinion of the Attorney  
15 General.<sup>4</sup> Plaintiffs undermine their own arguments by stating that the Constitution and the NRS  
16 can exist in tandem and simultaneously. It’s either one or the other - either they are existing side by  
17 side and to be read together; or one (Constitutional amendment) has replaced the other (Nevada  
18 Revised Statute) in its entirety.

19 From Plaintiffs’ own concessions and analysis, it should be clear that there has not been a  
20 complete replacement of the subject matter by the Amendments. Therefore, the interpretation of the  
21 minimum wage must default to the specific language which is contained in the Nevada Revised  
22

---

23 <sup>2</sup> *Lemberes* was overruled pertaining to the specific grounds for unavailability of a  
24 witness enumerated in NRS 171.198(6); the Supreme Court determined that the district court  
25 may also consider NRS 51.055, which defines unavailability. *Funches v. State*, 113 Nev. 916,  
26 922-923 (1997). Plaintiffs are far-reaching in their arguments that this reversal overturns the  
cases cited by Defendant holding that implied repeal is not favored absent specific provisions.

27 <sup>3</sup> *Response*, 10:21-24.

28 <sup>4</sup> *Response*, 10:1-4.

1 Statutes.

2 **B. Plaintiffs Have Not Provided Authority Supporting A Private Right of Action for**  
3 **Minimum Wages**

4 It is clear from the attachments to Plaintiffs' Response, that the Plaintiffs are "forum and  
5 judge shopping." In fact, this case was removed from Judge Ronald J. Israel after Defendants'  
6 present Motion to Dismiss was Filed. Just last year, these same claims for payments of minimum  
7 wages were brought on behalf of taxicab drivers from another cab company before Judge Israel in  
8 Thomas v. Nevada Yellow Cab Corporation, et al., case number A-12-661726-C. Exhibit A,  
9 Complaint. Judge Israel granted Defendants' motion to dismiss on August 30, 2012, indicating:

10 "The Court concludes that the adoption of the constitutional  
11 amendment by Nevada voters in 2006, now known as Article 15,  
12 Section 16 (the "Minimum Wage Amendment"), did not repeal NRS  
13 608.250 by "implication." The Court finds there is another  
14 reasonable construction of the Minimum Wage Amendment that does  
15 not require the repeal of NRS 608.250 by implication. The Minimum  
16 Wage Amendment made absolutely no reference to NRS 608.250.  
The focus of the Minimum Wage Amendment was the actual  
minimum wage. The Minimum Wage Amendment's definition of  
'employee' is not in conflict with NRS 608.250's exceptions, which  
include taxi and limousine drivers. As a result, this Court holds that  
the Minimum Wage Amendment did not repeal NRS 608.250 or its  
exceptions." Exhibit B, Order, p.2.

17 This Order is all on all fours with the present matter. Contrarily, those Orders attached by  
18 Plaintiffs as supporting authority in their Response pertain to collection for overtime wages which is  
19 not applicable. Plaintiffs' second claim for relief does not present a private cause of action and  
20 must be dismissed for failure to state a claim upon which relief can be granted and lack of  
21 jurisdiction over the subject matter. Plaintiffs' recourse is to pursue any alleged claim for unpaid  
22 minimum wages through Nevada's Labor Commissioner.

23 **II. CONCLUSION**

24 Plaintiffs' causes of action pled in their Complaint are twofold:

25 1. First Claim for Relief pursuant to Article 15, Section 16, of the Nevada Constitution.

26 The Constitutional Amendment did not eliminate the current and long-standing exemptions to the  
27 minimum wage and overtime laws for various categories of workers in Nevada, more specifically,  
28 taxicab and limousine drivers.

2. Second Claim for Relief pursuant to NRS 608.040 for unpaid minimum wages. By statute, this claim falls under the jurisdiction of the Nevada Labor Commissioner for enforcement. NRS 608.180

Based upon the foregoing points and authorities, Defendant A CAB, LLC respectfully requests this Honorable Court to enter an Order granting Defendant's Motion to Dismiss pursuant to NRCP 12(b)(1) and (5).

DATED this 10 day of January, 2013.

**RODRIGUEZ LAW OFFICES, P. C.**

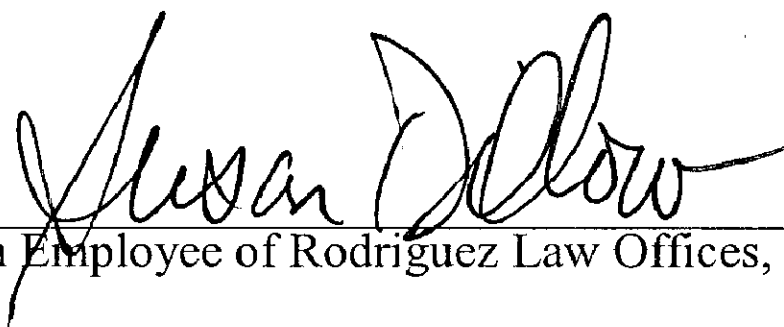


Esther C. Rodriguez, Esq.  
Nevada State Bar No. 006473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** a true and correct copy of the foregoing **Reply in Support of Motion to Dismiss** was served by placing same, postage prepaid, in the U.S. Mail this 10 day of January, 2013 to:

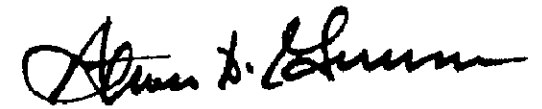
Leon Greenberg, Esq.  
Leon Greenberg Professional Corporation  
2965 South Jones Boulevard, Suite E4  
Las Vegas, Nevada 89146  
*Counsel for Plaintiff*



An Employee of Rodriguez Law Offices, P.C.

# EXHIBIT A

# EXHIBIT A



CLERK OF THE COURT

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3 DANA SNIEGOCKI, ESQ., SBN 11715  
4 Leon Greenberg Professional Corporation  
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dana@overtimelaw.com

7 Attorneys for Plaintiffs

9 **DISTRICT COURT**  
10 **CLARK COUNTY, NEVADA**

11 CHRISTOPHER THOMAS, and )  
12 CHRISTOPHER CRAIG, )  
13 Individually and on behalf of )  
14 others similarly situated, )

14 Plaintiffs, )

15 vs. )

16 NEVADA YELLOW CAB )  
17 CORPORATION, NEVADA CHECKER )  
18 CAB CORPORATION, and NEVADA )  
19 STAR CAB CORPORATION, )

20 Defendants. )

Case No.: A-12-661726-C

Dept.: XXVIII

**COMPLAINT**

**ARBITRATION  
EXEMPTION CLAIMED  
BECAUSE THIS IS  
A CLASS ACTION CASE**

21 CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and  
22 on behalf of others similarly situated, by and through their  
23 attorney, Leon Greenberg Professional Corporation, as and for a  
24 Complaint against the defendants, state and allege, as follows:

25 **JURISDICTION, PARTIES AND PRELIMINARY STATEMENT**

26 1. The plaintiffs, CHRISTOPHER THOMAS, and CHRISTOPHER  
27 CRAIG, (the "individual plaintiffs" or the "named plaintiffs") are  
28 residents of the State of Nevada and during all relevant times were

1 residents of Clark County, Nevada, and all plaintiffs are current  
2 employees of the defendants.

3       2.     The defendants NEVADA YELLOW CAB CORPORATION, NEVADA  
4 CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION,  
5 (hereinafter referred to as "Yellow Checker Star" or "defendants")  
6 are corporations existing and established pursuant to the laws of  
7 the State of Nevada with their principal place of business in the  
8 County of Clark, State of Nevada and conduct business in Nevada.

9                                   **CLASS ACTION ALLEGATIONS**

10       3.     The plaintiffs bring this action as a class action  
11 pursuant to Nev. R. Civ. P. §23 on behalf of themselves and a class  
12 of all similarly situated persons employed by the defendants in the  
13 State of Nevada.

14       4.     The class of similarly situated persons consists of all  
15 persons employed by defendant in the State of Nevada during the  
16 applicable statute of limitations periods prior to the filing of  
17 this Complaint continuing until date of judgment, such persons being  
18 employed as Taxi Cab Drivers (hereinafter referred to as "cab  
19 drivers" or "drivers") such employment involving the driving of taxi  
20 cabs for the defendants in the State of Nevada.

21       5.     The common circumstance of the cab drivers giving rise to  
22 this suit is that while they were employed by defendants they were  
23 not paid the minimum wage required by Nevada's Constitution, Article  
24 15, Section 16 for many or most of the days that they worked in that  
25 their hourly compensation, when calculated pursuant to the  
26 requirements of said Nevada Constitutional Provision, did not equal  
27 at least the minimum hourly wage provided for therein.

28       6.     The named plaintiffs are informed and believe, and based

1 thereon allege that there are at least 300 putative class action  
2 members. The actual number of class members is readily  
3 ascertainable by a review of the defendants' records through  
4 appropriate discovery.

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

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

12 9. A class action is superior to other available methods for  
13 the fair and efficient adjudication of the controversy. Due to the  
14 typicality of the class members' claims, the interests of judicial  
15 economy will be best served by adjudication of this lawsuit as a  
16 class action. This type of case is uniquely well-suited for class  
17 treatment since the employers' practices were uniform and the burden  
18 is on the employer to establish that its method for compensating the  
19 class members complies with the requirements of Nevada law.

20 10. The individual plaintiffs will fairly and adequately  
21 represent the interests of the class and have no interests that  
22 conflict with or are antagonistic to the interests of the class and  
23 have retained to represent them competent counsel experienced in the  
24 prosecution of class action cases and will thus be able to  
25 appropriately prosecute this case on behalf of the class.

26 11. The individual plaintiffs and their counsel are aware of  
27 their fiduciary responsibilities to the members of the proposed  
28 class and are determined to diligently discharge those duties by

1 vigorously seeking the maximum possible recovery for all members of  
2 the proposed class.

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

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

15 13. The named plaintiffs repeat all of the allegations  
16 previously made and bring this First Claim for Relief pursuant to  
17 Article 15, Section 16, of the Nevada Constitution.

18 14. Pursuant to Article 15, Section 16, of the Nevada  
19 Constitution the named plaintiffs and the class members were  
20 entitled to an hourly minimum wage for every hour that they worked  
21 and the named plaintiffs and the class members were often not paid  
22 such required minimum wages.

23 15. The named plaintiffs seek all relief available to them and  
24 the alleged class under Nevada's Constitution, Article 15, Section  
25 16 including appropriate injunctive and equitable relief to make the  
26 defendants cease their violations of Nevada's Constitution and a  
27 suitable award of punitive damages.

28 16. The named plaintiffs on behalf of themselves and the

1 proposed plaintiff class members, seek, on this First Claim for  
2 Relief, a judgment against the defendants for minimum wages, such  
3 sums to be determined based upon an accounting of the hours worked  
4 by, and wages actually paid to, the plaintiffs and the class  
5 members, a suitable injunction and other equitable relief barring  
6 the defendants from continuing to violate Nevada's Constitution, a  
7 suitable award of punitive damages, and an award of attorney's fees,  
8 interest and costs, as provided for by Nevada's Constitution and  
9 other applicable laws.

10 WHEREFORE, plaintiffs demand the relief on each cause of action  
11 as alleged aforesaid.

12 Plaintiffs demand a trial by jury on all issues so triable.

13  
14 Dated this 11<sup>th</sup> day of May, 2012.

15  
16 Leon Greenberg Professional Corporation

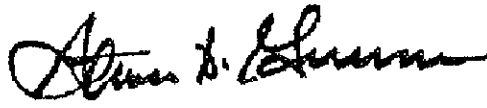
17  
18 By: /s/ Leon Greenberg

19 LEON GREENBERG, Esq.  
20 Nevada Bar No.: 8094  
21 2965 South Jones Blvd- Suite E4  
22 Las Vegas, Nevada 89146  
23 (702) 383-6085

24  
25 Attorney for Plaintiff  
26  
27  
28

# EXHIBIT B

# EXHIBIT B

  
CLERK OF THE COURT

1 **ORDR**  
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3 GENERAL COUNSEL  
4 Nevada Bar No. 001866  
5 TAMER B. BOTROS, ESQ.  
6 ASSOCIATE COUNSEL  
7 Nevada Bar No. 012183  
8 **YELLOW CHECKER STAR**  
9 **TRANSPORTATION CO. LEGAL DEPT.**  
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Las Vegas, Nevada 89118  
T: 702-873-6531  
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mgordon@ycstrans.com  
Attorneys for Defendants  
NEVADA YELLOW CAB CORPORATION  
NEVADA CHECKER CAB CORPORATION  
NEVADA STAR CAB CORPORATION

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

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

14 Plaintiff,

15 vs.

16 NEVADA YELLOW CAB CORPORATION,  
17 NEVADA CHECKER CAB CORPORATION  
NEVADA STAR CAB CORPORATION

18 Defendants.

Case No.: A-12-661726-C

Dept. No.: XXVIII

Date of Hearing: July 30, 2012  
Time of Hearing: 9:00 a.m.

19 **ORDER DISMISSING CASE**

20 Defendants, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB  
21 CORPORATION and NEVADA STAR CAB CORPORATION, hereinafter ("YCS") by and through  
22 their undersigned attorneys, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., brought  
23 its "Motion to Dismiss" on for hearing on the 30<sup>th</sup> day of July, 2012. Marc C. Gordon, Esq., General  
24 Counsel of the Yellow Checker Star Transportation Legal Department, appeared on behalf of  
25 Defendants, and Leon Greenberg, Esq., having appeared on behalf of Plaintiffs at the hearing.  
26 Following arguments of counsel, due consideration by the Court of all briefs, pleadings and papers on  
27 file herein, and good cause appearing therefore,  
28

<input type="checkbox"/> Voluntary Dis	<input type="checkbox"/> Stip Dis	<input type="checkbox"/> Sum Jdgm	<b>FINAL DISPOSITIONS</b> <input type="checkbox"/> Time Limit Expired <input type="checkbox"/> Dismissed (with or without prejudice) <input type="checkbox"/> Judgment Satisfied/Paid in full
<input type="checkbox"/> Involuntary (stat) Dis	<input type="checkbox"/> Stip Jdgm	<input type="checkbox"/> Non-Jury Trial	
<input type="checkbox"/> Jdgm on Arb Award	<input type="checkbox"/> Default Jdgm	<input type="checkbox"/> Jury Trial	
<input checked="" type="checkbox"/> Mot to Dis (by deft)	<input type="checkbox"/> Transferred		

1           **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

2           1.     The Court agrees with the Defendants that the decision of the United States District  
3 Court of Nevada in Lucas v. Bell Trans., 2009 WL 2424557 (D. Nev. 2009), is sound and persuasive.  
4 The Nevada Supreme Court strongly disfavors implied repeal. The decision in Lucas v Bell Trans.,  
5 supra, although not binding authority on this Court, is persuasive authority, and therefore adopted by  
6 this Court.

7           2.     The Court concludes that the adoption of the constitutional amendment by Nevada voters  
8 in 2006, now known as Article 15, Section 16 (the "Minimum Wage Amendment"), did not repeal  
9 NRS 608.250 by "implication." The Court finds there is another reasonable construction of the  
10 Minimum Wage Amendment that does not require the repeal of NRS 608.250 by implication. The  
11 Minimum Wage Amendment made absolutely no reference to NRS 608.250. The focus of the  
12 Minimum Wage Amendment was the actual minimum wage. The Minimum Wage Amendment's  
13 definition of "employee" is not in conflict with NRS 608.250's exceptions, which include taxi and  
14 limousine drivers. As a result, this Court holds that the Minimum Wage Amendment did not repeal  
15 NRS 608.250 or its exceptions. Because NRS 608.250(2)(e) expressly states that Nevada's minimum  
16 wage does not apply to taxicab and limousine drivers, Plaintiffs cannot sue for a violation of unpaid  
17 minimum wages under Nevada law. NRS 608.250(2)(e).

18           3.     The Motion to Dismiss Plaintiffs' Complaint, brought by Defendants, NEVADA  
19 YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION and NEVADA  
20 STAR CAB CORPORATION, is granted in its entirety and with prejudice. Accordingly, this case is  
21 dismissed.

22           DATED this 30 day of August, 2012.

23  
24   
25 DISTRICT COURT JUDGE

26 RONALD J. ISRAEL  
27  
28 

Submitted by:

YELLOW CHECKER STAR  
TRANSPORTATION CO. LEGAL DEPT.

MARC C. GORDON, ESQ.

GENERAL COUNSEL

Nevada Bar No. 001866

TAMER B. BOTROS, ESQ.

ASSOCIATE COUNSEL

Nevada Bar No. 012183

5225 W. Post Road

Las Vegas, Nevada 89118

Attorneys for Defendants

NEVADA YELLOW CAB CORPORATION

NEVADA CHECKER CAB CORPORATION

NEVADA STAR CAB CORPORATION

Approved as to Form by:

LEON GREENBERG P.C.

LEON GREENBERG, ESQ.

Nevada Bar No. 8094

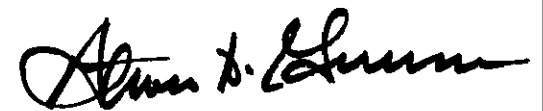
DANA SNIEGOCKI, ESQ.

Nevada Bar No. 11715

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Attorney for Plaintiffs



CLERK OF THE COURT

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[dana@overtimelaw.com](mailto:dana@overtimelaw.com)

Attorneys for Plaintiffs

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

MICHAEL MURRAY and MICHAEL	)	Case No.: A-12-669926-C
RENO, Individually and on	)	Dept.: I
behalf of others similarly	)	
situated,	)	
Plaintiffs,	)	<b>FIRST AMENDED COMPLAINT</b>
vs.	)	<b>ARBITRATION EXEMPTION</b>
A CAB TAXI SERVICE LLC and	)	<b>CLAIMED BECAUSE THIS IS</b>
A CAB, LLC,	)	<b>A CLASS ACTION CASE</b>
Defendants.	)	

MICHAEL MURRAY (previously named as "MICHAEL MURPHY")  
and MICHAEL RENO, Individually and on behalf of others  
similarly situated, by and through their attorney, Leon  
Greenberg Professional Corporation, as and for a Complaint  
against the defendants, state and allege, as follows:

**JURISDICTION, PARTIES AND PRELIMINARY STATEMENT**

1. The plaintiffs, MICHAEL MURRAY and MICHAEL RENO,  
(the "individual plaintiffs" or the "named plaintiffs")

1 are residents of the State of Nevada and during all  
2 relevant times were residents of Clark County, Nevada, and  
3 all plaintiffs are current employees of the defendants.

4 2. The defendants A CAB TAXI SERVICE LLC and A CAB,  
5 LLC, (hereinafter referred to as "A CAB" or "defendants")  
6 are limited liability companies or corporations existing  
7 and established pursuant to the laws of the State of  
8 Nevada with their principal place of business in the  
9 County of Clark, State of Nevada and conduct business in  
10 Nevada.

#### 11 **CLASS ACTION ALLEGATIONS**

12 3. The plaintiffs bring this action as a class  
13 action pursuant to Nev. R. Civ. P. §23 on behalf of  
14 themselves and a class of all similarly situated persons  
15 employed by the defendants in the State of Nevada.

16 4. The class of similarly situated persons consists  
17 of all persons employed by defendant in the State of  
18 Nevada during the applicable statute of limitations  
19 periods prior to the filing of this Complaint continuing  
20 until date of judgment, such persons being employed as  
21 Taxi Cab Drivers (hereinafter referred to as "cab drivers"  
22 or "drivers") such employment involving the driving of  
23 taxi cabs for the defendants in the State of Nevada.

24 5. The common circumstance of the cab drivers giving  
25 rise to this suit is that while they were employed by  
26 defendants they were not paid the minimum wage required by  
27 Nevada's Constitution, Article 15, Section 16 for many or  
28 most of the days that they worked in that their hourly

1 compensation, when calculated pursuant to the requirements  
2 of said Nevada Constitutional Provision, did not equal at  
3 least the minimum hourly wage provided for therein.

4       6. The named plaintiffs are informed and believe,  
5 and based thereon allege that there are at least 200  
6 putative class action members. The actual number of class  
7 members is readily ascertainable by a review of the  
8 defendants' records through appropriate discovery.

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

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

18       9. A class action is superior to other available  
19 methods for the fair and efficient adjudication of the  
20 controversy. Due to the typicality of the class members'  
21 claims, the interests of judicial economy will be best  
22 served by adjudication of this lawsuit as a class action.  
23 This type of case is uniquely well-suited for class  
24 treatment since the employers' practices were uniform and  
25 the burden is on the employer to establish that its method  
26 for compensating the class members complies with the  
27 requirements of Nevada law.

28       10. The individual plaintiffs will fairly and

1 adequately represent the interests of the class and have  
2 no interests that conflict with or are antagonistic to the  
3 interests of the class and have retained to represent them  
4 competent counsel experienced in the prosecution of class  
5 action cases and will thus be able to appropriately  
6 prosecute this case on behalf of the class.

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

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

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

26 13. The named plaintiffs repeat all of the  
27 allegations previously made and bring this First Claim for  
28 Relief pursuant to Article 15, Section 16, of the Nevada

1 Constitution.

2 14. Pursuant to Article 15, Section 16, of the Nevada  
3 Constitution the named plaintiffs and the class members  
4 were entitled to an hourly minimum wage for every hour  
5 that they worked and the named plaintiffs and the class  
6 members were often not paid such required minimum wages.

7 15. The named plaintiffs seek all relief available to  
8 them and the alleged class under Nevada's Constitution,  
9 Article 15, Section 16 including appropriate injunctive  
10 and equitable relief to make the defendants cease their  
11 violations of Nevada's Constitution and a suitable award  
12 of punitive damages.

13 16. The named plaintiffs on behalf of themselves and  
14 the proposed plaintiff class members, seek, on this First  
15 Claim for Relief, a judgment against the defendants for  
16 minimum wages, such sums to be determined based upon an  
17 accounting of the hours worked by, and wages actually paid  
18 to, the plaintiffs and the class members, a suitable  
19 injunction and other equitable relief barring the  
20 defendants from continuing to violate Nevada's  
21 Constitution, a suitable award of punitive damages, and an  
22 award of attorney's fees, interest and costs, as provided  
23 for by Nevada's Constitution and other applicable laws.

24 **AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA**  
25 **REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED**  
26 **PLAINTIFFS**  
**AND THE PUTATIVE CLASS**

27 17. Plaintiffs repeat and reiterate each and every  
28 allegation previously made herein.

1        18.     The named plaintiffs bring this Second Claim for  
2 Relief against the defendants pursuant to Nevada Revised  
3 Statutes § 608.040 on behalf of themselves and those  
4 members of the alleged class of all similarly situated  
5 employees of the defendants who have terminated their  
6 employment with the defendants.

7        19.     The named plaintiffs have been separated from  
8 their employment with the defendants and at the time of  
9 such separation were owed unpaid wages by the defendants.

10       20.     The defendants have failed and refused to pay the  
11 named plaintiffs and numerous members of the putative  
12 plaintiff class who are the defendants' former employees  
13 their earned but unpaid wages, such conduct by such  
14 defendants constituting a violation of Nevada Revised  
15 Statutes § 608.020, or § 608.030 and giving such named  
16 plaintiffs and similarly situated members of the putative  
17 class of plaintiffs a claim against the defendants for a  
18 continuation after the termination of their employment  
19 with the defendants of the normal daily wages defendants  
20 would pay them, until such earned but unpaid wages are  
21 actually paid or for 30 days, whichever is less, pursuant  
22 to Nevada Revised Statutes § 608.040.

23       21.     As a result of the foregoing, the named  
24 plaintiffs seek on behalf of themselves and the similarly  
25 situated putative plaintiff class members a judgment  
26 against the defendants for the wages owed to them and such  
27 class members as prescribed by Nevada Revised Statutes §  
28 608.040, to wit, for a sum equal to up to thirty days

1 wages, along with interest, costs and attorneys' fees.

2 WHEREFORE, plaintiffs demand the relief on each cause  
3 of action as alleged aforesaid.

4 Plaintiffs demand a trial by jury on all issues so  
5 triable.

6 Dated this 30<sup>th</sup> day of January, 2013.

7

8 Leon Greenberg Professional Corporation

9

10 By: /s/ Leon Greenberg

11 LEON GREENBERG, Esq.  
12 Nevada Bar No.: 8094  
13 2965 South Jones Blvd- Suite E4  
14 Las Vegas, Nevada 89146  
15 (702) 383-6085

16

Attorney for Plaintiff

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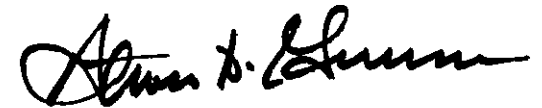
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CLERK OF THE COURT

1 **DECN**

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11 Attorneys for Plaintiffs

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 MICHAEL MURRAY, and MICHAEL	)	Case No.: A-12-669926-C
15 RENO, Individually and on	)	
16 behalf of others similarly	)	Dept.: I
17 situated,	)	
18 Plaintiffs,	)	
19 vs.	)	DECISION AND ORDER
20 A CAB TAXI SERVICE LLC, and A	)	
21 CAB, LLC,	)	
22 Defendants.	)	

23 This matter having come before the Court on the defendants'  
24 motion to dismiss plaintiffs' complaint<sup>1</sup> pursuant to NRCP Rules  
25 12(b)(1) and 12(b)(5), such motion having come before the Court for  
26 oral argument on January 17, 2012, with Esther C. Rodriguez, Esq.,  
27 arguing on behalf of the defendants and Leon Greenberg, Esq.,  
28 arguing on behalf of the plaintiffs, and after due consideration of  
the arguments, briefs and papers submitted by counsel for the  
parties, and the record of these proceedings;

---

<sup>1</sup> The Complaint served in this case indicated the first named plaintiff as Michael Murphy although the Court's docket indicates his name is Michael Murray which is such person's correct name. Defendants do not concede that the caption of this order is proper.

1       **THE COURT FINDS:**

2       **Summary of Plaintiffs' Claims and the Parties' Dispute**

3       Plaintiffs allege they were formerly employed by defendants as  
4 taxi cab drivers. They allege when they were so employed the  
5 defendants were obligated to pay them a minimum wage as provided for  
6 under Nevada's Constitution Article 15, Section 16 ("Section 16").  
7 They further allege they were not paid such minimum wage. As a  
8 result, they allege they are entitled to damages and other  
9 relief as provided for by Section 16 and certain penalties  
10 pursuant to NRS § 608.040. Defendants claim Section 16 does not  
11 confer any right to a minimum wage upon taxi drivers and moves  
12 to dismiss on that basis.

13       **Discussion**

14       The Court's decision ultimately rests upon the supremacy  
15 of Nevada's Constitution in all matters of law not otherwise  
16 controlled by federal law or the United States Constitution.  
17 The very first sentence of Section 16, in paragraph "A,"  
18 provides:

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

21       This language is clear, direct and unambiguous.

22       Accordingly, the Court's inquiry is limited to determining  
23 whether the parties are "employer" and "employee" for the  
24 purposes of Section 16. Defendants assert Section 16 was  
25 intended only to raise the minimum wage and not disturb the  
26 exemptions to Nevada's minimum wage requirements in Nevada  
27 Revised Statutes 608.250(2). In resolving such assertion the  
28 starting point for the Court must, of course, be the language

1 of Section 16 itself. In Section 16, paragraph "C," the  
2 following definition of "employee" is provided:

3 As used in this section, "employee" means any person who  
4 is employed by an employer as defined herein but does not  
5 include an employee who is under eighteen (18) years of  
6 age, employed by a nonprofit organization for after school  
or summer employment or as a trainee for a period not  
longer than ninety (90) days.

7 Again, this language is clear, direct and unambiguous.  
8 Through such language Section 16 extends its minimum wage  
9 requirements to all employees except those set forth in paragraph  
10 "C." Such paragraph "C" does not include taxi drivers among the  
11 employees excluded from the reach of Section 16.

12 Defendants argue that Section 16 makes no mention of the  
13 exemptions in Nevada Revised Statutes 608.250(2) and implied repeal  
14 occurs only when there is irreconcilable repugnancy between the two  
15 laws compelling the conclusion that the later enactment necessarily  
16 repeals the earlier. They further argue where express terms of  
17 repeal are not used, the presumption is always against an intention  
18 to impliedly repeal an earlier statute. In support of these  
19 contentions they cite *Washington v. State*, 30 P.3d 1134, 1170 (Sup  
20 Ct. Nev. 2001), *Mengelkamp v. List*, 501 P.2d 1032, 1034 (Sup. Ct.  
21 Nev. 1972), and the authorities discussed therein. Accordingly, in  
22 defendants' view, this Court must find that the two laws can exist  
23 and be read in harmony; and Section 16 did not supplant the  
24 exemptions specified in Nevada Revised Statute 608.250(2).

25 Unfortunately for defendants, the foregoing clear and  
26 unambiguous language of Section 16, paragraph "A," and the clear and  
27 unambiguous language of paragraph "C" setting forth who is an  
28 "employee" for the purposes of Section 16, renders the Court unable

1 to conduct the intent analysis urged by defendants and reach the  
2 disposition they desire.

3       An examination of the intent or purpose behind a constitutional  
4 provision is only proper when ambiguity exists in the language of  
5 the provision. If there is no ambiguity the provision must be  
6 applied in accordance with its plain meaning. See, *Halverson v.*  
7 *Miller* 186 P.3d 893, 897 (Nev. Sup. Ct. 2008); *Nevadans for Nevada*  
8 *v. Beers*, 142 P.3d 339, 347 (Nev. Sup. Ct. 2006); and *Rogers v.*  
9 *Heller*, 18 P.3d 1034, 1038, n. 17 (Nev. Sup. Ct. 2001). The Court  
10 discerns no ambiguity in the language of Section 16 and none has  
11 been brought to its attention by defendants. Under such  
12 circumstances, for the Court to engage in an analysis of the intent  
13 behind Section 16, and by doing so override its express, clear, and  
14 unambiguous language, would be antithetical to our system of  
15 constitutional law. The people of the State of Nevada, through the  
16 democratic process, have made Section 16 the supreme law of the  
17 State of Nevada by placing its provisions in Nevada's Constitution.  
18 This Court is duty bound to enforce Section 16 and its clear  
19 language.

20       The provisions of NRS 608.250(2) make no mention of Section 16  
21 and speak only of providing an exemption to the requirements set  
22 forth in NRS 608.250(1). Nor does Section 16 grant the legislature  
23 the power to modify any of its requirements. Section 16, being a  
24 constitutional provision not subject to legislative modification,  
25 must displace any conflicting statute. Accordingly, the provisions  
26 of NRS 608.250 are not controlling upon plaintiffs' claims brought  
27 under Section 16.

28       In reaching its decision, the Court acknowledges it has been

1 advised of the contrary conclusion rendered in the opinion issued by  
2 United States District Court Judge Jones in *Lucas v. Bell*  
3 *Transportation*, 2009 U.S. Dist. LEXIS 72549, (D. Nev. June 23, 2009).  
4 It has also been made aware that the holding of *Lucas* has been  
5 adopted by two of the judges of this Court.<sup>2</sup> With all due respect  
6 to its judicial brethren, this Court must decline to follow *Lucas*  
7 which this Court believes has not appropriately recognized, and  
8 respected, the clear language and primacy of Section 16.

9 The Court realizes application of Section 16 to the defendants,  
10 and its industry, represents a significant change for how such  
11 employers must conduct business. The Court is effectuating such  
12 change because it is required to do so, it passes no judgment on the  
13 wisdom of such change. [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 **Conclusion**

19 Defendants' motion to dismiss pursuant to NRCP Rules 12(b)(1)  
20 and 12(b)(5) is denied.

21

22

IT IS SO ORDERED this 8 day of Jul, 2013

23

24

  
HONORABLE JUDGE KENNETH CORY  
DISTRICT COURT, CLARK COUNTY  
ER

25

26

27


28

<sup>2</sup> See, *Thomas v. Nevada Yellow Cab*, A-12-661726-C, August 30, 2012 and *Gilmore v. Desert Cab*, A-12-668502-C.

1 Submitted by:

2 LEON GREENBERG PROFESSIONAL CORP.

3

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Tel (702) 320-8400

12 Attorney for the Defendants

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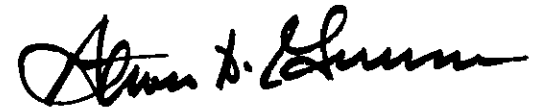
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CLERK OF THE COURT

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*Attorneys for Defendant A Cab, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL MURPHY and MICHAEL RENO,  
Individually and on behalf of others similarly  
situated,

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC and A CAB, LLC,

Defendants.

Case No.: A-12-669926-C  
Dept. No. I

Hearing Date:

Hearing Time:

**DEFENDANT'S MOTION FOR RECONSIDERATION**

Defendant A Cab, LLC, by and through its attorney of record, ESTHER C. RODRIGUEZ, ESQ., of RODRIGUEZ LAW OFFICES, P.C., and pursuant to NRCP 12(b)(1) and (5), 60, and EDCR 2.24 hereby respectfully moves this Honorable Court to reconsider its prior decision of February 11, 2013, denying Defendant's motion to dismiss the claims for relief in Plaintiffs' Complaint. This Motion is based upon the pleadings and papers on file, the attached Memorandum of Points and Authorities, and any oral argument that may be entertained at the hearing of this Motion.

DATED this 27<sup>th</sup> day of February, 2013.

**RODRIGUEZ LAW OFFICES, P.C.**

/s/ Esther C. Rodriguez, Esq.  
Esther C. Rodriguez, Esq.  
Nevada Bar No. 6473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that Defendant will bring the foregoing Motion on for hearing  
before this Court on the <sup>0</sup>1 day of APRIL, 2013, or as soon thereafter as counsel  
may be heard.

DATED this 27<sup>th</sup> day of February, 2013.

**RODRIGUEZ LAW OFFICES, P. C.**

/s/ Esther C. Rodriguez, Esq.  
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Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**POINTS AND AUTHORITIES**

**A. Legal Standard for Reconsideration**

Defendant seeks reconsideration of this Court's ruling denying its motion to dismiss served on February 13, 2013. Pursuant to EDCR 2.24, a party may move the Court for reconsideration of a prior ruling within 10 days after service of the written notice of the order. Rule 60 of the Nevada Rules of Civil Procedure a court may relieve the party from prior order based on a number of reasons, including newly discovered evidence.

As this Court may recall, during the oral arguments Plaintiffs raised a number of issues not briefed in their responsive pleading and with these arguments ultimately swayed the Court to deny the dismissal of the Complaint. Specifically, the argument was made that the people of Nevada had knowingly voted to repeal the exemptions currently in place which exclude taxicab drivers from the minimum wage requirements. The Court indicated that it could not override the will of the people; that it must uphold the Constitution; and that it must enforce the Constitution's definition of who was covered by the minimum wage requirement.

In response to this newly focused argument, Defendant requests that the Court consider the additional evidence of what was on the ballot when the people voted for the Constitutional Amendment; as well as the recently decided additional opinions from this Court's Eighth Judicial

District Court brethren who also recently addressed the same issues and dismissed the claims.

**B. The Amendment Itself and the Ballot Materials Demonstrate That the Categorical Exemptions Have Not Been Repealed**

During the oral arguments before this Court, Plaintiffs indicated that the people of Nevada had specifically spoken and voted to repeal the exemptions outlined in Nevada Revised Statutes § 608.250. This argument rang true to this honorable Court. Defendant asserts that the constitutional amendment merely raised the amount of the minimum wage for those workers who are entitled to receive it; it did not repeal any of the long-standing categorical exemptions. In support, Defendant presents to this Court the actual ballot questions. Nothing was stated in the ballot questions, or the amendment itself, purporting to affect the exclusions from the minimum wage law.

The Amendment specifically states what it was doing: raising the amount of the minimum wage. The ballot question and the attached materials that were sent to the voters repeatedly reference the “minimum wage” that was in existence. The ballot question, itself, stated that it sought to raise the amount of the minimum wage. The ballot question, the Amendment, and the ballot materials said nothing about the exemptions and made no effort change them. A copy of the Statewide Ballot Questions (including full text of Amendment) is attached as **Ex. A** for this Court’s review and consideration.

**C. Applying the Proper Analysis the Two Laws are Easily Reconciled.**

The Minimum Wage Amendment is limited to addressing the “employee” issue and how minors are to be treated. It does nothing to address the occupational “exemptions” of NRS 608.250(2). The Minimum Wage Amendment largely follows the structure of the FLSA. Under the FLSA, § 203 defines “employee” and “employer.” A completely different section of the FLSA is used to list all of the “exemptions.” In that section, § 213, the FLSA lists nearly all the same exemptions, or exclusions, that are listed in NRS 608.250(2). The Minimum Wage Amendment’s definition section does not impliedly repeal the exclusions of NRS 608.250(2) because they are easily reconciled as addressing different issues.

Nevada’s Minimum Wage Law has historically treated the “employee” definition section different from the “exemption” section. Because the two items were treated differently under

1 Nevada law, they cannot conflict with one another. The “employee” definition section of the  
2 Minimum Wage Amendment deals almost entirely with one issue: how to treat employees who are  
3 minors. The Minimum Wage Amendment’s “employee” definition section states:

4 As used in this section, "employee" means any person who is employed by an  
5 employer as defined herein but does not include an employee who is under eighteen  
6 (18) years of age, employed by a nonprofit organization for after school or summer  
7 employment or as a trainee for a period not longer than ninety (90) days.

8 In other words, minors will not be treated as “employees” under the Minimum Wage Amendment.

9 While there may be some trainees who are not minors, the vast majority of potential workers falling  
10 under this provision are minors. The definition section is squarely addressing the issue of how  
11 minors are to be treated, even to the point of redundancy, capturing the same minors within its  
12 exception to “employee” by age, by “after school” employment, and by employment during  
13 summer break. The definition section primarily addresses whether minors are to be paid the  
14 minimum wage.

15 For most of its existence, the Minimum Wage Law, NRS 608.250, had its own separate  
16 provision addressing whether minors would be treated as employees in the same manner as adult  
17 employees. In 2001, the statute was changed to give the Labor Commissioner authority to set the  
18 wage in accordance with federal law. The 2001 change is not of particular significance except that,  
19 in giving the Labor Commissioner such authority, the provision relating to minors was taken out of  
20 the statute because it was no longer needed given that the Labor Commissioner was being given  
21 authority to regulate all wages, including wages being paid to minors. The importance of this is  
22 that, before the Labor Commissioner was given this authority, NRS 608.250 contained both a  
23 definition section relating to treatment of minors and a separate section listing occupational  
24 exemptions. Prior to 2001, NRS 608.250 stated:

25 1. Except as otherwise provided in this section, the minimum wage  
26 which may be paid to employees in private employment within the  
27 state is \$3.35 per hour. The labor commissioner shall prescribe  
28 increases in the minimum wage in accordance with those prescribed  
by federal law, unless he determines that such increases are contrary  
to the public interest. The minimum amount which may be paid to a  
minor is 85 percent of that amount.

2. The provisions of subsection 1 do not apply to: (a) Casual babysitters. (b) Domestic service employees who reside in the household where they work. (c) Outside salespersons whose earnings are based on commissions. (d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year. (e) Taxicab and limousine drivers. (f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the rehabilitation division of the department of employment, training and rehabilitation.

3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that provided in this section. NRS 608.250 (2000 version).

The section addressing payment of the minimum wage to minors was totally separate from the section addressing which types of occupations that would be exempt. The “employee” section addresses how minors are treated. The “exemption” section addresses whether there are certain types of occupations that should be exempt. Nevada has historically treated these issues separately.

In 2001, the Minimum Wage Law, NRS 608.250 was amended, changing section 1. This section now states:

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest. NRS 608.250(1).

As far as how to treat minor “employees,” the Labor Commissioner shall act “in accordance with federal law.” Federal law treats the issue of minor “employees” and occupation “exemptions” separately, as stated above. Consequently, the Labor Commissioner would be able to continue to address minor pay by following the “employee” definition under federal law. The Minimum Wage Amendment changes this by giving a Nevada a new definition for “employees.”

The Minimum Wage Amendment does not, however, provide new law stating occupational “exemptions” or otherwise addressing the issue of “exemptions.” As a result, the long-standing exemptions of NRS 608.250(2) continue in force.

Implied repeal of one law through enactment of another does not occur, save when one is

1 irreconcilably repugnant to the other, or by some other means intent to abrogate the earlier law is  
2 made evident. *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972). In that case,  
3 the Nevada Supreme Court applied the same standard and held that the amendment in question did  
4 not repeal the statute.

5 **D. Judicial Comity and Consistency**

6 Plaintiffs' arguments have been rejected by every judge encountering their arguments in  
7 both the federal courts and the Eighth Judicial District Court. Each has determined that the  
8 Constitutional Amendment did not impliedly repeal the long-standing exemptions outlined in the  
9 Nevada Revised Statutes. Although not binding upon this Court, judicial comity requires that  
10 other judges on the same level within the same district and jurisdiction should give deference to  
11 their colleague's ruling. See *Foley v. SMA Life Assurance Company*, 281 P3d. 1172 (Nev. 2009).  
12 The reasoning behind this principle is particularly applicable in the present matter in that this case  
13 would have already been dismissed but for Plaintiffs' use of a peremptory challenge to remove  
14 Judge Israel, having received his dismissal in the similar matter of *Thomas v. Nevada Yellow Cab*  
15 *Corporation*, Case No. A-12-661726-C. See *Nevada Pay TV v. Eighth Judicial Dist. Court*, 102  
16 Nev. 203, 719 P.2d 797 (1986) indicating that one purpose of the rule (SCR 48.1) is the prevention  
17 of "judge shopping".<sup>1</sup>

18 **1. United States District Court of Nevada Decisions**

19 **a. Two (2) Federal Reviews and Opinions in *Lucas v. Bell Trans*, Case No.**  
20 **2:08-cv-1792-GMN-RJJ.**

21 Defendant has advised the Court of the rationale and decisions in *Lucas v. Bell Trans*, and  
22 attaches these Orders for the Court's review and consideration.

23 On June 24, 2009, Judge Robert Jones granted Defendants' motion to dismiss the minimum  
24 wage claims finding that the Constitutional Amendment did not impliedly repeal the long-standing

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25  
26 <sup>1</sup> *Nevada Pay TV* was superseded by *State, Dept. of Motor Vehicles and Public Safety v.*  
27 *Eighth Judicial Dist. Court In and For County of Clark*, 113 Nev. 1338, 948 P.2d 261 (1997), in  
28 terms of establishing which judge should rule on the timeliness of the challenge.

1 exemption for limousine and taxicab drivers. See Order dated June 23, 2009, attached as **Ex. B.**

2 On October 14, 2009, Judge Jones again addressed the issue, and denied Plaintiffs' motion  
3 to amend/certify question to the Nevada Supreme Court/Ninth Circuit. See Order dated October  
4 14, 2009, attached as **Ex. C.**

5 **b. Four (4) Opinions in *Greene v. Jacob Transportation Services, LLC*, Case**  
6 **No. 2:09-cv-00466-RCJ-RJJ.**

7 In the *Greene v. Jacob Transportation Services, LLC* case, there are four more opinions that  
8 have been drafted by the judges, with each opinion rejecting Plaintiffs' claims. Two of those  
9 opinions were drafted by Judge Robert Jones; the third opinion was drafted by Judge Gloria  
10 Navarro; and the fourth opinion was drafted by Magistrate Judge Robert J. Johnston.

11 On November 10, 2009, Judge Jones granted Defendant's motion to dismiss the minimum  
12 wage claims. See Order dated November 10, 2009, attached as **Ex. D.**

13 On January 27, 2010, Judge Jones denied Plaintiff's motion to certify the question to the  
14 Nevada Supreme Court/Ninth Circuit. See Order dated January 26, 2010, attached as **Ex. E.**

15 On March 7, 2011, Judge Navarro reviewed the issues and found Judge Jones' Orders to be  
16 well-reasoned. Judge Navarro denied Plaintiffs' motion to reconsider. See Order dated March 7,  
17 2011, attached as **Ex. F.**

18 On August 31, 2011, Magistrate Judge Robert J. Johnston again reviewed the issues and  
19 denied Plaintiffs' motion to reconsider. Magistrate Johnston indicated, "When the case was  
20 reassigned from Judge Robert C. Jones to Judge Gloria M. Navarro, Plaintiff filed a Motion to  
21 Reconsider (#45). That motion was denied in an Order (#55) where Judge Navarro held that 'Judge  
22 Jones provided a thorough analysis of the statute in question and applied them to the facts of this  
23 case to rule that Plaintiff did not have a cause of action as a matter of law.' Order (#55) at 3." See  
24 Order dated August 31, 2011 attached as **Ex G.** "As there are no factual differences and Plaintiff  
25 cites or provides no newly discovered evidence or intervening change in the controlling law, there  
26 is no reason the state law claims should be renewed against Jacob Transportation." *Id.*

27 Each of these opinions is court-drafted. Moreover, each opinion demonstrates that each  
28 federal judge carefully considered the issues, before issuing their decisions.

1                   **2. Eighth Judicial District Court Decisions**

2                   **a. Honorable Judge Ronald J. Israel**

3                   Defendant previously alerted the Court to the decision by the Honorable Judge Ronald  
4 Israel in the matter of *Thomas v. Nevada Yellow Cab Corporation*, Case No. A-12-661726-C. (**Ex.**  
5 **H**). In dismissing the matter on August 30, 2012, Judge Israel agreed with the decision of the  
6 United States District Court of Nevada in *Lucas v. Bell Trans*, and concluded that the adoption of  
7 the constitutional amendment by Nevada voters did not repeal NRS 608.250 by implication.

8                   **b. Honorable Judge Douglas W. Herndon**

9                   On January 16, 2013, in the matter of *Gilmore v. Desert Cab, Inc.*, Case No. A668502,  
10 Judge Douglas W. Herndon dismissed Plaintiffs' complaint indicating NRS 608.250 is the  
11 appropriate law, and the Constitutional Amendment does not change what NRS 608.250 stands for.  
12 See attached Minute Order at **Ex. I** (Court Order not available online currently).

13                   **c. Honorable Kerry Earley**

14                   On February 14, 2013, in the matter of *Tesema v. Lucky Cab Co*, Case No. A660700, Judge  
15 Kerry Earley dismissed Plaintiffs' First Claim for Relief asserting minimum wage claims pursuant  
16 to the Nevada Constitution, and Plaintiffs' Second Claim for Relief asserting claims pursuant to  
17 NRS 608.040. Order attached as **Ex. J**.

18                   **II.**

19                   **CONCLUSION**

20                   While neither the ballot initiative nor the resulting constitutional amendments made any  
21 express reference to the NWHL, the intent clearly was to revise the minimum wage portions of the  
22 NWHL, not supplant the **entire** minimum wage statute and corresponding **exceptions**.  
23 Consequently, all other minimum wage provisions contained in the NWHL survive the  
24 constitutional amendments, at least to the extent that those provisions are not in conflict and  
25 otherwise can be harmonized with the constitutional amendments. Notably, the constitutional  
26 amendments do not speak to removing the minimum wage **exceptions** provided under NRS  
27 680.250(e), including the **exceptions** for **taxicab and limousine drivers**. The NRS 608.250  
28 **exceptions** and the Amendments' definition of "employee" can happily co-exist.

1 Based upon the foregoing points and authorities, Defendant A CAB, LLC respectfully  
2 requests this Honorable Court to reconsider its prior decision and to enter an Order granting  
3 Defendant's Motion to Dismiss.

4 DATED this 27<sup>th</sup> day of February, 2013.

5 **RODRIGUEZ LAW OFFICES, P. C.**

6  
7 /s/ Esther C. Rodriguez, Esq.  
8 Esther C. Rodriguez, Esq.  
9 Nevada State Bar No. 006473  
10 10161 Park Run Drive, Suite 150  
11 Las Vegas, Nevada 89145  
12 *Attorneys for Defendant A Cab, LLC*

11 **CERTIFICATE OF SERVICE**

12 **I HEREBY CERTIFY** a true and correct copy of the foregoing **Motion for**  
13 **Reconsideration** was served by placing same, postage prepaid, in the U.S. Mail this 27<sup>th</sup> day of  
14 February, 2013 to:  
15 Leon Greenberg, Esq.  
16 Leon Greenberg Professional Corporation  
17 2965 South Jones Boulevard, Suite E4  
18 Las Vegas, Nevada 89146  
19 *Counsel for Plaintiff*

19 /s/ Susan Dillow  
20 An Employee of Rodriguez Law Offices, P.C.

# EXHIBIT A

# EXHIBIT A

**State of Nevada**

**Statewide  
Ballot Questions**

**2006**



**To Appear on the November 7, 2006  
General Election Ballot**

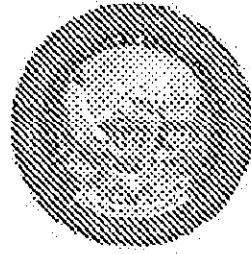
**Issued by  
Dean Heller  
Secretary of State**

**DEAN HELLER**  
*Secretary of State*

**KIM A. BUYS**  
*Chief Deputy Secretary  
of State*

**PAMELA A. RUCKEL**  
*Deputy Secretary for  
Southern Nevada*

**STATE OF NEVADA**



**OFFICE OF THE  
SECRETARY OF STATE**

**CHARLES E. MOORE**  
*Securities Administrator*

**SCOTT W. ANDERSON**  
*Deputy Secretary  
for Commercial Recordings*

**ELICK C. HSU**  
*Deputy Secretary  
for Elections*

**STACY M. WOODBURY**  
*Deputy Secretary  
for Operations*

Dear Fellow Nevadan:

You will soon be taking advantage of one of your most important rights as an American citizen: the right to vote! As Secretary of State and the state's Chief Election Officer, I take the job of informing the public about various statewide ballot questions very seriously. An informed and knowledgeable electorate is a cornerstone to fair and just elections.

With that in mind, the Secretary of State's office has prepared this booklet detailing the statewide questions that will appear on the 2006 General Election Ballot. The booklet contains "Notes to Voters," a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note. Any fiscal note included in this booklet explains only adverse impacts and does not note any possible cost savings.

I encourage you to carefully and thoughtfully review the ballot questions listed in the booklet. As a voter, your actions on these ballot questions can create new laws, amend existing laws or amend the Nevada Constitution.

On the 2006 General Election Ballot, there are ten statewide questions. Ballot Question Numbers 8, 9, 10 and 11 appear on the ballot through the actions of the Nevada State Legislature. Ballot Question Numbers 2, 4, 5, and 7 qualified for this year's ballot through the initiative petition process. Ballot Question Numbers 1 and 6 also qualified through the initiative petition process, passed at the 2004 General Election and appear for the second and last time on the 2006 General Election Ballot. Ballot Question Number 3 was removed from the Ballot by the Nevada Supreme Court.

You can also view these ballot questions on the Secretary of State's web site at [www.secretaryofstate.biz](http://www.secretaryofstate.biz). If you require further assistance or information, please feel free to contact my office at 775-684-5705.

Respectfully,

A handwritten signature in cursive script that reads "Dean Heller".

**DEAN HELLER**  
Secretary of State

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**QUESTION NO. 6**  
**Amendment to the Nevada Constitution**

**CONDENSATION (Ballot Question)**

Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?

Yes.....☐

No.....☐

**EXPLANATION (Ballot Question)**

The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees \$5.15 per hour worked if the employer provides health benefits, or \$6.15 per hour worked if the employer does not provide health benefits. The rates shall be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.

The following arguments for and against and rebuttals for Question No. 6 were prepared by a committee as required by Nevada Revised Statutes (NRS) 293.252.

**ARGUMENT IN SUPPORT OF QUESTION NO. 6**

All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a decreased taxpayer burden and stronger families.

Low-income workers who do not currently earn enough to cover the basic costs of living for their families — housing, health care, food and child care — will clearly benefit. Many low-income Nevada families live in poverty even though they have full-time jobs. A Nevada worker at the current minimum wage for 40 hours per-week — every week, all year — makes only \$10,712. If the minimum wage had been increased to keep up with rising prices over the last 25 years, it would now bring in \$15,431 per-year — not \$10,712. At the current \$5.15 an hour, many minimum wage workers in Nevada have incomes below the federal poverty line. We want to encourage people to work and be productive members of society. It's economic common sense.

Taxpayers will benefit as an increased minimum wage allows low-income working families to become more financially able to free themselves from costly taxpayer-provided services such as welfare, childcare and public health services.

Our state's economy will benefit as we develop a workforce that will earn more spendable income and put dollars directly into local stores and businesses.

Raising the minimum wage one dollar affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by nursing home employees, childcare workers, and restaurant employees.

Minimum wage workers are not just teenagers working part-time to pay for movies, CDs and fast food. The vast majority of minimum wage workers in Nevada are adults (79% are 20 and older). Most work full-time. Six out of 10 minimum wage earners are women. Twenty-five percent are single mothers. And altogether they are the parents of 25,000 children. The paycheck these workers bring home accounts for about half of their families' earnings.

No matter what special interests and big corporations who oppose a fair minimum wage tell you, virtually *every* reputable economic study has found that workers don't get fired when minimum wages are passed or increased. In fact, employment increases. Eight of the eleven states that had a minimum wage above the federal level in 2003 are producing more jobs than the United States as a whole.

Raising the minimum wage makes sense for *all* of Nevada. Cast a vote for Nevada working people, Nevada taxpayers, Nevada values and a stronger Nevada economy.

*The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252*

#### **REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 6**

Contrary to claims by those eager to change Nevada's constitution, the most credible economic research for over 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers.

A recent example is the study, *The Effects of Minimum Wages Throughout the Wage Distribution*, by David Neumark, National Bureau of Economic Research; Mark Schweitzer, Federal Reserve Bank of Cleveland; and William Wascher, Board of Governors of the Federal Reserve - Division of Research and Statistics: "The evidence indicates that workers initially earning near the minimum wage are adversely affected by minimum wage increases.... Although wages of low-wage workers increase, their hours and employment decline, and the combined effect of these changes is a decline in earned income." *National Bureau of Economic Research, Working Paper 7519, 5/8/2000.*

The same year, Stanford University's Thomas MaCurdy & Frank McIntyre showed that the effect of a minimum wage increase is very similar to a "sales tax levied only on selective commodities" and conclude: "... three in four of the poorest workers *lose* from shouldering the costs of higher prices resulting from the wage increase. When these benefits and costs are considered, the minimum wage is *ineffective* as an anti-poverty policy."

*The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252*

## ARGUMENT AGAINST QUESTION NO. 6

This constitutional amendment would actually *increase* poverty in Nevada, rather than fight it.

Suffering the most would be single mothers with little education, and other unskilled workers who are just entering the job market.

Today, such entry-level employees are paid not just with wages, but also the chance to learn new job skills. With those new skills—and the work habits they learn—they are able to climb the job ladder and make better lives for themselves and their families.

But if government forces entry-level wages artificially higher, fewer businesses will be able to hire these unskilled workers. That's because their *total* cost to the company—their pay, plus their training costs—will often be greater than these workers contribute to the company. So some workers will be let go, and others will never be hired.

Nevada has long been known as a state where businesses enjoy economic opportunities they cannot find elsewhere. But this constitutional amendment would end all that.

It would suddenly place Nevada at a big economic disadvantage to many other states—states without these high wage requirements. Under this amendment, wages paid in Nevada must, from now on, exceed the federal minimum wage by about \$1 an hour. This would seriously damage Nevada businesses—especially small mom and pop businesses, which usually have fewer resources to work with.

This proposal also would discriminate against non-union companies—which means against the great majority of small businesses in Nevada. It would give labor union officials the power, under the law, to permit *union* companies to hire new employees at rates *below* the new minimum wage. This is unfair to both companies and union members. It is also a virtual invitation to union corruption.

The key to fighting poverty—and to achieving higher wages for *all* workers—is long-term economic growth. Artificially higher wages imposed by government will only obstruct such growth.

This proposed constitutional amendment should be rejected.

Fiscal impact: Negative.

Environmental impact: Neutral.

Public health, safety and welfare impact: Negative.

*The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252*

## REBUTTAL TO ARGUMENT AGAINST QUESTION NO. 6

Raising the minimum wage in Nevada will decrease poverty as it increases people's participation in the State's economy. If increased wages actually made people poorer – as the special interests opposed to this amendment ridiculously claim – *nobody* in Nevada would ever ask for a raise.

Single mothers, as well as anyone else working a minimum wage job, will see an increase in their wages that will actually allow them to pay for housing, healthcare, food and childcare.

All available economic studies show that *everyone* wins when the minimum wage is increased. Low-income workers earn more, become less dependent on welfare and other public programs which eases the burden on taxpayers, and have more money to spend on local goods and services -- which strengthens the economy and generates more jobs.

There is *nothing* in the amendment to raise the minimum wage that would exempt union companies – it's a federal minimum that all companies must follow.

Raise low-income workers' wage. Spur Nevada's economic growth. Generate more buying power to support Nevada businesses. Create jobs. Move low-wage workers away from dependence on public programs and ease taxpayers' burden.

You can achieve *all* of these goals by voting YES on the minimum wage amendment.

*The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252*

## FISCAL NOTE

### FINANCIAL IMPACT – CANNOT BE DETERMINED

Although the proposal to amend the *Nevada Constitution* to increase the minimum wage in Nevada could result in additional costs to Nevada's businesses, the impact on a particular business would depend on the number of employees working at a wage below the new requirement, the amount by which the wages would need to be increased and any actions taken by the business to offset any increased costs associated with the increased wage requirement.

The proposal would, however, result in beneficial financial impacts for employees who receive a wage increase as a result of the proposal and who are not impacted adversely by any actions taken by the business to offset the increased costs associated with the increased wage requirement.

In addition, if the proposal results in an increase in annual wages paid by Nevada's employers, revenues received by the State from the imposition of the Modified Business Tax would also increase.

## FULL TEXT OF THE MEASURE

### RAISE THE MINIMUM WAGE FOR WORKING NEVADANS

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

#### THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

##### Section 1. Title.

This Measure shall be known and may be cited as “**The Raise the Minimum Wage for Working Nevadans Act.**”

##### Section 2. Findings and Purpose

The people of the State of Nevada hereby make the following findings and declare their purpose in enacting this Act is as follows:

1. No full-time worker should live in poverty in our state.
2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage from \$5.15 an hour to \$6.15 an hour, a full-time worker will earn an additional \$2,000 in wages. That’s enough to make a big difference in the lives of low-income workers to move many families out of poverty.
3. For low-wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada’s working families.
4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
5. At \$5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
6. Raising the minimum wage from \$5.15 an hour to \$6.15 an hour affirms Nevadan’s beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

##### Section 3.

Article 15 of the Constitution of the State of Nevada is hereby amended by adding thereto a new section to read as follows:

##### *Sec. 16. Payment of minimum compensation to employees.*

- A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such*

benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

- B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.
- C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

*D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.*

# EXHIBIT B

# EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTHONY LUCAS, GREGORY H.  
CASTELLO, LILLIAN MELTON, LEAVON  
R. SMITH, ROBERT A. GREENE, on behalf  
of themselves and all others similarly situated,

Plaintiffs,

vs.

BELL TRANS, a Nevada Corporation, Does  
150, inclusive,

Defendant.

2:08-cv-01792-RCJ-RJJ

ORDER

This lawsuit is a class and collective action for unpaid minimum wages and overtime compensation brought on behalf of all persons who worked for Defendant Bell Trans during the last three years as limousine drivers. Now before the Court is Bell Trans's Motion to Dismiss. (#4). The Limousine Plaintiffs have also filed a Motion for Leave to Amend Complaint (#9) and a Motion to Strike a sur-reply filed by Bell Trans in relation to the Motion for Leave to Amend Complaint (#18). The Court has considered the motions, briefs, pleadings, and oral argument on behalf of all parties and issues the following opinion and order.

**I. FACTS**

On December 18, 2008, Plaintiffs Anthony Lucas, Gregory H. Castello, Lillian Melton, Leavon R. Smith, and Robert A. Greene (collectively, "the Limousine Plaintiffs") filed the present lawsuit individually and on behalf of all persons who were employed by Bell Trans as limousine drivers within the last three years. (#1). The Limousine Plaintiffs have pleaded claims for 1) failure

1 to pay wages for each hour worked in violation of NRS 608.016; 2) failure to pay minimum wages  
2 in violation of the Fair Labor Standards Act, 29 U.S.C. § 206 and Section 16 of the Nevada  
3 Constitution; 3) failure to pay overtime compensation in violation of NRS 608.100 and the Fair  
4 Labor Standards Act, 29 U.S.C. § 207; 4) failure to pay wages in violation of NRS 608.040; and 5)  
5 unlawful wage deductions in violation of NRS § 608.100. Bell Trans has now filed a Motion to  
6 Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (#4).

## 7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the  
9 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of what  
10 the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957).  
11 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails  
12 to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the  
13 complaint’s sufficiency. *See North Star Int’l. v. Arizona Corp. Comm’n.*, 720 F.2d 578, 581 (9th  
14 Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,  
15 dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally  
16 cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, --- U.S. ---, 127  
17 S.Ct. 1955, 1964 (2007). In considering whether the complaint is sufficient to state a claim, the  
18 court will take all material allegations as true and construe them in the light most favorable to the  
19 plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is  
20 not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact,  
21 or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.  
22 2001).

23 “Generally, a district court may not consider any material beyond the pleadings in ruling on  
24 a Rule 12(b)(6) motion . . . However, material which is properly submitted as part of the complaint  
25 may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896

1 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents whose contents are  
2 alleged in a complaint and whose authenticity no party questions, but which are not physically  
3 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without  
4 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d  
5 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial  
6 notice of “matters of public record.” *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir.  
7 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to  
8 dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp.*  
9 *Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

10 If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave  
11 to amend. The court should “freely give” leave to amend when there is no “undue delay, bad faith[,]”  
12 dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . .  
13 . the amendment, [or] futility of the amendment . . . .” Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371  
14 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies  
15 of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d  
16 655, 658 (9th Cir. 1992).

### 17 **III. ANALYSIS**

18 Bell Trans argues that the Limousine Plaintiffs cannot state a claim for violation of Nevada’s  
19 labor laws because there is no private right of action related thereto. Bell Trans argues that the  
20 Nevada Labor Commissioner has exclusive jurisdiction over the enforcement of Nevada’s labor  
21 laws. In support of its state law claims, the Limousine Plaintiff rely upon several provisions within  
22 NRS Chapter 608 and Section 16 of the Nevada Constitution. NRS Chapter 608 governs  
23 employment compensation, wages, and hours, making employers responsible for paying employee  
24 wages.

1           **A.       *Baldonado v. Wynn Las Vegas***

2           Bell Trans's argument rests on the recent Nevada Supreme Court decision, *Baldonado v.*  
3 *Wynn Las Vegas, LLC*, 194 P.3d 96 (2008). In *Baldonado*, Daniel Baldonado and Joseph Cesarz  
4 were employed by Wynn Las Vegas as table game dealers. *Id.* at 98. At the beginning of their  
5 employment, Wynn had a token pooling and distribution policy, outlining the manner in which  
6 employee tokens, or tips, would be collected, calculated, and distributed, which limited the  
7 distribution of tips among the actual dealers. *Id.* Wynn later revised the pooling and distribution  
8 policy so that the pit manager and floor supervisor positions also received a share of the daily tip  
9 pool, which ultimately resulted in a reduction of the table dealers' shares of the pool by 10 to 15  
10 percent and a reduction in their overall salaries. *Id.* at 99. As a result, Baldonado and similarly  
11 situated table dealers filed a class action against Wynn, claiming that the modified token policy  
12 reduced their compensation in violation of NRS 608.160 (making it unlawful for employers to take  
13 employee tips), NRS 608.100 (making it unlawful for employers to require employees to rebate  
14 compensation earned and paid), and NRS 613.120 (making it unlawful for managers and shift bosses  
15 to receive gratuities from employees as a condition of the employees' employment). *Id.*

16           The district court dismissed the plaintiffs' complaint on the ground that the particular Nevada  
17 statutes relied on by the plaintiffs provided no private causes of action. The Nevada Supreme Court  
18 affirmed. In its decision, the Nevada Supreme Court analyzed the existence of a private right of  
19 action under NRS 608.160, but it stated that its reasoning and decision as to NRS 608.160 applied  
20 equally to NRS 608.100 and NRS 613.120, because the latter two statutes "are included within the  
21 Labor Commissioner's authority in the same manner as, and phrased similarly to, NRS 608.160, in  
22 that all three statutes deem certain employer conduct unlawful . . . ." *Id.* at 100.

23           The Nevada Supreme Court began its analysis by observing that NRS 608.160 "does not  
24 expressly mention whether employees may privately enforce its terms." *Id.* As a result, the Court  
25 had to determine whether a private right of action could be implied in NRS 608.160. *Id.* "Whether

1 a private cause of action can be implied is a question of legislative intent.” *Id.* at 100–01. To that  
2 end, three factors guide a court’s analysis in gauging the legislative intent to create an implied private  
3 of action: “(1) whether the plaintiffs are ‘of the class for whose [e] special benefit the statute was  
4 enacted’; (2) whether the legislative history indicates any intention to create or to deny a private  
5 remedy; and (3) whether implying such a remedy is ‘consistent with the underlying purposes of the  
6 legislative [sch]eme.’” *Id.* at 101 ((quoting *Sports Form v. Leroy’s Horse & Sports*, 108 Nev. 37,  
7 39, 823 P.2d 901, 902 (1992) (quoting *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26  
8 (1975)) (quotations omitted).

9 As the first two factors were not helpful, the Nevada Supreme Court based its holding on  
10 the third factor—“whether a private remedy is consistent with the legislative scheme.” *Id.* at 102.  
11 The Court broke its third factor analysis into two parts.

12 First, it determined that “the Legislature has entrusted the labor laws’ enforcement to the  
13 Labor Commissioner, unless otherwise specified.” *Id.* It observed that NRS 608.180 provides that  
14 “[t]he Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to  
15 608.195, inclusive, to be enforced.” *Id.* If there is a violation of any of the provisions falling within  
16 NRS 608.005 to 608.195, then the Labor Commissioner “can direct the district attorney, the Deputy  
17 Labor Commissioner, the Attorney General, or special counsel to ‘prosecute the action for  
18 enforcement according to law.’” *Id.* (quoting NRS 608.180). The Court acknowledged that as a  
19 general matter, “when an administrative official is expressly charged with enforcing a section of  
20 laws, a private cause of action generally cannot be implied.” *Id.*

21 The second half of the Nevada Supreme Court’s analysis highlighted the adequacy of an  
22 administrative remedy provided under Chapter 608. That administrative scheme allows private  
23 parties to file labor law complaints with the Labor Commissioner. The Commissioner has a duty  
24 to hear and resolve such complaints. *Id.* at 104. NRS 607.205 and NRS 607.207 establish the Labor  
25 Commissioner’s authority to conduct hearings to resolve labor complaints. After a hearing is

1 conducted, the Commissioner must render a written decision within thirty days, setting forth findings  
2 of fact and conclusions of law, which must be mailed to the parties. *Id.* at 103. The parties can then  
3 challenge the Labor Commissioner's decision through a district court petition for judicial review,  
4 which can ultimately be appealed to the Nevada Supreme Court. *Id.* These two factors led the  
5 Nevada Supreme Court to hold that "in light of the statutory scheme requiring the Labor  
6 Commissioner to enforce the labor statutes and the availability of an adequate administrative remedy  
7 for those statutes' violations, the Legislature did not intend to create a parallel private remedy for  
8 NRS 608.160 violations." *Id.* at 102.

9 In *Baldonado*, the Court bolstered its decision in a footnote on another ground, which at the  
10 same time left open the possibility for some provisions within NRS 608 as creating a private right  
11 of action. It noted that two other statutes in NRS Chapter 608, not relied upon by the plaintiffs in  
12 that case, "expressly recognize a civil enforcement action to recoup unpaid wages: NRS 608.140  
13 (civil actions by employees to recoup unpaid wages) and NRS 608.150 (civil actions by the district  
14 attorney to recoup unpaid wages from general contractors)." *Id.* at 104 n.33. In contrast, the  
15 provisions relied upon by the plaintiffs in *Baldonado*—NRS 608.160, NRS 608.100, and NRS  
16 613.120—did not contain such express language. *Id.* Accordingly, "[t]he existence of express civil  
17 remedies within the statutory framework of a given set of laws indicates that the Legislature will  
18 expressly provide for private civil remedies when it intends that such remedies exist; thus, if the  
19 Legislature fails to expressly provide a private remedy, no such remedy should be implied." *Id.*

20 Under *Baldonado*, the Limousine Plaintiffs do not have an implied private right of action  
21 under NRS 608.100. The Limousine Plaintiffs attempt to escape the *Baldonado* holding by arguing  
22 that *Baldonado* only applies to tips, not wages. Clearly, that is not the case, as the Nevada Supreme  
23 Court stated that its reasoning for not recognizing an implied private right of action under NRS  
24 608.160 also applied to the other two statutes at issue, including NRS 608.100. Thus, the Court  
25 holds that there is no private right of action in NRS 608.100.

1 The existence of a private right of action to recover unpaid wages, however, can be found in  
2 NRS 608.140, which recognizes a cause of action for wages earned and unpaid. NRS 608.140  
3 indicates that a laborer or employee can “have cause to bring suit for wages earned and due  
4 according to the terms of his employment,” and if he does, he can obtain a “decision of the court or  
5 verdict of the jury that the amount for which he has brought suit is justly due . . . .” As previously  
6 mentioned, in *Baldonado*, the Nevada Supreme Court recognized that NRS 608.140 contains an  
7 express civil remedy in the form of a civil action by employees to recoup unpaid wages. 194 P.3d  
8 at 104 n.33. Thus, NRS 608.140 demonstrates that there is a private right of action in NRS 608 for  
9 unpaid wages. *See Nunez v. Sahara Nevada Corp.*, 677 F.Supp. 1471, 1475 n.7 (D.Nev. 1988)  
10 (stating that NRS 608.140 “specifically creates a cause of action for wages earned and unpaid and  
11 penalties and a reasonable attorney’s fee.”); *Moen v. Las Vegas Intern. Hotel, Inc.*, 402 F.Supp. 157,  
12 160–61 (D.Nev. 1975) (holding same).

13 Chapter 608 also contains a private right of action for unpaid wages in NRS 608.016, NRS  
14 608.020, and NRS 608.040. “An employer shall pay to the employee wages for each hour the  
15 employee works.” NRS 608.016. “Whenever an employer discharges an employee, the wages and  
16 compensation earned and unpaid at the time of such discharge shall become due and payable  
17 immediately.” NRS 608.020. “If an employer fails to pay: (a) Within 3 days after the wages or  
18 compensation of a discharged employee becomes due . . . the wages or compensation of the  
19 employee continues at the same rate from the day he . . . was discharged until paid or for 30 days,  
20 whichever is less.” NRS 608.040(1). In *Boucher v. Shaw*, three former employees of the Castaways  
21 Hotel, Casino and Bowling Center sued three of their former managers under these three statutory  
22 provisions to recover unpaid wages for themselves and for a class of Castaways employees. *Boucher*  
23 *v. Shaw*, 483 F.3d 613, 614–15 (9th Cir. 2007). The district court dismissed the plaintiffs’ lawsuit,  
24 in part, because the district court held that the three managers could not qualify as “employers” under  
25 Chapter 608 of the Nevada Revised Statutes. *Id.* On appeal, the Ninth Circuit determined that the

1 question of whether individual managers could be held liable as employers for unpaid wages under  
2 Chapter 608 of the Nevada Revised Statutes should be certified to the Nevada Supreme Court. *Id.*  
3 at 616. The Nevada Supreme Court agreed with the district court, holding that Chapter 608's  
4 definition of "employer" does not extend beyond common law employers to include individual  
5 managers. *See Boucher v. Shaw*, 124 Nev. 96, 196 P.3d 959 (2008). Neither the district court nor  
6 the Ninth Circuit nor the Nevada Supreme Court stated that the plaintiffs did not have a private right  
7 of action for unpaid wages under Chapter 608. All three courts assumed that such a right existed.  
8 This Court does not disagree.

9 In sum, there is no general private right of action for all of the provisions found in Chapter  
10 608. This conclusion is confirmed by *Baldonado*. In most cases, a private party must first file a  
11 complaint with the Labor Commissioner and obtain a decision from the Commissioner before  
12 bringing any kind of lawsuit in court. Nevertheless, Chapter 608 does contemplate a private right  
13 of action for the recovery of unpaid wages that the employee has earned.

14 Based upon the discussion above, the Limousine Plaintiffs may sue for the recovery of unpaid  
15 wages. The Limousine Plaintiffs make this claim in their first cause of action. They allege that Bell  
16 Trans only paid them for when they were actually driving customers. (#1, ¶ 32). According to them,  
17 there were many other times when they should have been paid for their time but they were not. For  
18 example, they allege that they should have been paid for their attendance at a 4-day training class that  
19 they were required to attend before employment. (*Id.*, ¶ 34). They also allege that they should have  
20 been paid for the fifteen minutes that they were required to be present before their actual shift began  
21 to wait in line at the dispatch office to pick up their trip sheets and keys. (*Id.*, ¶ 35). Thus, the  
22 Limousine Plaintiffs have stated a cause of action under Nevada law for unpaid wages, consistent  
23 with NRS 608.140 and NRS 608.040. The Limousine Plaintiffs, however, cannot proceed with a  
24 private action under NRS 608.100.

1           **B.       Minimum Wages**

2           The private right of action for unpaid wages, however, does not extend to minimum wage  
3 and overtime claims. Unearned wages is different from unpaid minimum wages or overtime  
4 compensation.

5                   **1.       The Nevada Wage and Hour Law**

6           Nevada has minimum wage and overtime compensation statutes. The Nevada Wage and  
7 Hour Law (“NWHL”), like the Fair Labor Standards Act (“FLSA”), establishes minimum wages that  
8 apply to private employers within this state. *See* NRS 608.250. Under the NWHL, the Labor  
9 Commissioner is to establish by regulation the minimum wage that may be paid to employees in  
10 private employment within the State. NRS. 608.260 recognizes a private right of action by the  
11 employee against his or her employer to recover the difference between the amount paid to the  
12 employee and the amount of the minimum wage. The NWHL’s minimum wage requirements,  
13 however, only apply to certain employees. The NWHL expressly states that it does not apply to  
14 taxicab and limousine drivers. NRS 608.250(e). Under the NWHL, the Limousine Plaintiffs have  
15 no claim for violation of unpaid minimum wages under Nevada law.

16                   **2.       The Amendment**

17           In 2004, the Nevada Constitution was amended, Nev. Const. art. 15, § 16, by initiative, to  
18 increase the state minimum wage. The Amendment was approved by the voters again in the 2006  
19 general election. The Amendment provides that state minimum wage “shall be five dollars and  
20 fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein,  
21 or six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits . . .  
22 .” Nev. Const. art. 15, § 16(A). The Amendment states the following:

23           An employee claiming violation of this section may bring an action against his or her  
24 employer in the courts of this State to enforce the provisions of this section and shall  
25 be entitled to all remedies available under the law or in equity appropriate to remedy  
any violation of this section, including but not limited to back pay, damages,

1 reinstatement or injunctive relief. An employee who prevails in any action to enforce  
2 this section shall be awarded his or her reasonable attorney's fees and costs.

3 *Id.* at § 16(B). As to the definition of "employee," the Amendment states the following:

4 "employee" means any person who is employed by an employer as defined herein but  
5 does not include an employee who is under eighteen (18) years of age, employed by  
6 a nonprofit organization for after school or summer employment or as a trainee for  
a period of not longer than ninety (90) days.

7 *Id.* at § 16(C).

8 Thus, the Amendment does not include the excluded categories listed in NRS 608.250(2).  
9 Under the Amendment's language, as long as one is 18 years or older and does not work for the type  
10 of nonprofit organization program described above, he or she has a private right of action to collect  
11 minimum wages as provided in § 16.

12 In March 2005, the Nevada Attorney General issued an opinion on whether the Amendment,  
13 which was merely proposed at that stage, would void NRS 608.250 through NRS 608.290. The  
14 relevant excerpt from his opinion on this issue stated the following:

15 The effect of the proposed amendment on the NRS 608.250 exclusions is controlled  
16 by two presumptions. First, the voters should be presumed to know the state of the  
17 law in existence related to the subject upon which they vote. *Op. Nev. Att'y Gen.*  
18 153 (December 21, 1934). Second, it is ordinarily presumed that "[w]here a statute  
19 is amended, provisions of the former statute omitted from the amended statute are  
20 repealed." *McKay v. Board of Supervisors*, 102 Nev. 644, 650, 730 P.2d 438, 442  
21 (1986). In keeping with these presumptions, the people, by acting to amend the  
minimum wage coverage and failing to include the statutory exclusions in the  
proposed amendment, are presumed to have intended the repeal of the existing  
exclusions so that the new minimum wage would be paid to all who meet its  
definition of "employee." Accordingly, the proposed amendment would effect an  
implied repeal of the exclusions from minimum wage coverage at NRS 608.250(2).

22 05-04 *Op. Nev. Att'y Gen.* 7 (Mar. 2, 2005).

23 The Nevada Attorney General's opinion does not necessarily carry weight with this Court.  
24 The Nevada Supreme Court has concluded in the past that "[o]pinions of the Attorney General are  
25 not binding legal authority or precedent." *Blackjack Bonding v. City of Las Vegas Municipal Court*,

1 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). In *Blackjack Bonding*, the Nevada Supreme Court  
2 had to decide whether municipal courts have the power to collect fees independent of specific  
3 statutory authorization. *Id.* In support of the plaintiff's position, the plaintiff relied upon an opinion  
4 of the Nevada Attorney General that concluded that municipal courts are not empowered by the  
5 Nevada Constitution or statutory authority to collect filing fees for bail or property bonds. *Id.* The  
6 Nevada Supreme Court held to the contrary. In doing so, as a general matter, it recognized the lack  
7 of weight that the Attorney General's opinion carried with the Court, and more particularly, it  
8 determined that the Nevada Attorney General's basis for his opinion in that case was wrong. *Id.*

9 As to the Attorney General's opinion on the Amendment, the Attorney General's reasoning  
10 seems to be inconsistent. In the beginning of the Attorney General's analysis, the Attorney General  
11 recognized that "[a] constitutional amendment, ratified subsequent to the enactment of a statute, is  
12 controlling on any point covered in the amendment." *Id.* at 5 (citing *State ex rel. Nevada Orphan*  
13 *Asylum v. Hallock*, 16 Nev. 373, 378 (1882)). The Attorney General also stated that "ratification of  
14 a constitutional amendment will render void any existing law *that is in conflict* with the  
15 amendment." *Id.* (emphasis added) (citing Op. Nev. Att'y Gen. 08 (May 19, 1908); 16 AM. JUR.  
16 2d Constitutional Law § 68 (1979)). But the Amendment did not cover any of the exceptions found  
17 in NRS 608.250; it made no mention of NRS 608.250 or its exceptions. Furthermore, the  
18 Amendment's definition of "employee" is not necessarily in conflict with NRS 608.250. The NRS  
19 608.250 exceptions and the Amendment's definition of "employee" can happily co-exist.

20 The Attorney General's two presumptions are also questionable. First, to presume that the  
21 general citizenry is aware of and well-versed in all of its government's laws is highly idealistic.  
22 With the mountain of statutes and regulations that exists at the federal, state, and local government  
23 level, most citizens would need to be spending a lot of time in the library to know the terms of all  
24 the laws applicable to them. Second, the Attorney General relied upon the general principle that  
25 "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are

1 repealed.” *McKay v. Board of Sup’rs of Carson City*, 102 Nev. 644, 650, 730 P.2d 438 (1986). A  
2 related principle is that “[i]t is ordinarily presumed that the legislature, by deleting an express portion  
3 of a law, intended a substantial change in the law.” *Id.*

4 The problem with the Attorney General’s second presumption is that NRS 608.250 was  
5 enacted by the Nevada Legislature, but the Amendment was not. The Amendment came directly  
6 from the people of Nevada (or a majority of them) in conformity with Nevada’s initiative process.  
7 See Nev. Const. art. 19, § 2 (reserving to the people the power to propose, by initiative petition,  
8 amendments to the constitution, and to enact or reject them at the polls); *Garvin v. Ninth Judicial*  
9 *Dist. Court ex rel. County of Douglas*, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) (discussing  
10 the initiative power). Thus, the applicability of these principles of statutory interpretation to the case  
11 here is much weaker than if the Nevada legislature actually amended NRS 608.250.

12 Additionally, the Attorney General himself stated that “the primary focus of the initiative  
13 [was] on raising the current Nevada minimum wage of \$5.15 per hour . . . .” 05-04 Op. Nev. Att’y.  
14 Gen. 6 (Mar. 2, 2005). As a result of that focus, the presumption that the people of Nevada were  
15 likely aware of the various exceptions under NRS 608.250 does not seem that strong. If the people  
16 knew anything about NRS 608.250 at the time they voted on the Amendment, it was most likely the  
17 minimum wage prescribed under that state law.

18 The Attorney General opined that because the Amendment did not expressly incorporate the  
19 exceptions found in NRS 608.250 but instead included its two own exceptions (i.e., above 18 years  
20 old and not participating in a non-profit organization program), the Amendment impliedly repealed  
21 all of the NRS 608.250 exceptions. Under Nevada law, however, the implied repeal of a statute is  
22 “heavily disfavored.” *Washington v. State*, 117 Nev. 735, 30 P.3d 1134, 1137 (2001). The Nevada  
23 Supreme Court has stated that it “will not consider a statute to be repealed by implication unless  
24 there is *no other* reasonable construction of the two statutes.” *Id.* (emphasis added). “The fact that  
25 a statute is enacted after another statute, but is subsequently amended without mention of the first

1 statute, may weigh against a finding of legislative intent to repeal by implication.” *Id.* The  
2 Amendment made no reference to NRS 608.250. There is no indication that when Nevada voters  
3 went to the polls, they were informed that their vote would be repealing or amending NRS 608.250  
4 and its multiple exceptions.

5 In sum, this Court cannot conclude that there is no other reasonable construction of the  
6 Amendment than that it repealed NRS 608.250. The Amendment made absolutely no reference to  
7 NRS 608.250. The focus of the Amendment was the actual minimum wage. And the Amendment’s  
8 definition of “employee” is not in conflict with NRS 608.250’s exceptions, which include limousine  
9 drivers. As a result, this Court holds that the Amendment did not repeal NRS 608.250 or its  
10 exceptions. Because the NWHL expressly states that it does not apply to taxicab and limousine  
11 drivers, the Limousine Plaintiffs cannot sue for a violation of unpaid minimum wages under Nevada  
12 law. NRS 608.250(e).

### 13 C. Overtime Compensation

14 Nevada’s overtime compensation statute, NRS 608.018, requires an employer to “pay 1 1/2  
15 times an employee’s regular wage rate whenever an employee who receives compensation for  
16 employment at a rate less than 1 1/2 times the minimum rate” works “[m]ore than 40 hours in any  
17 scheduled week of work” or “[m]ore than 8 hours in any workday, unless by mutual agreement the  
18 employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of  
19 work.” The Limousine Plaintiffs cite to NRS 608.100(1) for their overtime compensation claim, but  
20 that is not the correct provision; it is NRS 608.018.

21 NRS 608.018 does not have a similar civil remedy provision like NRS 608.250 has with NRS  
22 608.260. Nevertheless, this inquiry is not crucial to the Court’s decision because NRS 608.018  
23 excludes the overtime compensation requirements for “[e]mployees who are not covered by the  
24 minimum wage provisions of NRS 608.250,” which includes taxicab and limousine drivers. NRS  
25 608.018(3). In fact, in his 2005 opinion, the Attorney General concluded that although the

1 Amendment effectuated an “implied repeal of the provisions for calculation of the minimum wage  
2 and minimum wage entitlement found in NRS 608.250, the statutory exclusions from overtime  
3 compensation and the provisions of NRS 608.250 relied upon in NRS 608.018, would stand as  
4 enacted for purposes of the overtime compensation law.” 05-04 Op. Nev. Att’y. Gen. 1 (Mar. 2,  
5 2005). For the reasons explained above in connection with Nevada minimum wages, the Court  
6 holds that the exceptions found in NRS 608.250, and consequently NRS 608.018, are still in force,  
7 notwithstanding the Amendment. Because the Limousine Plaintiffs fall within the express  
8 exceptions for Nevada’s overtime compensation statute, they cannot bring a claim for unpaid  
9 overtime compensation under Nevada law.

#### 10 **D. THE FLSA**

11 In its Motion to Dismiss, Bell Trans also claims that the Limousine Plaintiffs have no  
12 standing to bring their FLSA claim because the wage claims fall exclusively under the jurisdiction  
13 of the Labor Commissioner. Bell Trans’s argument that Nevada’s labor laws somehow preempt an  
14 FLSA action is groundless and entirely inconsistent with the U.S. Constitution.

15 Bell Trans’s position flies in the face of the U.S. Constitution’s Supremacy Clause. As a  
16 result of the Supremacy Clause, federal law may certainly preempt state law. Federal law preempts  
17 state law if the state law “actually conflicts” with federal law. *Cal. Fed. Sav. & Loan Ass’n v.*  
18 *Guerra*, 479 U.S. 272, 280-81, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987); *Davidson v. Velsicol Chemical*  
19 *108 Nev. 591, 593, 834 P.2d 931, 932 (1992)* (“Under the Supremacy Clause, state laws which are  
20 contrary to, or which interfere with, the laws of Congress are invalid.” (citation omitted)). But state  
21 law cannot preempt federal law, not unless the applicable “federal act itself sanctions the application  
22 of state standards.” *U.S. v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976).

23 The FLSA sets limits on minimum wages and the number of hours an employee is permitted  
24 to work before the employer is required to pay overtime. 29 U.S.C. §§ 206–207. Under the FLSA,  
25 an employee may bring a collective action on behalf of “similarly situated” employees based on their

1 employer's alleged violations of the FLSA. 29 U.S.C. § 216(b); *Does I thru XXIII v. Advanced*  
 2 *Textile Corp.*, 214 F.3d 1058, 1064 (9th Cir. 2000). The FLSA explicitly contemplates that state law  
 3 will co-exist with the FLSA's standards, allowing state labor laws to establish higher standards than  
 4 those established in the FLSA. The FLSA states that "[n]o provision of this chapter or of any order  
 5 thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance  
 6 establishing a minimum wage higher than the minimum wage established under this chapter." 29  
 7 U.S.C. § 218(a). The Ninth Circuit has held that the FLSA only preempts state laws that are less  
 8 beneficial to the employee. *See Pac. Merch. Shipping Assoc. v. Aubry*, 918 F.2d 1409, 1425 (9th  
 9 Cir.1990) ("There is no indication that Congress, in enacting the FLSA [ ], intended to preempt states  
 10 from according more generous protection to [its] employees. [T]he purpose behind the FLSA is to  
 11 establish a national floor under which wage protections cannot drop, not to establish absolute  
 12 uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA."  
 13 (emphasis omitted)).

14 Lawsuits are routinely litigated that include minimum wage and overtime claims under the  
 15 FLSA and the relevant state's parallel labor laws. There is no dispute—both claims can co-exist.  
 16 In fact, in a recent decision, the Nevada Supreme Court reversed a state trial court's ruling that  
 17 "essentially concluded that the FLSA preempted Nevada law under a conflict analysis because the  
 18 NWHL applied to the same subject." *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 176 P.3d 271,  
 19 274 (2008). The Nevada Supreme Court held that there is no conflict between the wage rights of  
 20 plaintiffs under the NWHL and wage rights of plaintiffs under the FLSA. *Id.* As a result, the  
 21 Nevada Supreme Court held that the plaintiffs' FLSA claim did not preempt their NWHL claim. *Id.*

22 For these reasons, this Court cannot dismiss the Limousine Plaintiffs' FLSA claims.

#### 23 **IV. MOTION FOR LEAVE TO AMEND THE COMPLAINT**

24 The Limousine Plaintiffs have also filed a Motion for Leave to Amend Complaint. (#9).  
 25 They claim that two months after filing their Complaint, as a result of an article on the case

1 published in the *Las Vegas Sun*, they received many phone calls informing them that Bell Trans was  
2 only one of three limousine companies owned by Whittlesea-Bell Corporation. In addition to Bell  
3 Trans, Whittlesea-Bell Corporation owns Presidential Limousine and Bell Limo.

4 The Limousine Plaintiffs allege that the other two companies, like Bell Trans, carried out a  
5 common policy under which they underpaid their drivers and failed to compensate them for  
6 overtime. The Limousine Plaintiffs have been contacted by multiple drivers from these other two  
7 companies, who wish to participate in the lawsuit. The Limousine Plaintiffs have received thirteen  
8 consent to sue forms from such drivers.

9 Under Federal Rule of Civil Procedure 15(a), "a party may amend its pleading once as a  
10 matter of course . . . before being served with a responsive pleading." Except for amendments made  
11 "of course" or pursuant to stipulation, leave of court is required to amend a pleading. Fed. R. Civ.  
12 P. 15(a). The rules require that leave to amend should be freely granted "when justice so requires."  
13 *Id.*

14 The Limousine Plaintiffs do not need to ask this Court for leave to amend the Complaint.  
15 Bell Trans has not yet filed an answer. It has merely filed a Motion to Dismiss. A motion to  
16 dismiss, however, is not a responsive pleading within the meaning of Rule 15(a). *See, e.g., Rhoades*  
17 *v. Avon Prods., Inc.*, 504 F.3d 1151, 1158 n. 5 (9th Cir. 2007) (quoting *Miles v. Dep't of Army*, 881  
18 F.2d 777, 781 (9th Cir. 1989)). A plaintiff can respond to a motion to dismiss by filing an amended  
19 complaint. *See Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC*, 532 F.3d 963, 977 (9th Cir.  
20 2008). Even if a court grants a motion to dismiss, a plaintiff maintains an absolute right to file an  
21 amended complaint, so long as the defendant has not yet answered. *See Mayes v. Leipziger*, 729  
22 F.2d 605, 607 (9th Cir. 1984) ("Neither the filing nor granting of . . . a motion [to dismiss] before  
23 answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is  
24 improper[.]") (quoting *Breier v. Northern Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th  
25

1 Cir. 1963)). Thus, the Limousine Plaintiffs still have an absolute right to amend the Complaint once  
2 as a matter of course.

3 For these reasons, the Court must grant the Limousine Plaintiffs' Motion for Leave to Amend  
4 Complaint.

5 **V. MOTION TO STRIKE**

6 Five days after the Limousine Plaintiffs filed their reply brief to their Motion for Leave to  
7 Amend, Bell Trans filed a "Supplemental Statutory Citations in Opposition to Plaintiffs' Motion for  
8 Leave to Amend Complaint." (#17). It merely quoted NRS 608.140, which has already been  
9 discussed above in connection with the Motion to Dismiss. The Limousine Plaintiffs then filed a  
10 Motion to Strike that filing, arguing that it was a sur-reply that Bell Trans did not have permission  
11 to file. Bell Trans's supplemental brief added nothing to its other briefs. Furthermore, the Court is  
12 not ruling in favor of Bell Trans on its arguments related to NRS 608.140. This Court is holding that  
13 the Limousine Plaintiffs have a private right of action for unpaid wages under NRS 608. Therefore,  
14 this Court denies the Motion to Strike.

15 ...

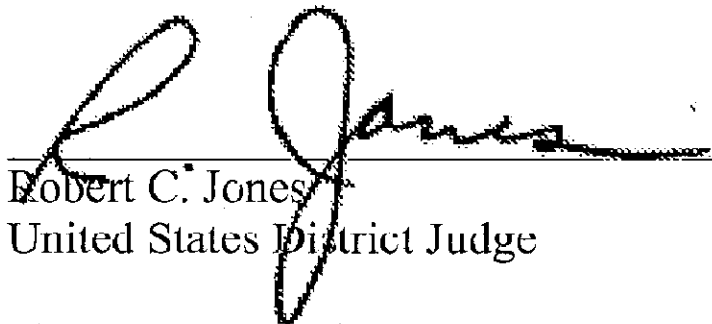
16 ...

**CONCLUSION**

IT IS HEREBY ORDERED that:

- (1) Bell Trans's Motion to Dismiss is GRANTED as to the Limousine Plaintiffs' claims for compensation under NRS 608.100, for unpaid minimum wages under Nevada law (under either NRS 608.250 or Nev. Const. art. 15, § 16), and for unpaid overtime compensation under Nevada law (#4);
- (2) Bell Trans's Motion to Dismiss is DENIED as to the Limousine Plaintiffs' claims for unpaid wages under NRS 608 (#4);
- (3) the Limousine Plaintiffs' Motion to Amend is GRANTED (#9);
- (4) the Limousine Plaintiffs' Motion to Strike is DENIED (#18).

Dated: June 23, 2009

  
Robert C. Jones  
United States District Judge

# EXHIBIT C

# EXHIBIT C

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
6

7 ANTHONY LUCAS et al., )

8 Plaintiffs, )

9 vs. )

10 BELL TRANS et al., )

11 Defendants. )

2:08-cv-01792-RCJ-RJJ

ORDER

12  
13 This lawsuit is a class and collective action for unpaid minimum wages and overtime  
14 compensation brought on behalf of all persons who worked for Defendant Bell Trans during the last  
15 three years as limousine drivers. Now before the Court is Plaintiffs' Motion to Amend and Certify  
16 Order for Interlocutory Review or, in the Alternative, Motion to Certify Question to the Nevada  
17 Supreme Court (#30). Defendants have filed a Response (#33), and Plaintiffs have filed a Reply  
18 (#39). The Court DENIES the Motion. (#30).

19 I. FACTS

20 On December 18, 2008, Plaintiffs Anthony Lucas, Gregory H. Castello, Lillian Melton,  
21 Leavon R. Smith, and Robert A. Greene filed the present lawsuit individually and on behalf of all  
22 persons who were employed by Bell Trans as limousine drivers within the last three years. (#1).  
23 Plaintiffs have pleaded claims for: (1) failure to pay wages for each hour worked in violation of Nev.  
24 Rev. Stat. § 608.016; (2) failure to pay minimum wages in violation of the Fair Labor Standards Act  
25 ("FLSA"), 29 U.S.C. § 206 and Section 16 of the Nevada Constitution; (3) failure to pay overtime

1 compensation in violation of Nev. Rev. Stat. § 608.100 and the FLSA, 29 U.S.C. § 207; (4) failure  
2 to pay wages in violation of Nev. Rev. Stat. § 608.040; and (5) unlawful wage deductions in  
3 violation of Nev. Rev. Stat. § 608.100.

4 Bell Trans filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
5 Procedure. (#4). On June 24, 2009, the Court issued an order ("the Order") granting the Motion to  
6 Dismiss (#4) as to Plaintiff's state law claims for compensation under Nev. Rev. Stat. § 608.100;  
7 for unpaid minimum wages under Nev. Rev. Stat. § 608.250 or Nev. const. art. 15, § 16; and for  
8 unpaid overtime under Nevada law. The Court denied the Motion to Dismiss (#4) as to Plaintiff's  
9 claims for unpaid wages under Nev. Rev. Stat. § 608.

10 Plaintiffs have filed the present Motion (#30) to obtain interlocutory review by the Ninth  
11 Circuit, or, in the alternative, certification to the Nevada Supreme Court on the following issue,  
12 which Plaintiffs lost via the Order:

13 Does Section 16 of Article 15 of the Constitution of the State of Nevada require  
14 payment of the constitutionally mandated minimum wages to employees who are  
15 currently excluded from entitlement from the statutory minimum wages under NRS  
608.250(2), unless those employees are not within the Constitutional definition of  
a protected "employee" pursuant to Section 16(c) of the Nevada State Constitution?

16 (#30 at 4:27--5:4 and 8:17--22). Plaintiffs have not explicitly asked the Court to reconsider the  
17 original Motion (#4).

## 18 **II. LEGAL STANDARDS**

### 19 **A. Interlocutory Review Under 29 U.S.C. § 1292(b)**

20 A court of appeals may grant interlocutory appellate review of an issue without staying  
21 proceedings below when a district judge notes in the relevant order that he believes such review is  
22 merited:

23 When a district judge, in making in a civil action an order not otherwise appealable  
24 under this section, shall be of the opinion that such order involves a controlling  
25 question of law as to which there is substantial ground for difference of opinion and  
that an immediate appeal from the order may materially advance the ultimate  
termination of the litigation, he shall so state in writing in such order. The Court of

1 Appeals which would have jurisdiction of an appeal of such action may thereupon,  
 2 in its discretion, permit an appeal to be taken from such order, if application is made  
 3 to it within ten days after the entry of the order: *Provided, however,* That application  
 for an appeal hereunder shall not stay proceedings in the district court unless the  
 district judge or the Court of Appeals or a judge thereof shall so order.

4 28 U.S.C. § 1292(b). A district court cannot itself grant interlocutory review under this statute. A  
 5 court of appeals may do so in its discretion, but only if the district court's order contains the required  
 6 language. *See id.*

7 **B. Certification to a State Supreme Court**

8 Under the Nevada Rules of Appellate Procedure:

9 The Supreme Court may answer questions of law certified to it by the Supreme Court  
 10 of the United States, a Court of Appeals of the United States or of the District of  
 Columbia, a United States District Court, or a United States Bankruptcy Court when  
 11 requested by the certifying court, if there are involved in any proceeding before those  
 courts questions of law of this state which may be determinative of the cause then  
 12 pending in the certifying court and as to which it appears to the certifying court there  
 is no controlling precedent in the decisions of the Supreme Court of this state.

13 Nev. R. App. P. 5(a). A federal court may decide not to certify a question to a state supreme court  
 14 where it would be inefficient and uneconomical. *See in re Sullivan*, 200 B.R. 682, 685 (Bankr. D.  
 15 Nev. 1996). Although the Nevada Supreme Court will not entertain piecemeal questions that will  
 16 not be determinative of any part of a federal case, it will consider questions that do not entirely  
 17 dispose of a federal case. It has rejected the Wyoming view, which requires the state law questions  
 18 to dispose of an entire case. *Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1164 & n.6 (Nev.  
 19 2006). It has also rejected the Maine and New York approaches, whereby certification is only  
 20 appropriate if one possible answer will dispose of the entire case, or if the answer will dispose of  
 21 at least one entire claim. *Id.* at 1164 & n.7. Nevada has adopted the California approach, whereby  
 22 certification is granted if the answer may be determinative of part of the federal case, there is no  
 23 controlling Nevada precedent, and the answer will help settle important questions of law. *Id.*

24 A district court's decision not to certify a question to a state court is reviewed for an abuse  
 25 of discretion. *Thompson v. Paul*, 547 F.3d 1055, 1059, 1065 (9th Cir. 2008). A district court

1 deciding a state law issue that has not been addressed by the state's supreme court properly looks  
2 to, *inter alia*, other relevant cases from the controlling jurisdiction to determine how that state's high  
3 court would rule. *See Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1087 (9th Cir. 2003).

### 4 **III. ANALYSIS**

#### 5 **A. Interlocutory Review Under 29 U.S.C. § 1292(b)**

6 Because the Court in this case did not state that it was "of the opinion that such order  
7 involves a controlling question of law as to which there is substantial ground for difference of  
8 opinion and that an immediate appeal from the order may materially advance the ultimate  
9 termination of the litigation," Plaintiff asks the Court to amend its Order to so state, so that he may  
10 then appeal the issue to the Ninth Circuit while the case proceeds in this court. In other words, the  
11 present Motion before this Court is in effect a motion for this Court to reconsider its construction  
12 of Nev. Rev. Stat. § 608.250 and Nev. const. art. 15, § 16, or at least to amend its Order to the effect  
13 that there is a substantial ground for difference of opinion on the question.

14 In the Order, the Court found that the passage of Nev. const. art. 15, § 16 by referendum and  
15 the opinion of the Nevada Attorney General did not lead the Court to conclude that there is no other  
16 reasonable construction of Nev. const. art. 15, § 16 than that it repealed the exceptions for limousine  
17 drivers from minimum wage lawsuits in Nev. Rev. Stat. § 608.250. (#27 at 9–13). Plaintiffs urge  
18 the Court to reconsider and find instead that there is at least substantial grounds for difference of  
19 opinion, in accordance with the test for 28 U.S.C. § 1292(b) certification.

20 The test for certification under § 1292(b) is: "(1) that there be a controlling question of law;  
21 (2) that there be a substantial grounds for difference of opinion; and (3) that an immediate appeal  
22 may materially advance the ultimate termination of the litigation." *In re Cement Antitrust Litigation*,  
23 673 F.2d 1020, 1026 (9th Cir. 1982). Plaintiffs can only show the first prong of this test. The  
24 second prong cannot be shown, and the third prong is doubtful.

1 First, there can be no doubt that there is a controlling question of law at issue. The Court's  
2 construction of Nev. Rev. Stat. § 608.250 and Nev. const. art. 15, § 16 have caused it to dismiss one  
3 of Plaintiffs' claims, whereas the construction Plaintiffs urge would clearly support the validity of  
4 the claim. Therefore, the first prong of the test is met.

5 Second, it is not clear whether an immediate appeal will materially advance the ultimate  
6 termination of the litigation. Here, Plaintiff is attempting to revive a dismissed claim via  
7 interlocutory review. It is difficult to see how this will do anything but prolong the litigation.  
8 Plaintiff argues that a class action under Nevada law will be more economical than a class action  
9 under FLSA and conducting a collective action notice under federal case law. *See Hoffman-*  
10 *LaRouche, Inc., v. Sperling*, 493 U.S. 165 (1989). Plaintiffs also argue that reversal on appeal will  
11 result in "protracted new litigation," but this is the case with nearly every motion to dismiss that a  
12 district court grants. It is not clear, in any case, that Plaintiffs will abandon their federal claims if  
13 allowed to sue on their state law claims. They did, after all, bring both claims in the Complaint, and  
14 the federal claim has survived a motion to dismiss. If anything, adding a state law claim could make  
15 the litigation more costly and protracted.

16 We come lastly to the second prong, which requires the most analysis. The following  
17 passage is helpful in understanding what constitutes "substantial grounds for difference of opinion":

18 A requirement of the statute which allows certification of interlocutory  
19 appeals by the district court is that the district judge must be of the opinion that there  
20 is a substantial ground for difference of opinion over the controlling question of law  
21 certified for appeal. If a controlling court of appeals has decided the issue, no  
22 substantial ground for difference of opinion exists and there is no reason for an  
23 immediate appeal. Disagreement among courts outside a particular circuit does not  
24 establish the "substantial ground for difference of opinion" required to support an  
25 interlocutory appeal. On the other hand, there is a substantial ground for difference  
of opinion which supports a certificate for an interlocutory appeal if a trial court rules  
in a manner which appears contrary to the rulings of all Courts of Appeals which  
have reached the issue, if the circuits are in dispute on the question and the court of  
appeals of the circuit has not spoken on the point, if complicated questions arise  
under foreign law, or if novel and difficult questions of first impression are  
presented. *However, just because a court is the first to rule on a particular question,*  
*or just because counsel contends that one precedent, rather than another, is*

1 controlling, does not mean that there is such a substantial difference of opinion as  
2 will support an interlocutory appeal.

3 Determining whether the standard that a substantial ground for difference of  
4 opinion has been met requires an inquiry into the merits of the plaintiff's claim;  
5 additionally, a substantial ground for difference of opinion may be demonstrated by  
6 adducing conflicting and contradictory opinions of courts which have ruled on the  
7 issue. Furthermore, the mere fact that a substantially greater number of judges have  
8 resolved the issue one way rather than another does not tend to show that there is no  
9 substantial ground for difference of opinion, since it is the duty of the district judge  
10 faced with the motion for certification to analyze the strength of the arguments in  
11 opposition to the challenged ruling when deciding whether the issue for appeal is  
12 truly one on which there is a substantial ground for dispute.

13 4 Am. Jur. 2d *Appellate Review* § 123 (2009) (citations omitted) (emphasis added).

14 Plaintiffs have not shown a substantial ground for difference of opinion. They have provided  
15 no authority contrary to the Court's holding in the Order. The only legal document to which  
16 Plaintiffs cite is the Nevada Attorney General's non-authoritative opinion (#30 at 6:19–20), the  
17 reasoning of which the Court has already attacked in its Order. Next, Plaintiffs cite to information  
18 available on the Internet, including "many legal resource guides, law firms, and even the Nevada  
19 Labor Commissioner Michael Tanchek." (*Id.* at 6:21–22). These sources are not unbiased legal  
20 authority. They are not legal authority at all. Nor are they persuasive. These sources consist of  
21 outreach by law firms seeking clients, the opinion of the Labor Commissioner, and information  
22 disseminated by special interest groups. None of this is legal authority. A law review article might  
23 be more persuasive, though it would still not be authoritative.

24 The kind of "substantial grounds for difference of opinion" Plaintiffs must show is a  
25 difference of opinion between the district courts of this Circuit and/or the appellate courts of the  
state where this Court sits. There is no such difference of opinion. This Court's Order is the only  
opinion to interpret the issue at hand. If anything, Plaintiff could argue that the matter at hand is a  
novel and difficult matter of first impression. But just because a court is first to rule on a question  
does not itself make the question appropriate for interlocutory review under § 1292(b). *See Krangel*  
*v. Gen. Dynamics Corp.*, 968 F.2d 914, 915–16 (9th Cir. 1992). And although the question is a

1 matter of first impression, it is neither novel nor particularly difficult. It is a relatively  
2 straightforward matter of statutory interpretation. The Court's reasoning as to the construction of  
3 the Nevada Constitution with the statute at issue was sound.

4 As noted in the Order, implied repeal of a statute is "heavily disfavored" under Nevada law.  
5 *Washington v. State*, 30 P.3d 1134, 1137 (Nev. 2001). Such a construction will not be made "unless  
6 there is no other reasonable construction of the two statutes." *Id.* The Court further notes that even  
7 with respect to repeal of a statute by constitutional provision, as here, "[i]mplied repeal of one law  
8 through enactment of another does not occur, save when one is irreconcilably repugnant to the other,  
9 or by some other means intent to abrogate the earlier law is made evident." *Mengelkamp v. List*, 501  
10 P.2d 1032, 1034 (Nev. 1972) (citing *Thorpe v. Schooling*, 7 Nev. 15 (1871)).

11 Moreover, *Mengelkamp* is directly applicable to the present case. In that case, the Court  
12 ultimately found that the constitutional grant of the right to vote to all persons reaching the age of  
13 eighteen did not imply that the age requirement for holding public office had also been changed:  
14 "We cannot say that members of the public who cast their ballots to allow 18-year-olds to vote  
15 thereby manifested intent to abolish age requirements theretofore imposed on candidates for state  
16 office." *Id.* Likewise here, it cannot be said that those members of the public who cast their ballots  
17 to increase the minimum wage throughout the state, generally, also meant to repeal the categorical  
18 exemptions theretofore imposed on limousine drivers under Nev. Rev. Stat. § 608.250(2)(e). The  
19 statutory exemption is perfectly consistent with the Amendment, which raised the minimum wage  
20 generally, without mentioning already-existing categorical exemptions.

21 Nor does the presence of the definition of "employee" in the Amendment necessarily  
22 abrogate the exemption. This definition applies to the Amendment but does not necessarily repeal  
23 existing prohibitions on categories of workers. The definition of "employee" in the Amendment is  
24 clearly meant to exclude part-time, minor workers from the constitutional increase, not to revisit the  
25 exempt categories of full-time workers. The Nevada Attorney General opined that because the

1 Amendment fails to mention the statutory exclusions, that they are presumed to be repealed. But  
2 as already noted, this is an incorrect statement of Nevada law, under which the presumption is  
3 clearly the other way around. The Attorney General's construction would be analogous to holding,  
4 for example, that the Nineteenth Amendment (prohibiting gender discrimination in voting, without  
5 reference to race discrimination) repealed the Fifteenth Amendment (prohibiting race discrimination  
6 in voting) by implication, and that the Twenty-Sixth Amendment repealed both of them (prohibiting  
7 age discrimination in voting as against those who are eighteen years or older, without reference to  
8 race or gender discrimination).

9 This is an issue of first impression, but the relevant law of statutory construction is clear, and  
10 the issue is not exceedingly complex. There are no substantial grounds for differences of opinion.

11 **B. Certification to a State Supreme Court**

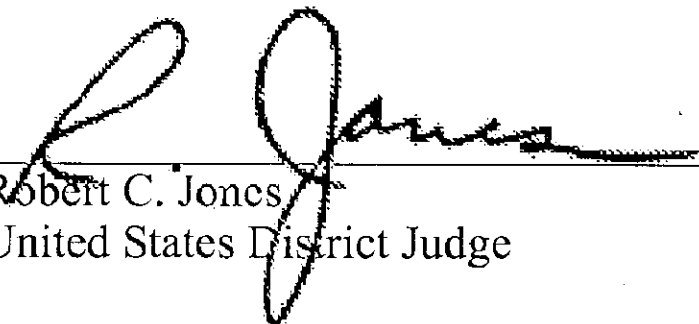
12 Nevada will grant certification if the answer may be determinative of part of the federal case,  
13 there is no controlling Nevada precedent, and the answer will help settle important questions of law.  
14 *Id.*

15 Here, the answer will be determinative of part of the federal case, because the Court's  
16 construction of Nev. Rev. Stat. § 608.250 and Nev. const. art. 15, § 16 has caused it to dismiss one  
17 of Plaintiffs' claims. The answer will also help to settle an important issue of law. It is arguable  
18 whether there is controlling Nevada precedent. There is no case law directly on point as to the  
19 construction of Nev. Rev. Stat. § 608.250 and Nev. const. art. 15, § 16; however, the case law  
20 concerning statutory interpretation is clear and on point. Under *Mengelkamp*, a constitutional  
21 Amendment by referendum does not impliedly repeal a prior statute unless "one is irreconcilably  
22 repugnant to the other, or by some other means intent to abrogate the earlier law is made evident."  
23 *Mengelkamp*, 501 P.2d at 1034. Therefore, the Court will not certify this question to the Nevada  
24 Supreme Court.

1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion to Amend and Certify Order for Interlocutory  
3 Review or, in the Alternative, Motion to Certify Question to the Nevada Supreme Court (#30) is  
4 DENIED.

5 DATED: October 14, 2009

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8 Robert C. Jones  
9 United States District Judge  
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# EXHIBIT D

# EXHIBIT D

1  
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3  
4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
6

7 ROBERT A. GREENE,  
8 *Plaintiff,*

9 vs.

10 EXECUTIVE COACH & CARRIAGE,  
11 *Defendant.*

)  
) 2:09-cv-00466-RCJ-RJJ  
)  
)

ORDER

12  
13 I. INTRODUCTION

14 Before the Court is Defendant Bentley Transportation Services' Motion to Dismiss. (#6).  
15 This case is factually similar to *Lucas v. Bell Trans*, 2:08-cv-01792-RCJ-RJJ. The Plaintiff  
16 limousine driver is suing the Defendant limousine company on behalf of himself and those similarly  
17 situated for various violations of state and federal labor law. In the present motion, Defendant  
18 moves to dismiss Plaintiff's state law claims.

19 The Court has considered the pleadings and arguments of both parties. IT IS HEREBY  
20 ORDERED THAT Defendant's Motion to Dismiss (#6) is GRANTED.

21 II. BACKGROUND

22 On March 10, 2009, Plaintiff Robert A. Greene filed the present lawsuit individually and on  
23 behalf of all persons who have worked for Defendant Bentley Transportation Services dba Executive  
24 Coach & Carriage ("Defendant") within the last three years. Plaintiff asserts several claims against  
25 Defendant: (1) failure to pay the minimum wage under Fair Labor Standards Act ("FLSA"); (2)

1 failure to pay overtime under the FLSA; (3) liquidated damages under the FLSA; (4) failure to pay  
2 for all hours worked under Nevada Revised Statute 608.016; (5) failure to pay the minimum wage  
3 under Article 15, § 16 of the Constitution of the State of Nevada; (6) failure to pay overtime under  
4 Nevada Revised Statute 608.100(1)(b); (7) waiting penalties under Nevada Revised Statute 608.040;  
5 and (8) improper wage deductions under Nevada Revised Statute 608.100.

6 In the present motion, Defendant contends that Plaintiff's state law claims should be  
7 dismissed. Defendant argues that the state law minimum wage and overtime claims should be  
8 dismissed because limousine drivers are excepted from Nevada's overtime and minimum wage  
9 provisions. Defendant further argues that, since Plaintiff has no cognizable claim for backpay under  
10 Nevada law, there is no basis for an award of waiting penalties and that claim must also be  
11 dismissed. Finally, Defendant asserts that Plaintiff has not stated a claim for improper wage  
12 deduction.

### 13 III. STANDARD OF REVIEW

14 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the  
15 claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what  
16 the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).  
17 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails  
18 to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the  
19 complaint's sufficiency. *See North Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th  
20 Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,  
21 dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally  
22 cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
23 554–55 (2007). In considering whether the complaint is sufficient to state a claim, the court will  
24 take all material allegations as true and construe them in the light most favorable to the plaintiff.  
25 *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not

1 required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or  
2 unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

3 If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave  
4 to amend. The court should “freely give” leave to amend when there is no “undue delay, bad faith[,]”  
5 dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of .  
6 . . the amendment, [or] futility of the amendment . . .” Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371  
7 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies  
8 of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d  
9 655, 658 (9th Cir. 1992).

#### 10 IV. ANALYSIS

##### 11 A. Failure to Pay for All Hours Worked and Violation of Nevada Minimum Wage 12 Laws

13 In his complaint, Plaintiff claims that Defendant violated Nevada’s minimum wage laws.  
14 Defendant apparently did not pay its drivers an hourly wage. Instead, drivers were compensated  
15 only with a percentage of their fares. Plaintiff alleges that, under this pay scheme, Defendant  
16 violated Nevada law by failing to pay its limousine drivers the minimum wage for each hour they  
17 worked. Plaintiff alleges several specific situations in which drivers were not paid, including: (1)  
18 a mandatory thirty-two hour training course for new drivers; (2) mandatory company meetings; (3)  
19 time required to fix and maintain Defendant’s vehicles; and (4) generally any non-driving time while  
20 the drivers were engaged in work for Defendant.

21 In the present motion, Defendant asserts that Plaintiff’s state law minimum wage claim must  
22 be dismissed because limousine drivers are specifically excluded from Nevada’s minimum wage  
23 laws under Nevada Revised Statute 608.250(2)(e). Plaintiff counters that Article 15, § 16 of the  
24 Nevada Constitution, which was enacted by ballot initiative in 2006, impliedly repealed the  
25 previously existing exclusions. Because the electorate did not intend to repeal the exclusions to

1 Nevada's minimum wage law by enacting Article 15, § 16, those exclusions remain in force, and  
2 the Court should thus grant dismissal of Plaintiff's state law minimum wage claims.

3 **1. The Nevada Wage and Hour Law and Nevada's Constitutional**  
4 **Amendment**

5 Nevada has minimum wage and overtime compensation statutes. The Nevada Wage and  
6 Hour Law ("NWHL"), which is codified at Nevada Revised Statute 608.250, establishes minimum  
7 wages that apply to private employers within this state. Included in the NWHL is a list of  
8 occupations that are specifically excluded from its minimum wage provision. *See Nev. Rev. Stat.*  
9 *608.250(2).* Among the excluded occupations are "taxicab and limousine drivers." *Nev. Rev. Stat.*  
10 *608.250(2)(e).*

11 In the 2006 election cycle, the Nevada voters approved a measure, raised by initiative,  
12 entitled "Raise the Minimum Wage for Working Nevadans." The effect of the measure was to add  
13 Article 15, § 16 to the Constitution of the State of Nevada ("Minimum Wage Amendment" or  
14 "Amendment"). The Minimum Wage Amendment essentially raised the state minimum wage to  
15 \$6.15 per hour unless an employer provided health insurance to its employees under certain terms,  
16 in which case the minimum wage was set at \$5.15 per hour. The Amendment also provided for  
17 annual cost of living increases to the minimum wage, which were tied to the Consumer Price Index.  
18 The Minimum Wage Amendment made no mention of any of the exclusions in Nevada Revised  
19 Statute 608.250(2).

20 The dispute between the parties centers on the import of Section 16(c) of the Minimum Wage  
21 Amendment, which defines "employer" and "employee." Section 16(c) provides:

22 As used in this section, "employee" means any person who is employed by an  
23 employer as defined herein but does not include an employee who is under eighteen  
24 (18) years of age, employed by a nonprofit organization for after school or summer  
25 employment or as a trainee for a period not longer than ninety (90) days.  
"Employer" means any individual, proprietorship, partnership, joint venture,  
corporation, limited liability company, trust, association, or other entity that may  
employ individuals or enter into contracts of employment.

1 Nev. Const. art. 15 § 16(c). Subject to these definitions, Section 16(a) of the Minimum Wage  
 2 Amendment provides that “[e]ach employer shall pay a wage to each employee of not less than the  
 3 hourly rates set forth in this section.” Nev. Const. art. 15, § 16(a). Plaintiff’s theory is that the  
 4 Minimum Wage Amendment impliedly repealed the enumerated exemptions in Nevada Revised  
 5 Statute 608.250(2). Plaintiff argues that since he fits the definition of “employee” under Article 15,  
 6 § 16(c), he is entitled to the minimum wage. Defendant counters that the only effect of the  
 7 Amendment was to raise the minimum wage, and that the NWHL exclusions are still in force.

## 8                   2.       The Scope of the Minimum Wage Amendment

9       The viability of Plaintiff’s state law minimum wage claim depends upon whether the  
 10 Minimum Wage Amendment and the exemptions in Nevada Revised Statute 608.250(2) conflict.  
 11 It is a basic principle that, if a constitutional provision conflicts with a statute, the constitutional  
 12 provision controls. *See We the People Nev. v. Miller*, 192 P.3d 1166, 1177 n.55 (Nev. 2008). If the  
 13 Minimum Wage Amendment’s definition section was intended to completely supplant the NWHL’s  
 14 list of exemptions, then those exemptions would be impliedly repealed and Plaintiff’s state law  
 15 minimum wage claim survives. Conversely, if the Amendment was intended only to raise the  
 16 minimum wage and not disturb the exemptions, those exemptions (including the exemption for  
 17 limousine drivers) still stand and Plaintiff’s claim fails.

18       As a preliminary matter, implied repeal is disfavored under Nevada law. *Presson v. Presson*,  
 19 147 P. 1081, 1082 (Nev. 1915). Implied repeal occurs only when “there is an irreconcilable  
 20 repugnancy between the two laws compelling the conclusion that the later enactment necessarily  
 21 repeals the earlier.” *Las Vegas v. Int’l Ass’n of Firefighters*, 543 P.2d 1345, 1346 (Nev. 1975).  
 22 “Where express terms of repeal are not used, the presumption is always against an intention to  
 23 [impliedly] repeal an earlier statute.” *Western Realty Co. v. Reno*, 63 Nev. 330, 344 (Nev. 1946).

24       The scope of a constitutional provision is determined by the intent of those who enacted it.  
 25 *See Guinn v. Legislature of Nev.*, 119 Nev. 460, 471 (Nev. 2003) (“In construing the Constitution,

1 our primary objective is to discern the intent of those who enacted the provisions at issue.”). Since  
2 a ballot initiative is enacted by the voters, the crucial determination that must be made is what the  
3 voters intended when they passed the measure. *See Miller v. Burk*, 188 P.3d 1112, 1120 (Nev.  
4 2008). When the language of constitutional provision adopted through initiative process is clear on  
5 its face, Nevada courts will not go beyond that language in determining the voters' intent. *Id.* But  
6 if the language of such a constitutional amendment is ambiguous, meaning that it is subject to two  
7 reasonable but inconsistent interpretations, the Court may turn to extrinsic evidence to determine  
8 what the voters intended. *Id.* Courts attempting to discern the voters' intent and understanding of  
9 a ballot measure may consider the ballot summaries and arguments issued to the voters, *Prof'l*  
10 *Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 239 (Cal. 2007), as well as “public policy and  
11 reason.” *Miller*, 188 P.3d at 1120.

12 Because the language of the Minimum Wage Amendment is subject to two reasonable but  
13 inconsistent interpretations, the Court may examine extrinsic evidence to discern the intent of the  
14 voters when they enacted it. *See Miller*, 188 P.3d at 1120. One possible interpretation of the  
15 Minimum Wage Amendment is that it was intended to create an inalienable *right* to a minimum  
16 wage for anyone defined as an employee under its terms. Under this interpretation, the exclusions  
17 in Nevada Revised Statute 206.250 would be irreconcilable with the Nevada Constitution, and would  
18 thus be impliedly repealed. However, an equally reasonable interpretation of the Minimum Wage  
19 Amendment is that the voters merely intended to bypass the legislature to raise the minimum wage  
20 and provide for mandatory annual cost-of-living increases, and that the Amendment otherwise  
21 preserved the status quo ante. Under this interpretation, there would be no conflict between the  
22 Minimum Wage Amendment and the NWHL, and the exclusions would remain in force. In order  
23 to determine which of these two reasonable interpretations the voters intended, resort to extrinsic  
24 evidence is necessary.

1 An examination of the available extrinsic evidence suggests that the Nevada voters did not  
2 intend to repeal the exclusions in the NWHL by enacting the Minimum Wage Amendment. Perhaps  
3 the best evidence of the voters' intent in enacting the Amendment is the wording of the ballot  
4 question and the scope of the arguments for and against the initiative.<sup>1</sup> See *People v. Rizo* 996 P.2d  
5 27, 30 (Cal. 2000) (noting the particular usefulness of "the analyses and arguments contained in the  
6 official ballot pamphlet" in determining voter intent). The measure itself is entitled "Raise the  
7 Minimum Wage for Working Nevadans" (#6 Ex. 2 at 35), which seems to imply that the enactment's  
8 scope was limited to changing the amount of the minimum wage and not the occupations entitled  
9 to that minimum wage. The condensation of the ballot question, which reduces the question to a  
10 single sentence, asks: "Shall the Nevada Constitution be amended to raise the minimum wage paid  
11 to employees?" (#6 Ex. 2 at 31.) Voters reading this condensed question would have no reason to  
12 think that they were voting to repeal exemptions to the previously existing law, nor would they have  
13 any reason to consider the impact of such a change when casting their ballots. The arguments both  
14 for and against the Amendment were entirely centered upon its impact on those already receiving  
15 the minimum wage. One would expect that if one of the contemplated purposes of the enactment  
16 was to abolish the NWHL's exceptions that the arguments would include at least a passing reference  
17 to how such a change would affect the state. In sum, a Nevada voter who had cast her ballot in favor  
18 of the Amendment based on careful consideration of these materials would likely be surprised if  
19 someone told her that she had also voted to extend the minimum wage to casual babysitters, live-in  
20 domestic workers, limousine drivers, and other previously excluded occupations. See Nev. Rev.  
21 Stat. 608.250(2). Given the presumption against implied repeal, the extrinsic evidence available is  
22 insufficient to support the conclusion that Nevada voters intended to abolish the NWHL's exceptions  
23  
24

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25 <sup>1</sup> Defendant has provided these materials as Exhibit 2 to its Motion to Dismiss.

1 by enacting Article 15, § 16. Rather, the voters intended only to change the amount of the minimum  
2 wage and provide for mandatory cost-of-living increases.

3 **3. The State Attorney General's Opinion**

4 Plaintiff's opposition to the dismissal of his minimum wage claim rests almost entirely on  
5 an advisory opinion issued by the Nevada Attorney General, which concluded that the Minimum  
6 Wage Amendment *did* impliedly repeal the exemptions in the NWHL. The relevant excerpt from  
7 the opinion states as follows:

8 The effect of the proposed amendment on the NRS 608.250 exclusions is controlled  
9 by two presumptions. First, the voters should be presumed to know the state of the  
10 law in existence related to the subject upon which they vote. Op. Nev. Atty' Gen.  
11 153 (December 21, 1934). Second, it is ordinarily presumed that "[w]here a statute  
12 is amended, provisions of the former statute omitted from the amended statute are  
13 repealed." *McKay v. Board of Supervisors*, 730 P.2d 437, 442 (1986). In keeping  
14 with these presumptions, the people, by acting to amend the minimum wage  
15 coverage and failing to include the statutory exclusions in the proposed amendment,  
16 are presumed to have intended the repeal of the existing exclusions so that the new  
17 minimum wage would be paid to all who met its definition of "employee."  
18 Accordingly, the proposed amendment would effect an implied repeal of the  
19 exclusions from minimum wage coverage at NRS 608.250(2).

20 (#8 Ex. A at 12.)

21 Opinions issued by the Attorney General are not binding on the Court. *Cannon v. Taylor*,  
22 493 P.2d 1313, 1314 (Nev. 1972). The Nevada Supreme Court has issued holdings contrary to  
23 Attorney General opinions if the court had concluded that the Attorney General's opinion was  
24 poorly reasoned. *See, e.g., Miller v. Burk*, 188 P.3d 1112, 1123 n.54 (Nev. 2008) (refusing to adhere  
25 to an Attorney General opinion because it was "internally inconsistent"); *Blackjack Bonding v. City  
of Las Vegas Municipal Court*, 14 P.3d 1275, 1279 (Nev. 2000) (rejecting the reasoning in an  
Attorney General Opinion because "[the] opinion confuse[d] jurisdiction, which is subject to  
legislative control, with independent, inherent judicial powers, which are not subject to legislative  
control").

1 Because the Attorney General Opinion in this case is poorly reasoned, the Court should  
2 disregard it. Both of the assumptions upon which the Attorney General's analysis rests are flawed.  
3 First, the Attorney General states that "the voters should be presumed to know the state of the law  
4 in existence related to the subject upon which they vote."<sup>2</sup> The presumption the Attorney General  
5 makes here appears to be a modification of the well-settled presumption that *legislatures* are  
6 presumed to know the state of the law when they act. *See, e.g., Int'l Game Tech. Inc. v. Second*  
7 *Judicial Dist. Court of Nev.*, 127 P.3d 1088, 1103 (Nev. 2005). This presumption is eminently  
8 sensible when applied to legislators because, as professional lawmakers, they should be expected  
9 to be very familiar with the law. But the reasonableness of this presumption falls apart when it is  
10 applied to lay voters; it is not reasonable to assume that a cashier voting on a ballot initiative is  
11 intimately familiar with related provisions of the Nevada Revised Statutes. The Attorney General's  
12 second presumption, that "it is ordinarily presumed that, where a statute is amended, provisions of  
13 the former statute omitted from the amended statute are repealed," simply has no application here.  
14 The voters were not voting to amend Nevada Revised Statute 608.250; they were voting to create  
15 an entirely new section of the Nevada Constitution which could happily co-exist with the previously  
16 existing statutory exceptions. Given that these two presumptions are flawed, it does not follow that  
17 "[the voters] are presumed to have intended the repeal of all existing exclusions" by not including  
18 them in the minimum wage amendment.

#### 19 4. Conclusion

20 Plaintiff's state law minimum wage claim should be dismissed. Plaintiff, as a limousine  
21 driver, is expressly excluded from Nevada's minimum wage law under Nevada Revised Statute  
22 608.250(2). The Nevada electorate did not intend an implied repeal of that exemption by enacting  
23

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24 <sup>2</sup> As Defendant points out, the authority the Attorney General cites for this proposition is another (non-  
25 binding) Attorney General opinion. There does not appear to be any mandatory authority supporting a presumption  
that the voters are presumed to know the state of the law in existence related to the subject upon which they vote.

1 the Minimum Wage Amendment. Thus, the exemption is still in force and Plaintiff's claim fails.

2 **B. Plaintiff's State Law Overtime Claim**

3 Defendant also contends that Plaintiff's overtime claim must also be dismissed. The statute  
 4 governing Nevada's overtime law is Nevada Revised Statute 608.018. Nevada Revised Statute  
 5 608.018(3)(j) specifically states that taxicab and limousine drivers are not entitled to overtime under  
 6 Nevada law. Plaintiff, apparently realizing this, claims that his state law overtime claim arises not  
 7 under Nevada Revised Statute 608.018 but rather under Nevada Revised Statute 608.100. That  
 8 statute provides, *inter alia*, that it is "unlawful for any employer to . . . [p]ay a lower wage, salary  
 9 or compensation to an employee than the amount that employer is required to pay employee by  
 10 virtue of any statute or regulation . . . ." Plaintiff claims that Defendant's failure to pay its limousine  
 11 drivers overtime is a violation of the FLSA, which in turn amounts to a violation of Nevada Revised  
 12 Statute 608.100. Because Nevada Revised Statute 608.100 affords Plaintiff no private cause of  
 13 action, the Court should dismiss Plaintiff's state law overtime compensation claim.<sup>3</sup>

14 The Nevada Supreme Court held in *Baldonado v. Wynn Las Vegas*, 194 P.3d 96 (Nev. 2008),  
 15 that Nevada Revised Statute 608.100 does not provide a private cause of action.<sup>4</sup> In *Baldonado*, the  
 16 plaintiffs were table game dealers that worked for defendant Wynn Las Vegas. *Id.* at 98. Wynn  
 17 modified its tip policy to compel the table game dealers to share a portion of their tips with pit  
 18 managers and floor supervisors, which lowered the dealers' overall salaries. *Id.* at 99. The table  
 19 game dealers filed a class action suit against Wynn seeking damages and injunctive relief. *Id.*  
 20 Among the dealers' claims was an allegation that Wynn had violated Nevada Revised Statute

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22 <sup>3</sup> Even if Nevada Revised Statute 608.100 did provide a private cause of action, Plaintiff's position that any  
 23 violation of the FLSA amounts to a violation of 608.100 would lead to an absurd result. Under Plaintiff's theory,  
 24 any Nevada FLSA Plaintiff would be able to bootstrap any FLSA opt-in collective action into a Rule 23(b)(3) opt-  
 out class action based on a violation of 608.100. It seems unlikely that the Nevada legislature intended such a result.

25 <sup>4</sup> This Court engaged in a detailed treatment of *Baldonado* in the recent case of *Lucas v. Bell Trans*, 2:08-  
 cv-01792-RJJ-RJJ (#27 at 4--8.)

1 608.100. *Id.* The trial court determined that Nevada Revised Statute 608.100 did not confer a  
 2 private cause of action on the dealers and dismissed that claim. *Id.* The Nevada Supreme Court  
 3 affirmed.<sup>5</sup> *Id.* at 107. The court determined that “the Legislature has entrusted the labor laws’  
 4 enforcement to the Labor Commissioner, unless otherwise specified.” *Id.* at 102. The court also  
 5 highlighted the adequacy of an administrative remedy provided under Chapter 608, which allows  
 6 private parties to file labor law complaints with the Labor Commissioner. *Id.* at 102. The  
 7 Commissioner has a duty to hear and resolve such complaints. *Id.* at 104.

8 In short, Nevada Revised Statute 608.100 confers no private right of action. Because  
 9 Plaintiff’s overtime claim is based on a violation of Nevada Revised Statute 608.100, his claim fails.

#### 10 **C. Plaintiff’s Improper Wage Deduction Claim**

11 Defendant has also moved to dismiss Plaintiff’s claim for “improper wage deductions.”  
 12 Plaintiff claims in his Complaint that Defendant deducted a “leasing fee” of at least five dollars each  
 13 time a limousine driver drove a vehicle for a client or customer. (#1 at 16 ¶ 64.) Plaintiff alleges  
 14 that these “leasing fees” violated Nevada Revised Statute 608.100(2)’s proscription against  
 15 “requir[ing] an employee to rebate, refund or return any part of the wage, salary or compensation  
 16 earned by and paid to the employee.”

17 The essence of Defendant’s argument is that Plaintiff’s factual allegations are insufficient  
 18 to support his claim for improper wage deduction. However, the Court need not consider this  
 19 argument because, as discussed above, Nevada Revised Statute 608.100 does not grant a private  
 20 cause of action. Since this claim is based on an alleged violation of Nevada Revised Statute  
 21 608.100, the claim should be dismissed.

#### 22 **D. Plaintiff’s Claim for Waiting Penalties**

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24 <sup>5</sup> The Nevada Supreme Court also determined that there was no private cause of action under 608.160  
 25 (which prohibits taking employee tips), and 608.120 (which makes it unlawful for managers and shift bosses to  
 require gratuities as a condition of employment). Neither of those statutes are at issue in the case at bar.

1 Finally, Defendant claims that Plaintiff's claim for waiting penalties should be dismissed.  
2 Plaintiff's Complaint included a claim for relief under Nevada Revised Statute 608.040. That statute  
3 provides:

4 1. If an employer fails to pay

5 (a) Within 3 days after the wages or compensation of a discharged employee  
6 becomes due; or

7 (b) On the day the wages or compensation is due to an employee who resigns or  
8 quits,

9 the wages or compensation of the employee continues at the same rate from the day  
he resigned, quit or was discharged until paid or for 30 days, whichever is less.

10 Nev. Rev. Stat. 608.040. Plaintiff's Complaint "seek[s] waiting penalties in addition to wages due  
11 for themselves and all class members who terminated employment within the last three years." (#1  
12 at 16 ¶ 62.

13 Because Plaintiff does not have any valid state law claim for minimum wage and overtime,  
14 there can be no delay damages. Under Nevada law, Plaintiff was not deprived of any wages or  
15 overtime which he had been due. Thus, there is no basis for this claim and it should be dismissed.

## 16 V. CONCLUSION

17 The Court has considered the pleadings and arguments of both parties. IT IS HEREBY  
18 ORDERED THAT Defendant's Motion to Dismiss (#6) is GRANTED.

19 DATED: November 10, 2009

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21   
22 ROBERT C. JONES  
23 UNITED STATES DISTRICT JUDGE  
24  
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# EXHIBIT E

# EXHIBIT E



1 Defendant: (1) failure to pay the minimum wage under Fair Labor Standards Act ("FLSA"); (2)  
2 failure to pay overtime under the FLSA; (3) liquidated damages under the FLSA; (4) failure to pay  
3 for all hours worked under Nevada Revised Statute 608.016; (5) failure to pay the minimum wage  
4 under Article 15, § 16 of the Constitution of the State of Nevada; (6) failure to pay overtime under  
5 Nevada Revised Statute 608.100(1)(b); (7) waiting penalties under Nevada Revised Statute 608.040;  
6 and (8) improper wage deductions under Nevada Revised Statute 608.100.

7 On November 10, 2009, this Court issued an Order dismissing Plaintiff's state law claims.  
8 (#16). In the Order, the Court expressly addressed whether or not the 2006 Minimum Wage  
9 Amendment to the Constitution of the State of Nevada ("Wage Amendment"), which added Article  
10 15, § 16 to the State Constitution, repealed the Nevada Wage and Hour Law ("Nevada Wage Law"),  
11 codified at Nevada Revised Statute 608.250. Specifically at issue was whether the exemptions in  
12 the Nevada Wage Law survived the Wage Amendment. The Court concluded that the Wage  
13 Amendment did not impliedly overrule the Wage and Hour Law and dismissed Plaintiff's state law  
14 claims for failure to state a claim.

15 Plaintiff now seeks for this Court to certify the following question:  
16 Does Section 16 of Article 15 of the Constitution of the State of Nevada require  
17 payment of the constitutionally mandated minimum wages to employees who are  
18 currently excluded from entitlement from the statutory minimum wages under NRS  
608.250(2), unless those employees are not within the Constitutional definition of  
a protected "employee" pursuant to Section 16(c) of the Nevada State Constitution?

19 Plaintiff also requested this at oral arguments for Defendant's Motion to Dismiss. (Oral Argument,  
20 August 10, 2009). The Court declined to address this request in its November 10, 2009 Order.  
21 (#16).

## 22 DISCUSSION

23 Pursuant to Nevada Rule of Appellate Procedure 5, the Nevada Supreme Court may answer  
24 questions of law certified to it by a United States District Court upon the certifying court's request:  
25

1 if there are involved in any proceeding before those courts questions of law of this  
2 state which may be determinative of the cause then pending in the certifying court  
3 and as to which it appears to the certifying court there is no controlling precedent in  
4 the decisions of the Supreme Court of this state.

5 Nev. R. App. P. 5(a). A certifying court may invoke Rule 5 on its own motion. See Nev. R. App.  
6 p. 5(b). The Nevada Supreme Court accepts certification of an issue when the answer to that issue  
7 “may ‘be determinative’ of part of the federal case, there is no controlling [Nevada] precedent, and  
8 the answer will help settle important questions of law.” *Volvo Cars of North America, Inc. v. Ricci*,  
9 122 Nev. 746, 751, 137 P.3d 1161 (2006) (citing *Ventura Group v. Ventura Port Dist.*, 24 Cal. 4th  
10 1089, 104 Cal. Rptr. 2d 53, 16 P.3d 717, 719 (2001)).

11 Certification to the highest state court is not mandatory and lies within the discretion of the  
12 federal court. *Lehmen Bros. v. Schein*, 416 U.S. 386, 390–91, 94 S. Ct. 1741 (1974); *Carolina Cas.*  
13 *Ins. Co. v. McGhan*, 572 F. Supp. 2d 1222, 1225–26 (D. Nev. 2008). A district court’s decision not  
14 to certify a question to a state court is reviewed for an abuse of discretion. *Thompson v. Paul*, 547  
15 F.3d 1055, 1059, 1065 (9th Cir. 2008). There are a variety of factors that are generally considered  
16 by a district court in assessing the appropriateness of certifying a question to the state court. These  
17 factors include “whether the state law question presents a significant question of important state  
18 public policy, whether the issue involved has broad application, whether law from other states is  
19 instructive, the state court’s case load, [] comity and federalism concerns,” and “the timing of the  
20 certification.” *Carolina Cas. Ins. Co.*, 572 F. Supp. 2d at 1226; see also *Kremen v. Cohen*, 325 F.3d  
21 1035, 1037–38 (9th Cir. 2003); *Boucher v. Shaw*, 483 F.3d 613, 616 (9th Cir. 2007).

22 Plaintiff seeks certification in the present case, arguing that the issue is a determinative part  
23 of the case, there is no controlling Nevada precedent, and that the answer will help settle important  
24 questions of law. (Plaintiff’s Motion at pg. 5, #11). Plaintiff argues that this Court’s decision has  
25 a collateral impact on millions of Nevada workers who are exempt under state statute but are not  
exempt, according to Plaintiff’s interpretation, under the Nevada Constitution. Defendant counters

1 that Plaintiff's request is untimely and, in essence, is an attempt to have the Nevada Supreme Court  
2 decide issues which this Court already considered and upon which this Court already issued a  
3 dispositive motion. Further, Defendant argues that Plaintiff fails to show any "particularly  
4 compelling reasons" for certifying the question at issue. Consideration of the following cases  
5 provides guidance for this Court's treatment of the present motion.

6 In *Boucher v. Shaw*, the Ninth Circuit dealt with certification of issues involving the  
7 definition of "employer" under a Nevada Statute. *Boucher*, 483 F.3d at 614–15. The court did not  
8 provide much discussion of the certification considerations themselves, but certified the question  
9 to the Nevada Supreme Court on the basis that the statute at issue was ambiguous. *Id.* at 616.  
10 "Because this question represents an issue of first impression and has significant implications for  
11 Nevada's wage protection law and because we cannot be certain how the Nevada Supreme Court  
12 would resolve this matter, we believe certification on this question of law to be appropriate." *Id.*  
13 The court then certified the following question: "Can individual managers be held liable as  
14 employers for unpaid wages under Chapter 608 of the Nevada Revised Statutes?" *Id.*

15 The Ninth Circuit also dealt with certification in *Kremen v. Cohen*. There, the court dealt  
16 with an issue involving conversion of an internet domain name. The court adopted a very broad  
17 approach to certification, invoking the process on the basis of deference to the state court. The court  
18 stated that "[t]he certification procedure is reserved for state law questions that present significant  
19 issues, including those with important public policy ramifications, and that have not yet been  
20 resolved by the state courts." *Id.* at 1037. The court further stated that "[i]n a case such as this one  
21 that raises a new and substantial issue of state law in an arena that will have broad application, the  
22 spirit of comity and federalism cause us to seek certification." *Id.* at 1038.

23 Judge Kozinski, however, dissented from the majority opinion, questioning the use of  
24 certification. Of note, Judge Kozinski pointed out that certification had not been sought by any of  
25 the parties. *Id.* at 1044 (Kozinski, J., dissenting). Additionally, he argued that there are extra costs,

1 delays, and burdens on litigants that should be avoided by a restrained approach to certification.  
2 “Certification is justified only when the state supreme court has provided no authoritative guidance,  
3 other courts are in serious disarray and the question cries out for a definitive ruling.” *Id.* As the  
4 court was “perfectly capable of answering” the certified question itself, something the majority  
5 acknowledged as well, *see id.* at 1038 (majority opinion), Judge Kozinski contended that  
6 certification was unnecessary and inappropriate. *Id.* at 1044 (Kozinski, J., dissenting).

7 A final case to consider is *Carolina Cas. Ins. Co. v. McGhan*, which although not binding  
8 on this Court, is the case which provides the most detailed analysis of the certification  
9 considerations. *Carolina Cas. Ins. Co.*, 572 F. Supp. 2d at 1225–26. In that case, Judge Pro  
10 considered whether or not to certify two issues under Nevada law. *Id.* at 1225. The court had  
11 already entertained summary judgment motions on those issues and made dispositive orders. *Id.*  
12 Judge Pro first acknowledged that certification is not mandatory and that “the federal court’s task  
13 typically is to predict how the state’s highest court would decide the issue.” *Id.* at 1225–26 (citing  
14 *Med. Lab. Mgmt. Consultants v. Am. Broad Cos., Inc.*, 306 F.3d 806, 812 (9th Cir. 2002); *Strother*  
15 *v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 865 (9th Cir. 1996)). Next, the court looked to  
16 various factors significant to the question of certification. Of particular importance was the timing  
17 of the request to certify. Citing *Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984), the court  
18 stated that “[w]hen a party requests certification for the first time after losing on the issue, that party  
19 must show ‘particularly compelling reasons’ for certifying the question.” *Carolina Cas. Ins. Co.*,  
20 572 F. Supp. 2d at 1226. In that case the court determined that the moving party needed to  
21 demonstrate compelling reasons to justify certification as they had waited to request certification  
22 until the court had already decided the issues in question. *Id.*

23 The court further ruled that the moving party failed to show a compelling reason to certify.  
24 *Id.* Significant to this analysis was the whether or not there existed an issue of important state public  
25 policy. *Id.* The court concluded that public policy was not implicated, distinguishing the case from

1 those involving issues of broad application and greater significance. *Id.* The court further  
2 considered that certification would not promote time, energy, and resource savings, as the issues had  
3 already been fully litigated before the district court. Accordingly, the court denied certification of  
4 the issue.

5 Applying these cases to the facts in the instant action, it appears that there are two significant  
6 issues to evaluate: (1) the timing of Plaintiff's request for certification and (2) the significance of  
7 the issue for which Plaintiff seeks certification.

8 **A. Timing of Plaintiff's Request for Certification**

9 Defendant's primary argument against Plaintiff's Motion is its timing. The main focus of  
10 Defendant is the relevance of the stage of litigation in *Lucas v. Bell Trans*, 2:08-cv-01792-RCJ-RJJ,  
11 which is parallel litigation against the same Defendants by different plaintiffs, but the same  
12 plaintiffs' attorney. In that case, which is also before this Court, an Order was issued on June 24,  
13 2009, dismissing the plaintiffs' state law claims and holding that the exemptions in the Nevada  
14 Wage Law survived the Wage Amendment. (*Lucas*, 2:08-cv-01792-RCJ-RJJ, Dock. #27). In that  
15 case, on June 26, 2009, Plaintiff also filed a similar motion to the motion in the present case,  
16 requesting certification. (*Lucas*, 2:08-cv-01792-RCJ-RJJ, Dock. #30). This motion was denied in  
17 the Order issued by this Court on October 14, 2009. (*Lucas*, 2:08-cv-01792-RCJ-RJJ, Dock. #58).

18 The timing of the filings in the instant case are, of course, more relevant to the appropriate  
19 timing of Plaintiff's Motion. On May 6, 2009, Defendant filed its Motion to Dismiss Plaintiff's  
20 State Law Claims, which raised the issue of the potential conflict between the Nevada Wage Law  
21 and the Wage Amendment to the Nevada Constitution. (#6). After a stipulation to extend time to  
22 respond, Plaintiff responded to Defendant's Motion on May 26, 2009, raising the argument that the  
23 Nevada Wage Law was impliedly repealed. (#8). Plaintiff did not file its Motion to Certify until  
24 August 5, 2009. (#11). Oral arguments on Defendant's Motion to Dismiss were heard on August  
25

1 10, 2009, and on November 10, 2009, the Court issued an Order granting Defendant's Motion and  
2 finding that the Nevada Wage Law was not repealed. (#16).

3 Defendant argues that Plaintiff's Motion is untimely because Plaintiff waited to see the  
4 outcome of the Court's decision in the *Lucas* case before filing the motion to certify in the present  
5 case. Further, Defendant argues that Plaintiff's failure to make the motion to certify until over two  
6 months after it presented the arguments to this Court for determination demonstrates that the request  
7 is untimely and improper. Plaintiff counters that there is no preclusive effect from the *Lucas*  
8 litigation, so the Court should not consider the timing of the *Lucas* case.

9 The Court need not rely on the *Lucas* litigation to find that Plaintiff's Motion was untimely.  
10 As already noted, Plaintiff made his arguments on the exact issue presented in the present Motion  
11 to Certify more than two months before filing the present motion. Plaintiff did wait until it was  
12 apparent how the Court was going to rule. Further, Plaintiff made no effort, other than his comments  
13 at oral argument, to seek resolution of his Motion to Certify at the same time as the Motion to  
14 Dismiss. Accordingly, the timing of Plaintiff's Motion to Certify amounts to taking two swings at  
15 the same issue. Plaintiff is correct that his motion is not untimely as a matter of civil procedure.  
16 However, the timing of this motion still negatively affects its consideration when assessing the  
17 circumstances under which the motion was brought. Accordingly, under the discretion provided the  
18 Court in this area, this Court holds that Plaintiff's Motion to Certify is inappropriate in its timing.

19 **B. No Particularly Compelling Reasons for Certification**

20 Following the analysis applied in *Carolina Cas. Ins. Co.*, the Court now looks to whether  
21 or not Plaintiff has presented particularly compelling reasons for certification. Defendant argues that  
22 Plaintiff has not demonstrated compelling reasons, citing the heavy disfavor that accompanies  
23 implied repeal, as well as the Order's limited application to Plaintiff. Plaintiff, of course, contends  
24 that the reasons for certification are compelling and cites to much of the same sources cited in  
25 Plaintiff's Response to Defendant's Motion to Dismiss. (*See* #8). Much of this evidence has already

1 been presented to this Court and found to be unpersuasive. (#16). However, Plaintiff now uses this  
2 evidence not to persuade the Court of their merits necessarily, but to demonstrate that this is an issue  
3 that should be decided by the Nevada Supreme Court, rather than by this Court.

4 Plaintiff also relies heavily on the case of *Boucher v. Shaw*, where the Ninth Circuit elected  
5 to certify a question of whether individual managers are employers under NRS § 608.011, due to  
6 the public policy concerns in having the Nevada Supreme Court make that interpretation. *Boucher*,  
7 483 F.3d at 616. In that case, the court took a broad stance towards certification based on the fact  
8 that it was an issue of first impression and that it “could not be certain how the Nevada Supreme  
9 Court would resolve this matter.” *Id.* In *Kremen v. Cohen*, the Circuit took an even broader  
10 approach, certifying where the issue raised was a “new and substantial issue of state law in an arena  
11 that will have broad application.” *Kremen*, 325 F.3d 1038. This was despite the acknowledgment  
12 that the court was quite capable of resolving the issue presented. *Id.* Also of note, is the citation to  
13 *Boucher* in *Carolina Cas. Ins. Co.* as an example of a situation where public policy of general  
14 applicability would warrant certification. *Carolina Cas. Ins. Co.*, 572 F. Supp. 2d at 1226.

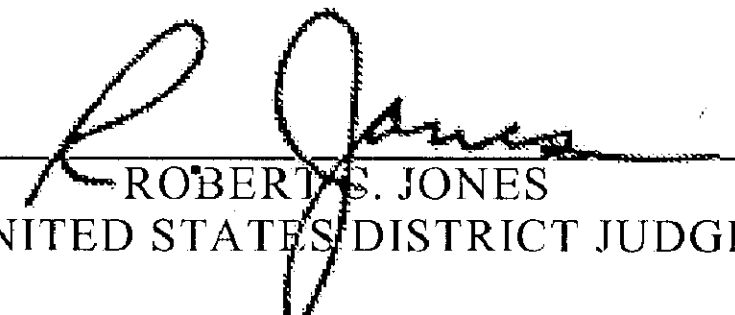
15 The instant case is similar to *Boucher* in some respects, in that they both implicate  
16 interpretation of Nevada’s wage laws. However, *Boucher* is also distinguishable in that the issue  
17 this Court determined was whether the Nevada Wage Law was impliedly repealed by the Wage  
18 Amendment. Unlike *Boucher*, where there was no state law precedent, there is precedent concerning  
19 implied repeal and the interpretation of conflicting laws, even if there is no precedent on the precise  
20 issue of the Nevada Wage Law’s survival after the Wage Amendment. This was addressed in this  
21 Court’s Order granting Defendant’s Motion to Dismiss. (#16). And while it is true that this  
22 exemption issue affects public policy, insofar as interpretation of this conflict is handled, this  
23 Court’s decision is binding on no one except for the parties present. Accordingly, unlike the  
24 potential broad application in *Kremen*, where the Ninth Circuit certified, no such broad application  
25 is present here.

1 Given the close nature of this determination, it is again worthwhile to note the discretion  
2 afforded this Court in its ruling on this issue. While certification would not necessarily be  
3 inappropriate, it does not seem that compelling reasons exist which require this Court to grant  
4 certification. Considering the timing of the motion and the fact that this Court has already disposed  
5 of these exact same issues, this Court denies Plaintiff's Motion to Certify.

6 **CONCLUSION**

7 IT IS HEREBY ORDERED THAT Plaintiff's Motion to Certify A Question to the Nevada  
8 Supreme Court (#11) is DENIED.

9 DATED: January 26, 2010

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13 ROBERT S. JONES  
14 UNITED STATES DISTRICT JUDGE  
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# EXHIBIT F

# EXHIBIT F

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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ROBERT A. GREENE, on behalf of )  
himself and all others similarly situated, )

Plaintiffs, )

vs. )

EXECUTIVE COACH AND CARRIAGE, )  
a Nevada Corporation; DOES 1-50, )  
inclusive, )

Defendants. )

Case No.: 2:09-cv-00466-GMN-RJJ

**ORDER**

**INTRODUCTION**

Before the Court is Plaintiff Robert A. Greene's Motion to Reconsider (ECF No. 45). Defendant Bentley Transportation, LLC dba Executive Coach and Carriage filed a Response and a Countermotion to Strike Plaintiff's Motion (ECF No. 46 & 47). Plaintiff Robert Greene filed a Reply and a Response to Defendant's Motion to Strike (ECF No. 48 and 49). Defendant filed a Reply to the Motion to Strike (ECF No. 50).

**FACTS AND BACKGROUND**

On March 10, 2009, Plaintiff Robert A. Greene filed the present lawsuit individually and on behalf of all persons who have worked for Defendant Bentley Transportation Services dba Executive Coach & Carriage ("Defendant") within the last three years. Plaintiff asserts several claims against Defendant: (1) failure to pay the minimum wage under Fair Labor Standards Act ("FLSA"); (2) failure to pay overtime under the FLSA; (3) liquidated damages under the FLSA; (4) failure to pay for all hours worked under Nevada Revised Statute 608.016; (5) failure to pay the minimum wage under Article 15, § 16 of the Constitution of the State of Nevada; (6) failure to pay

overtime under Nevada Revised Statute 608.100(1)(b); (7) waiting penalties under Nevada Revised Statute 608.040; and (8) improper wage deductions under Nevada Revised Statute 608.100.

Defendant filed a Motion to Dismiss Plaintiff's state law claims (ECF No. 6) and the Court granted Defendant's motion (ECF No. 16). The Honorable Judge Robert C. Jones dismissed Plaintiff's minimum wage claims under N.R.S. § 608.250(2), overtime pay claims under N.R.S. § 608.018, improper wage deduction claims under N.R.S. 608.100(2) and waiting penalty claims under N.R.S. § 608.040 on November 10, 2009. (ECF No. 16). Defendant then filed a Motion for Summary Judgment as to Plaintiff's remaining state law based claims (ECF No. 20). Judge Jones again granted Defendant's Motion on June 9, 2010 (ECF No. 31) after holding a hearing regarding the motion on May 10, 2010 (ECF No. 28) dismissing Plaintiff's claims under N.R.S. § 608.016.

Plaintiff's instant Motion to Reconsider asks the Court to modify its order holding that Plaintiff's state-law claims under N.R.S. § 608.016 fail as a matter of law.<sup>1</sup> Plaintiff attaches to his motion arguments put forth by the plaintiff in *Lucas v. Bell Trans*, 2:08-cv-01792-GMN-RJJ opposing a motion for summary judgment on plaintiff's state law claims in that case. Defendant motions the Court to strike Plaintiff's attachments as they are irrelevant to the instant case.

## DISCUSSION

### **A. Legal Standard**

Although the Federal Rules of Civil Procedure do not expressly authorize a motion for reconsideration, "[a] district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment . . ." *Smith v. Massachusetts*, 543 U.S.

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<sup>1</sup> Plaintiff incorrectly indicates that this Order is located at ECF No. 33 on the Court's Docket and that the Order is dated July 8, 2010. The Order that held that Plaintiff's state-law claims fail as a matter of law under § 608.016 is at ECF No. 31 and was filed on June 9, 2010.

1 462, 475, 125 S. Ct. 1129, 1139 (2005) (internal quotes omitted). The court's inherent  
2 power extends to prior rulings in the same litigation, even if made by a district judge  
3 previously presiding in the case. *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570,  
4 572 (7th Cir. 2006).

5 "[A] motion for reconsideration should not be granted, absent highly unusual  
6 circumstances." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Reconsideration  
7 of a grant of summary judgment is appropriate where: (1) the court is presented with  
8 newly discovered evidence; (2) the court committed clear error or the initial decision was  
9 manifestly unjust; or (3) there is an intervening change in controlling law. *School Dist.*  
10 *1J, Multnomah County, Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

#### 11 **B. Analysis**

12 Plaintiff does not present the Court with any newly discovered evidence or  
13 indicate that there is an intervening change in the controlling law. Plaintiff instead argues  
14 that the Court committed clear error and that the initial decision was manifestly unjust.  
15 Plaintiff asks the Court to review Judge Jones' Order *de novo*. Plaintiff attaches an  
16 argument from another case before this same Court to explain that Judge Jones' ruling  
17 was flawed, instead of explaining to the Court how it committed clear error on the facts  
18 of this case.

19 Defendant motions the Court to strike Plaintiff's attached arguments as irrelevant.  
20 The Court sees no reason to strike Plaintiff's attached arguments if they can shed light on  
21 any injustice or error that the Court may have committed.

22 The Court has reviewed Judge Jones' ruling and the arguments presented by  
23 Plaintiff and has not found any reason to overturn this Court's previous Order. Judge  
24 Jones provided a thorough analysis of the statute in question and applied them to the facts  
25 of this case to rule that Plaintiff did not have a cause of action as a matter of law.

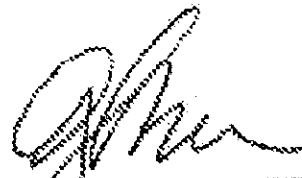
1 Plaintiff cannot rely on an argument from a factually dissimilar case to assume that the  
2 Court must be in error in the present case. Judge Jones distinguished the differences of  
3 the two cases in his Order to the satisfaction of this Court. The Court does not find any  
4 clear error in Judge Jones' reasoning or that his ruling is manifestly unjust. Accordingly,  
5 Plaintiff's Motion to Reconsider is **DENIED**.

6 **CONCLUSION**

7 IT IS HEREBY ORDERED that Plaintiff's Motion to Reconsider (ECF No. 45) is  
8 **DENIED**.

9 IT IS FURTHER ORDERED that Defendant's Motion to Strike (ECF No. 47) is  
10 **DENIED**.

11 DATED this 7th day of March, 2011.

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14 Gloria M. Navarro  
15 United States District Judge  
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EXHIBIT G

EXHIBIT G

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

ROBERT A. GREENE,

Plaintiff,

vs.

EXECUTIVE COACH AND CARRIAGE,

Defendant,

2:09-cv-466-GMN-RJJ

ORDER

Plaintiff's Motion for Leave to File First Amended Complaint (#82)

Plaintiff's Motion to Strike Defendant's Opposition (#103)

This matter comes before the Court on Plaintiff's Motion for Leave to File First Amended Complaint (#82) and Plaintiff's Motion to Strike Defendant's Opposition (#103). The Court also considered Defendant's Opposition to the Motion to Amend (#97) and Plaintiff's Reply (#95). The Court also heard oral argument on both motions.

**BACKGROUND**

This is a Federal Labor Standards Act case. Plaintiff, Robert G. Greene, alleges that he was denied compensation in violation of the FLSA by his employer while working as a limousine driver. He moves the Court to grant permission to correct his middle initial in the case caption from "A" to "G." He also asserts that he only recently became aware that he was actually employed by Jacob Transportation and not Executive Coach and Carriage. Consequently, he now seeks to add Jacob Transportation as a named defendant in the case. Greene also seeks to add James and Carol Jimmerson, owners of Jacob Transportation, as named defendants in the case. Finally, Greene asks the Court to reinstate his dismissed state law claims against Jacob Transportation. Greene also asks the Court to strike Defendant's Response (#97) as untimely.

Executive Coach opposes the motion.

## **DISCUSSION**

### **I. From “A” to “G”**

As a preliminary matter, the motion to correct the Plaintiff’s name by changing his middle initial from “A” to “G” is granted. However, the Court is astounded that such a small, housekeeping item would require a motion to the Court instead of a stipulation. At the hearing, counsel for Greene, Joshua D. Buck of the Thierman Law Firm, stated that he did not seek a stipulation from the Defendants because the litigation was contentious. There is nothing in the Federal Rules or anywhere else that states that opposing attorneys need not work with each other if the litigation is “contentious” and such an assertion is unreasonable. This part of the motion does nothing but multiply the proceedings. Defense counsel indicated that he had no objection to the change.

### **II. Whether James Jimmerson and Carol Jimmerson May be Added as Named Defendants**

Where an individual exercises control over the nature and structure of the employment relationship, or economic control over the relationship, that individual is an employer within the meaning of the FLSA, and is subject to liability. *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009). When determining whether an individual is an employer under the FLSA, the court looks at the whole activity rather than any factor in isolation. *Id.* Some factors to consider include whether the individual has significant control of day-to-day functions, the power to hire and fire, the power to determine salaries, and the responsibility of keeping employment records. *Id.*

When a party seeks to amend a pleading after the pretrial scheduling order’s deadline for amending the pleadings has expired, the moving party must first satisfy the stringent “good cause” standard of FED. R. CIV. P. 16(b), not the more liberal standard of FED. R. CIV. P. 15(a). *Amerisource Bergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 952 (9th Cir. 2006); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Contrary to FED. R. CIV. P. 15(a)’s relaxed amendment policy, FED. R. CIV. P. 16(b)’s “good cause” standard centers on the moving party’s diligence in pursuit of modification of the scheduling order.

1 *Johnson*, 975 F.2d at 609. Only after the moving party satisfies the good cause standard of FED.  
2 R. CIV. P. 16 does the Court examine whether the amendment is proper under FED. R. CIV. P.  
3 15(a). *Id.* at 607-08 (“the evaluation of good cause is not coextensive with an inquiry into the  
4 propriety of the amendment under Rule 15”). The good cause standard centers primarily on the  
5 diligence of the party seeking the amendment. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271,  
6 1294 (9<sup>th</sup> Cir. 2000). If the moving party was not diligent, the inquiry should end. *Zivkovic v. S.*  
7 *California Edison Co.*, 302 F.3d 1080, 1087 (9<sup>th</sup> Cir. 2002); *Johnson*, 975 F.2d at 609.  
8 Additionally, although FED. R. CIV. P. 16(b) does not require a showing of prejudice, the Court  
9 may consider whether prejudice would result to the party opposing amendment in making its  
10 good cause determination. *Coleman*, 232 F.3d at 1295.

11 Here, the deadline for amending pleadings was extended by Order (#81) to June 15, 2011.  
12 Plaintiff filed his Motion to Amend (#82) the same day the extension was granted, June 21, 2011.  
13 Therefore, even with the extension, Plaintiff’s Motion to Amend (#82) is untimely and must  
14 satisfy the good cause standard of FED. R. CIV. P. 16. That is, Greene must demonstrate that he  
15 was diligent in pursuing an amendment and complying with the Court’s schedule. He has not  
16 made such a showing.

17 Plaintiff merely asserts that “[b]ased on recent discovery, Plaintiff reasonably believes  
18 Jim Jimmerson and Carol Jimmerson exert sufficient control ... to create employer status under  
19 the FLSA.” Plaintiff’s Motion to Amend (#82) at 8 ll. 14-17. However, Greene provides no  
20 support for this assertion in his motion, either by affidavit or attachment of the recent discovery  
21 produced. Without this information, the Court cannot make a determination whether James  
22 Jimmerson or Carol Jimmerson qualify as employers under the FLSA utilizing the factors  
23 outlined in *Boucher*. Thus, Greene has failed to demonstrate good cause to amend the complaint  
24 in order to add the Jimmersons as named defendants.

### 25 **III. Whether Jacob Transportation May be Added as Named Defendant**

26 Greene asserts that it brought the current motion “immediately upon receiving  
27 documentary evidence indicating that Jacob was Plaintiff’s employer” and that Defendant “did  
28 not reveal any documentation indicating that Jacob was Plaintiff Greene’s employer until after

1 this Court denied its latest motion for summary judgment.” Plaintiff’s Motion (#82) at 6. The  
2 order to which Plaintiff refers, Order (#54), was issued March 4, 2011.

3 This assertion is somewhat baffling because on December 2, 2009, Greene executed a  
4 consent to sue in another FLSA case for the same time period as this case, involving the same  
5 claims in which Jacob Transportation is named as a defendant. Consent to Become Party  
6 Plaintiff, Attached as Exhibit 2 to Defendant’s Response (#97). Furthermore, Greene’s own  
7 employment application under the heading “Employment Application” contains the following:  
8 “Jacob Transportation Services, LLC DBA Executive Las Vegas CPCN 1062.” Employment  
9 Application at EC&C 0008, Attached as Exhibit 2 to Plaintiff’s Motion (#82). Furthermore, each  
10 one of his payroll stubs has Jacob Transportation at the top. Personal Earning Statements at  
11 EC&C 0001-6, Attached as Exhibit 2 to Plaintiff’s Motion (#82). With that it mind, it is difficult  
12 to believe that Greene did not know who he was employed by or that such a revelation came as  
13 an unexpected shock. This is information that Plaintiff and his attorneys should have known if  
14 they had been diligent in speaking with their own client and pursuing the case. Greene has failed  
15 to show good cause why his complaint should be amended because he was not diligent.  
16 If the moving party was not diligent, the inquiry ends. *Zivkovic v. S. California Edison Co.*,  
17 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson*, 975 F.2d at 609.

#### 18 **IV. State Law Claims Against Jacob Transportation**

19 Because Jacob Transportation cannot be added to the case, there is nothing that would  
20 justify a renewal or reinstatement of the state law claims. Even if those parties could be added as  
21 named defendants, the state law claims could not be included in the amended complaint because  
22 the state law claims have already been dismissed as a matter of law (Order #16). When the case  
23 was reassigned from Judge Robert C. Jones to Judge Gloria M. Navarro, Plaintiff filed a Motion  
24 to Reconsider (#45). That motion was denied in an Order (#55) where Judge Navarro held that  
25 “Judge Jones provided a thorough analysis of the statute in question and applied them to the facts  
26 of this case to rule that Plaintiff did not have a cause of action as a matter of law.” Order (#55) at  
27 3.

28 At the hearing, counsel for Greene, Joshua Buck, admitted that adding or substituting

Jacob Transportation in place of the current legal entity would not result in any factual differences. As there are no factual differences and Plaintiff cites or provides no newly discovered evidence or intervening change in the controlling law, there is no reason the state law claims should be renewed against Jacob Transportation.

“[F]utile amendments should not be permitted.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987). Plaintiff interprets *DCD Programs* as “recognizing that an amendment is futile only if it would clearly be subject to dismissal.” Plaintiff’s Motion (#82) at 10 ll. 12-13. Plaintiff’s motion for amendment is clearly subject to dismissal and is futile. It does nothing but unreasonably multiply the proceedings and does not facilitate “the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

#### **V. Plaintiff’s Motion to Strike (#103)**

This motion seeks to strike Defendant’s Response (#97) for being untimely. This is troubling, especially given the fact that Plaintiff’s own Motion to Amend (#82) is untimely. At the hearing, Plaintiff could not explain why his Motion (#82) should be entertained while Defendant’s Response (#97) should not. Doing so would not be just. The Court denied Plaintiff’s oral motion to file a supplemental written reply. Plaintiff’s Motion (#103) does nothing but unreasonably multiply the proceedings. It is a frivolous motion that should never have been filed.

#### **VI. 28 U.S.C. § 1927 Sanctions**

28 U.S.C. § 1927 states:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.

The key term in the statute is “vexatiously.” *In re Girardi*, 611 F.3d 1027, 1060 (9th Cir. 2010)<sup>1</sup>. Carelessly, negligently, or unreasonably multiplying the proceedings is not enough. *Id.* Ninth circuit case law is unclear as to whether a finding of mere recklessness alone is enough to

---

<sup>1</sup>This case was amended September 10, 2010. The amendment is factual only, and has no bearing on any holding in the case. *See In re Girardi*, — F.3d — ; 2010 WL 3517899 (9th Cir. 2010).

1 warrant sanctions or whether there must be a finding of subjective bad faith. *In re Girardi*, 611  
2 F.3d at 1061. However, it is clear that: (1) recklessly or intentionally misleading the court, or (2)  
3 a finding that the attorney recklessly raised a frivolous argument, are sufficient to impose  
4 sanctions under § 1927. *Id.* Therefore, if an argument is reckless and frivolous, § 1927 sanctions  
5 are justified. *Id.*

6 Greene's Motion to Amend (#82) and Motion to Strike (#103) are reckless, frivolous  
7 motions that are appropriate for § 1927 sanctions. In both cases, the relief sought by Plaintiff is  
8 either contrary to law, the facts or both. The non-frivolous part of the motion, correcting  
9 Plaintiff's middle initial, could have been done through stipulation rather than filing unnecessary  
10 motions on the court docket. Such practice is not acceptable.

11 Therefore, the Thierman Law Firm is liable for and will pay all of Defendant's costs,  
12 expenses, and attorney's fees related to Plaintiff's Motion to Amend (#82) and Plaintiff's Motion  
13 to Strike (#103). Defendant is to file an affidavit of costs within 7 days of this order. Plaintiff  
14 shall have 7 days to respond.

### 15 CONCLUSION

16 Based on the foregoing, and good cause appearing therefore,

17 IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File First Amended  
18 Complaint (#82) is **DENIED** in part and **GRANTED** in part. Plaintiff's motion is granted only  
19 as to the correction of Plaintiff's middle initial and is denied in all other respects.

20 IT IS FURTHER ORDERED that Plaintiff's Motion to Strike Defendant's Opposition  
21 (#103) is **DENIED**.

22 IT IS FURTHER ORDERED that Plaintiff shall be **SANCTIONED** pursuant to 29  
23 U.S.C. § 1927. The Thierman Law Firm is liable for and will pay all of Defendant's costs,  
24 expenses, and attorney's fees related to Plaintiff's Motion to Amend (#82) and Plaintiff's Motion

25 . . . .

26 . . . .

27 . . . .

28 . . . .

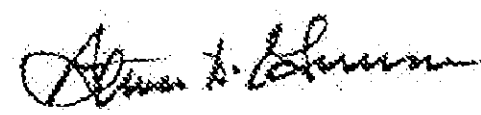
1 to Strike (#103). Defendant is to file an affidavit of costs within 7 days of this order. Plaintiff  
2 shall have 7 days to respond.

3 DATED this 31st day of August, 2011.

4  
5   
6 ROBERT J. JOHNSTON  
United States Magistrate Judge

# EXHIBIT H

# EXHIBIT H

  
CLERK OF THE COURT

1 **ORDER**  
2 MARC C. GORDON, ESQ.  
3 GENERAL COUNSEL  
4 Nevada Bar No. 001866  
5 TAMER B. BOTROS, ESQ.  
6 ASSOCIATE COUNSEL  
7 Nevada Bar No. 012183  
8 **YELLOW CHECKER STAR**  
9 **TRANSPORTATION CO. LEGAL DEPT.**  
10 5225 W. Post Road  
11 Las Vegas, Nevada 89118  
12 T: 702-873-6531  
13 F: 702-251-3460  
14 [mgordon@ycstrans.com](mailto:mgordon@ycstrans.com)  
15 Attorneys for Defendants  
16 NEVADA YELLOW CAB CORPORATION  
17 NEVADA CHECKER CAB CORPORATION  
18 NEVADA STAR CAB CORPORATION

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

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

14 Plaintiff,

15 vs.

16 NEVADA YELLOW CAB CORPORATION,  
17 NEVADA CHECKER CAB CORPORATION  
18 NEVADA STAR CAB CORPORATION

18 Defendants.

Case No.: A-12-661726-C

Dept. No.: XXVIII

Date of Hearing: July 30, 2012  
Time of Hearing: 9:00 a.m.

19 **ORDER DISMISSING CASE**

20 Defendants, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB  
21 CORPORATION and NEVADA STAR CAB CORPORATION, hereinafter ("YCS") by and through  
22 their undersigned attorneys, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., brought  
23 its "Motion to Dismiss" on for hearing on the 30<sup>th</sup> day of July, 2012. Marc C. Gordon, Esq., General  
24 Counsel of the Yellow Checker Star Transportation Legal Department, appeared on behalf of  
25 Defendants, and Leon Greenberg, Esq., having appeared on behalf of Plaintiffs at the hearing.  
26 Following arguments of counsel, due consideration by the Court of all briefs, pleadings and papers on  
27 file herein, and good cause appearing therefore,  
28

<input type="checkbox"/> Voluntary Dis	<input type="checkbox"/> Stip Dis	<input type="checkbox"/> Sum Jdgmt	<b>FINAL DISPOSITIONS</b> <input type="checkbox"/> Time Limit Expired <input type="checkbox"/> Dismissed (with or without prejudice) <input type="checkbox"/> Judgment Satisfied/Paid in full
<input type="checkbox"/> Involuntary (stat) Dis	<input type="checkbox"/> Stip Jdgmt	<input type="checkbox"/> Non-Jury Trial	
<input type="checkbox"/> Jdgmt on Arb Award	<input type="checkbox"/> Default Jdgmt	<input type="checkbox"/> Jury Trial	
<input checked="" type="checkbox"/> Mot to Dis (by def)	<input type="checkbox"/> Transferred		

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

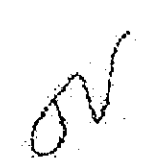
2 1. The Court agrees with the Defendants that the decision of the United States District  
3 Court of Nevada in Lucas v. Bell Trans., 2009 WL 2424557 (D. Nev. 2009), is sound and persuasive.  
4 The Nevada Supreme Court strongly disfavors implied repeal. The decision in Lucas v Bell Trans.,  
5 supra, although not binding authority on this Court, is persuasive authority, and therefore adopted by  
6 this Court.

7 2. The Court concludes that the adoption of the constitutional amendment by Nevada voters  
8 in 2006, now known as Article 15, Section 16 (the "Minimum Wage Amendment"), did not repeal  
9 NRS 608.250 by "implication." The Court finds there is another reasonable construction of the  
10 Minimum Wage Amendment that does not require the repeal of NRS 608.250 by implication. The  
11 Minimum Wage Amendment made absolutely no reference to NRS 608.250. The focus of the  
12 Minimum Wage Amendment was the actual minimum wage. The Minimum Wage Amendment's  
13 definition of "employee" is not in conflict with NRS 608.250's exceptions, which include taxi and  
14 limousine drivers. As a result, this Court holds that the Minimum Wage Amendment did not repeal  
15 NRS 608.250 or its exceptions. Because NRS 608.250(2)(e) expressly states that Nevada's minimum  
16 wage does not apply to taxicab and limousine drivers, Plaintiffs cannot sue for a violation of unpaid  
17 minimum wages under Nevada law. NRS 608.250(2)(e).

18 3. The Motion to Dismiss Plaintiffs' Complaint, brought by Defendants, NEVADA  
19 YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION and NEVADA  
20 STAR CAB CORPORATION, is granted in its entirety and with prejudice. Accordingly, this case is  
21 dismissed.

22 DATED this 30 day of August, 2012.

23  
24   
25 DISTRICT COURT JUDGE

26 RONALD J. ISRAEL  
27  
28 

Submitted by:

Approved as to Form by:

YELLOW CHECKER STAR  
TRANSPORTATION CO. LEGAL DEPT.

LEON GREENBERG P.C.

MARC C. GORDON, ESQ.

LEON GREENBERG, ESQ.

GENERAL COUNSEL

Nevada Bar No. 8094

Nevada Bar No. 001866

DANA SNIEGOCKI, ESQ.

TAMER B. BOTROS, ESQ.

Nevada Bar No. 11715

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Las Vegas, NV 89146

5225 W. Post Road

Attorney for Plaintiffs

Las Vegas, Nevada 89118

Attorneys for Defendants

NEVADA YELLOW CAB CORPORATION

NEVADA CHECKER CAB CORPORATION

NEVADA STAR CAB CORPORATION

# EXHIBIT I

# EXHIBIT I

REGISTER OF ACTIONS  
CASE No. A-12-668502-C

Barbara Gilmore, Plaintiff(s) vs. Desert Cab, Inc., Defendant(s)

§  
§  
§  
§  
§  
§

Case Type: Other Civil Filing  
Subtype: Other Civil Matters  
Date Filed: 09/17/2012  
Location: Department 3  
Conversion Case Number: A668502

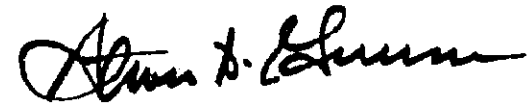
PARTY INFORMATION		
Defendant	Desert Cab, Inc.	Lead Attorneys Jeffrey A. Bendavid Retained 7023848424(W)
Plaintiff	Gilmore, Barbara	Leon M. Greenberg Retained 7023836085(W)

EVENTS & ORDERS OF THE COURT	
01/16/2013	<b>Motion to Dismiss</b> (9:00 AM) (Judicial Officer Herndon, Douglas W.) <i>Defendant, Desert Cab, Inc's Motion to Dismiss Plaintiff, Barbara Gilmore's Complaint</i>  <b>Minutes</b> 01/16/2013 9:00 AM - Leon Greenberg, Esq. present on behalf of Plaintiff Barbara Gilmore. Jeffrey Bendavid, Esq. present on behalf of Defendant Desert Cab, Inc. Argument by Mr. Bendavid and Mr. Greenberg. Statements by the Court, noting 608.250 is appropriate law and amendment does not change what 608.250 stands for. Additionally, Court stated that the same issue was raised previously in other cases. COURT ORDERED, motion GRANTED. Mr. Greenberg stated that the Yellow Cab case is on appeal and requested that Court stay this matter until a decision is made. COURT ORDERED, request DENIED  <a href="#">Return to Register of Actions</a>

# EXHIBIT J

# EXHIBIT J

ORDR  
MARIO P. LOVATO  
Nevada Bar No. 7427  
LOVATO LAW FIRM, P.C.  
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Las Vegas, Nevada 89129  
T: (702) 979-9047  
F: (702) 554-3858  
mpl@lovatolaw.com  
Attorney for Defendants  
Lucky Cab Co. and  
Lucky Transportation Co.



CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

MELAKU TESEMA, MINALE M. ABEBE,  
METASEBIA MILLION, and ACMETHAY  
GEBERSECASA, individually and on behalf of  
others similarly situated,

Plaintiffs,

vs.

LUCKY CAB CO. and LUCKY  
TRANSPORTATION, INC.,

Defendants.

CASE NO. A660700  
DEPT NO. 4

ORDER

On February 1, 2013, a hearing took place for Defendants' Motion to Dismiss Plaintiffs' "First Supplemental and Amended Complaint," the parties appearing through their respective counsel, the Court having reviewed the pleadings and papers, as well as the arguments made by counsel, and for good cause,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Defendants' Motion to Dismiss Plaintiffs' "First Supplemental and Amended Complaint" is GRANTED IN PART and DENIED IN PART such that:

1. Defendant's Motion to Dismiss Plaintiffs' First Claim for Relief (asserting minimum wage claims pursuant to the Nevada Constitution) and Plaintiffs' Second

1 Claim for Relief (asserting claims pursuant to NRS 608.040) is GRANTED such that the  
2 claims are DISMISSED against Defendants.  
3

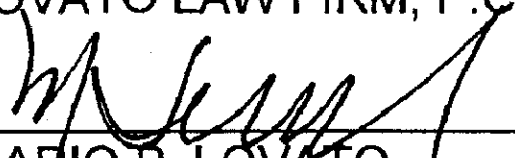
4 2. Defendants' Motion to Dismiss Plaintiffs' Third Claim for Relief (for Breach  
5 of Contract) is DENIED, as, pursuant to NRCP 12(b)(5), Plaintiffs have sufficiently  
6 ~~pleaded~~ <sup>pleaded</sup> the claim.

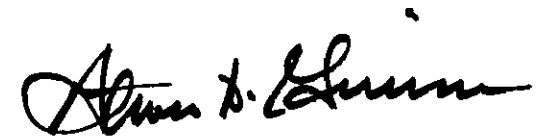
7 DATED: February 11, 2013.

8  
9  
10   
DISTRICT COURT JUDGE  RT

11 Submitted by:

12 LOVATO LAW FIRM, P.C.

13   
14 MARIO P. LOVATO  
15 Nevada Bar No. 7427  
16 Attorney for Defendants  
17 Lucky Cab Co. and  
18 Lucky Transportation Co.  
19  
20  
21  
22  
23  
24  
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CLERK OF THE COURT

**OPPM**

LEON GREENBERG, ESQ., SBN 8094  
DANA SNIEGOCKI, ESQ., SBN 11715  
Leon Greenberg Professional Corporation  
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Las Vegas, Nevada 89146  
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(702) 385-1827(fax)  
[leongreenberg@overtimelaw.com](mailto:leongreenberg@overtimelaw.com)  
[dana@overtimelaw.com](mailto:dana@overtimelaw.com)

Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL MURRAY, and MICHAEL  
RENO, Individually and on  
behalf of others similarly  
situated,

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC, and A  
CAB, LLC,

Defendants.

Case No.: A-12-669926-C

Dept.: I

**PLAINTIFFS' RESPONSE IN  
OPPOSITION TO DEFENDANTS'  
MOTION SEEKING  
RECONSIDERATION OF THE  
COURT'S FEBRUARY 8, 2013  
ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS**

Plaintiffs, by and through their attorney, Leon Greenberg Professional Corporation, submit this memorandum of points and authorities in response to defendants' motion seeking to have the Court reconsider its February 8, 2013 Order denying defendants' motion to dismiss the complaint.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**ARGUMENT**

**I. DEFENDANTS FAIL TO MEET THE STANDARD FOR RECONSIDERATION**

"Only in very rare instances in which *new issues of fact or law* are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Masonry & Tile*

1 *Contrs. v. Jolley, Urga & Wirth Ass'n*, 113 Nev. 737, 741 (Nev. 1997)  
2 (Emphasis in original), citing *Moore v. City of Las Vegas*, 92 Nev.  
3 402, 405, 551 P.2d 244, 246 (1976). Further, a district court may  
4 reconsider a previously decided issue *if substantially different*  
5 *evidence* is subsequently introduced or the decision is clearly  
6 erroneous. *Id.* (emphasis added), citing *Little Earth of United*  
7 *Tribes v. Department of Housing*, 807 F.2d 1433, 1441 (8th Cir.  
8 1986).

9 As discussed, *infra*, defendants present no new evidence. They  
10 simply rehash and represent the same arguments already rejected by  
11 the Court. Nor was the Court's prior order clearly erroneous.  
12 Indeed, the Court, after careful consideration of the Nevada  
13 Constitution's language, reached a decision which it voiced from the  
14 bench as one that it was "grieved" but obligated to promulgate. The  
15 Court, quite correctly, found it was duty bound to deny defendants'  
16 motion under the Nevada Constitution's clear and unambiguous  
17 language, as such document sets forth the supreme law of the State  
18 of Nevada which the Court is without discretion to vary. There is  
19 no basis for the Court to rehear or reconsider its prior Order.

20 **II. DEFENDANTS' CLAIM THE COURT'S DECISION RESTED**  
21 **UPON AN INCOMPLETE EXAMINATION OF THE "INTENT"**  
22 **OF NEVADA'S VOTERS IS WITHOUT MERIT**

23 **A. Plaintiffs' Counsel Never Argued an Evaluation**  
24 **Of the Voters' "Intent" Should Be Conducted**

25 Defendants misrepresent the argument presented by Plaintiffs to  
26 the Court. That argument rested solely upon the supremacy of the  
27 Nevada Constitution and the clear and unambiguous language of the  
28 same. Certain colloquy at the January 17, 2013 hearing discussed  
the background surrounding the passage of Article 15, Section 16, of

1 the Nevada Constitution ("Section 16"). That colloquy was  
2 irrelevant to the Court's decision. It has always been plaintiffs'  
3 counsel's contention that the "intent" examination urged by  
4 defendants is improper given the clear and unambiguous language of  
5 Section 16 and such constitutional provision must be enforced  
6 pursuant to its plain language. See, *Halverson v. Miller* 186 P.3d  
7 893, 897 (Nev. Sup. Ct. 2008); *Nevadans for Nevada v. Beers*, 142  
8 P.3d 339, 347 (Nev. Sup. Ct. 2006); and *Rogers v. Heller*, 18 P.3d  
9 1034, 1038, n. 17 (Nev. Sup. Ct. 2001).

10 **B. The Court Correctly Held an Examination of the**  
11 **"Intent" of Nevada's Voters is Improper Given**  
**The Clear and Unambiguous Language of Section 16**

12 The Court has correctly, and unequivocally, rejected  
13 defendants' now repeated argument that it should engage in an  
14 examination of the "intent" of Nevada's voters in enacting Section  
15 16:

16 An examination of the intent or purpose behind a constitutional  
17 provision is only proper when ambiguity exists in the language  
18 of the provision. If there is no ambiguity the provision must  
19 be applied in accordance with its plain meaning. See,  
20 *Halverson v. Miller* 186 P.3d 893, 897 (Nev. Sup. Ct. 2008);  
21 *Nevadans for Nevada v. Beers*, 142 P.3d 339, 347 (Nev. Sup. Ct.  
22 2006); and *Rogers v. Heller*, 18 P.3d 1034, 1038, n. 17 (Nev.  
23 Sup. Ct. 2001). The Court discerns no ambiguity in the  
24 language of Section 16 and none has been brought to its  
25 attention by defendants. Under such circumstances, for the  
26 Court to engage in an analysis of the intent behind Section 16,  
27 and by doing so override its express, clear, and unambiguous  
28 language, would be antithetical to our system of constitutional  
law. The people of the State of Nevada, through the democratic  
process, have made Section 16 the supreme law of the State of  
Nevada by placing its provisions in Nevada's Constitution.  
This Court is duty bound to enforce Section 16 and its clear  
language. Order at page 4.

Defendants make no argument that the foregoing reasoning by the  
Court was in error or overlooked any relevant or controlling  
principles of law. Indeed, they cite *no authority whatsoever*

1 supporting their claim the "intent" of the voters in enacting  
2 Section 16 is properly examined by this Court.

3 **III. DEFENDANTS' PROPOSED "INTENT" EXAMINATION**  
4 **WOULD ACTUALLY SUPPORT THE COURT'S DECISION**

5 The improper "intent" of the voters examination urged by  
6 defendants, if conducted, would not support a reconsideration or  
7 modification of the Court's Order. Defendants argue that the ballot  
8 initiative enacting Section 16 stated its purpose was to merely  
9 "raise the minimum wage for those workers entitled to receive it"  
10 under *then existing* Nevada state law. Yet there is nothing in the  
11 ballot initiative stating the "raise" of the minimum to be enacted  
12 by Section 16 was limited only to those workers *currently* "entitled  
13 to receive it." The language of Section 16 is clear, as the Court  
14 found, and it must be presumed the voters' "intent" was to enact,  
15 and have enforced, what Section 16 says.

16 Defendants' argument on the voters' intent makes a mockery of  
17 the democratic process. Section 16 means what it says. The voters  
18 of the State of Nevada, when they voted to place Section 16 in the  
19 Constitution, did so by marking ballots that set forth the language  
20 of Section 16 in its entirety. Defendants are urging this Court to  
21 rule that the voters of Nevada are too stupid, too feeble minded, too  
22 ignorant, to be trusted to read and understand what they voted for.  
23 Such an argument urges a complete abandonment of the cherished  
24 principle of *Marbury v. Madison* that has guided our country and  
25 system of law for over 210 years. Defendants advocate not for a  
26 "government of laws" which are clearly stated and enacted by the  
27 people, but a "government of men," e.g., of judicial guardians who  
28 are not limited or controlled by the Nevada Constitution's clear

1 language and who do whatever they decide is best for the populace.

2 **IV. DEFENDANTS' "JUDICIAL COMITY" ARGUMENT IS SPECIOUS**

3 Contrary to defendants' insinuations, all of the decisions that  
4 have recognized defendants' "taxi driver minimum wage exemption from  
5 Section 16" claim rely upon the decision of United States District  
6 Court Judge Jones in *Lucas v. Bell Transportation*, 2009 U.S. Dist.  
7 LEXIS 72549, (D. Nev. June 23, 2009). None of the subsequent  
8 decisions that defendants reference actually discuss or analyze the  
9 relevant issues, all simply adopt, without scrutiny, the holding in  
10 *Lucas*.

11 *Lucas* is not binding or even persuasive precedent. As this  
12 Court observed during oral argument, *Lucas* never engaged in any  
13 actual analysis of the language of Section 16. *Lucas* never  
14 identified any ambiguity in the language of Section 16 or explained  
15 why it was empowered to conduct an examination of the "intent" of  
16 the voters in enacting Section 16. As this Court correctly found,  
17 *Lucas* failed to recognize the supremacy of Section 16 and the  
18 holding of *Lucas* was in error.

19 That more than one jurist has deferred to the holding in *Lucas*  
20 does not make such holding correct. None of those jurists have  
21 actually scrutinized *Lucas* or explained what ambiguity exists in  
22 Section 16 that allows the "intent" examination which resulted in  
23 the holding of *Lucas*. Nor have any of those jurists explained how  
24 it can be found that the voters of Nevada "intended" anything other  
25 than what Section 16's clear language commands. Indeed, Judge Jones  
26 himself, subsequent to *Lucas* and in his decision in the related case  
27 of *Green v. Executive Coach & Carriage* (Ex. "D" of moving papers)  
28 observed: "When the language of a constitutional provision adopted

1 through the initiative process is clear on its face, Nevada courts  
2 will not go beyond that language in determining the voters' intent.  
3 *Miller v. Burk*, 188 P.3d 1112, 1120 (Sup. Ct. Nev 2008)." Yet  
4 despite correctly reciting such principle, and citing controlling  
5 authority establishing such principle, Judge Jones *never explains*,  
6 either in *Lucas* or *Greene*, how the language of Section 16 is not  
7 "clear on its face" or presents any ambiguity requiring scrutiny of  
8 the voters' intent. His failure to do so, and the failure of other  
9 jurists to do so, establishes that *Lucas* and the subsequent cases  
10 adopting its holding are in error.

11 **CONCLUSION**

12 WHEREFORE, defendants' motion should be denied in its entirety.

13 Dated this 18th day of March, 2013.

14  
15 Leon Greenberg Professional Corporation

16 By: /s/ Leon Greenberg  
17 LEON GREENBERG, Esq. NSB 8094  
18 Attorney for Plaintiff  
2965 South Jones Blvd Suite E4  
19 Las Vegas, Nevada 89146  
(702) 383-6085  
20  
21  
22  
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25  
26  
27  
28

CERTIFICATE OF MAILING

The undersigned certifies that on March 18, 2013, she served the within:

RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION SEEKING  
RECONSIDERATION OF THE COURT'S  
FEBRUARY 8, 2013 ORDER DENYING  
DEFENDANTS' MOTION TO DISMISS

by depositing the same in the U.S. mail, first class postage, prepaid, addressed as follows:

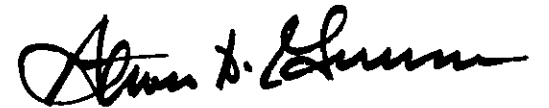
TO:

Esther C. Rodriguez, Esq.  
RODRIGUEZ LAW OFFICES, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, NV 89145

*/s/ Sydney Saucier*

---

Sydney Saucier



CLERK OF THE COURT

**MSTR**  
Esther C. Rodriguez, Esq.  
Nevada Bar No. 6473  
RODRIGUEZ LAW OFFICES, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
702-320-8400  
[info@rodriguezlaw.com](mailto:info@rodriguezlaw.com)  
*Attorneys for Defendant A Cab, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL MURPHY and MICHAEL RENO,  
Individually and on behalf of others similarly  
situated,

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC and A CAB, LLC,

Defendants.

Case No.: A-12-669926-C  
Dept. No. I

Hearing Date:

Hearing Time:

**DEFENDANT'S MOTION TO STRIKE AMENDED COMPLAINT**

Defendant A Cab, LLC, by and through its attorney of record, ESTHER C. RODRIGUEZ, ESQ., of RODRIGUEZ LAW OFFICES, P.C., and pursuant to NRCP 15(a), and EDCR 2.24 hereby respectfully moves this Honorable Court to strike Plaintiff's Amended Complaint. This Motion is based upon the pleadings and papers on file, the attached Memorandum of Points and Authorities, and any oral argument that may be entertained at the hearing of this Motion.

DATED this 25<sup>th</sup> day of March, 2013.

**RODRIGUEZ LAW OFFICES, P.C.**

/s/ Esther C. Rodriguez, Esq.  
Esther C. Rodriguez, Esq.  
Nevada Bar No. 6473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that Defendant will bring the foregoing Motion on for hearing before this Court on the 29 day of April <sup>In Chambers</sup>, 2013, or as soon thereafter as counsel may be heard.

DATED this 25<sup>th</sup> day of March, 2013.

**RODRIGUEZ LAW OFFICES, P. C.**

/s/ Esther C. Rodriguez, Esq.  
Esther C. Rodriguez, Esq.  
Nevada State Bar No. 006473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**POINTS AND AUTHORITIES**

**I.**

**ARGUMENT**

The subject of this case is an alleged class action on behalf of Plaintiffs and those similarly situated employed by Defendant A Cab, LLC (hereinafter "Defendant", "A Cab, LLC" and/or "A Cab"). The Plaintiffs, those named and those similarly situated, claim that they were employed by A Cab as taxicab drivers. Plaintiffs alleged that A Cab failed to pay the taxicab drivers minimum wage for "many or most" of the days worked. A Cab denies the allegations.

Plaintiffs filed their complaint on October 8, 2012. Defendant A Cab was served with a copy of the complaint, and timely filed its Motion to Dismiss on November 15, 2012. A Motion for Reconsideration is pending before this Court. As a responsive pleading has been filed, Plaintiffs cannot amend their Complaint without leave of court or written consent of the parties. Defendant A Cab does not consent to the amendment of Plaintiffs' complaint.

Furthermore, Plaintiffs failed to properly identify Plaintiff Michael Murphy in their complaint. Plaintiffs Michael Murphy and Michael Reno identified themselves as taxicab drivers for A Cab, LLC. However, A Cab, LLC has not employed anyone named Michael Murphy as a taxicab driver, or in any other capacity.

Subsequent to the filing of its Motion to Dismiss, A Cab has received pleadings in which the Plaintiffs have amended the caption to reflect Plaintiff “Michael Murray” in the place and stead of “Michael Murphy.” This has occurred without Plaintiffs having filed any documents with the court for permission to change the caption. When Defendant A Cab requested clarification from Plaintiffs as to the change, Plaintiffs indicated it was a “clerical error on the part of the District Court Clerk.” Defendant A Cab requested Plaintiffs use the proper caption for the matter as reflected in the Complaint they filed. Plaintiffs then, on January 30, 2013, unilaterally and without permission from the court, amended their complaint to identify “Michael Murray” in the place and stead of “Michael Murphy”.

Plaintiffs have failed to seek leave of this court for permission to amend its complaint to properly identify Michael Murray as a Plaintiff and the time to do so has expired. Pursuant to NRS 608.260, an action to recover damages for the difference between minimum wage must be commenced within two years.

As Michael Murray has not been an employee of Defendant A Cab, LLC for more than two years, the statutes of limitations identified in NRS 608.260 has expired. Plaintiffs attempt to circumvent the legal process by arbitrarily amending its complaint is in violation of NRCP 15(a), and NRS 606.260. As such, Plaintiffs’ Amended Complaint should be stricken and any claims Michael Murray may have had against Defendant A Cab should not be allowed to proceed.

Additionally, as Plaintiff Michael Murphy has never been an employee of Defendant A Cab, LLC, any claims he has made in this action for wages against A Cab must be dismissed.

## II.

### LEGAL ARGUMENT

#### **A. Plaintiffs have Violated NRCP 15(a) with the filing of their Amended Complaint as they have not sought leave of court for permission to do so.**

Pursuant to NRCP 15(a), a party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a party may amend the party’s pleading only by leave of court or by written consent of the adverse party. In this instance, Plaintiffs served their complaint, and Defendant A Cab, LLC filed its Motion to Dismiss on

1 November 15, 2012. As such, Plaintiffs may only amend their complaint upon leave of court or  
2 written consent of the adverse party. Defendant A Cab has not consented to the amendment of  
3 Plaintiffs' complaint.

4 Plaintiffs requested that Defendant A Cab stipulate to its amended complaint. The time for  
5 Michael Murray to commence an action against A Cab has expired pursuant to NRS 608.260.

6 Additionally, A Cab's Motion for Reconsideration is currently pending before this Court. As such,  
7 Defendant A Cab refused to stipulate to allow Plaintiffs to amend their complaint. Plaintiffs have  
8 not sought leave of court for permission to amend their complaint, but have instead chosen to  
9 circumvent the legal process by arbitrarily filing its amended complaint, and the amended  
10 complaint should be stricken.

11 **B. The Statute of Limitations for Michael Murray has Expired and his Claims should be**  
12 **Dismissed from this Action.**

13 The subject of this litigation is Plaintiffs' alleged claim for unpaid minimum wages.  
14 Pursuant to NRS 608.260, an action to recover damages for the difference between minimum wage  
15 must be commenced within two years.

16 If any employer pays any employee a lesser amount than the  
17 minimum wage prescribed by regulation of the Labor Commissioner  
18 pursuant to the provisions of NRS 608.250, the employee may, at any  
19 time ***within 2 years***, bring a civil action to recover the difference  
between the amount paid to the employee and the amount of the  
minimum wage. NRS 608.260 (Emphasis added.)

20 As such, the statutes of limitations for any claim Michael Murray may have against A Cab  
21 with regards to alleged unpaid minimum wages has expired as Michael Murray has not worked for  
22 A Cab for more than two years. Plaintiffs have failed to file a timely claim on behalf of Michael  
23 Murray against A Cab and have allowed the statute of limitations to expire. Plaintiffs are  
24 attempting to circumvent the statute of limitations and the statute for time limits in which to file a  
25 complaint, by arbitrarily amending its complaint to now add Michael Murray as a Plaintiff.

26 The statute of limitations for Michael Murray's claims for alleged unpaid minimum wages  
27 against A Cab, LLC has expired, and Plaintiffs' actions to circumvent this fact are in violation of  
28 NRCP 15(a), and NRS 608.260. Therefore, Plaintiffs' Amended Complaint should be stricken and

any claims Michael Murray may have had against Defendant A Cab should be dismissed.

**C. Michael Murphy has Never been Employed by A Cab and his Claims should be Dismissed from this Action.**

The subject of this litigation is Plaintiffs' alleged claim for unpaid minimum wages. However, Plaintiff Michael Murphy has never been employed by Defendant A Cab, LLC. As such, any claims Michael Murphy may try to assert against Defendant A Cab for unpaid wages should be dismissed.

**III.**

**CONCLUSION**

Based upon the foregoing, Defendant respectfully requests that the forgoing Motion be GRANTED, and that Plaintiffs' Amended Complaint be stricken, and that the claims of Michael Murphy and Michael Murray be dismissed, with prejudice.

DATED this 25<sup>th</sup> day of March, 2013.

**RODRIGUEZ LAW OFFICES, P. C.**

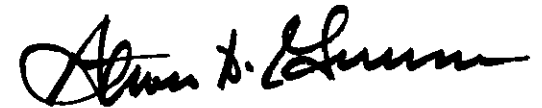
/s/ Esther C. Rodriguez, Esq.  
Esther C. Rodriguez, Esq.  
Nevada State Bar No. 006473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** a true and correct copy of the foregoing **Motion to Strike Plaintiffs' Amended Complaint** was served by placing same, postage prepaid, in the U.S. Mail this 25<sup>th</sup> day of March, 2013 to:

Leon Greenberg, Esq.  
Leon Greenberg Professional Corporation  
2965 South Jones Boulevard, Suite E4  
Las Vegas, Nevada 89146  
*Counsel for Plaintiff*

/s/ Susan Dillow  
An Employee of Rodriguez Law Offices, P.C.



CLERK OF THE COURT

**RIS**  
Esther C. Rodriguez, Esq.  
Nevada Bar No. 6473  
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10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
702-320-8400  
[info@rodriguezlaw.com](mailto:info@rodriguezlaw.com)  
*Attorneys for Defendant A Cab, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL MURPHY and MICHAEL RENO,  
Individually and on behalf of others similarly  
situated,

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC and A CAB, LLC,  
Defendants.

Case No.: A-12-669926-C  
Dept. No. I

Hearing Date: 4/1/13

Hearing Time: Chambers

**DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**

Defendant A Cab, LLC, by and through its attorney of record, ESTHER C. RODRIGUEZ, ESQ., of RODRIGUEZ LAW OFFICES, P.C., and pursuant to NRCP 12(b)(1) and (5), 60, and EDCR 2.24 hereby submits its Reply in Support of Motion for Reconsideration. This Reply is based upon the pleadings and papers on file, the attached Memorandum of Points and Authorities, and any oral argument that may be entertained at the hearing of this Motion.

DATED this 28 day of March, 2013.

**RODRIGUEZ LAW OFFICES, P.C.**



Esther C. Rodriguez, Esq.  
Nevada Bar No. 6473  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
*Attorneys for Defendant A Cab, LLC*

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Las Vegas, Nevada 89145  
Tel (702) 320-8400  
Fax (702) 320-8401

## POINTS AND AUTHORITIES

### A. Legal Standard for Reconsideration

Defendant has met the standard for reconsideration by supplying this Court with new facts (information on the underlying ballot and voting) as well as new law (the additional adverse decisions arising from the Eighth Judicial District Court). Rule 60 of the Nevada Rules of Civil Procedure indicates that a court may relieve the party from prior order based on a number of reasons, including newly discovered evidence. In their response, Plaintiffs indicate that the Court was “grieved” to reach its prior decision, but was obligated to do so. As this Court will recall, this was based on the Plaintiffs’ representations that the voters of this State had knowingly voted to abandon the current occupational exemptions from the minimum wage law. The Court indicated that it could not override the will of the people; that it must uphold the Constitution. This is exactly why the underlying ballot information has been provided to the Court for reconsideration of its decision which relied upon erroneous information.

Absolutely nothing was stated in the ballot questions, or the amendment itself, purporting to affect the exclusions from the minimum wage law. The following documents regarding the Amendment have been provided for the Court’s review:

1. the “Condensation”, which specifically and solely indicates: “Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?”
2. the “Explanation” of the Ballot Question;
3. the “Argument in Support of Question 6”;
4. the “Rebuttal to Argument in Support of Question No. 6”
5. the “Argument Against Question No. 6”
6. the “Rebuttal to Argument Against Question No. 6”
7. the Fiscal Note and Financial Impact

Not one of these statements addresses the repeal of the exemptions. Plaintiffs’ argument that the voters clearly and unambiguously voted to repeal the exemptions is not credible, given that that proposition is not addressed anywhere in the voting materials. Doesn’t it make sense that if this important change in the laws was the goal of the amendment (or even a repercussion of the

1 Amendment), that it would be addressed somewhere in the voting materials, the ballot, or the  
2 Amendment itself? It simply is not addressed.

3 It is the Plaintiffs who are stretching the Amendment to replace a long standing law of the  
4 State. The Amendment specifically states what it was doing: raising the amount of the minimum  
5 wage. The Amendment is limited to addressing the “employee” definition and how minors are to be  
6 treated. It does nothing to address the occupational “exemptions” of NRS 608.250(2). The ballot  
7 question and the attached materials that were sent to the voters repeatedly reference the “minimum  
8 wage” that was in existence. The ballot question, itself, stated that it sought to raise the amount of  
9 the minimum wage. The ballot question, the Amendment, and the ballot materials say nothing  
10 about the exemptions and made no effort change them. Nevada’s Minimum Wage Law has  
11 historically treated the “employee” definition section different from the “exemption” section.

12 The Minimum Wage Amendment does not provide new law stating occupational  
13 “exemptions” or otherwise addressing the issue of “exemptions.” As a result, the long-standing  
14 exemptions of NRS 608.250(2) continue in force.

15 Plaintiffs urge the Court to avoid the implied repeal analysis which every other Court has  
16 followed by arguing that the replacement language is unambiguous. The error in this argument is  
17 that Plaintiffs are mixing the occupational exemptions with the employee definition. There has  
18 been no outright repeal of the occupational exemptions; the 2013 Nevada Revised Statutes still  
19 contain language exempting “Taxicab and limousine drivers” from the minimum wage. See West’s  
20 Nevada Revised Statutes Annotated 26, Chapters 597 to 615, 2013 Supplementary Pamphlet  
21 attached as Exhibit A. This is the most current version of the statute. Any revisions to the law  
22 would be noted in this supplement.

23 **B. Judicial Commity and Plaintiffs’ misuse of numerous class action complaints.**

24 Plaintiffs argue that none of the federal or state judges have discussed or analyzed the  
25 relevant issues, but instead have simply adopted without scrutiny the holding in *Lucas*. Response,  
26 p. 5:7-10. Such an assertion is without basis. Each of the federal and state judges reviewed the  
27 pleadings and entertained extensive oral argument before concluding that the Plaintiffs’ matters  
28 must be dismissed. Plaintiffs’ arguments have been rejected by every judge encountering their

1 arguments in both the federal courts and the Eighth Judicial District Court, finding that the  
2 Constitutional Amendment did not impliedly repeal the long-standing exemptions outlined in the  
3 Nevada Revised Statutes.

4 Defendants raise the issue of judicial comity, which requires that other judges on the same  
5 level within the same district and jurisdiction should give deference to their colleague's ruling,  
6 because it is particularly important to this pressing issue. As pointed out in prior pleadings,  
7 Plaintiffs in this matter have already misused a peremptory challenge to remove Judge Israel  
8 seeking a different outcome, but also have acted improperly in their use of multiple class action  
9 complaints.

10 One of the primary requisites in filing a class action complaint is to prevent the risk of  
11 inconsistent or varying adjudications with respect to individual members of the class. *See* **NRCP**  
12 **23:**

13 An action may be maintained as a class action if the prerequisites of  
14 subdivision (a) are satisfied, and in addition:

15 (1) the prosecution of separate actions by or against individual members  
16 of the class would create a risk of

17 (A) **inconsistent or varying adjudications with respect to**  
18 **individual members of the class which would establish incompatible standards**  
19 **of conduct for the party opposing the class, (emphasis added) NRCP 23(b)(1)(A)**

20 Contrary to this legal principle, Plaintiffs have filed separate and numerous class action  
21 lawsuits in various state and federal forums hoping for an inconsistent adjudication to the prior  
22 adverse rulings they have already received. Instead of filing on behalf of limousine and taxicab  
23 drivers as a class (which is basically what Plaintiffs are arguing in each of their Complaints  
24 including this one ie that cab and limo drivers are now entitled to the minimum wage), Plaintiffs  
25 have filed separate class action lawsuits on an issue which has already been litigated and decided.

26 This issue has been repeatedly litigated, and is on appeal before the Nevada Supreme Court.  
27 With this present Complaint, Plaintiffs are improperly attempting to file yet another class action  
28 lawsuit to circumvent the adverse rulings they have already received in all other federal and state  
courts.

Defendant has laid out the numerous federal and state opinions in its Motion for

1 Reconsideration. To assert that none of these judges bothered to analyze the issues, but merely  
2 adopted the *Lucas* decision is of course insulting to the judiciary.

3 There is a June 24, 2009, opinion from Judge Robert Jones, attached as **Ex. B.**

4 There is an October 14, 2009, opinion from Judge Jones, attached as **Ex. C.**

5 There are four opinions in the *Greene v. Jacob Transportation Services, LLC* case from  
6 Judge Jones, Judge Navarro, and Magistrate Johnston, **Ex. D, E, F, G.**

7 There is an August 30, 2012 opinion from Judge Israel. **Ex. H.**

8 There is a January 16, 2013 opinion from Judge Herndon. **Ex. I.**

9 There is a February 14, 2013 opinion from Judge Earley. **Ex. J.**

10 Each of these opinions stems from the same issue that is now pled in this Court, namely that  
11 the cab driver exemption was repealed by the Amendment. Plaintiffs should be precluded from  
12 attempting to circumvent the prior decisions and the Supreme Court appeal with the improper use of  
13 this "class action" complaint.

#### 14 CONCLUSION

15 Based on the foregoing, Defendant respectfully requests that this Court reconsider its prior  
16 decision, and to enter an Order granting Defendant's Motion to Dismiss.

17 DATED this 28 day of March, 2013.

18 **RODRIGUEZ LAW OFFICES, P. C.**

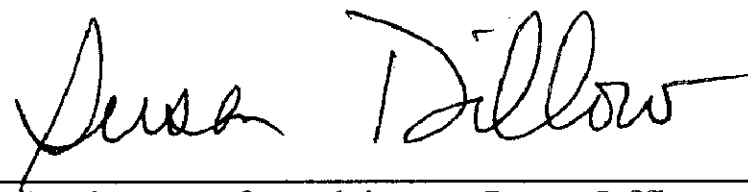
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21 Esther C. Rodriguez, Esq.  
22 Nevada State Bar No. 006473  
23 10161 Park Run Drive, Suite 150  
24 Las Vegas, Nevada 89145  
25 Attorneys for Defendant A Cab, LLC  
26  
27  
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **Reply in Support of Motion for Reconsideration** was served by placing same, postage prepaid, in the U.S. Mail this 28 day of March, 2013 to:

Leon Greenberg, Esq.  
Leon Greenberg Professional Corporation  
2965 South Jones Boulevard, Suite E4  
Las Vegas, Nevada 89146  
*Counsel for Plaintiff*



An Employee of Rodriguez Law Offices, P.C.

# EXHIBIT A

# EXHIBIT A

West's  
Nevada  
Revised Statutes Annotated  
26

Chapters 597 to 615  
Trade Regulations and Practices  
Labor and Industrial Relations

---

2013  
Supplementary Pamphlet

Replacing 2012 supplementary pamphlet  
supplementing 2000 main volume

THOMSON REUTERS  
**WESTLAW**

**Historical and Statutory Notes****2003 Legislation**

Laws 2003, c. 140, § 10, amended this section by substituting "This section does" for "The limitation set forth in subsection 1 and the other provisions in the section do" in Subsec. 7; inserting "any provision of", and substituting "or any regulation

adopted pursuant thereto" for "of this section" in Subsec. 8; adding new Subsec. 9; and making nonsubstantive changes.

**2009 Legislation**

Technical corrections were made to conform with Legislative Counsel Bureau revisions (2009).

**Research References****Treatises and Practice Aids**

Employment Coordinator Workplace Safety  
§ 5:172, Nevada.

Guide to Employment Law and Regulation 2d  
§ 49:8, Maximum Hour Law.

**MINIMUM WAGE****608.250. Establishment by Labor Commissioner; exceptions; penalty**

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest.

2. The provisions of subsection 1 do not apply to:

(a) Casual babysitters.

(b) Domestic service employees who reside in the household where they work.

(c) Outside salespersons whose earnings are based on commissions.

(d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 days of agricultural labor in any calendar quarter of the preceding calendar year.

(e) Taxicab and limousine drivers.

(f) Persons with severe disabilities whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

Added by Laws 1965, p. 696. Amended by Laws 1969, p. 724; Laws 1973, p. 1375; Laws 1975, pp. 500, 1582; Laws 1977, p. 1372; Laws 1987, p. 1190; Laws 1989, p. 1803; Laws 1993, p. 1803; Laws 2001, c. 90, § 9, eff. July 1, 2001.

**Historical and Statutory Notes****2001 Legislation**

Laws 2001, c. 90, § 9, amended this section by inserting "labor commissioner shall, in accordance with federal law, establish by regulation the" following "provided in this section, the" in Subsec. 1; substituting "." for "is \$3.35 per hour." at the end of the first sentence in Subsec. 1; substituting "those" for "such" in the second sentence of Subsec. 1; deleting the last sentence of Subsec. 1, which read as follows: "The minimum amount which may be paid to a minor is 85 percent of that

amount"; and substituting "established by the labor commissioner pursuant to the provisions of" for "provided in" following "wage less than that" in Subsec. 3.

**2007 Legislation**

Technical corrections were made to conform with Legislative Counsel Bureau revisions (2007).

**2009 Legislation**

Technical corrections were made to conform with Legislative Counsel Bureau revisions (2009).