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.	))))))))))))))	Supreme Court No. 77050 Electronically Filed Aug 05 2020 03:50 p.m. Elizabeth A. Brown Clerk of Supreme Court

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APPENDIX TO
APPELLANTS OPENING BRIEF
VOLUME III of LII

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

HUTCHISON & STEFFEN, PLLC

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Docket 77050 Document 2020-28839

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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 III 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:

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Attorneys for Respondents

DATED this 5th day of August, 2020.

/s/ Kaylee Conradi

_____

An employee of Hutchison & Steffen, PLLC

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CLERK OF THE COURT

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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

DEFENDANT'S OPPOSITION TO MOTION TO CERTIFY CASE AS CLASS ACTION PURSUANT TO NRCP 23 AND APPOINT A SPECIAL MASTER PURSUANT TO NRCP 53

Defendant A Cab, LLC ("A Cab"), by and through its attorney, Esther C. Rodriguez, Esq., of RODRIGUEZ LAW OFFICES, P.C., hereby submits this Opposition to Plaintiffs' Motion to Certify Case as Class Action Pursuant to NRCP 23 and Appoint a Special Master Pursuant to NRCP 53.

POINTS AND AUTHORITIES

I. Summary of Argument

This Court should deny this Motion in its entirety for the following reasons:

1. Plaintiffs have altogether failed to meet the minimum threshold for class certification; their allegations are unproven, and based only upon the self-serving declaration of a

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terminated employee (whose personnel file is riddled with dishonest acts/company theft).[1] Extensive evidence is not required for certification, but Plaintiffs must have a minimal showing of a claim, which have not achieved here. In fact, Plaintiffs have never even complied with NRCP 16.1 requiring the named Plaintiffs to put forth a calculation of damages.

2. A Cab's documented history demonstrates no minimum wage violations. The federal government (Department of Labor) found no minimum wage or record keeping violations for the time period of 2007-2009. A Cab subsequently entered into a settlement agreement with the Department of Labor for the next time period of 2010-2012. A settlement agreement is not a basis for certification.

3. The proposed class representatives are not appropriate as their individual claims may be barred by statute of limitations issues and other defenses. The proposed representatives consist of a former supervisor (not representative of the proposed class of drivers); an employee terminated for acts of dishonesty/theft; and a third person (Michael Saergent) who is conflicted as he already is a wage representative against another cab company. **Exhibit 1.**

4. Plaintiffs allege fraud which is not appropriate for certification (*Cummings v. Charter Hospital*, 111 Nev. 639 (1995)).

5. The factual allegations for unpaid hours are limited to these named Plaintiffs, thus limiting the number of possible claimants, making joinder not impracticable.

6. Plaintiffs do not present a justiciable controversy, as their claim is for unpaid hours cloaked as a claim for minimum wage. The proper forum for unpaid hours is the Nevada Labor Commissioner.

7. With this certification request and the request for a Special Master, Plaintiffs are attempting to circumvent the discovery rules and the current Orders of the Discovery Commissioner.

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[1] There is only 1 declaration from a named Plaintiff; a declaration from the other Plaintiff Michael Reno is conspicuously absent.

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II. Factual Background

Plaintiff Michael Murray and Michael Reno are former employees of Defendant A Cab, LLC ("A Cab"). Michael Murray worked for A Cab from September 6, 2008 to April 6, 2011, as a supervisor and a taxicab driver. Michael Reno worked for A Cab from June 16, 2010 to September 26, 2012 as a taxicab driver. These two employees allege a claim for unpaid work hours, under the guise of a minimum wage claim. (Plaintiffs' Complaint ¶ 14.) Their claim is founded upon the assertion that they were forced to write in fraudulent breaks which they claim to have never taken during their 12 hour work shifts. Declaration of Michael Murray, page 2, Exhibit E to Plaintiffs' Motion. As a result, when their respective paychecks are divided by 12 hours, the hourly rate of pay is decreased. Thus, each Plaintiff claims a violation of minimum wage, pursuant to Article 15, Section 16, of the Nevada Constitution. (Plaintiffs' Complaint ¶ 13 and 14.)

A Cab is one of the smallest taxicab companies in Las Vegas, serving primarily the westside residential section of the Las Vegas Valley. Until December 2014, the company was entirely restricted from serving the more lucrative areas of Las Vegas, including the Strip, McCarran Airport, and the Las Vegas Convention Center. A Cab now has a limited number of medallions that can service this area. A Cab is still a small business that is run by 1 owner, Creighton J. Nady, and has a limited number of employees, unlike some of the larger corporate cab companies have in Las Vegas, bearing in mind that class action certification is only appropriate when the class is so large it is difficult to ascertain and to manage; such is not the case here. But for the Plaintiffs' novel calculation of excluding break hours (without any proof other than the attached Plaintiff's declaration), Plaintiffs have no indication that any A Cab drivers have been underpaid. No discovery has yielded a shred of evidence to support the Plaintiffs' claims. Yet, here they are asking this Court for certification on a class-wide basis.

A Cab has always sought to comply with all federal and state regulations, including those pertaining to wage issues. Unlike the assertions made by the Plaintiffs in their motion, **A Cab has never been shown to be out of compliance with any federal or state wage regulation.**

A Cab indeed underwent an audit by the Department of Labor for the time period of 2007-2009. Unlike the wrongful characterization by the Plaintiffs, no wage violations were found.

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Exhibit B to Plaintiff's Motion. Plaintiffs argue that A Cab was reprimanded and admonished, when in fact their own exhibit demonstrates completely otherwise:

The Department of Labor report indicates:

"Section 6: **There were no minimum wage violations found**.

Section 7: **No overtime violations found**

Section 11: **No record keeping violations found**

Section 12: **The[y] *sic* were no Child Labor violations found during this investigation**." Exhibit B to Plaintiff's Motion, p. 2.

Shortly thereafter, A Cab subsequently underwent a second audit by the Department of Labor (DOL) for the same time period at issue in the Plaintiffs' complaint, October 2010 to October 2012. After several years of escalating costs associated with these back-to-back audits, A Cab chose to enter into an agreement with the DOL to resolve the second audit. The DOL agreed there would be no admission of any violation; and A Cab in fact recognized that any payments it made would go directly into the pockets of its drivers, which it was in favor of doing so. This settlement agreement is the basis for Plaintiffs' request to this Court for certification.

The exhibit relied upon by Plaintiffs as evidence of "a prior judgment" clearly states:

"Defendants agree and stipulate to enter into this Consent Judgment for the sole purpose of resolving disputed facts and neither admit nor deny the allegations contained in the Secretary's Complaint." Exhibit A to Plaintiff's Motion, p. 5, paragraph 11.

In fact, a Consent Judgment was only utilized as it is the Department of Labor's method to secure installment payments, when a lump sum payment is not received. **Exhibit 2, Affidavit of Creighton J. Nady.** Plaintiffs improperly argue that this settlement agreement entered into by A Cab establishes that the requested NRCP Rule 23(b)(3) certification should be granted. Plaintiff's Motion, page 4.

As this Court is aware, in June 26, 2014, the Nevada Supreme Court issued a decision in *Thomas v. Yellow Cab*, in which the Court for the first time gave guidance to the taxicab industry that the wage exemptions pertaining to taxidrivers were now extinguished by the passage of the

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amendment to the Nevada Constitution. Following that decision, A Cab again took steps to make sure its drivers were being paid in compliance with the new interpretation. It should be noted that what has not been interpreted is any guidance pertaining to when the extinguishment of the wage exemptions is effective. The cab industry has asserted in the other cases filed by Mr. Greenberg similar to this one that the effective date is June 26, 2014, when the Court issued its decision. Moreover, the specific wording issued by the Court supports that this indeed is the effective date, which would extinguish these particular two (2) Plaintiffs from asserting any claim against A Cab, as they were both terminated long before then. Michael Reno was terminated on September 26, 2012 for various reasons including continued cash drop shortages, violation of company policy, and insubordination. Exhibit 3, Reno personnel file excerpts. Michael Murray was terminated on April 7, 2011 for continued poor performance and low booking. Exhibit 4, Murray personnel file excerpts.

III. Points & Authorities

1. Plaintiffs have failed to make the basic requirements of NRCP 23 with the 2 named Plaintiffs.

NRCP 23, identical to its federal counterpart, governs the process of class certification. This rule provides that a class representative can sue on behalf of the class if (1) the class is so numerous that joinder is impractical, (2) questions of law or fact are common to class members, (3) claims and defenses of the representative are typical of those of the class, and (4) the representative will fairly and adequately protect the interests of the class. NRCP 23(a). *Meyer v. Eighth Judicial District Court*, 110 Nev. 1357, 1363 (1994). The court must also be satisfied that the elements of NRCP 23(b) are met. NRCP 23(b) generally deals with whether maintaining a class action is logistically possible and superior to other actions. *Id.*

As a prerequisite to class action certification, there must be questions of law and fact common to the class. This encompasses the three-fold requirement:

- that representative plaintiffs have an actionable claim sufficient to give rise to a justiciable controversy;
- that they be members of a class on whose behalf the action is maintained;

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- and that they assert a claim raising issues common to the class. *Penk v. Oregon State Bd. of Higher Ed.*, 93 F.R.D. 45. (D.C.Or.1981).

Plaintiffs have failed to demonstrate any of these three prerequisites: the representative plaintiffs do not have an actionable claim; they are not members of a potential class; and they do not assert a claim raising issues common to a class.

2. <u>Plaintiffs do not have an actionable claim sufficient to give rise to a justiciable controversy.</u>

A Cab has produced approximately 1800 pages in document production in this matter. All payroll information has been provided for the two named individuals Michael Reno and Michael Murray. These include the documents for each and every shift worked by Michael Reno and Michael Murray. All payroll information for these individuals have also been produced. This information all demonstrates that A Cab is in compliance with all payments to these individuals.

Plaintiffs have failed to establish an actionable claim for these 2 individuals under a claim for minimum wage. Per the attached declaration of Michael Murray to Plaintiffs' Motion, he is basing his claim on hours he asserts he worked and was not paid - this is not a claim for minimum wage, but rather for unclaimed hours worked. Plaintiff claims he was forced to record false "break time", and that "true hours" of work were not recorded. <u>Declaration of Plaintiff Murray</u>, Exhibit E to Plaintiff's Motion, page 2.

The State Labor Commissioner is the proper forum for a claim for unpaid hours, and has exclusive jurisdiction over the issue. **NRS 608.180**. Plaintiffs are attempting to circumvent a claim for unpaid hours, by instead adding these hours to the shift and dividing by an hourly rate to claim a payment for minimum wage per hour.

There is no Declaration from Plaintiff Michael Reno. Further, the documents pertaining to the newly named possible representatives (Michael Sergeant & Michael Brauchle) have never been produced pursuant to NRCP 16.1. It is improper for Plaintiffs to attach to a Motion, and for the Court to consider witnesses and documents not properly produced in the course of discovery.

. . .

. . .

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3. <u>The two named plaintiffs are not members of a potential class, nor representative of a class.</u>

The named class representative must himself satisfy all jurisdictional prerequisites before a class action can go forward. *Selman v. Harvard Medical School*, 494 F.Supp. 603 (S.D.N.Y.1980) affirmed 636 F.2d 1204. *See also*, *Red Apple Supermarkets, Inc. v. Deltown Foods, Inc.*, 419 F.Supp. 1256 (D.C.N.Y.1976).

Plaintiffs Murray and Reno may be barred by the statute of limitations. As admitted by the Plaintiffs in their Motion, the issue of statute of limitations and the effective date of the repeal of the minimum wage exceptions is currently before the Nevada Supreme Court. (Plaintiff's Motion, 12:27-13:3) Pending the decision of the Nevada Supreme Court, it is quite conceivable that these two named Plaintiffs will be dismissed as being time barred. As such, they cannot be representatives of a class.

In determining whether named plaintiffs adequately represent interests of class, a court is to determine whether conflicts of interest exist between representatives and rest of class members, and whether named plaintiffs' counsel will adequately protect interests of class. *In re VMS Securities Litigation*, 136 F.R.D. 466 (N.D.Ill.1991). This conflict with the potential class, also presents an issue for these two named Plaintiffs, as one (Murray) was a former road supervisor (not merely a driver); and the other was terminated for numerous dishonest acts. A court may consider a proposed class representative's honesty, conscientiousness, and other affirmative personal qualities in determining whether he would fairly and adequately protect the interests of the putative class. *In re Red Hat, Inc. Securities Litigation*, 261 F.R.D. 83 (E.D.N.C.2009). By each of these Plaintiffs' admissions in their declarations, they indicate they wrote in fraudulent reports of hours on their trip sheets. A review of various excerpts from Plaintiffs personnel records demonstrate numerous thefts from the company. **Exhibits 3 and 4**.

4. <u>These two Plaintiffs do not assert a claim raising issues common to a class.</u>

Plaintiffs' claims is based upon their assertions of fraud and strong-arming by A Cab's management. Commonality requirement for class certification obligates the named plaintiff to demonstrate that class members have suffered the "same injury," not merely that they have all

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suffered violation of same provision of law; claims must depend upon a common contention, and that common contention must be of such a nature that it is capable of classwide resolution, meaning that determination of its truth or falsity will resolve issue that is central to validity of each one of the claims in one stroke. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

A common course of conduct is not enough to show predominance, as would support class certification in a fraud action, because a common course of conduct is not sufficient to establish liability of the defendant to any particular plaintiff. *Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2nd Cir. 2002). Accordingly, Plaintiffs' claims that A Cab's procedure of forcing "false breaks" upon its drivers is not sufficient to support certification.

The presence of a common legal theory does not establish typicality for class certification purposes when proof of a violation requires individualized inquiry. *In re Teflon Products Liability Litigation*, 254 F.R.D. 354 (S.D.Iowa 2008). Commonality requirement for class certification requires that class members suffer common deprivation; it is not sufficient that class members share common circumstance. *Baldridge by Stockley v. Clinton*, 139 F.R.D. 119 (E.D.Ark.1991).

All time records pertaining to the named Plaintiffs have been produced by A Cab. With the documents pertaining to the named Plaintiffs, Plaintiffs cannot prove any type of wage violation. The only evidence supporting any type of violation are the self-serving declarations from the disgruntled former employees who claim they never took a break in a 12 hour shift. The federal government came in and investigated the work hours, and found no such evidence of 12 hour shifts, nor fraudulent breaks as alleged in the affidavits. See DOL report contained in Plaintiff's Motion, Exhibit B; as well as Exhibit 2, Affidavit of Creighton J. Nady. No violations have ever been issued to A Cab by the Nevada Labor Commissioner.

5. <u>There is no evidence of commonality and numerosity</u>

Under Rule 23(b)(3), a class may be certified if the district court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). The predominance inquiry focuses on "the relationship between the common and individual issues" and "tests whether proposed classes are

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sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir.1998) Rule 23(b)(3)'s predominance and superiority requirements were added "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (quoting Fed.R.Civ.P. 23(b)(3) Adv. Comm. Notes to 1966 Amendment). Accordingly, a central concern of the Rule 23(b)(3) predominance test is whether "adjudication of common issues will help achieve judicial economy."

In *Vinole v. Country Wide Home Loans, Inc.,* the Court held certification was improper for outside sales people (whose tasks and job duties were very carried out similar to independent taxi drivers). The Court indicated: Plaintiffs' claims will require inquiries into how much time each individual HLCs [Home Loan Consultants] spent in or out of the office and how the HLC performed his or her job; all of this where the HLC was granted almost unfettered autonomy to do his or her job. This must be considered along with the lack of issues subject to common proof that would actually ameliorate the need to hold several hundred mini-trials with respect to each HLC's actual work performance. Here, the district court held that analysis of the outside salesperson exemption precluded certification because that analysis would require an individualized inquiry into the manner in which each HLC actually carried out his or her work, and that this burden was not lessened by the presence of other issues susceptible to common proof. *Vinole v. Country Wide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009).

6. <u>Plaintiffs are seeking to circumvent the rules of Discovery, as well as the Orders of the Discovery Commissioner.</u>

Plaintiffs have never complied with NRCP 16.1 in providing a computation of any category of damages claimed. In May 2013, Plaintiffs merely stated they would supplement, but have never done so in two (2) years. **Exhibit 5**, Plaintiff's Disclosures Under Nev.R.Civ.P. 16.1. The amount sought by Plaintiff Murray or Plaintiff Reno has never been stated; Plaintiffs have never produced a calculation of damages for these 2 individuals as required by NRCP 16.1.

A Cab asserts these two individuals were properly paid, and Plaintiffs have failed altogether

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to provide a calculation of what they allege these two are owed. Other than a declaration from solely Murray saying he was "forced" to write in break times he never took, neither has ever claimed how many days they were not paid; how many hours they believe they were shorted, or how many dollars they believe they were shorted. Plaintiffs are required to demonstrate a sufficient amount before this Court certifies this matter as qualifying for class certification.

Finally, in their Motion, Plaintiffs continue to indicate that A Cab deliberately disobeyed this Court's prior Order. Such a representation is completely false. It is well-known that this issue of supplanting the minimum wage exemptions was before the Nevada Supreme Court after the District Court judges reached various conclusions. It was Plaintiffs' counsel who suggested that this matter be stayed pending the decision in *Thomas*. As such, a stay was agreed to and granted by this Court. To now argue that A Cab deliberately violated this Court's Order is disingenuous and unsupported. This matter was stayed, and A Cab has always taken all steps to remain in compliance with the Court Orders.

It is ironic that Plaintiffs would hurl this accusation, in that there are directly attempting to circumvent the Discovery Commissioner's Orders which are in place. In their Motion, Plaintiffs are seeking appointment of a Special Master to do the discovery that they themselves are refusing to do. The very same issues that serve as a basis for their request for a Special Master (review of trip sheets, computer database issues) are currently before the Discovery Commissioner. She has specifically admonished Plaintiffs that A Cab does not have to supply the requested information in the format they desire, but rather in the format in which it is kept. She has ordered depositions, and has a current return date of July 22, 2015, to continue to monitor the progress. It is apparent from Plaintiffs' current request, that they do not want to spend the fees and costs associated with complying with the Discovery Commissioner's Orders, but rather want their discovery done at the expense of Defendant.

IV. <u>Conclusion</u>

Plaintiffs have failed to demonstrate any type of wage violation with the named Plaintiffs. Plaintiffs have failed to demonstrate commonality and numerosity. A Cab's settlement to voluntarily pay the named drivers additional monies does not meet the threshold requirement for

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certification. Plaintiffs have not made any type of minimal showing that there is any wage violation at A Cab. In the cases relied upon by Plaintiffs, the court found that Plaintiffs must first make a prima facie showing of a claim. In this lawsuit, they have failed to do so.

Based upon the foregoing points and authorities, Defendant A CAB, LLC respectfully requests this Honorable Court to enter an Order denying Plaintiff's Motion to Certify Case as Class Action Pursuant to NRCP 23 and Appoint a Special Master Pursuant to NRCP 53.

DATED this 8th day of June, 2015.

RODRIGUEZ LAW OFFICES, P. C.

/s/ Esther C, Rodriguez, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 8th day of June, 2015, I electronically filed the foregoing with the Eighth Judicial District Court Clerk of Court using the E-file and Serve System which will send a notice of electronic service to the following:

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EXHIBIT 1

EXHIBIT 1

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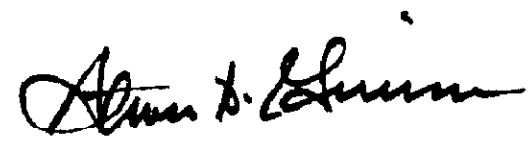

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Plaintiff, vs. HENDERSON TAXI, Defendant.	Case No.: A-15-714136-C Dept.: XVII **MOTION TO CERTIFY CLASS, INVALIDATE IMPROPERLY OBTAINED ACKNOWLEDGMENTS, ISSUE NOTICE TO CLASS MEMBERS, AND MAKE INTERIM AWARD OF ATTORNEY'S FEES AND ENHANCEMENT PAYMENT TO REPRESENTATIVE PLAINTIFF**

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

(1) Certifying this case as a class action pursuant to NRCP Rule 23(b)(3) for all taxi cab drivers employed by defendant from November 28, 2016 through the date of such Order for unpaid minimum wages owed under Nevada's Constitution, and certifying a subclass of such taxi drivers who have terminated their employment with the defendant on or after February 19, 2013 on the plaintiff's claims under NRS 608.040;

(2) Appointing the named plaintiff MICHAEL SARGEANT as class

EXHIBIT 2

EXHIBIT 2

AFFIDAVIT OF CREIGHTON J. NADY IN SUPPORT OF

OPPOSITION TO MOTION TO CERTIFY THIS CASE AS A CLASS ACTION

STATE OF NEVADA)
) s. s.
COUNTY OF CLARK)

CREIGHTON J. NADY, being first duly sworn, states:

1. I am the owner of A Cab, LLC ("A Cab"). A Cab is a local Las Vegas taxicab company, and was licensed in May 2001.

2. A Cab has always sought to comply with all State and Federal Regulations.

3. In April 2009, A Cab was audited by the Department of Labor for compliance with the Fair Labor Standards Act. The DOL Investigator spent time on the premises reviewing A Cab's documentation, and meeting with employees. After his investigation, the DOL indicated there were no minimum wage violations found. There were no record keeping violations found. There were no violations found pertaining to any "false breaks."

4. A Cab does not condone a driver falsifying his trip sheets with fraudulent hours and break times, as alleged by the Plaintiffs in this matter.

5. The Department of Labor subsequently conducted another audit throughout the taxicab industry in 2009 and 2010, including A Cab.

6. A Cab was audited for the time period October 2010 through October 2012. Several auditors were on site at A Cab, and took several years in reviewing thousands of documents and conducting interviews of employee drivers.

7. After escalating costs from these ongoing audits, and in an effort to bring the matter to conclusion, I agreed to settle the matter with the Department of Labor in September 2014. I was informed that any monies I paid towards the settlement agreement would go directly into the pockets of my drivers, which I was in favor of.

8. As A Cab was not in a financial position to make a lump sum payment of the agreed-upon amount $139,988.80, I agreed to make monthly installment payments to the DOL. As a result, the Department of Labor required that I enter into a Consent Judgment to secure the

Rodriguez Law Offices, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Tel (702) 320-8400
Fax (702) 320-8401

installment payments. This security required by the DOL is outlined in Paragraph 7 of the Consent Judgment.

9. I agreed to the Consent Judgment with the provision that there was no admission of liability, and that it was only entered into for the sole purpose of resolving disputed facts. This provision is outlined in Paragraph 11 of the Consent Judgment.

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

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 8th day of June, 2015.

CREIGHTON J. NADY

SUBSCRIBED and SWORN to before me this 8th day of June, 2015

Diana L. Hansen
NOTARY PUBLIC in and for the State of Nevada

DIANA L. HANSEN
Notary Public State of Nevada
No. 11-6244-1
My Appt. Exp. Sept. 29, 2015

Rodriguez Law Offices, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Tel (702) 320-8400
Fax (702) 320-8401

EXHIBIT 3

EXHIBIT 3

This is a notice of Termination from A Cab Taxi Service LLC.

Employee Name Michael A. Reno

Employee Number 3544

Date of Notice 9/28/12 **Hire Date** 6/16/~~12~~ 10

Date of Termination 9/26/12 **Last Day Worked** 9/26/12

Reason(s) for Termination:

Violation of company policy.
Employee handbook: pg13 B 2.
Insubordination. Countermanding or neglecting a supervisor's orders.

Voluntary _____ **Involuntary** X

Eligible for re-hire? NO

Employee Signature _____

Supervisor _____ **Final Check Due** 10/1/12

Operations Manager Bob McCullough

General Manager Jim Bangle

TAXI DRIVER TERMINATION FORM

Date: Friday, September 28, 2012

Company Name: A Cab Taxi LLC

Name of Driver: Michael A. Reno

T.A.#: 17799

Date of Termination: Wednesday, September 26, 2012

Last Day Worked: Wednesday, September 26, 2012

Reason for Termination:

Violation of company policy.
Employee handbook: pg 13 B2.
Insubordination, Countermanding or neglecting a supervisor's orders.

Submit Form Reset

Date: 1-5-2012

A Cab Taxi Company, LLC

NOTICE OF UNSATISFACTORY PERFORMANCE: LOW BOOK

Name: Michael Reno

T.A. # 17799

On 1-3-2012 your shift average book was $159.23. Your book for the day was $123.10. You were 22.7% below the average.

This level of productivity is unacceptable and immediate improvement is required. Continued performance at this level may result in further disciplinary action including but not limited to suspension and or termination of your employment. This letter will be kept in your personnel file. If I can be of any assistance in solving this problem please don't hesitate to make an appointment to see me.

Sam Wood

This letter will be kept in your personnel file.

Employee Signature: Michael Reno **Date:** 1/6/2012

Assistant General Manager: Sam Wood **Date:** 1-5-12

Operations Manager:
Or
General Manager: _____ **Date:** 1-6-12

A Cab 00356

CAB TAXI

This is a notice of an infraction of company policy.

Date 9-12-12

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 9-11-12

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

Standards of conduct:

...

V. Failure to turn in entire book at the end of your shift. Failure to do so may result in immediate termination.

Amount Due: $ 175.00

Amount Dropped: $ 174.00

- Difference $ 1.00
- $5.00 +10% $ 1.00
- Total $ 2.00 Amount to be deducted from paycheck.

Employee Signature Mike Reno

Verifier Signature Nancy R

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 3-17-12

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 3-16-12

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 234.00

Amount Dropped: $ 214.00

- **Difference** $ 20.00
- **$5.00 +10%** $ N/A
- **Total** $ 20.00 **Amount to be deducted from paycheck.**

Employee Signature Michael Reno

Verifier Signature Nancy D

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 11/23/12

Employee Name Reno, michael

Employee Number 17799

Date of Infraction 11/22/12

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. *Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.*

Amount Due: $ 144.00

Amount Dropped: $ 140.00

- **Difference** $ 4.00
- **$5.00 +10%** $ 5.00
- **Total** $ 9.00 **Amount to be deducted from paycheck.**

Employee Signature Michael Reno

Verifier Signature

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 9-24-11

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 9-23-11

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 229.00

Amount Dropped: $ 158.00

- **Difference** $ 71.00
- **$5.00 +10%** $ 12.00
- **Total** $ 83.00 **Amount to be deducted from paycheck.**

Employee Signature Michael Reno

Verifier Signature Nancy D

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 9-4-11

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 9-3-11

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 197.00

Amount Dropped: $ 191.00

- **Difference** $ 6.00
- **$5.00 +10%** $ 6.00
- **Total** $ 12.00 **Amount to be deducted from paycheck.**

Employee Signature Michael Reno

Verifier Signature Nancy D

General Manager Jim Haight

CAB TAXI

This is a notice of an infraction of company policy.

Date 7-30-11

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 7-29-11

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. *Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.*

Amount Due: $ 168.00

Amount Dropped: $ 166.00

- **Difference** $ 2.00
- **$5.00 +10%** $ 1.00
- **Total** $ 3.00 **Amount to be deducted from paycheck.**

Employee Signature

Verifier Signature Nancy D

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 6-18-11

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 6-17-11

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 180.00

Amount Dropped: $ 170.00

- **Difference** $ 10.00
- **$5.00 +10%** $ 6.00
- **Total** $ 16.00 **Amount to be deducted from paycheck.**

Employee Signature Michael Reno

Verifier Signature Nancy D

General Manager [illegible]

CAB TAXI

This is a notice of an infraction of company policy.

Date 2-26-11

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 2-25-11

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. *Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.*

Amount Due: $ 125.00

Amount Dropped: $ 124.00

- **Difference** $ 1.00
- **$5.00 +10%** $ 6.00
- **Total** $ 7.00 **Amount to be deducted from paycheck.**

Employee Signature _____

Verifier Signature _____

Notified General Manager on 2-26-11 (date) at 3:00pm (time).

General Manager _____

CAB TAXI

This is a notice of an infraction of company policy.

Date 12-26-10

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 12-25-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. *Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.*

Amount Due: $ 56.00

Amount Dropped: $ 54.00

- **Difference** $ 2.00
- **+10%** $ 1.00
- **Total** $ 3.00 **Amount to be deducted from paycheck.**

Employee Signature

Verifier Signature

Notified General Manager on 12-26-10 (date) at 3:30pm (time).

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 12-20-10

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 12-19-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 54.00

Amount Dropped: $ 45.00

- Difference $ 9.00
- +10% $ 1.00
- Total $ 10.00 Amount to be deducted from paycheck.

Employee Signature _____

Verifier Signature Diana Hansen

Notified General Manager on 12-20-10 at _____.
(date) (time)

General Manager _____

A Cab 00388

Fror

Ar.

This is a notice of an infraction of company policy.

Date 12-9-10

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 12-8-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 152.00

Amount Dropped: $ 140.00

- **Difference** $ 12.00
- **+10%** $ 1.00
- **Total** $ 13.00 **Amount to be deducted from paycheck.**

Employee Signature _____

Verifier Signature _____

Notified General Manager on 12-9-10 (date) at 3:30pm (time)

General Manager _____

A Cab 00391

CAB TAXI

This is a notice of an infraction of company policy.

Date 12-10-10

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 12-9-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 176.00

Amount Dropped: $ 173.00

- **Difference** $ 3.00
- **+10%** $ 1.00
- **Total** $ 4.00 **Amount to be deducted from paycheck.**

Employee Signature _____

Verifier Signature _____

Notified General Manager on 12-10-10 (date) at 3:15pm (time)

General Manager _____

CAB TAXI

This is a notice of an infraction of company policy.

Date 10-24-10

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 10-23-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 202.00

Amount Dropped: $ 193.00

- Difference $ 9.00
- +10% $ 1.00
- Total $ 10.00 Amount to be deducted from paycheck.

Employee Signature

Verifier Signature

Notified General Manager on 10-24-10 (date) at 4:30pm (time)

General Manager

A Cab 00396

AA000431

CAB TAXI

This is a notice of an infraction of company policy.

Date 9-19-10

Employee Name Michael Reno

Employee Number 17799

Date of Infraction 9-18-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 176.00

Amount Dropped: $ 167.00

- Difference $ 9.00
- +10% $ 1.00
- Total $ 10.00 Amount to be deducted from paycheck.

Employee Signature Mike Reno

Verifier Signature Nancy D

Notified General Manager on 9-19-10 (date) at 4:15 pm (time)

General Manager

EXHIBIT 4

EXHIBIT 4

CAB TAXI

This is a notice of Termination from A Cab Taxi Service LLC.

Employee Name Michael P. Murray

Employee Number 2018

Date of Notice 4/7/11 **Hire Date** 9/6/08

Date of Termination 4/7/11 **Last Day Worked** 4/6/11

Reason(s) for Termination:
Poor performance.
Low book.

Voluntary _____ **Involuntary** X

Eligible for re-hire? NO

Employee Signature _____ _____

Supervisor _____ **Final Check Due** 4/11/11

Operations Manager Bob McCullough

General Manager Jim Hedges

NEVADA TAXI CAB AUTHORITY

Date:	4/7/2011
Company Name:	A Cab Taxi LLC
Name of Driver:	Michael P. Murray
T.A. #:	24453
Company Representative Submitting Notice:	Diana Hansen
Date of Termination:	4/7/2011
Last Date Worked:	4/6/2011
Reason for Termination:	Poor performance. Low book.

Taxicab Authority
1785 E. Sahara Avenue, Suite 200
Las Vegas, NV 89104
(702) 486-6532
FAX: (702) 486-7350
web site: taxi.state.nv.us

NOTICE OF UNSATISFACTORY PERFORMANCE

Date: 3-18-2010

Employee Name: Michael Murray
Employee Number: 2018

Performance Related Problem: (Be Specific)
On 3-17-10 Mr. Murray failed to write up an incident report when a rock was thrown at cab 1301. The rock made damages severe enough that the windshield of cab 1301 had to be replaced.

Corrective Action:
It is an A Cab policy for road supervisors to write up all incidents in a report. In the future Mr. Murray must follow these procedures.

Disciplinary Action Taken:
Mr. Murray will receive a written warning. Any further problems of this type may result in a demotion from the road supervisor position.

Assistant General Manager: _____

Operations Manager: _____

Employee Signature: _____

Warning

Your level of productivity is unacceptable. Out of 25 you worked 5. You are suspended until you see Sam Wood about this matter. Monday thru Friday 9:00am to 5:00pm

Employee Signature: _____

Warning

Warning

Your level of productivity is unacceptable. On [illegible] you booked $ [illegible]. You are suspended until you see Sam Wood about this matter. Monday thru Friday 9:00am to 5:00pm

Employee Signature: [illegible]

CAB TAXI

This is a notice of an infraction of company policy.

Date 2-10-11

Employee Name Michael Murray

Employee Number 24453

Date of Infraction 2-9-11

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 129.00

Amount Dropped: $ 127.00

- **Difference** $ 2.00
- **$5.00 +10%** $ 6.00
- **Total** $ 8.00 **Amount to be deducted from paycheck.**

Employee Signature Mike Murray

Verifier Signature Nancy D

Notified General Manager on 2-10-11 (date) at 4:00pm (time).

General Manager Jon Haight

CAB TAXI

This is a notice of an infraction of company policy.

Date 1-5-11

Employee Name Michael Murray

Employee Number 24453

Date of Infraction 1-4-11

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 112.00

Amount Dropped: $ 111.00

- **Difference** $ 1.00
- **$5.00 +10%** $ 6.00
- **Total** $ 7.00 **Amount to be deducted from paycheck.**

Employee Signature _____

Verifier Signature Nancy D

Notified General Manager on 1-5-11 (date) at 4:30pm (time).

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 1-1-11

Employee Name Michael Murray

Employee Number 24453

Date of Infraction 12-31-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. *Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.*

Amount Due: $ 179.00

Amount Dropped: $ 170.00

- **Difference** $ 9.00
- 5.00 **+10%** $ 1.00
- **Total** $ 10.00 **Amount to be deducted from paycheck.**

Employee Signature

Verifier Signature

Notified General Manager on 1-1-11 (date) at 4:00pm (time)

General Manager

CAB TAXI

This is a notice of an infraction of company policy.

Date 10-28-10

Employee Name Micheal Murray

Employee Number 24453

Date of Infraction 10-27-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.

Amount Due: $ 133.00

Amount Dropped: $ 132.00

- Difference $ 1.00
- +10% $ 1.00
- Total $ 2.00 Amount to be deducted from paycheck.

Employee Signature _____

Verifier Signature Nancy [illegible]

Notified General Manager on 10-28-10 (date) at _____ (time).

General Manager [illegible]

CAB TAXI

This is a notice of an infraction of company policy.

Date 8-14-10

Employee Name Micheal Murray

Employee Number 24453

Date of Infraction 8-13-10

Infraction:

The employee named above has committed an infraction of the A Cab company policy regarding cash drop procedure as stated in the Employee New Hire Package:

7. Cash, Coupons and Charges:

...

G. *Drivers are required to turn their entire book at the end of every shift. Failure to do so may result in immediate termination.*

Amount Due: $ 154.00

Amount Dropped: $ 106.00

- **Difference** $ 48.00
- **+10%** $ 5.00
- **Total** $ 53.00 **Amount to be deducted from paycheck.**

Employee Signature _____

Verifier Signature Nancy D

Notified General Manager on 8-14-10 (date) at _____ (time)

General Manager

EXHIBIT 5

EXHIBIT 5

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DANA SNIEGOCKI, ESQ., SBN 11715
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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' DISCLOSURES UNDER NEV. R. CIV. P. 16.1**

Plaintiffs, as and for their compliance with the provisions of Nev. R. Civ. P. 16.1hereby state as follows:

I. The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information:

In response, plaintiffs identify the following persons:

Michael Murray, Michael Reno, and all other persons employed by the defendants who currently perform or who, in the past, have performed work as taxi cab drivers for the defendants. Plaintiffs reserve their right to supplement this response as discovery progresses.

II. A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b):

In response, the plaintiffs identify the following materials, which are bates

labeled and produced herewith:

2011 W2; Employee Handbook; Payroll Detail Report; Inspection Form; and Copies of Paystubs. The foregoing documents are produced herewith and labeled MURRAY RENO 000001-000091.

III. A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, no privilege or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered:

Because this case is filed as a class action, and plaintiffs lack records which are currently in defendants' possession, plaintiffs are unable to provide an accurate or good faith estimate of the damages at issue in this case at this time. Plaintiffs are only able to state that their damages will be based upon the difference between the amount of wages paid to the plaintiffs and putative plaintiff class members each day and the amount of wages such persons were entitled to under the minimum wage provision of Article 15, Section 16 of the Nevada Constitution. Plaintiffs' damages also include a penalty of up to 30 days' continuing wages for defendants' alleged failure to pay all wages owed upon termination of each plaintiff's and putative class members' employment. Plaintiffs reserve the right to supplement this response after necessary and relevant discovery has been exchanged between the parties such that plaintiffs are in a position to provide an accurate and good faith computation of damages.

Dated: May 23, 2013

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*
Leon Greenberg, Esq.
Nevada Bar No.: 8094
2965 South Jones Boulevard - Suite E4
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Plaintiff

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CLERK OF THE COURT

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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' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY THIS CASE AS A CLASS ACTION PURSUANT TO NRCP RULE 23 AND APPOINT A SPECIAL MASTER PURSUANT TO NRCP RULE 53**

Plaintiffs, through their attorneys, Leon Greenberg Professional Corporation, hereby submit this reply to defendants' opposition to plaintiffs' motion to certify this case as a class action and appoint a special master pursuant to NRCP Rule 53.

OVERVIEW OF REPLY

Defendants' opposition makes disjointed, irrelevant, substantially unexplained, and untrue assertions of law and fact. Among their most spectacularly incorrect assertions is that a federal court judgment's express finding that defendants owe $139,834.80 in unpaid minimum wages under the federal Fair Labor Standards Act (the "FLSA") to 430 taxi drivers was actually a "no admission" settlement. Defendants' opposition is also notable for its failure to dispute numerous facts detailed in the moving papers, including defendants' failure, as documented in their own payroll records, to comply with this Court's Order of February 2013 finding that they

must pay minimum wages to their taxi drivers. Such silence by defendants establishes that the facts set forth in the moving papers are correct and accurate and that the plaintiffs' motion should be granted in its entirety.

ARGUMENT

I. DEFENDANTS MAKE A LITANY OF UNSUPPORTED, IRRELEVANT AND UNEXPLAINED COUNTER ARGUMENTS

Rather than actually address, and dispute or rebut the facts and law marshaled by plaintiffs in support of their motion, defendants summarize at pages 1-2 of their opposition seven "counter-arguments" which consist almost entirely of defendants' unsupported and self serving conclusions. Even though all such counter-arguments are irrelevant and unworthy of consideration, plaintiffs address each such argument.

A. Defendants' first counter-argument that plaintiffs fail to make a "minimal showing of a claim" because their "allegations are unproven" is untrue and relies upon a non-existent legal standard.

It has long been established that class certification under Rule 23 is considered independently of the underlying merits of the plaintiffs' claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The question properly examined is not whether the plaintiffs' allegations are "proven," as defendants assert without citation to any legal authority, but whether the various criteria of Rule 23 are satisfied.

To the extent that defendants are seeking to improperly conflate Rule 23's requirements into some sort of "proof of allegations" test, the allegations of the plaintiffs are established by the documentary evidence in the moving papers, evidence that defendants *have not disputed*. *See,* Ex. "M" and page 20 of moving papers, establishing minimum wage violation for plaintiff Michael Murray in March of 2011 and Ex. "G" and pages 11-12 of moving papers, establishing minimum wage violation in 2014 for class member/alternative class representative Michael Sargaent.

B. Defendants' second counter-argument that there is no "documented history" of minimum wage violations by defendants and only a "settlement agreement" with the United States Department of Labor ignores the truth.

While there is no need to establish any "documented history" of minimum wage violations by the defendants to grant class certification, such history is incontrovertibly established in this case by the federal court's judgment. *See,* Ex. "A" and pages 7-8 of the moving papers. The language of that judgment expressly finds and irrefutably establishes that defendants have been found to owe $139,834.80 in unpaid minimum wages to 430 of their taxi drivers, including the named plaintiffs in this case. The defendants' assertion there is no such finding, only a "non-admission of liability" settlement agreement requiring a certain payment denies the existence of the judgment and its express findings.

That defendants' principal now insists in a declaration (Ex. "2" at ¶¶ 8-9 of their opposition) that he was required to enter into a consent judgment with the United States Department of Labor ("USDOL") as "security" to make settlement installment payments with the USDOL is irrelevant. Similarly, his insistence he only agreed to the consent judgment "with the provision there was no admission of liability" and his understanding of the legal ramifications and findings of that judgment are irrelevant. The language of the judgment speaks for itself and this Court is bound by its findings.

C. Defendants' third counter-argument that the proposed class representatives are unsuitable is almost entirely unexplained and supported by nothing but speculation and defendants' own self-serving claims.

Defendants assert that because plaintiff Murray also worked at certain times as a road supervisor for defendants, and not just as a taxi driver, he has a conflict with the class and is not a suitable class representative. They offer no explanation of *why* such a conflict exists, they simply assert it does and that Court must so recognize such conflict and disqualify him from representing the class. Such unexplained assertion is

specious and unworthy of even perfunctory consideration by the Court, much less the careful scrutiny the Court must give to any defendant's claim that a proposed class representative is personally incompetent. *See, Kline v. Wolf*, 702 F.2d 400, 402 (2nd Cir. 1983) (A "court must be wary of a defendant's efforts to defeat representation of a class on grounds of inadequacy when the effect may be to eliminate any class representation.") *See, also, Grider v. Keystone Health Plan*, 2006 WL 3825178 (E.D. Pa. 2006), citing *Stewart v. Associates Consumer Discount Company*, 183 F.R.D. 189, 196-197 (E.D .Pa.1998), observing that while "the burden of establishing the class requirements rests with plaintiffs" a defendant "bears the burden of proving plaintiffs' inadequacy" to serve as a class representative, and further noting that making such an adequacy determinations based upon assertions by a defendant "is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house," citing and quoting *Eggleston v. Chicago Journeyman Plumbers*, 657 F.2d 890, 895 (7th Cir.1981).

Defendants speciously assert plaintiff Reno is also unfit to act as a class representative because he has been accused by defendants of committing prior dishonest acts while employed by them. *See, CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011)(Warning that defendants should not be allowed "to derail legitimate class actions by conjuring up trivial credibility problems;" that "few plaintiffs come to court with halos above their heads; fewer still escape with those halos untarnished;" and a defendant seeking to disqualify a class representative based upon their lack of integrity "must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims.") and numerous other cases.

Defendants' assertion that Murray and Reno's claims "may be barred by the

statute of limitations" is almost entirely unexplained. They incorrectly assert the moving papers discuss how "the issue of the statute of limitations and the effective date of the repeal of the minimum wage exceptions is currently before the Nevada Supreme Court." The moving papers note the former but says absolutely nothing about the latter, which is a ridiculous and unexplained assertion by defendants that until the *Thomas v. Nevada Yellow Cab* decision was issued in June of 2014 the Nevada Constitution's minimum wage requirements had no force or effect upon the defendants or Nevada's taxi industry. Yet even if a two year statute of limitations (the shortest one possible) applies to the class claims both plaintiffs present claims within that statute of limitations. This case was commenced on October 8, 2012. Murray was employed by defendants until April 6, 2011 and Reno until September 26, 2012 (defendants' opposition at page 3) well within such two year statute of limitations.

The assertion that alternative class representative Sargeant has a conflict of interest because he is also a representative in a class action case against another Nevada taxi cab employer is unexplained. Without some sort of actual proof or explanation the Court is not free to simply accept defendants' wholly unexplained claim that Sargeant would be a conflicted, and thus improper, class representative.[1] *See, Kline* and the other cases discussed, *supra*.

D. Defendants' fourth counter-argument that "plaintiffs allege fraud which is not appropriate for certification" is wrong as no fraud claim is made in this case.

Citing, without further discussion, *Cummings v. Charter Hospital*, 896 P.2d 1137 (Nev. Sup. Ct. 1995), defendants insist because the plaintiffs are alleging fraud class certification is barred as a matter of law. Plaintiffs assert no cause of action for

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[1] Plaintiffs do not assert that alternative and additional class representatives Sargeant and Brauchle need to, or should be, appointed as class representatives for this case to appropriately certified and prosecuted as a class action. The Court should so appoint them if it believes doing so would assist in the disposition of this case.

fraud, which requires a reliance upon another's knowingly false representations. While *Cummings* does recognize, citing and quoting *Johnson v. Travelers Insurance Co.*, 515 P.3d 68, 72 (Nev. Sup. Ct. 1973), that "the inherent uniqueness of misrepresentation actions makes it difficult to find central facts susceptible of proof on a common basis," such principle of law is irrelevant to this case. Plaintiffs' allegation that defendants required their taxi drivers to falsify and inflate their break times on their trip sheets does not present a claim sounding in "fraud" (presumably this is from where defendants are getting their contrived assertion that there is some sort of "fraud" claim at issue in this case). Plaintiffs' allegations do not involve the sort of "misrepresentation" by a defendant, and reliance by a plaintiff, involved in fraud claims and that often makes such claims unsuitable for class certification.

E. Defendants' fifth counter-argument that "[t]he factual allegations for unpaid hours are limited to the named plaintiffs" which limits the number of class members and makes joinder "not impracticable" is, to the extent it is comprehensible, untrue.

Although this is denoted as a specific counter-argument at 5 of page 2 of defendants' opposition it is not intelligibly explained (or presented as a distinct and comprehensible argument) anywhere in the opposition. To the extent this is an assertion there are no class type allegations, or no reason to believe a sufficiently numerous group of claimants exist to warrant class certification, such assertion is false.

The factual allegations of the Complaint are that defendants failed to pay all of their taxi drivers the minimum wage. Indeed, defendants admit they had no policies in place to comply with the minimum wage standard imposed by Nevada's Constitution since 2006 because they believed (wrongly) they were not subject to such standard. They only acted to so comply after the *Thomas* decision in June of 2014 (Opposition, pages 4-5). As explained in the moving papers, the evidence that there is a large

enough group of claimants to warrant class certification is overwhelming, in light of the federal court judgment's findings and defendants' established violations of Nevada's minimum wage requirements until June of 2014 despite this Court's Order of February of 2013. *See,* Ex. "G" and pages 11-12 of moving papers.

F. Defendants' sixth counter-argument that the plaintiffs' claim "is for unpaid hours cloaked as a claim for minimum wage" which can only be adjudicated by the Nevada Labor Commissioner ignores the facts and operative law.

Defendants, apparently based upon the plaintiffs' assertions they were working during certain "break times" falsely recorded in defendants' records, insist that plaintiffs' claim is actually for "unpaid hours" which can only be adjudicated by the Nevada Labor Commissioner. Except for citing NRS 608.180, which they do not discuss, defendants offer no explanation of, or support for, this counter-argument.

Analytically, defendants might have some sort of still specious argument on this point *if* plaintiffs compensation agreement provided they would be paid by the hour and defendants fully paid them for certain hours but not others. In such a situation it could be argued, without merit in respect to the analysis required by law, that plaintiffs were seeking money only for those "unpaid" hours. But in this case the plaintiffs agreed to be paid a commission, based upon a formula that was applied to their "gross book" per shift. Ex. "K" moving papers. They claim their commission payment was less than the minimum wage for all hours worked during their shift, not that they received pay for some hours and not others during such shift.

Plaintiffs' claim is for minimum wages owed under Nevada's Constitution because the total compensation defendants paid to them each shift was less than the minimum wage required by the Constitution. Adopting defendants' argument on this point would absurdly render a worker who was paid $10 for working 10 hours someone "with a claim for unpaid hours, not minimum wages" because the employer could claim the worker was paid $10 for one hour and nothing for the other nine hours.

G. Defendants' seventh counter-argument that the plaintiffs "are attempting to circumvent the discovery rules and the current Orders of the Discovery Commissioner" is unsupported and mischaracterizes plaintiffs' Special Master appointment request.

(1) Plaintiffs are not circumventing any discovery rules, NRCR Rule 16.1, and the articulation of any amount of damages, has no bearing on class certification.

Based upon plaintiffs' current inability to set forth an accurate NRCP Rule 16.1 statement specifying damages, whether for the named plaintiffs or the class, defendants insist the Court must deny class certification. They state that "Plaintiffs are required to demonstrate a sufficient amount before this Court certifies this matter as qualifying for class certification." This statement of what plaintiffs are "required" to do is created by defendants for defendants' argument on this point. They cite no authority in support of such alleged rule of law because no authority exists. They do not proffer an explanation of the reason for such a rule or why such a rule should be adopted by this Court. They simply insist upon its existence (based upon only their creation of such a rule) and demand this Court's obedience to the same.

As discussed in the moving papers at page 18, damages issues are not germane to whether class certification should be granted in this case. Plaintiffs motion does not circumvent Rule 16.1's damages specification rule or any other discovery rule.

(2) The computer database issues are being dealt with by the Discovery Commissioner and the requested Special Master will not be involved with those issues. The Special Master is only sought to counter defendants' failure to keep accurate and accessible time records and their contrived "only the trip sheets state what hours were worked" defense.

Defendants assert that "the very same issues that serve as the basis for their request for a Special Master (review of trip sheets, computer database issues) are currently before the Discovery Commissioner." This is untrue. As explained in the moving papers, the request for a Special Master appointment has nothing to do with the computer database issues. Nor would the Special Master be appointed to deal with

those issues.

Irrespective of whatever computer database information is actually produced under the Discovery Commissioner's aegis, defendants will maintain such information does not actually, and accurately, establish the working hours of the class members. Defendants insist they kept no express "time clock" or record of each taxi driver's work hours in their computer system. The computer database files (which defendants speciously deny even exist or can be produced - issues that are being dealt with by the Discovery Commissioner) will only *inferentially* detail the hours of the class members' work, from records recording such activities as the time of day a driver's trip sheet was printed or turned in or the time their end of shift cash deposit was made.

While the computer database production may well provide powerful evidence of the hours of work of the taxi drivers, evidence that a jury may well decide to accept, defendants have not stipulated to be bound by any aspect of those database records. Defendants have adamantly maintained that "only the trip sheets show the true hours of work of each taxi driver." *See,* Ex. "L" moving papers. They are obviously doing so because those trip sheets contain many hours of "non-taken" break time that defendants insisted be listed to reduce their minimum wage liability. Yet the limited record before the Court, which defendants have not refuted with one iota of contrary evidence, establishes that an examination of those trip sheets *will still* establish minimum wage violations (albeit in a lesser amount owing to the "false break time" entries). *See,* Ex. "M" and page 20 of moving papers, establishing minimum wage violation for plaintiff Michael Murray in March of 2011 based upon such a trip sheet examination and Ex. "L" of the moving papers, explaining that the USDOL's finding that $139,834.80 in unpaid minimum wages under the FLSA was owed to 430 of defendants' taxi drivers was based upon such a trip sheet examination.

A Special Master, to be paid for by defendant, is sought *solely* to compile the

information from 230,000[2] or more trip sheets into a usable form. Such an appointment would not circumvent the Discovery Commissioner (who has no authority to appoint a Special Master in any event) nor contravene any "Order" issued in this case, as defendants' claim (they cite to no actual Order supporting such assertion). Nor will the Special Master have any involvement in the computer database production.

As explained in the moving papers, the USDOL found in 2009 that "there is no record of hours worked" being maintained by defendants on their taxi drivers. Ex. "B" moving papers. Defendants were advised by the USDOL at that time that "they must keep a record of actual hours worked" by their taxi drivers. *Id.* The USDOL secured defendants' "assurance of future compliance" with those requirements at that time. *Id.* Defendants never so complied, resulting in the USDOL's subsequent lawsuit over such record keeping violations of the FLSA and the federal court judgment compelling defendants to keep such records in the future. Ex. "A" and "C" of moving papers.

Defendants insist that because the 2009 USDOL report's pre-printed portion says "Section 11: No record keeping violations found" they were somehow found to have not committed record keeping violations. Such assertion is neither correct nor germane even if technically correct (perhaps the USDOL declined to make a formal finding of a record keeping violation because they inferentially determined there were no FLSA minimum wage violations at that time). The narrative section of that report clearly found there were no "actual records of hours worked" and advised defendants that going forward "they must keep a record of actual hours worked." To the extent the USDOL made no FLSA minimum wage violation finding at that time, it was based upon an examination of "scheduled hours" and "estimated period of time for meal

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[2] Defendants admit in their filings with this Court that they use approximately 46,080 trip sheets per year in the operation of their business.

period" which yielded a conclusion that "in most workweeks" the drivers were receiving sufficient wages (and tips) for FLSA minimum wage purposes. What is germane is that the 2009 report clearly apprized defendants to keep actual hours worked records, defendants promised to do so, and then intentionally failed to do so.

II. THE PREDOMINANCE OF COMMON ISSUES AND SUPERIORITY OF CLASS RESOLUTION REQUIREMENTS ARE SATISFIED

Defendants attempt to argue that a predominance of common issues, and the superiority of class resolution, have not been established, as required by NRCP Rule 23(b). In support of that argument (which is not articulated in any clear fashion) they cite the denial of class certification in *Vinole v. Country Wide Home Loans,* 571 F.3d 935 (9th Cir. 2009) (no pin cite by defendants). Except for insisting the same result should occur in this case as in *Vinole*, defendants do not explain their reliance on that case. That is not surprising, as *Vinole* provides no guidance to this Court. Class certification was denied in *Vinole* because there were individualized liability issues, specifically whether class members were exempted, because of the nature of their job duties, from the overtime wage requirements at issue in that case. The district court properly found those individualized issues, requiring an examination of the work performed by each employee to determine the applicability of the overtime exemption, rendered class certification inappropriate. 571 F.3d at 946-47.

There are no individualized liability, minimum wage exemption, issues in this case, as there were in *Vinole.* As discussed in the moving papers, there are issues common to all of the class members, such as the appropriate minimum wage rate (the "qualifying health insurance" issue); the additional sums owed to the 430 FLSA judgment class members; the applicable statute of limitations and any toll of that statute of limitations; the extent and accuracy of defendants' records; and the need to grant injunctive relief to prevent defendants' continuing violations of Nevada's

Constitution, among other issues. As discussed in the moving papers, the class certification granted by the Court is conditional and subject to amendment in the future, the Court can decide exactly what issues will, and will not, be determined on a class basis at the time of trial. *See*, Moving Papers pages 18-19.

As regards the superiority of class resolution requirement, that requirement is met for at least three reasons: the small size of the individual claim; the vulnerability of the class members and their justifiable fear of enforcing their minimum wage rights individually; and the strong public interest in enforcing Nevada's Constitution.

There is no reason to conclude many, if any, of the individual class members' claims are sufficiently large to make individual lawsuits by the class members sensible. The central purpose of the class action lawsuit is to afford justice to persons holding claims too small to be sensibly sued upon individually. *See*, *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") The class action procedure allows for the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Id.* The small size of the claim of each class member establishes the superiority of class resolution in this case. *See, also*, *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 515 (9th Cir. 2013) (Abuse of discretion to find class certification was not superior for class of approximately 500 workers owed wages "[i]n light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims.")

The vulnerable status of the class members also establishes the superiority of class resolution. Class resolution has been found superior for groups of persons with a limited understanding of the law, or limited English skills, such as migrant workers or

prisoners, on the basis such persons are not likely or able to pursue legal action individually. *See*, Newburg, 5th Ed., § 4.65 and cases cited therein. The inherent difficulty employees face in vindicating their legal rights against their employer, who may terminate their employment in response, is also a reason to find the class resolution of claims in this case to be superior. *See*, *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 268 (D. Conn 2002) (Class resolution superior for minimum wage and overtime claims as "class members may fear reprisal and would not be inclined to pursue individual claims.") and *Noble v. 93 University Place Corp.*, 224 F.R.D. 330, 346 (S.D.N.Y. 2004) (Class resolution of employee overtime pay claims superior given their fear of reprisal and lack of familiarity with the legal system).

Very often government agencies are unable to fully enforce substantive legal protections, such as Nevada's Constitutional minimum wage rights, and the class action lawsuit has long been recognized as a means to fill that void. *See*, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980) (Class actions are "...an evolutionary response to the existence of injuries unremedied by the regulatory action of government."). *See, also* Newburg, 5th Ed., § 4:66, and cases cited therein, noting that courts, particularly in contexts like antitrust and securities law, "regularly invoke the importance of class actions in enforcing the substantive law as one of the reasons that a class action is a superior method of adjudication."

Article 15, Section 16, of the Nevada Constitution creates paramount legal rights and bars any waiver of those rights by individual employees. It grants civil remedies for violations of those rights, including equitable relief and attorney's fees, to the full extent of this Court's power. There is, indisputably, an overwhelming public interest in having those rights vigorously enforced that renders superior the class resolution, whenever possible, of claims brought under Article 15, Section 16.

III. THE REQUESTED SPECIAL MASTER APPOINTMENT IS NECESSARY EVEN IF THE COURT IS UNWILLING TO FIND THAT DEFENDANTS ACTED IN BAD FAITH

As discussed in the moving papers, the most appropriate conclusion to draw about defendants' record keeping practices, particularly in light of their history with the USDOL, is that such practices were intentionally maintained by the defendants to shield them from this sort of litigation. Why should these defendants, or any employer, create records that ultimately will be used against them and make proof of their minimum wage violations that much easier to establish on a class wide basis? Why should any employer *not* keep their employees' hours of work records in a fashion, as in this case, that is so diffuse that using those records to prove class wide minimum wage violations becomes impossible, unless those records are compiled and summarized at great expense?

It should also be observed that the defendants' record keeping practices violate Nevada Law, as NRS 608.115 requires employers maintain records "for the benefit of his or her employees" that show "total hours employed in the pay period by noting the number of hours per day." It also imposes a duty to furnish such records "within 10 days after the employee submit a request." The trip sheets defendants insist must be referenced in this litigation do not contain any total of the "number of hours per day" taxi drivers were working, only information from which such a total could be calculated. Defendants have maintained *no* totals of "hours employed in the pay period" of their taxi drivers in clear violation of NRS 608.115. That defendants believe their taxi drivers were exempt from Nevada's minimum wage requirements is irrelevant and NRS 608.115 contains no such exemption from its record keeping requirements.

Defendants' opposition submits *no evidence whatsoever* countering the inference that defendants' record keeping practices, in light of the 2009 USDOL

advisement, were conducted in bad faith. No declaration is submitted explaining what steps defendants did, or did not take, and why, to follow through with their "assurance" in 2009 to the USDOL that they would "keep a record of actual hours worked" by their drivers. But ultimately the appointment of the requested Special Master need not, and should not be required to, rest upon any such "bad faith" conclusion by the Court as to defendants' conduct. Such appointment is needed as a pragmatic matter, to effectuate the interests of justice and the enforcement of the minimum wage rights granted by Nevada's Constitution.

While in theory class counsel could undertake the massive cost of performing a manual accounting of defendants' 230,000 plus trip sheet records, and seek to recoup such cost from defendants at the conclusion of this litigation, why would any counsel assume that cost and the risk of the employer going bankrupt or out of business rather than pay any judgment? Plaintiffs are not seeking, as defendants claim, to have "their discovery done at defendants' expense." They are asking the Court to prevent defendants' unjust enrichment through their violation of NRS 608.115 and their "only the trip sheets show the hours worked" defense. It is the defendants who should assume the cost, and risk, of that defense, especially in light of defendants' violation of NRS 608.115. When that defense is overcome the defendants should not have the "get off scot free" option of defaulting and paying nothing either on a judgment or for the very substantial cost of compiling the trip sheet information that was needed to overcome such defense. In such circumstances defendants' corporate principal will also have absconded with the runaway profits he has enjoyed for the years that the defendants failed to pay minimum wages.

If this Court denies the requested Special Master appointment it will unduly reward these defendants, and by analogy other employers, who fail to appropriately document their compliance with the minimum wage requirements of Nevada's

Constitution. Such a denial will gravely impair the ability of employees to enforce the minimum wage rights granted to them by Nevada's Constitution and those rights will become in certain situations, as a practical matter, unenforceable. Such a circumstance would be completely contrary to the command in Article 15, Section 16, Subpart "B" of the Nevada Constitution commands that this Court to grant "...all remedies available under the law or in equity appropriate to remedy any violation..." those minimum wage rights.

The fundamental concern is not whether defendants have acted in bad faith in failing to maintain centralized, computerized, time clock records. Even if defendants have not acted in bad faith they should not be allowed to shield themselves from their minimum wage liability through their record keeping practices. Such practices are really "non-record keeping" practices since the trip sheet information they are raising in their defense does not actually set forth any hours of work totals, they only contain information from which a daily hours of work calculation can be made.

IV. THE STAY OF THIS CASE DID NOT ABSOLVE DEFENDANTS OF THEIR OBLIGATION TO PAY MINIMUM WAGES

Defendants do not, because they cannot, deny they failed for a period of 15 or 16 months after this Court's Order of February 2013 to pay their taxi drivers the minimum wages they were owed under the Nevada Constitution unreduced by any "tip credit" which, though permissible under the FLSA, is not allowed by Nevada's Constitution. *See*, Moving Papers at pages 11-12 and Ex. "G" thereto. Without citation to any authority whatsoever, defendants now insist the parties' stay of this case, entered into to explore a cooperative resolution and await the outcome of the *Thomas* appeal, somehow absolved defendants of any need to comply with this Court's Order of February of 2013. Defendants had no such right to violate the Court's Order. To the extent defendants hoped the *Thomas* appeal would mandate a reversal of this Courts' February 2013 Order they could have arranged to pay such disputed "tip

credit" amounts into an escrow account until such appeal was decided. They did not, preferring to distribute the profits represented by those amounts to defendants' corporate principal until the *Thomas* appeal was decided. As discussed in the moving papers, this intentional, and bad faith, conduct by defendants further supports the granting of the relief requested.

V. A PROPOSED FORM OF NOTICE TO THE CLASS IS PROVIDED TO ASSIST THE COURT

As discussed in plaintiffs' moving papers, any Court Order granting class certification under NRCP Rule 23(b)(3) needs to provide for an appropriate form of notice to the class, as required by NRCP Rule 23(c)(2). To assist the Court in its consideration of that issue, and expedite the issuance of any such Order, a proposed form of notice is submitted as Ex. "A."

CONCLUSION

For all the foregoing reasons, plaintiff's motion should be granted in its entirety together with such other further and different relief that the Court deems proper.

Dated: June 15, 2015

LEON GREENBERG PROFESSIONAL CORP.

/s/ Leon Greenberg

Leon Greenberg, Esq.
Nevada Bar No. 8094
2965 S. Jones Boulevard - Ste. E-3
Las Vegas, NV 89146
Tel (702) 383-6085
Attorney for the Plaintiffs

CERTIFICATE OF MAILING

The undersigned certifies that on July 13, 2015, she served the within:

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY THIS CASE AS A CLASS ACTION PURSUANT TO NRCP RULE 23 AND APPOINT A SPECIAL MASTER PURSUANT TO NRCP RULE 53

by court electronic service to:

TO:

Esther C. Rodriguez, Esq.
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

/s/ *Sydney Saucier*

Sydney Saucier

EXHIBIT "A"

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL MURRAY and MICHAEL RENO, Individually and on behalf of others similarly situated, Plaintiffs, vs. A CAB TAXI SERVICE LLC and A CAB, LLC, Defendants.	Case No.: A-12-669926-C Dept.: I NOTICE OF CLASS CERTIFICATION

You are being sent this notice because you are a member of the class of current and former taxi drivers employed by A CAB TAXI SERVICE LLC and A CAB, LLC that has been certified by the Court. Your rights as a class member are discussed in this notice.

NOTICE OF CLASS ACTION CERTIFICATION

On [date] this Court issued an Order certifying this case as a class action for all taxi driver employees of A CAB TAXI SERVICE LLC and A CAB, LLC (the "class members") who were employed at anytime from November 28, 2006 to [date of order]. The purpose of such class action certification is to resolve the following questions:

(1) Does A CAB TAXI SERVICE LLC and A CAB, LLC owe class members any unpaid minimum wages pursuant to Nevada's Constitution?

(2) If they do owe class members minimum wages, what is the amount each is owed and must now be paid by A CAB TAXI SERVICE LLC and A CAB, LLC ?

(3) What additional money, if any, should A CAB TAXI SERVICE LLC and A CAB, LLC pay to the class members besides unpaid minimum wages?

(4) For those class members who have terminated their employment with A CAB TAXI SERVICE LLC and A CAB, LLC since October 8, 2012, what, if any, additional money, up to 30 days unpaid wages, are owed to them by A CAB TAXI SERVICE LLC and A CAB, LLC under Nevada Revised Statutes 608.040?

The class certification in this case may also be amended or revised in the future which means the Court may not answer all of the above questions or may answer additional questions.

NOTICE OF YOUR RIGHTS AS A CLASS MEMBER

If you wish to have your claim as a class member decided as part of this case you do not need to do anything. The class is represented by Leon Greenberg and Dana Sneigocki (the "class counsel"). Their attorney office is Leon Greenberg Professional Corporation, located at 2965 South Jones Street, Suite E-3, Las Vegas, Nevada, 89146. Their telephone number is 702-383-6085 and email can be sent to them at leongreenberg@overtimelaw.com. Communications by email instead of telephone calls are preferred.

You are not required to have your claim for unpaid minimum wages and other possible monies owed to you by A CAB TAXI SERVICE LLC and A CAB, LLC decided as part of this case. If you wish to exclude yourself from the class you may do so by filing a written and signed statement with the Court no later than [insert date 45 days after mailing] setting forth your name and address and stating that you are excluding yourself from this case. If you do not exclude yourself from the class you will be bound by any judgment rendered in this case, whether favorable or unfavorable to the class. If you remain a member of the class you may enter an appearance with the Court through an attorney of your own selection. You do need not get an attorney to represent you in this case and if you fail to do so you will be represented by class counsel.

THE COURT IS NEUTRAL

No determination has been made that A CAB TAXI SERVICE LLC and A CAB, LLC owes any class members any money. The Court is neutral in this case and is not advising you to take any particular course of action. If you have questions about this notice or your legal rights against A CAB TAXI SERVICE LLC and A CAB, LLC you should contact class counsel at 702-383-6085 or by email to leongreenberg@overtimelaw.com or consult with another attorney. The Court cannot advise you about what you should do.

NO RETALIATION IS PERMITTED IF YOU CHOOSE TO PARTICIPATE IN THIS LAWSUIT

Nevada's Constitution protects you from any retaliation or discharge from your employment for participating in this case or remaining a member of the

class. You cannot be punished by A CAB TAXI SERVICE LLC and A CAB, LLC or fired from your employment with them for being a class member. A CAB TAXI SERVICE LLC and A CAB, LLC cannot fire you or punish you if this case is successful in collecting money for the class members and you receive a share of that money.

IT IS SO ORDERED

Date:

/s/ District Court Judge

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CLERK OF THE COURT

MOT
Esther C. Rodriguez, Esq.
Nevada Bar No. 6473
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702-320-8400
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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. XXVIII

DEFENDANT'S MOTION FOR DECLARATORY ORDER

REGARDING STATUTE OF LIMITATIONS

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 7(b), hereby respectfully moves this Honorable Court for Declaratory Order declaring a two-year statute of limitations for Plaintiffs' claims. 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 10th day of August, 2015.

RODRIGUEZ LAW OFFICES, P.C.

By: /s/ Esther C. Rodriguez, Esq.
Esther C. Rodriguez, Esq.
Nevada Bar No. 6473
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Attorneys for Defendant A Cab, LLC

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NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant will bring the foregoing Motion on for hearing before this Court on the 14 day of SEPT, 2015, or as soon thereafter as counsel may be heard. IN CHAMBERS

DATED this 10th day of August, 2015.

RODRIGUEZ LAW OFFICES, P.C.

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

POINTS AND AUTHORITIES

I.

FACTUAL BACKGROUND

Plaintiffs Michael Murray and Michael Reno are former employees of Defendant A Cab, LLC ("A Cab"). Michael Murray worked for A Cab from September 6, 2008 to April 6, 2011 as a taxicab driver. Michael Reno worked for A Cab from June 16, 2010 to September 26, 2012 also as a taxicab driver. These two drivers allege a claim for an hourly minimum wage.

Plaintiffs filed their initial Complaint on October 8, 2012. Defendant A Cab moved for dismissal of the Complaint for failure to state a claim, but was denied by this Court. Plaintiffs were granted leave to file an Amended Complaint against A Cab Taxi Service on January 30, 2013. Plaintiffs have recently been granted leave to amend their complaint again, this time to assert claims against owner C. J. Nady personally, to include civil conspiracy and unjust enrichment. Their first claim for relief remains as a claim for minimum wage pursuant to Article 15, Section 16, of the Nevada Constitution. Their second claim for relief is brought pursuant to NRS 608.040.

Defendant asserts that a two (2) year statute of limitations is appropriate based upon the Plaintiffs' claims and their underlying basis for assertion.

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II.

LEGAL ARGUMENT

1. Plaintiffs' Second Claim For Relief is Specifically Addressed In the NRS As Being Limited to a Two-Year Statute of Limitation.

Plaintiffs' Second Claim for Relief specifies that it is based upon NRS 608.020, NRS 608.030, and NRS 608.040. *Second Amended Complaint*, §25. Specifically, it is entitled: "As and For a Second Claim For Relief Pursuant to Nevada Revised Statutes §608.040 on Behalf of the Named Plaintiffs and The Putative Class". *Id.* at 8.

These statutory provisions are specifically delineated under NRS 608.180, as being under the enforcement of the Labor Commissioner. "The Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced, and upon notice from the Labor Commissioner or the representative." **NRS 608.180**. These statutes under the prosecution of the Labor Commissioner are limited to two years. *See* NRS 608.260 and NRS 608.115 requiring two years of record keeping of wage information.

2. Plaintiffs' Claim For Minimum Wage Should Be Limited to a Two-Year Period, As The Claims are Based Upon Unpaid Hours.

Plaintiffs specifically make a claim for minimum wage based upon an allegation that the Employer was falsifying true hours of work by the drivers. Plaintiffs claim they were forced to falsify break times in their reported trip sheets: "Defendants fostered such inaccurate and untrue recording by their taxi drivers of their work activities by refusing to allow taxi drivers to submit accurate daily taxi driver trip sheets that did not have such excessive, and untrue, recordings of break time." *Second Amended Complaint*, §17.

This allegation of falsified totals of hours worked has been a continuous claim by the Plaintiffs as the underlying basis for claiming they were paid less than minimum wage. *See*, *Declaration of Michael Murray*, previously submitted by Plaintiffs, and attached hereto as **Exhibit 1**.

"The Common False 'Break Time' Recording Issue' – Although defendants claim that taxicab drivers worked far fewer than 12 hours per day because they averaged breaks in excess of 1

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hour during each shift, that is not true." Murray continues to allege that he was forced to clock in and clock out and not record true hours of work.

Therefore, if the claim for minimum wage is one based upon an alleged inaccurate total of true hours worked, it is in reality a claim for unpaid work hours. The relevant statute for unpaid work hours is NRS 608.016: "An employer shall pay to the employee wages for each hour the employee works."

This is yet another provision that is specifically delineated under NRS 608.180, as being under the enforcement of the Labor Commissioner. "The Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced, and upon notice from the Labor Commissioner or the representative." **NRS 608.180**. These statutes under the prosecution of the Labor Commissioner are limited to two years. *See* NRS 608.260 and NRS 608.115 requiring two years of record keeping of wage information.

3. <u>Claims For Minimum Wage Are Limited In Enforcement Under NRS 608.260.</u>

If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, 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. **NRS 608.260**.

In this case, since Plaintiffs are alleging that Defendant failed to pay them minimum wage, in violation of the 2006 Minimum Wage Amendment (hereinafter "MWA"), the statute of limitations must be two (2) years pursuant to NRS 608.260. Plaintiffs filed their initial complaint on October 8, 2012. Pursuant to NRS 608.260, they would be entitled to pursue their alleged claims from October 8, 2010 to October 8, 2012.

4. <u>The Constitutional Amendment Did Not Impliedly Repeal The Statute of Limitations</u>.

The Nevada Supreme Court clarified for the first time in *Thomas v. Nevada Yellow Cab Corporation*, 130 Nev., Ad Op 52 (2014) that the <u>exemptions</u> contained in NRS 608.250 were impliedly repealed when voters in 2006 passed Article 15, Section 16 to the Nevada Constitution. The Supreme Court, however, did not address a new statute of limitations, nor did the Court in the

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Thomas decision indicate that NRS 608.260 was impliedly repealed. There was never an adoption of a new remedy for minimum wage claims.

This issue is currently before the Nevada Supreme Court in a different matter, *Williams v. Claims Jumper Acquisition Company, LLC*, Case No. A702048. However, numerous District Courts and our Ninth Circuit Court of Appeals have already addressed the issue. Thus, Defendant requests that this Court issue its Order declaring the statute of limitations to be applied.

The Ninth Circuit has upheld a two year limitation indicating that, "The district court properly dismissed the state constitutional claims to the extent they accrued more than two years before the farmworkers filed suit." *See* **Exhibit 2**, *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013). The U.S. District Court of Nevada has also analyzed and decided this specific issue. In *Latonya Tyus, et.al vs. Wendy's of Las Vegas, Inc.*, Case No.: 2:14-cv-00729-GMN-VCF, Chief Judge Gloria M. Navarro, in citing to *Rivera*, ruled that although the MWA is silent on the limitation period for minimum wage actions, such silence did not imply a repeal of the two-year limitation period of NRS 608.260, and dismissed all wage claims accruing before the two-year limitation period. *See Wendy's of Las Vegas, Inc.*, ruling attached hereto as **Exhibit 3**.

In *McDonagh v. Harrah's Las Vegas, Inc.*, Case No.: 2:13-CV-1744 JCM (CWH), Judge James C. Mahan ruled, "While article 15, section 16 of the Nevada Constitution does create a new two-tiered minimum wage in the state, the section is silent on whether it changes the two-year statute of limitations in the Nevada Revised Statutes. Therefore the court finds that the constitutional provision <u>was not intended to change this two-year statute of limitations</u>." *Id.* at page 11. *See* **Exhibit 4**.

This logic is supported by looking at the record-keeping requirements of the state statute. NRS 608.115(3) requires employers to maintain records of wages for a **2-year period** following the entry of information in the record. NRS 608.260 establishing a two-year limitation period for minimum wage actions mirrors the statutory record keeping requirement under NRS 608.115 for maintaining records of wages for a two year period. The fact that the MWA and NRS 608.260 concern wage and hour claims, highlights the importance of a limitations period. Employment records pertaining to wages are not retained indefinitely. NRS 608.115(3) explicitly requires

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employers to maintain wage records "for a 2-year period following the entry of information in the record." If there is not a two-year limitations period on minimum wage actions, it would establish a system whereby an employer's compliance with NRS 608.115(3), would potentially expose the employer to claims of spoliation and would conflict with pre-existing law on record keeping of wage records for a 2-year period.

5. <u>NRS 608.260 Does Not Conflict with The Minimum Wage Amendment</u>

The MWA contains no statute of limitations provision, and thus it does not conflict with NRS 608.260. Furthermore, the MWA text does not contain an express provision that conflicts with NRS 608.260. As stated in the MWA Article 15, Section 16(B) of the Nevada Constitution: 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.

The MWA gives effect and embraces the "appropriate" and pre-existing minimum wage statutory scheme and thus a remedy continues to exist under NRS 608.260. Chief Judge Navarro stated, "the two-year statute of limitations period found in NRS 608.260 does not necessarily and directly conflict with the Minimum Wage Amendment, which would make it irreconcilably repugnant." *See Wendy's of Las Vegas* ruling at page 4 attached hereto as Exhibit 3. Therefore, it is clear that the two (2) year limitations period does not conflict with the MWA.

The recent decisions of the Nevada Supreme Court reviewing the MWA supports the conclusion that the MWA does not operate to impliedly repeal NRS Chapter 608 or the "available" and "appropriate" remedy provided to Plaintiffs by NRS 608.260. In *Terry v. Sapphire Gentlemen's Club*, 130 Nev.Adv.Op. 87, 336 P.3d 951 (October 30, 2014), the Nevada Supreme Court confirmed that NRS Chapter 608 and the provisions of NRS 608.250 and NRS 608.260 were not entirely repealed by the MWA. *See* **Exhibit 5**. As part of the analysis in *Terry*, the Nevada Supreme Court discussed the impact of the MWA and its decision in *Thomas*. Specifically, the Supreme Court declared that only an "employee" is entitled to minimum wages under NRS Chapter 608 and that NRS 608.250 was only superseded, in part by the Minimum Wage Amendment as

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decided in *Thomas*. The Supreme Court in *Terry* acknowledged that the MWA supplanted "to some extent" the statutory provisions of NRS Chapter 608, but refused to hold that the MWA impliedly repealed all of NRS Chapter 608, including NRS 608.260. The analysis shows in *Terry*, the Supreme Court looked to both the MWA and NRS 608.260 and found them to be in harmony when evaluating a minimum wage claim.

In a similar case, Judge Joanna S. Kishner came to the same conclusion in finding the two (2) year statute of limitations in NRS 608.260 applies in minimum wage law suits. *See* Page 17-25 of Order in *Jaqueline Franklin v. Russell Road Food and Beverage, LLC*, et.al. Case No. A-14-709372-C attached hereto as **Exhibit 6**.

In the *Melaky Tesema v. Lucky Cab Co.*, Case No. A-12-660700-C matter, Judge Charles Thomson also found that requested period for conducting discovery for seven (7) years was "awful long time," and limited discovery to two (2) years. *See* **Exhibit 7**.

In *Neal Golden v. Sun Cab, Inc., d/b/a Nellis Cab Co.*, Case No A-13-678109-C, Judge Carolyn Ellsworth upheld the applicability of the two-years statute of limitations under NRS 608.260. *See* **Exhibit 8**. And as cited above, there are two federal cases that have reached the same conclusion: *Latonya Tyus, et.al. v. Wendy's of Las Vegas, Inc.*, Case No.: 2:14-cv-00729-GMN (VCF) and *McDonagh v. Harrah's Las Vegas, Inc.*, Case No.:2:13-cv-1744-JCM (CWH). Therefore, there are now multiple persuasive rulings from the Federal and State Court which have ruled that NRS 608.260 was not impliedly repealed and hence the two(2) year statute of limitations period applies in this instance.

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III.

CONCLUSION

Based on the foregoing points and authorities, Defendant respectfully requests that this Honorable Court grant Defendant's Motion for Declaratory Order to limit the statute of limitations to two (2) years in this case pursuant to NRS 608.260.

DATED this 10th day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 10th day of August, 2015, I electronically *filed* the foregoing with the Eighth Judicial District Court Clerk of Court using the E-file and Serve System which will send a notice of electronic service to the following:

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.

List of Defendant's Exhibits

Exhibit 1: *Declaration of Michael Murray*

Exhibit 2: *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013)

Exhibit 3: *Latonya Tyus, et.al vs. Wendy's of Las Vegas, Inc.*, Case No.: 2:14-cv-00729-GMN-VCF

Exhibit 4: *McDonagh v. Harrah's Las Vegas, Inc.*, Case No.: 2:13-CV-1744 JCM (CWH)

Exhibit 5: *Terry v. Sapphire Gentlemen's Club*, 130 Nev.Adv.Op. 87, 336 P.3d 951

Exhibit 6: *Jaqueline Franklin v. Russell Road Food and Beverage, LLC*, et.al. Case No. A-14-709372-C

Exhibit 7: *Melaky Tesema v. Lucky Cab Co.*, Case No. A-12-660700-C

Exhibit 8: *Neal Golden v. Sun Cab, Inc., d/b/a Nellis Cab Co.*, Case No A-13-678109-C

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EXHIBIT 1

EXHIBIT 1

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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 **DECLARATION OF MICHAEL MURRAY**

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

1. I am one of the named plaintiffs in this lawsuit seeking unpaid minimum wages from the defendants. I offer this declaration in support of my attorneys' request to have this court certify this case as a class action.

2. I was employed by defendants as a taxicab driver from September 6, 2008 until April 6, 2011.

3. Based upon my first hand knowledge from being a taxicab driver for defendants and witnessing other taxicab drivers working for defendants, I know that the follow common policies and practices existed for all of defendants' taxicab drivers while I was employed by defendants.

4. **The Common False "Break Time" Recording Issue** - The large majority of taxicab drivers were always given a 12 hour shift each day by defendants. Although defendants claim that taxicab drivers worked far fewer than 12 hours per day because they averaged breaks in excess of 1 hour during each shift, that is not true. On average, I, personally, would take no more than a total of one hour in breaks per day. I am aware based upon many conversations I have had with other taxicab drivers employed by the defendants that such drivers also took, on average, no more than one hour of breaks per shift. Because drivers were paid commissions, based upon the fares they collected, they did not want to take many breaks. In addition, the defendants would fire drivers who consistently did not book a certain average of fares in a one week period and drivers would be unable to keep their jobs and meet the defendants' fare booking standards if they took, on average, more than 1 hour break per shift. But defendants' tripsheets for myself and other drivers were falsely filled out by us to list several hours in breaks per shifts. The reason for this is because the supervisor in the shack who collects the drivers' keys and time stamps their tripsheets at the end of their shifts would tell drivers that they must write in a certain number of break periods whether or not they actually took such breaks. The supervisor would tell us the total amount of break time a driver should write in on the tripsheet based upon the total "book" or amount of fares collected by the driver. If the total book was "low" drivers were told to fill in more hours of break time so it appeared their commission payments, which were based upon the fares collected, would meet the minimum wage standards; if their total book was higher in amount, they would not need to write in as much break time. Tripsheets were not accepted by A Cab unless the break time specified by the supervisor was filled in.

5. **The Common Computer System "Clock In" and "Clock Out" Procedures that Recorded the Taxi Drivers' True Hours of Work** - It has been explained to me by my attorneys that the defendants in this case have asserted that they do not possess or maintain any computer records containing information that would

show the hours of work of myself and the other taxi drivers. That is not true.

6. At the start of every taxicab driver's shift at A Cab, each driver is required to hand their Taxi Authority card to a desk supervisor, who then, using a computer, scans the bar code on the back of the Taxi Authority card which "checks" the drivers in for the start of their shift. Taxicab drivers then wait to be assigned a cab to drive for their shift.

7. Once assigned a cab, a supervisor then prints a tripsheet for the taxicab driver. Those tripsheets are never printed until *after* the driver has "checked" in and is actually at the office to start work. Such tripsheets are generated from a computer system for each driver and include computer generated information at the top which states the name of the driver, the cab number the driver is driving for his/her shift, the date, and the start time, to the minute, for the shift. That start time is either the time the sheet is printed or the time the driver checked in, but either way it shows the time the driver is on site and has started work. The top of the tripsheet also includes a unique bar code. *See*, Ex. "1" attached hereto. These tripsheets are used throughout the shift by all taxicab drivers in order to keep a record of all rides they give and fares they accept. The taxicab drivers fill out these tripsheets by hand throughout their shift.

8. After a shift is concluded and drivers return back to A Cab's office, all taxicab drivers are required to perform a meter reading of their taxicabs. Drivers do this by activating the taxicab meter's "time-off" function which results in both the meter printing a paper receipt showing the meter totals as well uploading the meter's information directly into A Cab's computer system. *See*, Ex. "1" page 2, copy of receipt indicating "Meter Details" and also stating "Meter Totals Sent- OK."

9. Once the information described in paragraph 8 has been uploaded to A Cab's computer system, drivers then proceed to a supervisor's shack just outside of A Cab's building and hand their tripsheets to a supervisor who timestamps the drivers' tripsheets using a mechanical punch clock. *See*, Ex. "1" page two showing mechanical timestamp on bottom right corner. Drivers then proceed with their trip sheet over to

any one of a number of computers (called driver check-out stations) available to drivers to do our end of shift paperwork. This process requires drivers to scan the bar code at the top of the Ex. "1" tripsheet on the computer's scanning device. Once scanned, information appears on the computer screen showing the driver's name, cab number, meter readings, time they were clocked-in, and the time their tripsheet's bar code was scanned at the end of the shift (which is the current time the driver is working on the terminal). Drivers then proceed to input into the computer system the fares they received for each trip they drove and indicate whether such fare was paid by credit card, cash, or a taxi voucher. This information is handwritten by the drivers on their tripsheets throughout the day. Once all information has been entered, the computer system tallies all fares collected and informs the drivers how much cash they must deposit into a separate bill collector machine called a drop safe.

10. The drivers then proceed to the drop safe and again scan their bar code on the top of their tripsheets to log into the drop safe computer system. Once logged in, the drop safe's screen identifies the driver and specifies the total amount of cash, that was previously calculated by the computer described in paragraph 9, that must be dropped. Once the money is dropped, drivers then print a receipt from the drop safe which shows the driver's name, the total amount of cash dropped, and the time the cash drop was made. *See*, Ex. "1" page two, copy of receipt "Validated Drop."

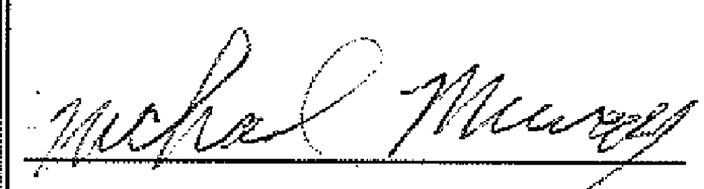
11. These functions described in paragraphs 6-10 are performed by every one of A Cab's drivers on every single shift they work.

12. I understand that my attorney is seeking to have this case certified as a class action, meaning that I would serve as a class representative in this case. My attorney has explained to me that by serving as a class representative I will be pursuing this case not just for myself but on behalf of all of the defendants' taxicab drivers who were not paid minimum wage under Nevada law for the applicable time period. I understand that if this case is certified as a class action I will have a responsibility to represent the other former and current A Cab taxicab drivers and act in their interests

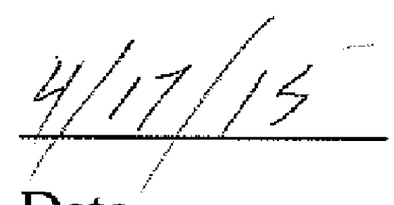
and not just my own personal interest. I understand that if this case is certified as a class action I will not be able to settle my claim against the defendants without approval from the Court. I am comfortable with serving as a class representative and support the class action certification of this case.

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

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



Michael Murray



Date

EXHIBIT 2

EXHIBIT 2

735 F.3d 892

Victor Rivera RIVERA; Ernesto Sebastian Castillo Rios; Vicente Cornejo Lugo; Jesus Garcia Mata; Luis Angel Garcia Mata; Gaudencio Garcia Rios; Simon Garcia Rios; Vicente Cornejo Cruz; Emilio Montoya Morales; Jorge Luis Aguilar Solano; Domingo Ramos Rios; Artemio Rincon Cruz; Sergio Rios Ramos; Pedro Rivera Camacho; Regulo Rincon Cruz; Aureliano Montes Montes; Manuel Rivera Rivera; Martin Flores Bravo; Virgilio Marquez Lara; Jose Balderas Guerrero; Gerardo Rios Ramos, Plaintiffs–Appellants,

v.

PERI & SONS FARMS, INC., Defendant–Appellee.

No. 11–17365.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted June 14, 2013.

Filed Nov. 13, 2013.

Summaries:

Source: Justia

Plaintiffs, farmworkers who are Mexican citizens, filed suit against Peri & Sons, a Nevada corporation that produces, harvests, and packages onions. Plaintiffs alleged that the corporation violated the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq. Deferring to the DOL's interpretation, the court concluded that the district court erred in ruling that the corporation was not required to reimburse its employees during the first week of work for inbound travel and immigration expenses to the extent that such expenses lowered their compensation below the minimum wage. The court further concluded, inter alia, that the district court erred in concluding that the farmworkers had not pled their breach of contract claims with sufficient specificity where such allegations were sufficient to give the corporation fair notice and to make plaintiffs' breach of contract claims plausible. Accordingly, the court reversed the district court's dismissal of the farmworkers' FLSA claims to the extent that they accrued within three years of filing; reversed its dismissal of their breach of contract claims; affirmed the dismissal of their claims under Nevada Revised Statutes 608.140; and reversed the dismissal of their other statutory and constitutional claims to the extent they accrued within two years of filing. The court remanded for further proceedings.

[735 F.3d 894]

José Jorge Behar, Chicago, IL, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the briefs were Matthew J. Piers, Chicago, IL, and Mark R. Thierman, Reno, NV.

Brad Johnston, Yerington, NV, argued the cause for the defendant-appellee. Gregory A. Eurich, Denver, CO, and Joseph Neguese, Denver, CO, filed the brief for the defendant-appellee.

Diane A. Heim, Washington, D.C., argued the cause and filed the brief for Amicus Curiae Secretary of Labor, in support of the plaintiffs-appellants. With her on the briefs were M. Patricia Smith, Washington, D.C., Jennifer S. Brand, Washington, D.C., and Paul L. Frieden, Washington, D.C.

Monte B. Lake, Washington, D.C., filed the brief for Amicus Curiae National Council of Agricultural Employers, in support of the defendant-appellee.

Appeal from the United States District Court for the District of Nevada, Robert Clive Jones, Chief District Judge, Presiding. D.C. No. 3:11–cv–00118–RCJ–VPC.

Before: DIARMUID F. O'SCANNLAIN and

fastcase

MILAN D. SMITH, JR., Circuit Judges, and JAMES K. SINGLETON, Senior District Judge.[*]

[735 F.3d 895]

OPINION
O'SCANNLAIN, Circuit Judge:

We are asked to decide claims of Mexican temporary farmworkers under the Fair Labor Standards Act and relevant state law.

IA

Peri & Sons is a Nevada corporation that produces, harvests, and packages onions.[1] The plaintiffs are Victor Rivera Rivera and twenty-three other Mexican citizens ("the farmworkers") admitted to the United States to cultivate, harvest, and process onions on Peri & Sons' farm. Since 2004, Peri & Sons has hired such foreign workers through the H–2A program of the United States Department of Labor (DOL).

American agricultural employers may hire aliens for temporary labor under the H–2A program if the DOL certifies that:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1). Before submitting an Application for Temporary Employment Certification, *see*20 C.F.R. § 655.130, an "employer must submit a job order," *id.* § 655.121(a)(1). Job orders must comply with various requirements relating to the terms of employment. *See, e.g., id.*§ 655.122.

The farmworkers incurred expenses related to their employment with Peri & Sons. Some had to pay a hiring or recruitment fee of between $100 and $500 to Peri & Sons' employees in order to be considered for employment. All had to obtain H–2A visas from the United States Consulate in Hermosillo, Sonora, Mexico. Each farmworker paid the necessary fees and covered his own lodging costs in Hermosillo. The farmworkers also paid a fee to obtain Form I–94 from the United States Citizenship and Immigration Services upon entering the country. These immigration and travel expenses exceeded $400 for each plaintiff. In addition, the farmworkers purchased protective gloves, which were required for the performance of their jobs, at a cost of at least $10 per week. They each also incurred expenses of at least $100 in traveling from Peri & Sons' farm in Nevada back to their homes in Mexico.

The farmworkers claim that these expenses were primarily for Peri & Sons' benefit but that the company did not properly reimburse them.

B

The farmworkers filed their original complaint on February 16, 2011. The operative complaint for this appeal, however, is the Second Amended Complaint (SAC), which contained four counts. First, the SAC alleged that Peri & Sons violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, partially because it failed to reimburse each farmworker during his first week of employment for travel and immigration expenses. Second, it

[735 F.3d 896]

claimed that Peri & Sons breached its employment contracts by violating the terms of the job orders submitted to the DOL. Third, it alleged violations of Nevada wage-and-hour laws for failure to pay the minimum wage and failure to pay wages owed under employment contracts. Fourth, it asserted violations of the

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minimum wage requirement in the Nevada Constitution.

The district court dismissed the SAC with prejudice. It rejected the farmworkers' FLSA claims on the ground that 29 C.F.R. § 531.35 did not treat the relevant expenses as kickbacks. The district court dismissed the breach of contract claims because the farmworkers did not plead specific violations of the contracts beyond reiterating the wage claims. As to the state law statutory and constitutional claims, the district court treated them as "redundant" and dismissed both for the same reason it dismissed the FLSA claims. It also applied a two-year statute of limitations to the wage claims, both state and federal, holding that those having accrued before February 16, 2009 were barred. The farmworkers timely appealed.

IIA

Both the specific regulations governing the H–2A program and the more general FLSA regulations promulgated by the DOL control whether and when employers must reimburse employees for inbound travel and immigration expenses. The parties agree that Peri & Sons' relationship with the farmworkers is subject to the H–2A regulations but dispute whether it is subject to the FLSA regulations.

Regulations concerning the H–2A program require employers to reimburse an employee who "completes 50 percent of the work contract period ... for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer ... to the place of employment." 20 C.F.R. § 655.122(h)(1). Peri & Sons argues that this regulation only obligated it to reimburse its employees' travel expenses after the employees had completed half of their work rather than during each employees' first week.

The FLSA, on the other hand, requires that employers reimburse certain expenses during each employee's first week of work. *See*29 C.F.R. § 531.36 (applying the rule to "any such workweek"). The farmworkers argue that this FLSA regulation required Peri & Sons to reimburse them for immigration and travel expenses during the first week of work. Peri & Sons argues that it is not subject to this FLSA regulation because applying the FLSA regulation to H–2A employees would, as a practical matter, make the H–2A regulation superfluous. Peri & Sons also contends that deducting travel costs would frequently reduce a worker's first week's wages far below the minimum wage.

We must evaluate such arguments in light of the DOL's regulatory interpretation. A DOL regulation has clarified "that the FLSA applies independently of the H–2A requirements and imposes obligations on employers regarding payment of wages." 20 C.F.R. § 655.122(h)(1); *accord id.* § 655.122(p)(1) ("[An] employer must make all deductions from the worker's paycheck required by law."). Before issuing its regulation, the DOL had rejected many of the specific arguments raised here by Peri & Sons. *See*Temporary Agricultural Employment of H–2A Aliens in the United States, 75 Fed.Reg. 6884, 6915 (Feb. 12, 2010). Under *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we

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must defer to the DOL's interpretation if: (1) the statutory provision is ambiguous, and (2) the agency's interpretation is reasonable.

The FLSA certainly does not unambiguously exempt H2A employers from its requirements and related regulations. *See*29 U.S.C. § 206 (requiring "[e]very employer" to pay the minimum wage to covered employees); *id.* § 213 (providing exemptions not relevant to Peri & Sons). Thus, the FLSA either unambiguously applies the reimbursement requirement to H–2A employers or contains an ambiguity on this point. Assuming without deciding that the statute is ambiguous, the DOL's interpretation is reasonable. Because the DOL's interpretation neither makes it impossible to comply with both provisions nor creates surplusage,[2] it is "a permissible construction of

the statute." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778.

B

Because Peri & Sons is subject to the FLSA reimbursement regulations, we must next decide whether the travel and immigration expenses incurred by the farmworkers are covered by such regulations.

The FLSA requires employers to pay at least the federal minimum wage to each employee "engaged in commerce." 29 U.S.C. § 206(a)(1). An employer has not satisfied the minimum wage requirement unless the compensation is "free and clear," meaning the employee has not kicked back part of the compensation to the employer. 29 C.F.R. § 531.35. Thus, employers generally may not issue paychecks at the minimum wage rate and then require employees to give some of the money back. An employer may charge its employees for the reasonable cost of providing them "board, lodging, or other facilities" because such charges are not kickbacks, meaning they can be included in the wage calculation. 29 U.S.C. § 203(m). Facilities "primarily for the benefit or convenience of the employer" do not count as "other facilities" and are not included in the wage calculation. 29 C.F.R. § 531.3(d)(1).

To the extent deductions for items not qualifying as "board, lodging, or other facilities"—such as items primarily benefitting the employer—lower an employee's wages below the minimum wage, they are unlawful. *Id.*§ 531.36(b). Thus, the question before us is whether the expenses incurred by the farmworkers primarily benefitted Peri & Sons or the farmworkers.

1

The farmworkers argue that they incurred travel and immigration expenses, including fees associated with recruitment, visas, and I–94 forms, for the benefit of Peri & Sons. Peri & Sons, on the other hand, characterizes immigration expenses as primarily for the benefit of the employee.

The FLSA regulations provide an illustrative list of facilities that are "primarily for the benefit or convenience of the employer":

(i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer;

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(iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

29 C.F.R. § 531.3(d)(2); *see also id.* § 531.32(c) (listing, as a facility primarily for the benefit of the employer, "transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad)"). Meals, however, "are always regarded as primarily for the benefit and convenience of the employee." *Id.* § 531.32(c).

The status of inbound travel and immigration expenses is ambiguous under this regulatory standard. Travel and proper immigration costs are essential for the H–2A employment relationship to come to fruition. Presumably, both employers and employees benefit from the employment relationship. Employers can only hire H–2A workers after demonstrating that they are unable to satisfy their labor needs with American workers, *see*20 C.F.R. § 655.161(b), so an employer's benefit is clear. Of course, foreign workers probably would not travel to the United States for temporary employment if employment of a similar quality were available closer to their homes. The employees' benefit is also clear. With such clear benefits to both the farmworkers and Peri & Sons, the identity of the primary beneficiary is ambiguous.

When regulations are ambiguous, we are required to defer to an agency's reasonable interpretations of those regulations. *See Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)). Deference, however, is not appropriate if the agency's "interpretation is nothing more than a convenient litigating position or a post hoc rationalization" for its actions rather than a "fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.,* —— U.S. ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012) (internal quotation marks and citations omitted). A change in an agency's interpretation does not present a "separate ground for disregarding the [agency's] present interpretation" unless the change leads to "unfair surprise." *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170–71, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007).

The DOL has expressly addressed the status of inbound travel expenses. Section 655.122(p) explains that an H–2A employer who is "subject to the FLSA may not make deductions that would violate the FLSA." 20 C.F.R. § 655.122(p)(1). In a section interpreting § 655.122(p) and the FLSA regulations, a regulatory preamble provides that "an H–2A employer covered by the FLSA is responsible for paying inbound transportation costs in the first workweek of employment to the extent that shifting such costs to employees (either directly or indirectly) would effectively bring their wages below the FLSA minimum wage." 75 Fed.Reg. at 6915.

With regard to immigration and recruitment expenses,[3] the preamble incorporated by reference the analysis from a previous field assistance bulletin. *Id.* ("Because of the similar statutory requirements and similar structure of the H–2A and H–2B

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programs, the same FLSA analysis applies to the H–2A program as was set forth in the Field Assistance Bulletin [2009–2 (Aug. 21, 2009)]."). That analysis stated: "[T]ravel and immigration-related costs necessary for workers hired under the H–2B program are for the primary benefit of their employers, and the employers therefore must reimburse the employees for those costs in the first workweek if the costs reduce the employees' wages below the minimum wage." U.S. Dep't of Labor Wage and Hour Div., Field Assistance Bulletin 2009–2, 9 (Aug. 21, 2009), *available at* http:// www. dol. gov/ whd/ Field Bulletins/FieldAssistanceBulletin2009_2.pdf. It also stated that "under both the visa program regulations and the FLSA, we believe that employers are responsible for paying the fees of any recruiters they retain to recruit foreign workers and provide access to the job opportunity." *Id.* at 12.

2

In the face of regulatory ambiguity, the DOL's determination that inbound travel and immigration expenses primarily benefit H–2A employers was reasonable. There is no reason to think that the DOL's determination was not a product of its considered judgment. Although the DOL briefly changed its interpretation at one point in 2008, there is no indication that the change caused any unfair surprise for Peri & Sons.[4] Therefore, we defer to the DOL's interpretation. The district court erred in ruling that Peri & Sons was not required to reimburse its employees during the first week of work for inbound travel and immigration expenses to the extent that such expenses lowered their compensation below the minimum wage.

III

The farmworkers also argue that, under the common law of Nevada, Peri & Sons breached their employment contracts by failing to adhere to the terms of the job order. The purported breaches of contract stemmed from not only the FLSA violations discussed above but also the refusal to reimburse the farmworkers for the cost

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of their outbound travel and for the cost of gloves necessary to perform the job. The district court dismissed this claim on the ground that the SAC did not plead the breach with sufficient specificity.

The Federal Rules of Civil Procedure require federal plaintiffs to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Rule 8(a) "generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner v. Switzer,* —— U.S. ——, 131 S.Ct. 1289, 1296, 179 L.Ed.2d 233 (2011). Such a statement must give the defendant "fair notice of the basis for [the plaintiffs'] claims." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

Under Nevada law, "the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.,* 434 F.Supp.2d 913, 919–20 (D.Nev.2006) (citing *Richardson v. Jones,* 1 Nev. 405, 408 (1865)). The farmworkers' complaint explained the contracts and damages at issue. It asserted that the underlying contracts were the job "orders described in Paragraphs 12 to 14 of this

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Complaint." Such is a plausible claim because "[i]n the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract." 20 C.F.R. § 655.122(q). The SAC also claimed that the farmworkers had "substantial injuries in the form of lost wages."

The SAC alleged breaches by Peri & Sons. Employment contracts between H–2A employers and employees must "[a]t a minimum ... contain all of the provisions required by this section." *Id.* § 655.122(q). Such mandatory terms include provisions prohibiting H–2A employers from "mak[ing] deductions that would violate the FLSA," *id.* § 655.122(p), and requiring H–2A employers to "provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker ... departed to work for the employer," *id.* § 655.122(h)(2). In light of these terms of the contract, the factual allegations incorporated into the breach of contract claim plausibly state a claim.

The district court erred in concluding that the farmworkers had not pled their breach of contract claims with sufficient specificity. Such allegations were sufficient to give Peri & Sons fair notice and to make the farmworkers' breach of contract claims plausible.[5]

IV

The farmworkers asserted claims under Nevada wage-and-hour laws that are largely duplicative of their claims under the FLSA and their claims for breach of contract.

A

In claims under Nevada Revised Statutes §§ 608.250 and 608.260, as well as the Nevada Constitution, the farmworkers allege that Peri & Sons failed to pay the Nevada minimum wage under the same kickback theory on which they relied for their FLSA claims. The district court dismissed these claims on the same grounds that it dismissed the FLSA claims, reasoning that the Nevada Supreme Court would follow federal precedent on this issue. We agree with the district court that the Nevada Supreme Court would probably interpret Nevada law to follow federal law on this issue. *Cf.*Nev.Rev.Stat. § 608.250 (directing the Labor Commissioner to set the minimum wage "in accordance with federal law"); Nev. Admin. Code § 608.160(2)(a) (prohibiting an employer from "deduct[ing] any amount from the wages due an employee unless ... [t]he employer has a reasonable basis to believe that the employee is responsible for the amount being deducted").

Peri & Sons claims that the Nevada courts would not interpret state law to follow federal law on this issue. The cases on which Peri & Sons relies, however, merely indicate that the Nevada courts do not interpret state law in accordance with federal law when the relevant statutes contain materially different language. In *Boucher v. Shaw,* 124 Nev. 1164, 196 P.3d 959, 963 n. 27 (2008), the Nevada Supreme Court refused to adopt a test used in the federal courts to determine whether an individual is an "employer." The court so

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ruled because the Nevada statute defining "employer" did not include any language indicating that officers of corporate employers were included. *See id.* The relevant federal statute, on the other hand, defined "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

In *Dancer v. Golden Coin, Ltd.,* 124 Nev. 28, 176 P.3d 271, 274 (2008), the court interpreted Nevada law to exclude tips from the calculation of an employee's minimum wage even though federal law permitted the inclusion of tips. Again, the state and federal statutes used significantly different language. *Compare*29 U.S.C. § 203(m)(2) (including tips in the definition of wages), *with*Nev.Rev.Stat. § 608.160(1)(b) (making it unlawful to count "any tips or gratuities bestowed upon the employees" in a calculation of the minimum wage). In this case, on the other hand, the relevant state law is not textually inconsistent with federal law. *Compare*29 U.S.C. § 206(a) ("Every employer shall pay to each of his employees ... wages at the following rates...."), *with*Nev.Rev.Stat. § 608.250(1) ("[T]he 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.").

Because we disagree with the district court's interpretation of federal law, its dismissal of these state law claims cannot stand.

B

In claims under Nevada Revised Statutes § § 608.040 and 608.050, the farmworkers allege that Peri & Sons failed to pay wages due under their employment contracts. The success of these claims depends upon the success of the contract claims discussed above. Because we conclude that the farmworkers adequately pled their claims for breach of contract, we also conclude that the district court should not have dismissed their state law causes of action for wages due under those contracts.

The district court, however, dismissed the farmworkers' claims under § 608.140 for a different reason. Section 608.140 only permits a plaintiff to recover attorneys' fees when the plaintiff establishes "that a demand has been made, in writing, at least 5 days before suit was brought, for a sum not to exceed the amount" recovered. Nev.Rev.Stat. § 608.140. Because the farmworkers failed to allege that they had made such a demand, the district court dismissed their claim under § 608.140. The farmworkers did not include any argument about making a demand in their opening brief. As a result, they waived their right to challenge the district court's ruling on this issue. *See Leer v. Murphy,* 844 F.2d 628, 634 (9th Cir.1988); *Miller v. Fairchild Indus., Inc.,* 797 F.2d 727, 738 (9th Cir.1986). The district court properly dismissed the farmworkers' § 608.140 claim.

V

The district court dismissed all of the farmworkers' wage-and-hour claims to the extent that they accrued before February 16, 2009, applying a two-year statute of limitations.[6] The farmworkers first argue that the district court should not have

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addressed statute of limitations issues on a motion to dismiss because plaintiffs are not required to counter affirmative defenses in their complaints. They also assert that their state constitutional claims are subject to a four-year

statute of limitations, and that their FLSA claims are subject to a three-year statute of limitations.[7] Peri & Sons contends that it was proper for the district court to consider statutes of limitations issues, that the farmworkers waived arguments about longer periods of limitations, and that we, even if we choose to consider such arguments, should reject them.

A

The farmworkers are correct to note that plaintiffs ordinarily need not "plead on the subject of an anticipated affirmative defense." *United States v. McGee,* 993 F.2d 184, 187 (9th Cir.1993). When an affirmative defense is obvious on the face of a complaint, however, a defendant can raise that defense in a motion to dismiss. *See Cedars–Sinai Med. Ctr. v. Shalala,* 177 F.3d 1126, 1128–29 (9th Cir.1999) (citing 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1357 (3d ed. 1998) ("A complaint showing that the governing statute of limitations has run on the plaintiff's claim for relief is the most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)(6)...."). In this case, the statute of limitations issues are apparent on the face of the complaint. The district court, therefore, was correct to address them.

B

With regard to their state constitutional claims, the farmworkers assert that the district court erred in failing to apply a catch-all four-year statute of limitations. *See*Nev.Rev.Stat. § 11.190(2)(c) (requiring "[a]n action upon a ... liability not founded upon an instrument in writing" to be brought within four years). Peri & Sons argues that the farmworkers cannot present this argument for the first time on appeal. In response, the farmworkers suggest that they did not have an opportunity to raise the argument below because the district court acted *sua sponte* in applying a two-year statute of limitations to their state constitutional claims.

The district court, however, did not act *sua sponte* on this issue. Peri & Sons clearly argued to the district court that the two-year statute of limitations applies to the farmworkers' state constitutional claims. Instead of arguing in favor of a four-year statute of limitations, the farmworkers merely contended that the issue should not be resolved on a motion to dismiss, a contention we have already rejected. The farmworkers' failure to raise the argument below constitutes a waiver. *See Costanich v. Dep't of Soc. & Health Servs.,* 627 F.3d 1101, 1110 (9th Cir.2010). The district court properly dismissed the state constitutional claims to the extent they accrued more than two years before the farmworkers filed suit.

C

With regard to the FLSA claims, the SAC clearly alleged that Peri & Sons' violations were "deliberate, intentional, and willful." The farmworkers argue that this allegation was sufficient to implicate

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the three-year statute of limitations in 29 U.S.C. § 255(a) for "a cause of action arising out of a willful violation." Peri & Sons contends that the farmworkers waived this argument by failing to raise it before the district court. *See Costanich,* 627 F.3d at 1110. The farmworkers, however, argued before the district court that they "adequately alleged that Defendant's FLSA violations were willful" and cited a Supreme Court case discussing the threeyear statute of limitations for willful violations. *See McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("Ordinary violations of the FLSA are subject to the general 2–year statute of limitations. To obtain the benefit of the 3–year exception, the Secretary must prove that the employer's conduct was willful....").

While the farmworkers' argument could have been clearer, it ought to be read in light of the contention by Peri & Sons to which they were responding. In front of the district court,

Peri & Sons acknowledged that willful violations were subject to a three-year statute of limitations but argued that there was no "factual basis" for finding the purported violations to be willful. Given the apparent source of the disagreement between the parties on the statute of limitations question, it was reasonable for the farmworkers to focus on the contested issue rather than the conceded one in their submission to the district court. On these facts, the farmworkers' submission was sufficient to raise the issue before the district court. It was not waived.

On appeal, Peri & Sons continues to argue that there is no factual basis for applying the three-year statute of limitations because any violation could not have been willful when the federal courts have disagreed with each other over the legality of such actions. The opinion on which Peri & Sons relies, *Gaxiola v. Williams Seafood of Arapahoe, Inc.,* 776 F.Supp.2d 117, 128 (E.D.N.C.2011), however, arose on summary judgment, not a motion to dismiss. *Id.* at 120. At the pleading stage, a plaintiff need not allege willfulness with specificity. *See*Fed.R.Civ.P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). We conclude that the farmworkers sufficiently alleged willfulness and that the district court erred in applying a two-year statute of limitations at this stage.

VI

For the foregoing reasons, we reverse the district court's dismissal of the farmworkers' FLSA claims to the extent that they accrued within three years of filing, reverse its dismissal of their breach of contract claims, affirm its dismissal of their claims under § 608.140, and reverse its dismissal of their other state statutory and constitutional claims to the extent that they accrued within two years of filing.[8] We remand for proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Notes:

[*] The Honorable James K. Singleton, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

[1] Because this case was dismissed upon a motion under Federal Rule of Civil Procedure 12(b)(6), we assume the truth of factual allegations in the operative complaint. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.,* 590 F.3d 806, 812 (9th Cir.2010); *Marder v. Lopez,* 450 F.3d 445, 448 (9th Cir.2006).

[2] The FLSA regulations require reimbursement in the first week to the extent that the expenses reduced an employee's wages below the minimum wage. The H–2A regulations require full reimbursement over a longer period of time. The H–2A regulations, therefore, are not superfluous because an employee paid more than the minimum wage would receive some reimbursement in the first week and some reimbursement later.

[3] This analysis does not apply to passport fees. *See*20 C.F.R. § 655.135(j). The farmworkers, however, have voluntarily dismissed their claim for reimbursement of passport fees.

[4] The withdrawal of the brief-lived 2008 interpretation expressly stated that the 2008 "interpretation may not be relied upon as a statement of agency policy." Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H–2A and H–2B Workers, 74 Fed.Reg. 13,261, 13,262 (Mar. 26, 2009).

[5] Contrary to Peri & Sons' assertion, the farmworkers did not waive their recruiting fees argument by failing to raise it below. The Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss alleged that some of the farmworkers had been required to pay recruiting fees and

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argued that reimbursement of such fees was required by law.

6. The farmworkers interpret the district court's order as applying a two-year statute of limitations to their breach of contract claims as well. It is not entirely clear whether the district court did so, but to the extent it did, it was in error. Nevada law provides a six-year statute of limitations for breach of contract claims. Nev.Rev.Stat. § 11.190(1)(b).

7. The farmworkers have not challenged the district court's application of a two-year statute of limitations to their claims under Nevada statutes. Accordingly, we do not disturb the district court's ruling on that issue.

8. Because of their success on this appeal, we award costs to the plaintiffs-appellants.

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EXHIBIT 3

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LATONYA TYUS, an individual; DAVID HUNSICKER, an individual; LINDA DAVIS, an individual; TERRON SHARP, an individual; COLLINS KWAYISI, an individual; LEE JONES, an individual; RAISSA BURTON, an individual; JERMEY MCKINNEY, an individual; and FLORENCE EDJEOU, an individual, all on behalf of themselves and all similarly situated individuals, Plaintiffs, vs. WENDY'S OF LAS VEGAS, INC., an Ohio corporation; CEDAR ENTERPRISES, INC., an Ohio Corporation; and DOES 1 through 100, inclusive, Defendants.	Case No.: 2:14-cv-00729-GMN-VCF **ORDER**

Pending before the Court is the Motion for Partial Judgment on the Pleadings (ECF No. 18) filed by Defendants Wendy's of Las Vegas, Inc. and Cedar Enterprises, Inc. (collectively, "Defendants"). Plaintiffs Raissa Burton, Linda Davis, Florence Edjeou, David Hunsicker, Lee Jones, Collins Kwayisi, Jeremy McKinney, Terron Sharp, and Latonya Tyus (collectively, "Plaintiffs") filed a Response (ECF No. 19), and Defendants filed a Reply (ECF No. 22). For the reasons discussed below, the Court **GRANTS** Defendants' Motion for Partial Judgment on the Pleadings.

I. BACKGROUND

This case arises out of violations of Nevada statutes pertaining to minimum wage regulations for employers. Plaintiffs are employees at various locations throughout Clark County, Nevada of the fast food restaurant chain, Wendy's. (Am. Compl. ¶ 1, ECF No. 3).

Plaintiffs allege that this action "is a result of [Defendants'] failure to pay Plaintiffs and other similarly-situated employees who are members of the Class the lawful minimum wage, because [Defendants] improperly claim, or have claimed, the right to compensate employees below the upper-tier hourly minimum wage level under Nev. Const. art. XV, § 16." (Id. ¶ 2).

Plaintiffs filed the instant action in this Court on May 9, 2014. (See Compl., ECF No. 1). Shortly thereafter, on May 20, 2014, Plaintiffs filed an Amended Complaint. (See Am. Compl.). Subsequently, Defendants filed a Motion to Dismiss, seeking dismissal of Plaintiffs' Amended Complaint. (Mot. to Dismiss, ECF No. 11). The Court dismissed Plaintiffs' Second, Third, and Fourth claims for relief with prejudice, and denied Defendant's Motion as to Plaintiffs' First claim for relief. (Feb. 4, 2015 Order, ECF No. 40).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "Judgment on the pleadings is properly granted when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012). Accordingly, "[a]nalysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." Id.

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

The Court, however, is not required to accept as true allegations that are merely

conclusory, unwarranted deductions of fact, or unreasonable inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible. Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555) (emphasis added).

III. DISCUSSION

In its Motion, Defendants assert that, "[b]ecause the statute of limitation is two years for minimum wage claims and statutes of limitations are strictly construed, Plaintiffs' class and individual claims falling outside the two year statute of limitations must be dismissed as a matter of law." (Mot. for Partial J. on the Pleadings 2:7–13, ECF No. 18). More specifically, Defendants assert that Nevada Revised Statute 608.260 provides the applicable statute of limitation in this case, which states that an "employee may, at any time within two years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage." (Id.; Nev. Rev. Stat. 608.260).

On the other hand, Plaintiffs assert that NRS 608.260 does not apply to this case and has been impliedly repealed by the Minimum Wage Amendment, the text of the Minimum Wage Amendment contains no limitation for actions to enforce its terms, and if a limitation does exist in this matter, it can only be the four-year catch-all provision found in NRS 11.220. (Response 5:14–14:6, ECF No. 19).

The Ninth Circuit and the District of Nevada have both addressed this question. See Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892 (9th Cir. 2013); see also McDonagh v. *Harrah's Las Vegas, Inc.*, No. 2:13-cv-01744-JCM-CWH, 2014 WL 2742874 (D. Nev. June 17, 2014). In Rivera, the district court held that, although the Minimum Wage Amendment is silent on the limitation period for minimum wage actions, such silence did not imply a repeal of the two-year limitation period of NRS 608.260, and dismissed all wage claims accruing before

the two-year limitation period. Rivera v. Peri & Sons Farms, Inc., 805 F. Supp. 2d 1042, 1046 (D. Nev. 2011). On appeal, the Ninth Circuit held that "[t]he district court properly dismissed the state constitutional claims to the extent they accrued more than two years before the farmworkers filed suit." Rivera, 735 F.3d at 902. Moreover, in McDonagh, the district court acknowledged that, "[w]hile article 15, section 16 of the Nevada constitution does create a new two-tiered minimum wage in the state, the section is silent on whether it changes the two-year statute of limitations in the Nevada Revised Statutes." 2014 WL 2742874, *4. The court went on to hold that "the constitutional provision was not intended to change this two-year statute of limitations." Id.

Plaintiffs argue that the Nevada Supreme Court's holding in Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518 (Nev. 2014), impliedly repealed NRS 608.260. (Response 7:3–9:21). In Thomas, the court noted that the Nevada Constitution controls over any conflicting statutory provisions, that a statute will be construed to be in harmony with the constitution, if reasonably possible, and "when a statute 'is irreconcilably repugnant' to a constitutional amendment, the statute is deemed to have been impliedly repealed by the amendment." Id. at 521. The court found the Minimum Wage Act to be "irreconcilably repugnant" to NRS 608.250(2), which excluded different classes of employees from its minimum wage mandate. Id. The court found that "[t]he Amendment's broad definition of employee and very specific exemptions necessarily and directly conflict with the legislative exception for taxicab drivers established by NRS 608.250(2)(e)." Id.

Unlike the statutory provision in Thomas, the Court finds that the two-year statute of limitations period found in NRS 608.260 does not necessarily and directly conflict with the Minimum Wage Amendment, which would make it irreconcilably repugnant. Rather, the statutory provision can be construed in harmony with the constitution. Therefore, although the Minimum Wage Amendment is silent on a limitations period, the Court finds that this silence

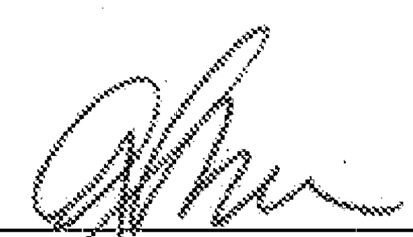
does not impliedly repeal the two-year statute of limitations period found in NRS 608.260. Accordingly, the Court dismisses with prejudice all wage claims accruing more than two years before Plaintiffs filed suit.

IV. CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion for Partial Judgment on the Pleadings (ECF No. 18) is **GRANTED**. Accordingly, all wage claims accruing more than two years before Plaintiffs filed suit are dismissed with prejudice.

IT IS FURTHER ORDERED that Plaintiffs' Countermotion for Partial Summary Judgment (ECF No. 21) and Defendants' Motion to Strike (ECF No. 24) are **DENIED as moot**.

DATED this 13th day of March, 2015.



Gloria M. Navarro, Chief Judge
United States District Judge

EXHIBIT 4

EXHIBIT 4

McDonagh v. Harrah's Las Vegas, Inc.

United States District Court for the District of Nevada

June 17, 2014, Decided; June 17, 2014, Filed

2:13-CV-1744 JCM (CWH)

Reporter
2014 U.S. Dist. LEXIS 82290; 2014 WL 2742874

NICOLE MCDONAGH, et al., Plaintiff(s), v. HARRAH'S LAS VEGAS, INC., et al., Defendant(s).

Prior History: Daprizio v. Harrah's Las Vegas, Inc., 2013 U.S. Dist. LEXIS 135745 (D. Nev. Sept. 20, 2013)

Core Terms

notice, statute of limitations, plaintiffs', tolling, cause of action, motion to dismiss, allegations, private right of action, employees, class certification, collection action, certification, Defendants', conditional, circulate, parties, pled, minimum wage, statutes, fail to pay, limitations, violations, hourly

Counsel: [*1] For Nicole McDonagh, David Grucello, Plaintiffs: David R Markham, LEAD ATTORNEY, Janine R. Menhennet, LEAD ATTORNEY, PRO HAC VICE, The Markham Law Firm, San Diego, CA; Joshua D Buck, Mark R. Thierman, LEAD ATTORNEYS, Thierman Law Firm, Reno, NV.

For Harrah's Las Vegas, Inc., Harrah's Entertainment, LLC, Defendants: Rick D Roskelley, LEAD ATTORNEY, Wendy M. Krincek, Littler Mendelson, PC, Las Vegas, NV.

Judges: JAMES C. MAHAN, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES C. MAHAN

Opinion

ORDER

Presently before the court is a motion to dismiss filed by defendants Harrah's Las Vegas, Inc. and Harrah's Entertainment, LLC. (Doc. # 21). Plaintiffs Nicole McDonagh and David Grucello filed a response in opposition (doc. # 23), and defendants filed a reply (doc. # 28).

Also before the court is plaintiffs' motion for circulation of notice of a pending FLSA 29 U.S.C. § 216(b) collective action. (Doc. # 26). Defendants filed a response in opposition (doc. # 33), and plaintiffs filed a reply (doc. # 38).

I. Background

In this case, plaintiffs assert claims on behalf of themselves and a proposed class consisting of all dual-rate supervisors and hourly employees employed by the defendants.

Plaintiffs filed the instant lawsuit alleging [*2] several causes of action: (1) violation of the Fair Labor Standards Act ("FLSA"), (2) breach of employment contract and NRS 608.040, (3) violations of NRS 608.016, 608.030, and 608.140, (4) failure to pay minimum wage in violation of the Nevada constitution, (5) failure to pay overtime wages in violation of NRS 608.140 and 608.018, and (6) failure to timely pay all wages due and owing upon termination pursuant to NRS 608.140 and 608.020-.050.

Plaintiffs allege that hourly employees and dual-shift supervisors were required to arrive at

work ten to fifteen minutes before their shifts began in order to attend management-conducted meetings referred to as "buzz sessions." (Doc. # 20 at p. 3). Plaintiffs further allege that these hourly employees and dual-shift supervisors were not paid for the time they spent at these "buzz sessions." (Doc. # 20 at p. 3).

Plaintiffs argue that the suit is a continuation of *Daprizio v. Harrah's Las Vegas Inc., 2:10-cv-00604-GMN, 2013 U.S. Dist. LEXIS 135745, 2013 WL 5328386 (D. Nev. 2013)* which was filed in April of 2010. (Doc. # 23 at p. 4). *Daprizio* attempted to argue similar claims on behalf of a class of plaintiffs. (Doc. # 23 at p. 4). However no class certification was ever requested. [*3] (Doc. # 21 at p. 17). Daprizio was dismissed as a result of her failure to disclose the litigation on her bankruptcy schedule which legally estopped her from pursuing the claim. (Doc. # 23 at p. 4).

II. Defendants' Motion to Dismiss

A. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While *Rule 8* does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). "Factual allegations must be enough to rise above the speculative level." *Twombly, 550 U.S. at 555*. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal, 556 U.S. at 678* (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts [*4] are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id. at 679*. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id. at 678*.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged — but not shown — that the pleader is entitled to relief." *Id.* (internal quotations omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly, 550 U.S. at 570*.

B. Discussion

1. Tolling

Plaintiffs allege that for purposes of the statute of limitations, the action should be treated as if it was commenced on April 27, 2010, by the filing [*5] of *Daprizio v. Harrah's Las Vegas, Inc.* in the District of Nevada. Plaintiffs' cite to *American Pipe* in reasoning that the statute of limitations should be tolled. *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*. Defendants contend that *American Pipe* does not relate to this case and cite to the Ninth Circuit's opinion in *Robbin v. Fluor Corp.* which distinguished *American Pipe* in cases in which class certification has been denied and a new member of the class attempts to re-litigate class certification. *835 F. 2d 213, 214 (9th Cir. 1987)*. Plaintiffs respond by referencing another Ninth Circuit opinion in which the court granted tolling in a class action that had previously been

properly certified in a prior case. *Catholic Social Servs. v. INS, 232 F.3d 1139, 1140 (9th Cir. 2000)* (en banc). In *Catholic Social Services*, the earlier action had been dismissed due to concerns beyond the merits of the claims or class. *Id.*

American Pipe allows for the tolling of the statute of limitations for "all asserted members of the class who would have been parties had the suit been permitted to continue." *414 U.S. at 554*. Once the statute of limitations has been tolled, it remains tolled [*6] for all members of the class until class certification is denied. *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*.

Plaintiffs in the present case were members of the proposed *Daprizio* class. Therefore the question is whether the asserted class in the present action can also qualify under *American Pipe*.

In order to determine whether *American Pipe* relates to the current action, a review of the prior action in *Daprizio* is needed. *Daprizio* was filed in April 2010, and attempted to bring a class action relating to the same or similar facts as in the present case. *Daprizio v. Harrah's Las Vegas, Inc., 2:10-CV-00604-GMN, 2013 U.S. Dist. LEXIS 135745, 2013 WL 5328386 (D. Nev. Sept. 20, 2013)*. A scheduling order was entered in March, 2012, which provided a deadline of May 31, 2012, to add parties or amend pleadings. *Id.* The scheduling order also placed a deadline of September 28, 2012, for plaintiffs to file a motion for conditional certification or a motion to certify class. *Id.* Daprizio failed to ever file a motion for conditional certification or to certify class. *Id.* In November 2012, Harrah's filed a motion for summary judgment which was granted on September, 20, 2013, for estoppel reasons arising out of an [*7] unrelated bankruptcy proceeding Daprizio was involved in. *Id.*

The parties are correct that neither *Robbin* nor *Catholic Social Services* are directly on point about whether *American Pipe* tolling applies in the present case. Unlike *Robbin*, class certification was not denied in the prior action and was never actually requested; and unlike *Catholic Social Services*, class certification was not granted in the prior action, because—again—it was never requested. Plaintiffs correctly point out that the matter of class certification on its merits has not been heard. However, after the deadline for filing a class-certification motion passed in *Daprizio*, plaintiffs in the present action were on notice that their claim was not being litigated, and that the proposed class that they purported to be a part of was not going to be certified.

Accordingly, the court finds that *American Pipe* tolling is appropriate for plaintiffs between April 27, 2010, and September 28, 2012, the period during which *Daprizio* was pending. The statute of limitations then continued to run for plaintiffs from September 29, 2012, until September 23, 2013, the date the present action was filed.

. . .

*2. Second Cause of Action - Failure [*8] to Plead Facts*

Defendants contend that plaintiffs' second cause of action should be dismissed for failure to plead a contract. (Doc. # 21 at p. 7). Defendants argue that because plaintiffs have not pled the specifics of an employment contract for either the named individuals or for any members of the alleged class, the plaintiffs have not met the standards of *Rule 8* pleading. (Doc. # 21 at p. 8).

As both parties point out, the elements of a claim for breach of contract are: (1) the existence of a contract, (2) breach of that contract, and (3) damage as a result of the breach.

In a motion to dismiss, a court accepts as true all well pled facts contained in the complaint. *Iqbal, 556 U.S. at 678*. In the amended complaint plaintiffs have pled that they were employed by defendants. (Doc. # 20 at p. 4-6). The court finds

that plaintiffs, having pled that they were employees, is sufficient to infer the existence of an employment contract.

Alternatively defendants argue that violations of NRS 608.040 must be dismissed because plaintiffs have not pled that the "30 days of pay" (due for employees not paid after resigning, quitting, or being discharged) was contracted for. (Doc. # 21 at p. 9-10). [*9] However, the penalty under NRS 608.040 is a statutory penalty and is not required as part of an employment contract for plaintiffs to allege a violation.

Defendants' motion to dismiss will therefore be denied as to the second cause of action.

3. Third, Fifth, and Sixth Causes of Action - Private Right of Action

Defendants argue that plaintiffs' third, fifth, and sixth causes of action must be dismissed because no private right of action was created by the statutes at issue in this case. (Doc. # 21 at p. 10).

The current landscape regarding whether chapter 608 of the NRS creates private rights of action is anything but clear. However, this court has previously held that no private right of action exists to enforce labor statutes arising from NRS §§ 608.010 et. seq. and 608.020 et. seq. Dannenbring v. Wynn Las Vegas, LLC, 907 F. Supp. 2d 1214, 1219 (D. Nev. 2013); *see also* Descutner v. Newmont USA Ltd., 3:13-cv-00371-RCJ-VPC, 2012 U.S. Dist. LEXIS 156656, 2012 WL 5387703, *2 (D. Nev. 2012) (finding no private right of action under NRS 608.018); Lucatelli v. Texas De Brazil (Las Vegas) Corp., 2:11-cv-01829-RCJ, 2012 U.S. Dist. LEXIS 66765, 2012 WL 1681394, *3 (D. Nev. 2012) (dismissing plaintiff's claims under NRS 608.018, 608.020, and 608.040, for [*10] overtime pay, payment at time of discharge, and penalty for failure to pay at time of discharge, respectively, and finding that the violations of Nevada labor statutes could not be asserted as private rights of action). The current tide of common law appears to show that NRS 608.140 "does not imply a private remedy to enforce labor statutes, which impose external standards for wages and hours," but only provides private rights of action for contractual claims. Descutner v. Newmont USA Ltd., 3:12-cv-00371-RCJ-VPC, 2012 U.S. Dist. LEXIS 156656, 2012 WL 5387703, *2 (D. Nev. 2012).

Notably, NRS 608.180 charges the labor commissioner with enforcement of NRS 608.005-608.195, which this court finds persuasive to imply that no private rights of action exist for the included statutes.

Therefore, the court will grant defendants' motion to dismiss regarding the third, fifth, and sixth causes of action.

4. Fourth Cause of Action - Statute of Limitations

Defendants argue that plaintiffs are not entitled to a six-year statute of limitations for failure to pay minimum wage. (Doc. # 21 at p. 12). Plaintiffs argue that Nevada's constitutional creation of a private right of action, which does not set forth a statute of limitations, [*11] implies a six-year statute of limitations as provided by NRS 11.190(1)(b). (Doc. # 23 at p. 22). Defendants cite to NRS 608.260, which establishes a two-year statute of limitations for collection of unpaid minimum wage. (Doc. # 21 at p. 13).

While article 15, section 16 of the Nevada constitution does create a new two-tiered minimum wage in the state, the section is silent on whether it changes the two-year statute of limitations in the Nevada Revised Statutes. Therefore the court finds that the constitutional provision was not intended to change this two-year statute of limitations.

Accordingly, plaintiffs are only entitled to a two-year statute of limitations for the fourth cause of action, failure to pay minimum wage in violation of the Nevada constitution.

. . .

5. Extent of the Proposed Class

Defendants request that the court dismiss class allegations that extend beyond the dealers and dual-rate supervisors at Harrah's Las Vegas, for failure to state a claim upon which relief can be granted. (Doc. # 21 at p. 13).

Plaintiffs have adequately pled that hourly shift employees were subject to the same policies and practices as the hourly shift dealers. Plaintiffs have met the requirements [*12] under Rule 8 regarding the alleged class.

Therefore, defendants' motion to dismiss claims extending beyond dealers and dual-rate supervisors will be denied.

III. Plaintiffs' Motion for Collective Action Certification

A. Legal Standard

The Fair Labor Standards Act ("FLSA") was created to provide a uniform national policy of guaranteeing compensation for all work or employment covered by the act. Barrentine v. Arkansas—Best Freight Sys., Inc., 450 U.S. 728, 741, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981). The FLSA grants individual employees broad access to the courts and permits an action to recover minimum wages, overtime compensation, liquidated damages, or injunctive relief. Id. at 740. Under the FLSA, an employee may initiate a collective action on behalf of himself or herself and other similarly situated people. 29 U.S.C. § 216(b). Court-supervised notice of pendency of § 216(b) actions "serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." Hoffman—La Roche, Inc. v. Sperling, 493 U.S. 165, 172, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989).

1. "Fairly Lenient" Standard Requiring Substantial Allegations, Based in Fact and Personal Knowledge, of a Single Policy or Plan

There is [*13] a two-tiered approach to certifying a collective class action under the FLSA. The first tier is the "notice stage" in which the standard is "fairly lenient" and "typically results in conditional class certification." Leuthold v. Destination America, Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004). In the notice stage, the "essential question is whether employees are sufficiently similarly situated, that notice should be sent to prospective plaintiff[s]." Small v. Univ. Med. Ctr. of S. Nev., 2:13-cv-00298-APG-PAL, 2013 U.S. Dist. LEXIS 84840, 2013 WL 3043454, at *1 (D. Nev. 2013) (internal quotations omitted). This "fairly lenient" standard is used because, at the initial stage of a collective action, the court has only minimal evidence to make its determination as to class member certification. Fetrow-Fix v. Harrah's Entertainment, Inc., 2:10-cv-00560-RLH-PAL, 2011 U.S. Dist. LEXIS 150116, 2011 WL 6938594, at *3 (D. Nev. 2011).

However, "unsupported assertions of widespread violations are insufficient." Small, 2013 U.S. Dist. LEXIS 84840, 2013 WL 3043454, at *1; *see also* Allerton v. Sprint Nextel Corp., 2:09-cv-01325-RLJ-GWF, 2009 U.S. Dist. LEXIS 132454, at *27 (D. Nev. 2009) (holding that "[m]ere allegations will not suffice [to meet plaintiff's burden]; some factual evidence [*14] is necessary" and that affidavits in support of the motion to circulate must "be based on the affiant's personal knowledge"); Silva v. Gordon Gaming Corp., 2:06-cv-00696-JCM-PAL, 2006 U.S. Dist. LEXIS 71847, 2006 WL 3542716, at *3-4 (D. Nev. 2006) (declarations based on "information and belief" are not sufficient to meet a plaintiff's burden on a motion to circulate notice under the FSLA).

Therefore, although the standard is low, the motion must "provide substantial allegations, supported by declarations or discovery, that the putative class members were together the victims of a single decision, policy, or plan." Small, 2013 U.S. Dist. LEXIS 84840, 2013 WL 3043454, at *1.

Plaintiffs must show "a factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice," and "plaintiffs cannot proceed [] if the action relates to other specific circumstances personal to the plaintiff rather than any generally applicable policy or practice." *Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, n.6 (D. Nev. 1999)*.

2. Geographic Scope of Certification

The court will limit the geographic scope of an FLSA notice where the plaintiffs fail to provide sufficient supporting affidavits [*15] or other evidence of similar violations outside the geographic location in which the plaintiffs were employed. *See Davis v. Westgate Planet Hollywood Las Vegas, LLC., 2:08-cv-07722-RCJ-PAL, 2009 U.S. Dist. LEXIS 5941, 2009 WL 102735, at *12-14 (D. Nev. 2009)* (denying request to circulate nationwide notice when plaintiff's proof is limited to specific employees at specific location).

B. Discussion

Plaintiffs' motion seeks to circulate notice of a collective action under the FLSA. Defendants oppose this motion on several grounds. For clarity, the court will address plaintiffs' request first, followed by defendants' arguments.

. . .

1. Sufficiently Similarly Situated

Plaintiffs have made "substantial allegations" supported by the evidence that defendants had a company-wide policy of mandatory "buzz-sessions" which employees attended off the clock. (Doc. # 26). The lenient standard for conditional class certification has been met for potential plaintiffs who were required to attend these "buzz-sessions."

Defendants argue that plaintiffs have not provided evidence for the additional claims of "rounding" and of the additional off-the-clock training for dual-rate supervisors. (Doc. # 33 at p. 7-8). The court agrees and will [*16] not allow conditional certification of the collective action on those claims.

2. Written Consent

Defendants argue that because plaintiffs have not filed written consent to sue with the court, the claim should be dismissed without prejudice, and the motion for conditional certification should be denied. (Doc. # 33 at p. 5).

Plaintiffs have subsequently filed their consents to sue with their reply in support of motion to circulate. (Doc. # 38 at exhibits 1-2). The court agrees with plaintiffs that this was a defect that has been cured.

3. Time Barred

Defendants argue that plaintiffs are time barred because the alleged practice of "pre-shift 'buzz' meetings" ended in 2010, and that the statute of limitations for FLSA claims is three years. (Doc. # 33 at p. 5-6). Defendants rely on the declaration of Harrah's Las Vegas, LLC's vice president of table games for its assertion. Plaintiffs have provided evidence in the form of declarations stating that they have been employed at Harrah's Las Vegas for a number of years, some of which were after 2010, and they were required to attend the alleged meetings every day before clocking in. (Doc. # 26 at exhibits 4-5).

Plaintiffs therefore have provided [*17] the minimal evidence needed for a court to allow notice to be circulated, as the evidence shows that claims may exist that are not time barred.

4. Equitable Tolling of Statute of Limitations

Plaintiffs have requested that the statute of limitations be tolled while the motion for conditional collective action certification is being considered.

The Ninth Circuit has made it clear that equitable tolling applies when either (1) "plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant," or (2) where "extraordinary circumstances beyond [the] plaintiffs' control made it impossible to file the claims on time." *Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996)*. In this action, there is no suggestion that potential plaintiffs have been prevented from asserting claims by any wrongful conduct by defendants. Plaintiffs have asserted no extraordinary circumstances that may warrant a tolling of the statute of limitations. Plaintiffs' request is merely on the grounds of equity for potential opt-in plaintiffs.

While the court is sympathetic to the equitable grounds of plaintiffs' request, the statutory language is clear regarding [*18] the running of the statute of limitations for individual plaintiffs in a collective action. *See 29 U.S.C. § 256*. Therefore the court will not toll the statute of limitations for the period plaintiffs' motion has been pending.

5. Content and Time Limit of Notice

Plaintiffs have submitted a proposed notice to the court for approval. (Doc. # 26-1). Defendants have objected to the proposed notice. (Doc. # 33 at p. 9). The court therefore orders a meet and confer so that the parties may find a mutually-acceptable form of notice to be submitted to the court for approval. This meet and confer must take place within thirty days of the issuance of this order.

Plaintiffs have also requested that the court allow the notice and consent to be translated into Spanish and mailed out with the English version. Plaintiffs have stated they will bear the costs of translation and mailing. The court will allow translation of the form that the parties find mutually acceptable. In regard to the window for opt-ins, the court will grant a sixty-day opt-in period, consistent with this district's precedent. *See, e.g., Williams v. Trendwest Resorts, Inc., 2:05-cv-0605-RCJ-LRL, 2006 U.S. Dist. LEXIS 89370, 2006 WL 3690686, at *2 (D. Nev. 2006)*. [*19] This sixty-day opt-in period shall begin running upon approval by the court of the mutually-acceptable form of notice.

IV. Conclusion

The court concludes that plaintiffs' second cause of action adequately puts forward a claim for which relief can be granted. Defendants' motion to dismiss is denied as to this claim.

The court also finds that no private right of action exists to support plaintiffs' third, fifth, and sixth causes action. Defendants' motion to dismiss is granted as to those claims.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion to dismiss (doc. # 21) be, and the same hereby is, GRANTED in part and DENIED in part, consistent with the foregoing.

IT IS FURTHER ORDERED that plaintiffs' motion for conditional certification and circulation of notice of a pending FLSA *§ 216(b)* collective action (doc. # 26) is GRANTED.

IT IS FURTHER ORDERED that the parties meet and confer in order to agree on a mutually acceptable notice to be submitted for the court's approval no later than thirty days following the entry of this order.

DATED June 17, 2014.

/s/ James C. Mahan

UNITED STATES DISTRICT JUDGE

EXHIBIT 5

EXHIBIT 5

130 Nev., Advance Opinion 87

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZURI-KINSHASA MARIA TERRY, INDIVIDUALLY; MARLENE NUNO, INDIVIDUALLY; MICHELE COSPER, INDIVIDUALLY; SELENA DENISE PELAEZ, INDIVIDUALLY; JESSICA ANNE MORGAN, INDIVIDUALLY; AND TINA CHAREST, INDIVIDUALLY, AND ALL ON BEHALF OF CLASS OF SIMILARLY SITUATED INDIVIDUALS,
Appellants,
vs.
SAPPHIRE/SAPPHIRE GENTLEMEN'S CLUB, A BUSINESS ORGANIZATION FORM UNKNOWN; AND SHAC, LLC, AN ACTIVE NEVADA DOMESTIC LIMITED LIABILITY COMPANY D/B/A SAPPHIRE/SAPPHIRE GENTLEMEN'S CLUB,
Respondents.

No. 59214

FILED

OCT 30 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

Appeal from a district court summary judgment holding that appellants were independent contractors and not employees within the meaning of NRS Chapter 608. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

Reversed and remanded with instructions.

Christensen Law Offices, LLC, and Thomas Christensen, Las Vegas; Rusing & Lopez and Michael J. Rusing and Sean E. Brearcliffe, Tucson, Arizona; The Law Offices of Robert L. Starr and Robert L. Starr, Woodland Hills, California,
for Appellants.

Greenberg Traurig, LLP, and Mark E. Ferrario and Tami D. Cowden, Las Vegas,
for Respondents.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

This case presents the question of whether appellants, performers at Sapphire Gentlemen's Club, are Sapphire employees within the meaning of NRS 608.010 and thus entitled to the minimum wages guaranteed by NRS Chapter 608. Because NRS 608.010's definition of employee hinges on NRS 608.011's definition of employer, we must decide the larger issue of when an entity is an employer under NRS 608.011, and in particular whether Sapphire is the performers' employer under that section. Given that the Legislature has long used federal minimum wage laws as a platform for this state's minimum wage scheme, that the statutes in question do not signal any intent to deviate from that course, and that for practical reasons the two schemes should be harmonious in terms of which workers are entitled to protection, we herein adopt the Fair Labor Standards Act's "economic realities" test for employment in the minimum wage context. 29 U.S.C. §§ 201-219 (2012). Under that test, the performers are Sapphire's employees within the meaning of NRS 608.010. We therefore reverse and remand.

I.

Sapphire Gentlemen's Club contracts for semi-nude entertainment with approximately 6,600 performers. Under these contracts, the performers may determine their own schedules (but agree to work a minimum shift length of six hours any day they decide to work unless they advise a Sapphire employee of their early clock-out); set prices for their private performances (provided that they comply with the club's established minimum charge); control the "artistic aspects" of their performances (though the club D.J. chooses the music they dance to, and they must obey club rules as to body positioning and physical contact with customers); and perform at other venues should they wish to. The performers also agree to abide by certain "house rules," including a minimum standard of coverage by their costumes and a minimum heel height; payment of a "house fee," which ranges in amount, any night they work; and performing two dances per shift on the club stage unless they pay an "off-stage" fee.

Sapphire pays no wages to the performers; their income is dependent upon tips and dancing fees paid by Sapphire patrons. In the district court, the performers challenged this practice, claiming that they were "employees" within the meaning of NRS 608.010 and thus guaranteed a minimum wage. The district court applied a five-factor test formerly used to determine employment status under the Nevada Industrial Insurance Act, now codified at NRS Chapters 616A-616D, *see Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 528, 815 P.2d 151, 159 (1991), *overruled by Tucker v. Action Equip. & Scaffold Co., Inc.*, 113 Nev. 1349, 951 P.2d 1027 (1997), *overruled by Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 148 P.3d 684 (2006), and found that the

performers were not "employees" within the meaning of NRS Chapter 608. The district court then granted a motion for summary judgment brought by Sapphire. The performers appeal.

II.

Only an "employee" is entitled to minimum wages under NRS Chapter 608. NRS 608.250, *superseded in part by constitutional amendment as recognized in Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. ___, 327 P.3d 518 (2014). NRS 608.010 defines employees as "persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." Sapphire argues that the performers had no "contract of hire" and alternatively that the performers were not "in the service of" Sapphire. But these arguments lack merit. First, the signed entertainment agreement, which describes in detail the terms under which Sapphire permits the performers to dance at its facility, is an express contract of hire, despite that therein the parties state that they "intend that the relationship created [by the agreement] will be only that of Sapphire and Entertainer and not any other legal relationship." Particularly where, as here, remedial statutes are in play, a putative employer's self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669 (5th Cir. 1968). Thus, Sapphire's protestations that the performers "never intended to be employees," and agreed to be independent contractors are beside the point.

Second, ordinarily one is "in the service of" another where one is "of use" to that person. *See Merriam-Webster's Collegiate Dictionary*

1137 (11th ed. 2007) (defining "serve" and "service"). And given that Sapphire concedes that the performers "are an important part of the business of a gentlemen's club, and moreover, that it is . . . the dancers that patrons come to see," the performers undeniably are "of use" to Sapphire, Sapphire's claims that the performers only "provided services to their own customers at Sapphire's facility" notwithstanding. Thus, whether the performers are "employees" under NRS 608.010 turns on whether Sapphire is their "employer."

As relevant to this appeal, an employer "includes every person having control or custody of any employment, place of employment or any employee." NRS 608.011. One has control where one has the "power to govern the management and policies of a person or entity." *Black's Law Dictionary* 378 (9th ed. 2009); *see also Merriam-Webster's Collegiate Dictionary* 272 (11th ed. 2007) (defining "control" as "power or authority to guide or manage"). Custody is "[t]he care and control of a thing or person for . . . preservation, or security." *Black's*, *supra*, at 441; *see also Merriam-Webster's*, *supra*, at 308 (defining "custody" as the "guarding" or "safekeeping" by one with authority). In the abstract, these definitions may sufficiently describe an employment relationship as one where a person has the power to direct the management of or the policies governing a worker, or is to some extent responsible for that worker's preservation and security. But this court is faced with a practical problem; namely, identifying which workers, and specifically whether *these* workers, are entitled to minimum wage protections. And our interpretation of NRS 608.011 must provide a structure that lower courts may also use to assess the realities of various working relationships under the section. Viewed with an eye toward such practical necessities, it is

clear that these definitions are insufficiently precise—a security guard, for example, may be somewhat responsible for the safety of employees in the facility he or she guards and thus fall within the definition of "employer" suggested by the conventional dictionary definition of "custody," but it seems unreasonable to deem such an individual responsible for the wages of his or her coworkers. Thus, the interpretation to which these definitions lead is not tenable. *See Harris Assocs. v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (explaining that this court eschews interpretations that produce unreasonable results).

In 2006, Nevada voters provided a new baseline minimum wage law, Article 15, Section 16 of Nevada's Constitution (the Minimum Wage Amendment), and a definition of "employer" to accompany that platform. This definition does not control the analysis here—the performers do not raise their right to minimum wages under the Minimum Wage Amendment; and though this court has recognized that the text of the Minimum Wage Amendment supplants that of our statutory minimum wage laws to some extent, *see Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. ___, ___, 327 P.3d 518, 522 (2014) (holding that "[t]he text of the Minimum Wage Amendment . . . supersedes and supplants the taxicab driver exception set out in NRS 608.250(2)"), the Department of Labor continues to use the definition of "employer" found in NRS 608.011, not that in the Minimum Wage Amendment. NAC 608.070. Still, because of the overlap between the Minimum Wage Amendment and NRS Chapter 608, the Minimum Wage Amendment's definition of employer could be instructive, were it not equally, if not more, tautological than NRS 608.011—"'[e]mployer' means any . . . entity that may employ individuals." Nev. Const. art. 15, § 16(C). Thus, apart from signaling this state's voters' wish

that more, not fewer, persons would receive minimum wage protections, *see Nev. Yellow Cab Corp.*, 130 Nev. at ___, 327 P.3d at 520-21 (relying on the "broad" definition of employee in the Minimum Wage Amendment to identify the voters' intent to extend minimum wage protections to taxicab drivers), the Minimum Wage Amendment offers little elucidation. So it is that a more concrete interpretative aid—one extrinsic from Nevada's statutory and constitutional minimum wage frameworks—is required.

The performers urge this court to adopt the economic realities test that federal courts use under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (2012), as that interpretive aid. Though the parties argue to the contrary, this court has not yet decided the applicability of this federal test under our minimum wage laws. In *Prieur v. D.C.I. Plasma Center of Nevada, Inc.*, we stated that the existence of an employment relationship was determined by looking to the "economic reality" of said relationship, but we did so only in dicta. 102 Nev. 472, 473, 726 P.2d 1372, 1373 (1986). And, while we later denied that *Prieur* had adopted the economic realities test to resolve minimum wage disputes, we did not reject the test in its entirety. *Boucher v. Shaw*, 124 Nev. 1164, 1170-71 n.27, 196 P.3d 959, 963 n.27 (2008). It must be said that the language of NRS 608.011 and the relevant FLSA provisions differs—the FLSA defines an "employer" as one who suffers or permits another to work. 29 U.S.C. § 203(d) & (g) (2012). But the Legislature has long relied on the federal minimum wage law to lay a foundation of worker protections that this State could build upon, *see* 1965 Nev. Stat., ch. 333, § 2, at 696 (extending Nevada's minimum wage protections to those not covered under the FLSA), and so in many significant respects, Nevada's minimum wage laws and those set federally run parallel. *See, e.g.*, NRS

608.250 (directing the Labor Commissioner to set the minimum wage "in accordance with federal law"); *see also* Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., February 18, 1975) (testimony by Raymond D. Bohart, Federated Employers of Nev.) (acknowledging that the bill in question, which extended Nevada's minimum wage statutory protections to both men and women, was "a duplication of the [FLSA] in many aspects"). Such parallels are part of a larger national pattern of laws that have emerged to deal with common problems in the minimum wage context, and many other states have adopted the economic realities test to determine whether an employment relationship exists under their respective state minimum wage laws. *See, e.g.*, *Campusano v. Lusitano Const. LLC*, 56 A.3d 303, 308 (Md. Ct. Spec. App. 2012); *Cejas Commercial Interiors, Inc. v. Torres-Lizama*, 316 P.3d 389, 394 (Or. Ct. App. 2013); *Commonwealth, Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), *aff'd*, 859 A.2d 1253 (Pa. 2004); *Anfinson v. FedEx Ground Package Sys., Inc.*, 244 P.3d 32, 40-41 (Wash. Ct. App. 2010), *aff'd*, 281 P.3d 289 (Wash. 2012). Where, as here, a statute that requires this court's interpretation implicates broad questions of public policy, the divergent acts of foreign jurisdictions dealing with similar subject matter may properly inform that interpretation. *See Schimek v. Gibb Truck Rental Agency*, 174 A.2d 641, 643 (N.J. Super. Ct. App. Div. 1961); *cf. Klamath Cnty. v. Laborers Int'l Union of N. Am., Local No. 915*, 534 P.2d 1169, 1172 (Or. Ct. App. 1975) (holding that the National Labor Relations Act was relevant to interpret a differently worded state labor relations statute).

True, this court has signaled its willingness to part ways with the FLSA where the language of Nevada's statutes has so required. *See Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 32-34, 176 P.3d 271, 274-75 (2008); *Boucher*, 124 Nev. at 1170-71 n.27, 196 P.3d at 963 n.27. Thus, in *Golden Coin*, this court held that Nevada law excluded tips from the calculation of an employee's minimum wages—contrary to the rule under the FLSA—because the language of the relevant statutes was entirely conflicting. 124 Nev. at 32-33, 176 P.3d at 274-75; *compare* 29 U.S.C. § 203(m) (2012) (stating that the minimum wage calculation includes "the cash wage paid" plus "the tips received"), *with* NRS 608.160(1)(b) (making it "unlawful for any person to . . . [a]pply as a credit toward the payment of the statutory minimum hourly wage . . . any tips or gratuities bestowed upon the employees of that person"). And in *Boucher* we determined that the language of NRS 608.011 was not intended to "pierce the corporate veil and extend personal liability to individual managers" for unpaid minimum wages because the Legislature had specifically excluded all references to "manager[s]." 124 Nev. at 1170, 196 P.3d at 963. Again, the FLSA's rule runs contrary, but the relevant statutory language expressly states that "any person acting directly or indirectly in the interest of an employer in relation to an employee" can also be held liable for back wages. 29 U.S.C. § 203(d), 206 (2012). Here, and in contrast to the circumstances of *Golden Coin* and *Boucher*, given the breadth of NRS 608.011's definition and the lack of direction it provides, we cannot say that there is any language in NRS 608.011 so "materially different" from that of 29 U.S.C. § 203(d) and (g) that it would caution this court against adopting the economic realities test to interpret the former. *See Rivera v.*

Peri & Sons Farms, Inc., 735 F.3d 892, 900 (9th Cir. 2013), *cert. denied*, 573 U.S. ___, 134 S. Ct. 2819 (2014).

Moreover, it seems that our Legislature intended that NRS 608.011 would encompass as many or more entities as the FLSA definition, *see* Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., February 20, 1975) (testimony by Stan Jones, Nev. State Labor Comm'r) (explaining that the bill that added the definition was necessary because "there are many workers in Nevada that the people in Washington have forgotten"), and to avoid preemption, our state's minimum wage laws may only be equal to or more protective than the FLSA. *See* 29 U.S.C. § 218 (1967); *Golden Coin*, 124 Nev. at 32-33, 176 P.3d at 274-75. In accordance with the FLSA's remedial purpose, 29 U.S.C. § 203(d) and (g) are necessarily broad, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003); indeed, it has been said that "a broader or more comprehensive coverage of employees [than that provided in the FLSA's definitions] would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (internal quotations omitted). And, recognizing that "a constricted interpretation of the phrasing by the courts would not comport with [such a] purpose," the Supreme Court has indicated that it fashioned the economic realities test to be wide-reaching. *Cf. United States v. Silk*, 331 U.S. 704, 711-12 (1947), *superseded by statute as recognized in Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983). Thus, the economic realities test examines the *totality of the circumstances* and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33 (1961); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431,

434 (5th Cir. 2013). Given this backdrop, this court has difficulty fathoming a test that would encompass more workers than the economic realities test, short of deciding that all who render service to an industry would qualify, a result that NRS Chapter 608 and our case law specifically negate. *See* NRS 608.255; *Prieur*, 102 Nev. at 474, 726 P.2d at 1373.

Thus, to the extent that our test could only, from a pragmatic standpoint, seek to be equally as protective as the economic realities test, and having no substantive reason to break with the federal courts on this issue, "judicial efficiency implores us to use the same test as the federal courts" under the FLSA. *See Moore v. Labor & Indus. Review Comm'n*, 499 N.W.2d 288, 292 (Wis. Ct. App. 1993) (adopting, for analogous state law purposes, the test used by federal courts to determine whether someone is an employee for the purpose of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012)). That the Legislature repeatedly heard testimony as to the burden on businesses and potential confusion should Nevada's Minimum Wage Act and the FLSA fail to operate harmoniously—*see, e.g.*, Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., February 24, 1975) (testimony by Stan Warren, Nev. Bell) (discussing his concern that if the FLSA and Nevada's Minimum Wage Act were inharmonious it would "increase their operation costs and bring about inefficiency" because "they would have to keep two sets of books"); *id.* (testimony by Louis Bergevin, Nevada Cattlemen's Association) (suggesting that the bills in question "be amended to read as the FLSA reads" for clarity)—and that it responded to these concerns by amending the bill in question—1975 Nev. Stat., ch. 353, § 1, at 500-01 (clarifying the protections to which employees that fell under the FLSA were entitled)—reflects and further illuminates this

administrative need, and further supports our adoption of the federal standard in this instance.

Inasmuch as the Legislature borrowed the language of NRS 608.010 from Nevada's workers' compensation statute, NRS 616A.105, *see* A.B. 48, 72d Leg. (Nev. 2003), the district court's adoption of the test formerly applied to NRS 616A.105 under NRS Chapter 608 was somewhat logical. But NRS Chapter 608 and the Nevada Industrial Insurance Act (NIIA) are not *in pari materia* because the underlying purpose of this state's workers' compensation laws—to wit, to limit "private controversy and litigation between employer and employee" and to give workers the right to compensation regardless of fault, *Pershing Quicksilver Co. v. Thiers*, 62 Nev. 382, 389, 152 P.2d 432, 436 (1944)—is distinct from that of the statutory minimum wage scheme, which seeks to safeguard the "health and welfare of persons required to earn their livings by their own endeavors." *See* NRS 608.005. And, while labor and employment laws that effectuate different goals "should not be entirely discounted, we must remain cognizant that they were not enacted for precisely the same purpose as the Minimum Wage Act."[1] *Stuber*, 822 A.2d at 872-73. With this in mind, other states utilize different tests for employment under their respective minimum wage and workers' compensation schemes. *Compare id.* (adopting the economic realities test to determine employment under Pennsylvania's minimum wage act), *with Southland Cable Co. v. W.C.A.B. (Emmett)*, 598 A.2d 329, 330-31 (Pa. Commw. Ct.

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[1]Thus, Sapphire's advancement of the *Meers v. Haughton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1985), "normal work" test—the test for employment under this state's *current* workers' compensation statutes—is likewise unavailing.

1991) (adopting the common-law control test to determine employment under Pennsylvania's workers' compensation act); *also compare Campusano*, 56 A.3d at 308 (adopting the economic realities test to determine employment under Maryland's minimum wage act), *with Mackall v. Zayre Corp.*, 443 A.2d 98, 103 (Md. Ct. App. 1982) (reiterating that the control test is used to determine employment under Maryland's workers' compensation act); *also compare Cejas*, 316 P.3d at 394 (adopting the economic realities test to determine employment under Oregon's minimum wage act), *with Dep't of Consumer & Bus. Servs. v. Clements*, 246 P.3d 62, 66-67 (Or. Ct. App. 2010) (applying a control-based test to determine employment under Oregon's workers' compensation act); *also compare Anfinson*, 244 P.3d at 40-41 (adopting the economic realities test to determine employment under Washington's minimum wage act), *with D'Amico v. Conguista*, 167 P.2d 157, 160 (Wash. 1946) (applying the common-law control test to determine employment under Washington's workers' compensation act).

Moreover, prior to 2003, NRS 608.010's definition of employee did not track that found in the workers' compensation statutes. *See* 2003 Nev. Stat., ch. 291, § 2, at 1518. It appears that the Legislature imported NRS 616A.105's language to the statutory minimum wage context solely because NRS 616A.105 had been read to encompass all workers regardless of immigration status, *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 448, 25 P.3d 175, 178 (2001), and the Legislature sought to revise the minimum wage statutes to also protect "persons unlawfully employed." *See* Hearing on A.B. 48 Before the Assembly Commerce & Labor Comm., 72d Leg. (Nev., Feb. 26, 2003). Thus, the Legislature did not have in mind any additional interpretive gloss that this court previously gave NRS

616A.105 or its predecessor, NRS 616.055. So, even setting the disparate purposes of NRS Chapter 608 and NIIA aside, there is no justification for deeming this specific post-enactment amendment to control NRS 608.010's meaning, so as to construe the sections harmoniously, as this court might otherwise be inclined to do. *See* 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 51:2 (7th ed. 2012) (noting that courts "assume that a legislature always has in mind previous statutes relating to the same subject when it enacts a new provision").

Thus, the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the federally set course, and for the practical reasons examined above, our state's and federal minimum wage laws should be harmonious in terms of which workers qualify as employees under them. We therefore adopt the FLSA's "economic realities" test for employment in the context of Nevada's minimum wage laws.

III.

While it is not necessary to list exhaustively every factor that could be relevant in the totality of circumstances that make up a working relationship's economic reality, there are some factors which courts nearly universally consider:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
>
> 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> 4) whether the service rendered requires a special skill;

> 5) the degree of permanence of the working relationship; and
>
> 6) whether the service rendered is an integral part of the alleged employer's business.

Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); *see also* Deborah T. Landis, Annotation, *Determination of "Independent Contractor" and "Employee" Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.S. § 203(e)(1))*, 51 A.L.R. Fed. 702 § 2 (1981) (collecting cases). With this in mind, we examine the district court's summary judgment regarding the performers' relationship with Sapphire de novo, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), and because the material facts in this case are undisputed, we decide whether an employment relationship exists between them as a matter of law. *See Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 325 (9th Cir. 1996); *cf. Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 47, 910 P.2d 271, 274 (1996) (suggesting that the question of whether an agency relationship exists may be a question of law where no material facts are disputed).

As to the "control" factor considered under the totality of the circumstances, at first look, the facts may appear mixed. Sapphire did not produce a set schedule for performers, theoretically allowing them to work any day they wished for as long as they wished, provided that they met a six-hour shift minimum or received permission to depart early. Additionally, though the club set a two stage-dance minimum for performers not paying the off-stage fee, and discouraged performers from refusing to give a lap dance if a customer requested one, the decision of whether or not to stage dance ultimately lay in the discretion of the performers, as did their acceptance or rejection of a patron's invitation for

a private dance. And, while Sapphire required performers to accept "dance dollars"—from which the club took a cut—whether or not they preferred to, performers were also permitted to accept cash, to which the club laid no claim.

But this court is mindful that Sapphire's supposed lack of control may actually reflect "a framework of false autonomy" that gives performers "a coercive 'choice' between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity." Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 Mich. J. Gender & L. 339, 347 (2013). Put differently, Sapphire emphasizes that performers may "choose[ ] not to dance on stage at Sapphire" so long as they also "choose to pay an optional 'off-stage fee,'" and similarly that a performer may "choose[ ] not to dance for a patron she knows will pay with dance dollars, she may make that choice," though the performer may not ask that patron to pay in cash, and in making either choice the performers also risk taking a net loss for their shift. But by forcing them to make such "choices," Sapphire is actually able to "heavily monitor [the performers], including dictating their appearance, interactions with customers, work schedules and minute to minute movements when working," while ostensibly ceding control to them. *Id.* at 342 n.12. This reality undermines Sapphire's characterization of the "choices" it offers performers and the freedom it suggests that these choices allow them; the performers are, for all practical purposes, "not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

Added to this is the weight of other economic realities factors. *See Real*, 603 F.2d at 754. First, given that the performers risked little

more than their daily house fees, personal grooming expenditures, costume costs, and time, and that the one who "takes the risks . . . reaps the returns," their opportunity for profit was limited accordingly. *See Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343, 1351-52 (M.D. Fla. 1997). That a performer might increase her profits through "hustling," that is using her interpersonal skills to solicit larger tips, is not dispositive—"[a]s is the case with the zealous waiter at a fancy, four star restaurant, a dancer's stake, her take and the control she exercises over each of these are limited by the bounds of good service . . . ." *Id.* at 1352; *see also Clincy v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1345-46 (N.D. Ga. 2011).

With regard to the relative investment of the parties, we note that Sapphire provides all the risk capital, funds advertising, and covers facility expenses. The performers' financial contributions are limited to those noted above—their costume and appearance-related expenses and house fees. Thus, the performers are "far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments," *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (internal quotation omitted); *see also Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 920 (S.D.N.Y. 2013); *Clincy*, 808 F. Supp. 2d at 1347; *Harrell*, 992 F. Supp. at 1350; *Reich v. Priba Corp.*, 890 F. Supp. 586, 593 (N.D. Tex. 1995); *Jeffcoat v. State, Dep't of Labor*, 732 P.2d 1073, 1077 (Alaska 1987), and this factor also weighs in the performers' favor.

All work requires some skill, so in the economic realities context, courts look specifically for workers' "special" skills; namely, whether their work requires the initiative demonstrated by one in

business for himself or herself. *See Circle C.*, 998 F.2d at 328. Sapphire suggests that the performers' ability to "hustle" clients is one such skill. But inasmuch as Sapphire does not appear to have interviewed the performers for any indication of their hustling prowess, it is not apparent that their work actually requires such initiative. In any case, though it may well be that a good "hustle" is a considerable boon in the field, "the ability to develop and maintain rapport with customers is not the type of 'initiative' contemplated by this factor." *Id.*

According to Sapphire, "[d]ancers are itinerant *because* they have the freedom to ply their dancing trade at a multitude of gentlemen's clubs," and so the factor looking to the permanency of the relationship should weigh in its favor. True, Sapphire allowed the performers to work at other venues, and different performers testified that they continued schooling or other employment during their tenure at Sapphire. But, that the performers "were free to work at other clubs or in other lines of work . . . do[es] not distinguish them from countless workers in other areas of endeavor who are undeniably employees . . . for example, waiters, ushers, and bartenders." *Rick's Cabaret*, 967 F. Supp. 2d at 921. The ultimate inquiry is the nature of the performers' dependence on the club, and "[e]ven if the freedom to work for multiple employers may provide something of a safety net, unless a worker possesses specialized and widely-demanded skills, that freedom is hardly the same as true economic independence." *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 452-53 (5th Cir. 1988), *modified on other grounds*, 867 F.2d 875 (5th Cir. 1989). Thus, though the temporary nature of the relationship at issue weighs against it being that of employer/employee, this factor carries little persuasive value in the context of topless dancers and the clubs at which they perform, and

cannot alone tilt the scales in Sapphire's favor. *See Priba Corp.*, 890 F. Supp. at 593-94.

Sapphire contends that "[e]xotic dancing is customarily performed by independent contractors, and therefore, is not an integral part of Sapphire's business." Quoting *Meers v. Haughton Elevator*, 101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985), Sapphire argues that "the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business[,] . . . [t]he test . . . is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors." Even assuming it is true that "exotic dancing" is typically performed by independent contractors—a tenuous proposition given that most foreign precedent demonstrates it is performed by *employees*, *see, e.g.*, *Circle C.*, 998 F.2d at 330 (holding that exotic dancers were employees not independent contractors); *Rick's Cabaret*, 967 F. Supp. 2d at 925-26 (accord); *Clincy*, 808 F. Supp. 2d at 1350 (accord); *Thompson v. Linda & A.*, 779 F. Supp. 2d 139, 151 (D.D.C. 2011) (accord); *Harrell*, 992 F. Supp. at 1354 (accord); *Priba Corp.*, 890 F. Supp. at 594 (accord); *Jeffcoat*, 732 P.2d at 1078 (accord)—Sapphire cites no authority supporting the application of the *Meers* "normal work" test to this factor in the economic realities context. And to do so simply makes no sense; if we are examining whether work is "integral" to an employer's business, the test *must be* whether it is "useful, necessary, or even absolutely indispensable" to the business. *See Merriam-Webster's Collegiate Dictionary* 650 (11th ed. 2007) (defining "integral" as "essential to completeness"). Given that Sapphire bills itself as the "World's Largest Strip Club," and not, say, a sports bar or night club, we are confident that

the women strip-dancing there are useful and indeed necessary to its operation. *See Linda & A.*, 779 F. Supp. 2d at 150 (calling it a "self-evident conclusion that nude dancers formed an integral part of [the strip club's] business").

Thus, based on our review of the totality of the circumstances of the working relationship's economic reality, Sapphire qualifies as an employer under NRS 608.011, and the performers therefore qualify as employees under NRS 608.010. In so holding, this court is in accord with the great weight of authority, which has almost "without exception . . . found an employment relationship and required . . . nightclub[s] to pay [their] dancers a minimum wage." *See Clincy*, 808 F. Supp. 2d at 1343 (internal quotation omitted) (collecting cases). We therefore reverse the district court's grant of summary judgment in favor of Sapphire and remand for further proceedings consistent with this opinion.

_____, J.
Pickering

We concur:

_____, C.J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

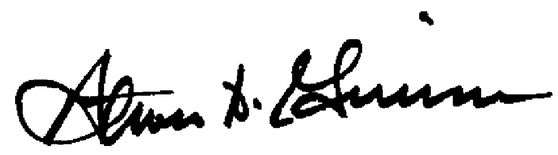
EXHIBIT 6

EXHIBIT 6

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, JANE DOE DANCER, through XI, Individually, and on behalf of Class of Similarly situated individuals, Plaintiffs, vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited Liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), SN INVESTMENT PROPERTIES, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X, Defendants.	CASE NO: A-14-709372-C Electronically Filed DEPT NO: XXXI 06/25/2015 04:00:24 PM  CLERK OF THE COURT

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT, RUSSELL ROAD FOOD AND BEVERAGE, LLC'S MOTION TO DISMISS AND GRANTING DEFENDANT'S MOTION TO STRIKE PRAYER FOR EXEMPLARY AND PUNITIVE DAMAGES

Defendant, RUSSELL ROAD FOOD AND BEVERAGE, a Nevada limited liability, dba CRAZY HORSE III GENTLEMEN'S CLUB's (the "Defendant"), Motion to Dismiss Plaintiffs, JANE DOE DANCER I through XI, and/or Motion to Strike Plaintiffs, JANE DOE DANCER II, III, VI, VIII, and IX through XI; Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to N.R.C.P. 12(b)(5), and/or its Motion to Strike Plaintiffs' First Cause of Action, Prayer for Exemplary and Punitive Damages, and Prayers for Relief Pursuant to N.R.C.P. 12(f), having come on regularly for hearing on May 7 and May 8, 2015, in Department 31of the above-entitled Court; the

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

Honorable Joanna S. Kishner presiding; Plaintiffs being represented by Ryan M. Anderson, Esq., of Morris//Anderson, and Defendant being represented by Gregory J. Kamer, Esq., of Kamer Zucker Abbot, and Jeffery A. Bendavid, Esq., of Moran Brandon Bendavid Moran. Based on the argument of the parties at the hearing and the relevant case law, the Court allowed each party to file supplemental briefs on the statute of limitations issue. Said supplemental briefs were filed on May 29, 2015, by both parties.[1] After a full review of the briefs of the parties, including the supplemental briefs; the arguments of counsel; and otherwise being fully advised in the premises, and good cause appearing, the Court therefore, finds, concludes, and orders as follows:[2]

I. PROCEDURAL BACKGROUND AND SUMMARY OF ARGUMENTS RAISED

On November 4, 2014, Plaintiff, Ashleigh Park, individually, and on behalf of the Class of similarly situated individuals ("Park"), filed her Class Action Complaint for Failure to Pay Wages, Pursuant to NRS 608.250; Failure to Pay Wages Upon Termination, Pursuant to NRS 608.020, et seq., Conversion, Unjust Enrichment, and Injunctive and Declaratory Relief.

On February 19, 2015, Park filed her First Amended Class Action Complaint. This First Amended Complaint identified additional Plaintiffs: Jacqueline Franklin, Lily Shepard, Stacie Allen, and Jane Doe Dancer, I through XI, on behalf of themselves

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[1] On June 4, 2015 a Notice of Dismissal without prejudice was filed on behalf of Defendant SN Investment Properties LLC and thus they are not a party to the action.

[2] On May 18, 2015 Plaintiffs filed a Motion for Leave to File Amended Complaint on Order Shortening Time. The Order on that Motion is set forth separately. The Court's ruling on the instant Motion to Dismiss is based on the First Amended Complaint filed in February, 2015 and is not reflective of any attempted changes Plaintiff sought in their Motion for Leave to Amend that was filed after the hearing in the present matter but prior to the instant decision.

and a class of all persons similarly situated (together with "Park," the "Plaintiffs"). This First Amended Complaint excluded Park's prior claims for Conversion, Injunctive Relief, and Declaratory Relief and included a newly-asserted claim for an alleged Failure to Pay Wages, Pursuant to Nev. Const. Art. XV, Sec. 16 (the "Minimum Wage Amendment").

According to Plaintiffs' allegations, Plaintiffs were employed by Defendant as topless dancers, hostesses, entertainers, erotic dancers, and/or strippers at Defendant's place of business, commonly known as Crazy Horse III. Plaintiffs alleged that Defendant violated the Minimum Wage Amendment and NEV. REV. STAT. § 608.250 by failing to pay Plaintiffs Nevada's minimum wage, required by Nevada law, for the hours that Plaintiffs worked as employees for Defendant. Plaintiffs also alleged in their First Amended Class Action Complaint that Defendant failed to pay Plaintiffs wages owed at the time of their respective resignation, termination, or discharge of employment with Defendant as required by NEV. REV. STAT. § 608.020-050.

Plaintiffs further alleged in their First Amended Class Action Complaint that Defendant was unjustly enriched as a result of: (a) Defendant's failure to pay any wages to Plaintiffs; (b) Defendant's wrongful conversion, confiscation, and taking of money from Plaintiffs as a condition of employment; and (c) improper imposition and taking of fees, charges, fines, and penalties from Plaintiff as a condition of their employment.

On March 16, 2015, Defendant filed its Motion to Dismiss and/or Strike. In their Motion, Defendant sought the following relief:

1. Plaintiffs, JANE DOE DANCER I through XI, must be dismissed since Plaintiffs have failed to properly identify the actual names of each these

fictitious Plaintiffs asserting claims against Defendant as required by N.R.C.P.17(a);

2. Plaintiffs, JANE DOE DANCER II, III, VI, VIII, and IX through XI, must be struck from Plaintiffs' First Amended Complaint as redundant pursuant to N.R.C.P. 12(f);

3. Plaintiffs' First Cause of Action must be dismissed pursuant to N.R.C.P. 12(b)(5) to the extent Plaintiffs' claims for unpaid minimum wages are barred by the applicable two (2) year statute of limitations;

4. Plaintiffs' Second and Third Causes of Action must be dismissed pursuant to N.R.C.P. 12(b)(5) to the extent Plaintiffs' claims for unpaid minimum wages are barred by the applicable two (2) year statute of limitations;

5. Plaintiffs' Fourth Cause of Action must be dismissed pursuant to N.R.C.P. 12(b)(5) since Plaintiffs are not entitled to an equitable remedy under Nevada law;

6. Plaintiffs' Fourth Cause of Action must be dismissed pursuant to N.R.C.P. 1 2(b)(5) since Plaintiffs have failed to assert any factual allegations demonstrating the necessary elements required for a claim of unjust enrichment;

7. Plaintiffs' First Cause of Action must struck as redundant pursuant to N.R.C.P. 12(f);

8. Plaintiffs' prayers for relief asserted as part of Plaintiffs' Fourth Cause of Action must be struck as immaterial pursuant to N.R.C.P. 12(f); and

9. Plaintiffs' prayer for exemplary and punitive damages must be struck since Plaintiffs have not asserted any claims sounding in tort upon which punitive damages may be awarded and Plaintiffs have not otherwise asserted any factual allegations demonstrating that Defendant's conduct was fraudulent, oppressive, or conducted with malice.

Plaintiffs filed their Opposition to the Motion to Dismiss and/or Strike on March 30, 2015. Defendant filed its Reply to Defendant's Opposition on May 1, 2015. A hearing on Defendant's Motion to Dismiss and/or Strike commenced on May 7, 2015, and concluded on May 8, 2015.

At the hearing on May 8, 2015, this Court allowed the parties to file supplemental briefs by May 29, 2015, concerning the single issue of whether the two-year statute of limitation provided by NEV. REV. STAT. § 608.260, or a four-year statute of limitation provided by NEV. REV. STAT. § 11.220 applied to Plaintiffs' First Cause of Action. Both parties submitted supplemental briefs.

In Defendant's Motion, and as argued at the hearing, Defendant maintained that Plaintiffs, Jane Doe Dancer I through XI, must be dismissed; or in the alternative, struck from Plaintiffs' First Amended Class Action Complaint since Plaintiffs failed to provide the actual names of each of these Plaintiffs as required by NEV. R. CIV. P. 10(a) and NEV. R. CIV. P. 17(a).

In Plaintiffs' Opposition and as argued at the hearing, (but not alleged in Amended Complaint), Plaintiffs maintained that NEV. R. CIV. P. 10(a) permits Plaintiffs to assert their claims against Defendant anonymously, by declaring so in the caption of their Complaint because of the risk of harassment, injury, ridicule, harm, or personal embarrassment associated with disclosing Plaintiffs true identities.

In Defendant's Motion and as argued at the hearing, Defendant maintained that Plaintiffs, Jane Doe Dancer II, III, VI, VIII, and IX through XI must be struck as redundant to already alleged Jane Doe Dancer Plaintiffs. Defendant maintained that these unnamed Jane Doe Dancer Plaintiffs, II, III, VI, VIII, and IX through XI were identical to previously alleged Jane Doe Dancer Plaintiffs without distinguishing each in any way.

In Plaintiffs' Opposition and as argued at the hearing, Plaintiffs maintained that Jane Doe Dancer Plaintiffs, II, III, VI, VIII, and IX through XI should not be struck as redundant because they were separate individuals whose identities were noted with a roman numeral, which was sufficient to distinguish Jane Doe Dancer Plaintiffs, II, III, VI, VIII, and IX through XI from the other Jane Doe Dancer Plaintiffs.

In Defendant's Motion, Defendant's Supplemental Brief, and as argued at the hearing, Defendant maintained that Plaintiffs' First Cause of Action must be dismissed

pursuant to NEV. R. CIV. P. 12(b)(5) to the extent that Plaintiffs' First Cause of Action alleging a violation of the Minimum Wage Amendment is barred by the applicable two-year statute of limitation prescribed by NEV. REV. STAT. § 608.260.

In Defendant's Motion, Defendant maintained that Plaintiffs' First Cause of Action in actuality was a claim alleging that they have not been paid wages as employees in violation of existing Nevada law and not the Minimum Wage Amendment. Accordingly, Defendant argued in its Motion that Plaintiffs' First Cause of Action was subject to the two-year statute of limitation prescribed by NEV. REV. STAT. § 608.260.

In Plaintiffs' Opposition and as argued in at the hearing, Plaintiffs maintained that any argument regarding the application of a statute of limitation was premature since an appropriate class of Plaintiffs had not yet been defined by the Court and no statute of limitation could be applied until such time. Plaintiffs also argued that a four-year limitations period based on the Constitutional Amendment was proper.

In Defendant's Supplemental Brief, Defendant further maintained that the Nevada Supreme Court, in *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 4, 235 P.3d 605, 608 (2013), and *Thomas v. Yellow Cab Corp.*, 130 Nev. Adv. 52, 8, 327 P.3d 518, 521 (2014), requires the Court to apply the clear textual meaning of the Minimum Wage Amendment. Since the Minimum Wage Amendment entitles an "employee" asserting a claim for a violation of the Minimum Wage Amendment to make use of all "remedies available under the law and in equity appropriate to remedy any violation" of the Minimum Wage Amendment, Defendant contended that an "available" and "appropriate" remedy under Nevada law based on Plaintiffs' allegations asserted in their First Cause of Action was provided by NEV. REV. STAT. § 608.260, which expressly

included a two-year statute of limitation. Accordingly, Defendant maintained that Plaintiffs' First Cause of Action must be dismissed to the extent that Plaintiffs' claim for a violation of the Minimum Wage Amendment is barred by the applicable two-year statute of limitation.

In Defendant's Supplemental Brief, Defendant further maintained that the Nevada Supreme Court, as evidenced in *Thomas v. Yellow Cab Corp.,* 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), and *Terry v. Sapphire/Sapphire Gentlemen's Club,* 130 Nev. Adv. Op. 87, 336 P.3d 951 (October 30, 2014), have never determined that NEV. REV. STAT. § 608, and in particular, NEV. REV. STAT. § 608.250 and 608.260 have been impliedly repealed in their entirety. Accordingly, Defendant maintained that the provisions of NEV. REV. STAT. § 608.260 can be construed in harmony with the Minimum Wage Amendment and remains an "available" and "appropriate" remedy to Plaintiffs based on the allegations of non-payment of Nevada's minimum wage alleged in Plaintiffs' First Cause of Action.

In Defendant's Supplemental Brief, Defendant further maintained that applying the four- year "catch-all" statute of limitation provided by NEV. REV. STAT. § 11.220 would result in a prohibited, absurd, and unreasonable outcome whereby an "employee" could expand the his or her claim beyond the existing statutory scheme encompassing two years to four years simply by foregoing a statutory claim under NEV. REV. STAT. § 608.260, and only asserting a claim for the failure of an employer to pay Nevada's minimum wage pursuant to the Minimum Wage Amendment.

In Defendant's Supplemental Brief, Defendant further maintained that applying the two-year statute of limitations provided by NEV. REV. STAT. § 608.260 to Plaintiffs'

First Cause of Action conforms to Nevada's rule of construction that a specific statute dealing in detail with a particular subject, controls over a general statute relating only in general terms. Relying on *Western Realty Co. v. City of Reno,* 63 Nev. 330, 337, 172 P.2d 158, 161 (1946), and *Lader v. Warden,* 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). Defendant maintained that the two-year statute of limitation provided by NEV. REV. STAT. § 608.260 deals directly with the allegations of non-payment of Nevada's minimum wage asserted in Plaintiffs' First Cause of Action, and as such, controlled over the provisions of NEV. REV. STAT. § 11.220 which only provided a general "catch-all" statute of limitation for those claims not otherwise specifically addressed by statute.

In Plaintiffs' Supplemental brief, they argued that the four-year limitations period for Minimum Wage Amendment claims is correct as a matter of Constitutional and Statutory interpretation. In so doing, they set forth that the relief the Minimum Wage Amendment provided was a separate claim than the statute, and thus, the time period should be different.

In their Supplemental Brief, Plaintiffs also asserted that the Minimum Wage Amendment is silent. Thus, Plaintiffs argue that pursuant to the provisions of NEV. REV. STAT. § 11.220, the limitations period for their Minimum Wage Amendment claim should be four years.

Plaintiffs argued further in their Supplemental brief that a four-year limitation period makes sense because it mirrors the limitations period for unjust enrichment claims. They assert that since the Amendment allows for both claims in law and equity, limitations periods for both should be the same. They asserted that it is

Defendant's interpretation of the limitations period, not theirs, that provides an absurd result.

Plaintiffs further contended that the Nevada Supreme Court's holding in *Thomas v. Yellow Cab Corp.,* 130 Nev. Adv. Op. 52, 8, 327 P.3d 518, 521 (2014), provides an analytical basis to state that the statutory provision should not be applied; and thus, the longer limitations period is appropriate.

In Defendant's Motion, and as argued at the hearing, Defendant maintained that Plaintiffs' First Cause of Action must be struck as redundant, pursuant to NEV. R. CIV. P. 12(f), since Plaintiffs' First Cause of Action is not an actual Constitutional claim, but a claim alleging a violation of NEV. REV. STAT. § 608.250 which was already asserted in Plaintiffs' Second Cause of Action.

Plaintiffs argue in their Opposition, and at the hearing, that the relief that can be sought under the Amendment is different than what can be sought pursuant to statute. Accordingly, the claims are not redundant. Plaintiffs acknowledged that they are not seeking double recovery for unpaid wages.

In Defendant's Motion, and as argued at the hearing, Defendant maintained that Plaintiffs' Fourth Cause of Action for Unjust Enrichment must be dismissed, pursuant to NEV. R. CIV. P. 12(b)(5), since Defendants are afforded a full and adequate remedy under Nevada law (*i.e.* NEV. REV. STAT. § 608) to sue and recover actual unpaid wages owed to Plaintiffs as alleged "employees" of Defendant. Defendant further maintained that Nevada's regulatory scheme permits Nevada's Labor Commission to assess an administrative penalty against any violator of Nevada's minimum wage laws, thereby providing another legal remedy available Plaintiffs.

In Plaintiffs' Opposition, and as argued at the hearing, Plaintiffs maintained that Plaintiffs' Fourth Cause of Action for Unjust Enrichment should not be dismissed since Plaintiffs only include a claim for unjust enrichment as an "alternative equitable basis" for relief to the claims for legal relief set forth in the First Amended Class Action Complaint.

In Defendant's Motion, and as argued at the hearing, Defendant maintained that Plaintiffs' Fourth Cause of Action for Unjust Enrichment must be dismissed, pursuant to NEV. R. CIV. P. 12(b)(5), since Plaintiffs failed to assert an actual claim for Unjust Enrichment under Nevada law, and further failed to set forth any facts sufficient for Plaintiffs to recover on such a claim.

In Defendant's Motion, and as argued at the hearing, Defendant maintained that the prayer for relief associated with Plaintiffs' Fourth Cause of Action must be struck as immaterial pursuant to NEV. R. CIV. P. 12(f). Relying on *Asphalt Prods. Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995), Defendant maintained that the correct measure of damages in an unjust enrichment case is limited to the "reasonable value of services performed." Accordingly, Defendant concluded that Plaintiffs' associated prayer for relief must be struck as immaterial, pursuant to NEV. R. CIV. P. 12(f), since Plaintiffs' prayer for relief never seeks the payment of "the reasonable value of the services" allegedly provided by Plaintiffs to Defendant. Further, Defendant maintained that Plaintiffs could never obtain such relief since Plaintiffs' Fourth Cause of Action never identifies any actual services provided to Defendant by Plaintiffs.

In Defendant's Motion, and as argued at the hearing, Defendant maintained that Plaintiffs' prayer for exemplary and punitive damages asserted in Plaintiffs' First, Second, and Third Causes of Action must be struck since none of these causes of action "sound in tort" as required by Nevada law for the recovery of exemplary and punitive damages.

In Plaintiffs' Opposition, and as argued at the hearing, Plaintiffs maintained that their prayer for exemplary and punitive damages asserted in their First, Second, and Third Causes of Action cannot be stricken since each cause of action alleges a tort not based in contract. Plaintiffs, therefore, concluded that they are entitled to an award of exemplary and punitive damages at trial.

In Defendant's Motion, and as argued at the hearing, Defendant maintained that Plaintiffs' prayer for exemplary and punitive damages asserted in Plaintiffs' First, Second, and Third Causes of Action also must be stricken since Plaintiffs' First, Second, and Third Causes of Action failed to assert any specific factual allegations demonstrating the statutory definition of "fraud, oppression, or malice," as defined by NEV. REV. STAT. § 42.001.

In Plaintiffs' Opposition, and as argued at the hearing, Plaintiffs maintained that their prayer for exemplary and punitive damages asserted in their First, Second, and Third Causes of Action cannot be stricken since Plaintiffs' First Amended Complaint alleged multiple facts that could allow a jury to conclude that Defendant is guilty of oppression, fraud, and malice as defined by NEV. REV. STAT. § 42.001.

II. DISCUSSION

The allegations in Plaintiffs' First Amended Class Action Complaint must be accepted as true for purposes of a Motion to Dismiss. *San Diego Prestressed Concrete Co. v. Chicago Title Ins.*, 555 P.2d 484 (Nev. 1976). A pleading is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief the pleader seeks. NEV. R. CIV. P. 8(a). The test for determining whether the allegations of a complaint are sufficient to state a claim is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested. *Ravera v. City of Reno*, 100 Nev. 68, 675 P.2d 407, 408 (Nev. 1984). A Motion to Dismiss is properly granted when "it appears beyond a doubt that [Plaintiff] could prove no set of facts which, if true, would entitle it to relief." *Buzz Stew, L.L.C. u. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). The "court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff." *Stubbs v. Strickland*, 129 Nev. Adv. Op. 15, 297 P.3d 326, 329 (2013). Further, the Nevada Supreme Court has held "[a] complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief." *Blackjack Bonding v. City of Las Vegas Mun. Court*, 14 P.3d 1275, 1278 (Nev. 2000).

In addition, a court may grant a Motion to Strike, pursuant to NEV. R. CIV. P. 12(f), if contested language constitutes an "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." NEV. R. CIV. P. 12(f). Courts have further found that Motions to Strike should not be granted unless it is clear that the

matter to be stricken could have no possible bearing on the subject matter of the litigation. *Germaine Music v. Universal Songs of Polygram*, 275 F.Supp.2d 1288, 1300 (D.Nev.2003).

In the present case, Defendant has filed both a Motion to Dismiss and a Motion to Strike various portions of Plaintiffs First Amended Complaint so the Court will address all requests for relief herein.

A. Defendant's Motion to Dismiss Plaintiffs, JANE DOE DANCER I through XI for Failing to Properly Identify the Actual Names of Each of the Fictitious Plaintiffs as Required by N.R.C.P.17(a)[3]

NEV. R. CIV. P. 17(a) and NEV. R. CIV. P. 10(a) requires every action commenced in Nevada to be prosecuted in the name of the real parties in interest and identify each in the caption of the complaint. Plaintiffs' First Amended Class Action Complaint fails to identify the actual names of all of the Plaintiffs bringing suit against Defendant.

Further, Plaintiffs' First Amended Class Action Complaint fails to provide any allegations supporting the use of anonymous names for Plaintiffs, Jane Doe Dancer I through XI, in the place of providing the actual name of these individual Plaintiffs. Instead, with reference to Jane Doe Dancers I-III, the allegations merely state in relevant part that the Plaintiff Jane Doe Dancer "was at all times relevant to this action a resident of Clark County, Nevada, and, at the present time and at various other

[3] Defendant's filed their Motion as a Motion to Dismiss and/or Motion to Strike various aspects of Plaintiffs First Amended Class Action Complaint. The Court has analyzed the standard by which the Court deemed it appropriate to address the relief requested. The Court considered both the Motion to Dismiss standard and the Motion to Strike standard, with respect to each of the aspects of relief requested, but has only set forth the analysis of the standard that was applied as noted further herein.

relevant times, has been employed by Defendants as an exotic dancer." (*See* Am. Compl. at ¶ ¶ 7-9). With reference to Jane Doe Dancers IV-VIII, the allegations merely state in relevant part that the Plaintiff Jane Doe Dancer "was at all times relevant to this action a resident of Clark County, Nevada and, as recently as at least [2012 to 2014] and at various other relevant times, has been employed by Defendants as an exotic dancer." (*See* Am. Compl. at ¶¶ 10-14). With reference to Jane Doe Dancers IX and X, the allegations merely state in relevant part that each was "at all times relevant to this action a resident of Clark County, Nevada and, at all relevant times, has been employed by Defendants as an exotic dancer." (*See* Am. Compl. at ¶¶ 15-16). This failure to provide any supporting reasons for the necessity to use anonymous names for some of the Plaintiffs, and not for the others who are individually named, as well as the fact that the Amended Complaint states that some of the anonymous Plaintiffs are no longer working at Defendant's establishment, does not provide a basis for the Court to allow the use of anonymous names for those Plaintiffs listed in the First Amended Complaint. Further, as argued by Defendant, the current method of pleading does not sufficiently put Defendant on notice of who is making the claim in accordance with *Buzz Stew* and *Ravera*. ("The test for determining whether the allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of the claim and the relief requested." *Ravera* at 70.)

Therefore, Plaintiffs Jane Doe Dancer I through XI are hereby DISMISSED without prejudice from Plaintiffs' First Amended Class Action Complaint with leave to amend since Plaintiffs are required by NEV. R. CIV. P. 10(a) and NEV. R. CIV. P. 17(a) to

assert their claims against Defendant as real parties in interest identifying their true individual names.[4]

B. <u>Defendant's Motion to Dismiss Plaintiffs' First Cause of Action to the Extent Plaintiffs' Claims for Unpaid Minimum Wages are Barred by the Applicable Two Year Statute of Limitations</u> [5]

Constitutional interpretation seeks "to determine the public understanding of a legal text" leading up to and "in the period after its enactment or ratification." *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605 (2010). Further, when interpreting a constitutional provision, the starting point is the text itself. The text "must . . . not be read in a way that would render words or phrases superfluous[.]" *Blackburn v. State*, 129 Nev. Adv. Op. 8, 294 P.3d 422, 426 (2013). To that end, *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 4, 235 P.3d 605, 608

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[4] Defendant also asserts that the Doe Dancers should be dismissed because they are duplicative of either each other or of the named Plaintiffs. As the Court needs to take the allegations as true at the Motion to Dismiss stage and the designation of different Roman numerals at the end of each individual's name, as well as the fact Plaintiffs have in some instances inserted differing years in the paragraphs that set forth the employment status, shows a sufficient distinction between each potential Plaintiff. Accordingly, the Court DENIES, without prejudice, Defendant's Motion to Dismiss the Doe Dancers on the grounds that they are duplicative.

[5] Defendant also sets forth that "Plaintiffs' Second and Third Causes of Action must be dismissed pursuant to NEV. R. CIV. P. 12(b)(5) to the extent Plaintiffs' claims for unpaid minimum wages are barred by the applicable two-year statute of limitations." The Court finds that request to be inapposite based on the allegations of Plaintiffs' Complaint. Specifically, Paragraph 27 of Plaintiffs' First Amended Complaint alleges: "The Class Period is the four-year period immediately preceding the filing of this Complaint for the First Cause of Action, **the two-year period immediately preceding the filing of this Complaint for the Second and Third Causes of Action**, and the three-year period immediately preceding the filing of this Complaint for the Fourth Cause of Action, and going forward into the future until entry of judgment in this action." *See*, Am. Compl. at ¶ 27. (emphasis added) Given the First Amended Class Action Complaint sets forth that Plaintiffs are only seeking statutory unpaid wages for a two-year period, the Defendant's Motion is MOOT under either a Motion to Dismiss or Motion to Strike standard with respect to this assertion. As Plaintiffs are not making such a claim, the Court need not address that portion of Defendant's Motion.

(2013), and *Thomas v. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 8, 327 P.3d 518, 522 (2014), require the Court to apply the clear textual meaning of the Minimum Wage Amendment. The text of the Minimum Wage Amendment entitles an "employee" asserting a claim for a violation of the Minimum Wage Amendment to make use of all "remedies available under the law and in equity appropriate to remedy any violation" of the Minimum Wage Amendment.

The existing statutory scheme regarding the payment of Nevada's minimum wage set forth in NEV. REV. STAT. § 608, provides "available" and "appropriate" remedies at law to rectify an "employee's" claim for a violation of the Minimum Wage Amendment for individuals such as the present Plaintiffs as they are only making claims alleging Defendant failed to pay them the minimum wage.

Plaintiffs' First Cause of Action alleges that Plaintiffs were employed by Defendant as topless dancers, hostesses, entertainers, erotic dancers, and/or strippers at Defendant's place of business, commonly known as Crazy Horse III. Plaintiffs' First Cause of Action further alleges that Defendant violated the Minimum Wage Amendment by failing to pay Plaintiffs Nevada's minimum wage required by Nevada law for the hours that Plaintiffs worked as employees for Defendant.

Based on Plaintiffs' allegations asserted in their First Cause of Action, NEV. REV. STAT. § 608.260 is an "available" and "appropriate" remedy at law to rectify the violation of the Minimum Wage Amendment alleged by Plaintiffs in their First Cause of Action. NEV. REV. STAT. § 608.260, provides, in part:

> If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, 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.[6]

As stated above, NEV. REV. STAT. § 608.260 plainly permits an "employee" who was not paid Nevada's minimum wage to recover the difference between the amount paid and the amount owed. Indeed, the Nevada Supreme Court in *Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951 (October 30, 2014) recently applied many of the provisions of NEV. REV. STAT. § 608 in determining that exotic dancers of a different establishment were employees of that establishment. In that case too, the Plaintiffs were claiming that they were categorized as independent contractors, and thus, not paid the minimum wage they were entitled to under applicable law.[7]

Since NEV. REV. STAT. § 608.260 is an "available" and "appropriate" remedy available to Plaintiffs to rectify their alleged violation of the Minimum Wage Amendment for Defendant's alleged failure to pay Plaintiffs, as "employees," Nevada's minimum

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[6] The Court is cognizant that arguments have been made in other cases that the Minimum Wage Amendment modifies in part the role of the Labor Commissioner, and that the regulations that she promulgates are different than they were pre-Amendment. There is nothing in the Minimum Wage Amendment, however, or subsequent case law that expressly changes the limitations period in NEV. REV. STAT. § 608.260, or sets forth that it does not apply to minimum wage claims made pursuant to the Amendment. Thus, the Court does not adopt the reasoning that the limitations provision was implicitly repealed. In other words, there was no support provided to the Court that an expansion of who a claimant may be and an expansion of what claims that individual may bring impliedly repeals when those claims can be brought. Further, the Court does not find that a change in the baseline of the minimum wage rate or a change in how that rate is promulgated would double the limitations period for a Plaintiff pursuing a minimum wage claim they could make, pursuant to statute, by relabeling it a Constitutional claim. This would be particularly applicable in the present case as Plaintiffs' claims in their original Complaint were statutory claims and then they amended the Complaint to add a claim pursuant to the Minimum Wage Amendment.

[7] The Court is cognizant that the Plaintiffs in the *Terry* case did not assert a claim pursuant to the Minimum Wage Amendment, but the analysis is still valid as it demonstrates that the Statute does provide an available and appropriate remedy for alleged minimum wage violations. It also shows that the Nevada Supreme Court looked to both the Minimum Wage Amendment and the Statutory framework harmoniously when evaluating a minimum wage claim.

wage amount for the work they performed, Plaintiffs' First Cause of Action would be properly subject to the two-year statute of limitation expressly provided in NEV. REV. STAT. § 608.260.

To the extent that Plaintiffs assert that the Amendment should provide for a four-year limitations period as the two-year period was impliedly repealed by the Minimum Wage Amendment, the Court does not find that argument persuasive. In *Thomas v. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), The Nevada Supreme Court specifically stated:

> We will construe statutes, "if reasonably possible, so as to be in harmony with the constitution." *State v. Glusman,* 98 Nev. 412, 419, 651 P.2d 639, 644 (1982). But when a statute "is irreconcilably repugnant" to a constitutional amendment, the statute is deemed to have been impliedly repealed by the amendment. *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972). The presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist. *See W. Realty Co. v. City of Reno,* 63 Nev. 330, 344, 172 P.2d 158, 165 (1946)."

Thomas at 5.

In that case, the issue was whether taxi cab drivers were still exempt from minimum wage provisions after the Constitutional Amendment became effective in 2006. The Nevada Supreme Court in that case found that since there was a direct conflict between the explicit exemptions listed in the Amendment and those that existed in the statute, that portion of the statutory provision, NEV. REV. STAT. § 608.250(2)(e), which listed the exemptions, was in conflict and inconsistent with the Amendment. Hence, that statutory provision was supplemented by the Minimum Wage Amendment. In so finding, the Court stated that its ruling was based on the fact that there was an express conflict between the two provisions. *Thomas* at 6. Indeed, the

Nevada Supreme Court reiterated the canon of construction that "the expression of one thing is the exclusion of another" thereby making it clear that the two provisions were in direct conflict with one another. The Court noted that the Minimum Wage Amendment's express enumeration of "specific exceptions" to the minimum wage requirements "supersedes and supplants" the conflicting exceptions in NEV. REV. STAT. § 608.250(2). *Id.* at 9. Here, there are no express conflicts. Instead, the language of the Minimum Wage Amendment can either be read as a direct reference to the statutory scheme, which includes a two-year statute of limitations in NEV. REV. STAT. § 608.260, or as silent on the issue. Under either interpretation, there is no direct conflict between the provisions at issue in the present case. In the absence of a conflict, the Court needs to take heed of the Nevada Supreme Court's admonition that, "The presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist." *Thomas* at 5, citing *W. Realty Co.v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165 (1946). In so doing, this Court finds that there is not an implicit repeal of the statutory limitations period of two years.

The Nevada Supreme Court's decision in *Terry* further supports that the statutory limitations period was not implicitly repealed. In *Terry*, the issue before the Court, as noted above, was whether exotic dancers could pursue their claims that they were not paid the minimum wage owed them or whether they were precluded from doing so as they were categorized as independent contractors. In its analysis of their claims, the Nevada Supreme Court expounded on the Minimum Wage Amendment's interaction with the statutes in NEV. REV. STAT. § 608. While the Court noted that the

Minimum Wage Amendment "supplants our statutory minimum wage laws to some extent," it recognized the continued viability of causes of action raised under NEV. REV. STAT. § 608.250 and NEV. REV. STAT. § 608.260. Indeed, if the Court felt that the statute was no longer in existence, the Court could have easily stated so rather than provide an entire analysis as how the Plaintiffs in that case fell within the parameters of the statutory scheme and were hence eligible to make their claim for relief as employees.

Given neither *Thomas* nor *Terry* stand for the proposition that the Minimum Wage Amendment intended to repeal the entirety of the statutory framework for minimum wage claims, the Court must determine how to best reconcile the two so that they are in harmony with one another. To do so would be consistent with what is viewed to be what the voters intended to do when they passed the Minimum Wage Amendment. This Court finds that the voters modified discrete portions of Nevada's minimum wage law, such as NEV. REV. STAT. § 608.250(2)'s exceptions noted in *Thomas*. The Minimum Wage Amendment also established a new "baseline" wage rate including setting forth a two-tier payment schedule depending on whether insurance was provided or not provided. It also expanded the minimum wage protections to more Nevadans, and included a specific anti-retaliation provision as well as additional remedies. The voters did not, however, demonstrate any intent to modify the statute of limitations for alleged violations of the minimum wage. Thus, allowing Plaintiffs the same time period to allege Constitutional violations of the minimum wage, as they have to allege statutory violations of the minimum wage, meets the goal of harmonizing the two as directed by the Nevada Supreme Court in *Thomas*

and *Terry*. As the Minimum Wage Amendment provides that Plaintiffs may use "available" and "appropriate" remedies, and the statutory framework already has an available limitations period, a two-year statute of limitations set forth in NEV. REV. STAT. § 608.260 applies to the Plaintiffs' first cause of action[8].

In finding that the two-year limitations period would be appropriate, the Court also looked at the actual relief being sought as an independent basis for its decision. As set forth by the Nevada Supreme Court, the term "action," as used in NEV. REV. STAT. § 11.190, refers to the nature or subject matter of the claim and not to what the pleader says it is. See *Hartford Insurance Group v. Statewide Appliances, Inc.*, 87 Nev. 195, 484 P.2d 569 (1971). While the *Hartford* court was looking at the issue of which statute of limitations to apply from an insurance subrogation standpoint, their determination that it is the nature or subject matter of the claim that will determine what limitation period applies is instructive to the instant case. In *Hartford*, the insurance

---

[8] Recent federal decisions by Judges Mahan, Jones, and Navarro reached the same result although their analysis was slightly different. For example in *McDonagh v. Harrah's Las Vegas, Inc.*, Case No. 2:13-CV-1744 JCM-CWH, 2014 (December 6, 2014) the Honorable James C. Mahan held, "While article 15, section 16 of the Nevada Constitution does create a new two-tiered minimum wage in the state, the section is silent on whether it changes the two-year statute of limitations in the Nevada Revised Statutes. Therefore the court finds that the constitutional provision was not intended to change this two-year statute of limitations." *McDonagh*, 2014 U.S. Dist. LEXIS 82290 at *11-12. Similarly, in *Rivera v. Peri & Sons Farms*, the Court reached a similar conclusion. After considering the various arguments, the Honorable Robert C. Jones held, "The state also has a two year statute of limitations, and Section 16 is silent on the limitation period for minimum wage actions, so the Court will not imply a repeal of section 608.260's two-year limitation period." *Rivera*, 805 F. Supp. 2d 1042 at 1046. The Court notes that the *Rivera* case was appealed to the Ninth Circuit (*see* 735 F.3d at 892, at 902) but the statute of limitations argument was not raised on appeal. In *Tyus v. Wendy's of Las Vegas*, Case No 2:14-CV-00729-GMN-VCF, the Honorable Gloria Navarro also found that "[u]nlike the statutory provision in *Thomas*, the..two year statute of limitations period found in NRS 608.260 does not necessarily and directly conflict with the Minimum Wage Amendment...although the Minimum Wage Amendment is silent on a limitations period, the Court finds that this silence does not impliedly repeal the two-year statute of limitations. 2015 WL 1137734 at * 3. While none of these cases are binding precedent for the instant Court, the Court can review them as persuasive authority for the guidance that they offer. *See e.g. Executive Management v. Ticor Title*, 118 Nev. 46, 38 P.3d 872 (2002).

company as the subrogee of its insured, filed an action for breach of express and implied warranties due to its insured's personal property being damaged. In addressing which statute of limitations applied, the Court had the option of applying NEV. REV. STAT. § 11.190(2)(c) which governed "an action upon a contract, obligation or liability not founded upon an instrument in writing" or NEV. REV. STAT. § 11.190(3)(c) which covers "an action for injuring personal property." In looking past the titling of the cause of action to what was the true nature of the action actually sought to recover, the Nevada Supreme Court determined that NEV. REV. STAT. § 11 .190(3)(c), rather than NEV. REV. STAT. § 11.190(2)(c), applied because the Plaintiff sought recovery for injuries to personal property.

The Nevada Supreme Court engaged in a similar analysis in *Blotzke v. Christmas Tree, Inc.* 88 Nev. 449, 499 P.2d 647 (1972). In that case, Plaintiff sued his employers for personal injuries alleging that they had not provided a safe place to work, but based his claim upon contract to have the benefit of a longer statute of limitations. The Court did not adopt the Plaintiff's contract analysis, and instead, found that the relief he was actually seeking sounded in tort rather than contract, and thus, applied the shorter limitation period even though it barred the claim.

In the present case, from a review of the entire First Amended Class Action Complaint and in particular the First and Second Causes of Action, it is clear that Plaintiffs are utilizing the Nevada Supreme Court's analysis in *Terry* to state that: 1. They are Defendant's employees rather than independent contractors, and; 2. As employees, they are entitled to be paid the minimum wage, which due to their prior classification as independent contractors, they have not been paid. Plaintiffs have pled

this failure to pay the minimum wage both under the Minimum Wage Amendment and the statutory framework of NEV. REV. STAT. § 608. The former does not have a limitations period directly stated in the body of the Minimum Wage Amendment. The latter has an express two-year statute of limitations provision.

Other than labeling the first claim as one under the Minimum Wage Amendment, and the second one as one pursuant to NEV. REV. STAT. § 608, the apparent nature of the relief sought by Plaintiffs appears to be the same - payment of alleged unpaid minimum wage payments. As is discussed further below, the Court cannot affirmatively determine, at the motion to dismiss stage, if the actual relief sought is identical; but the Court can determine what is the nature of the relief sought. In the present case, the nature of the relief sought is the payment of the minimum wage rate due employees pursuant to the Labor Commissioner Bulletins for the time period each Plaintiff worked for Defendant. The relief sought falls squarely within the statutory framework of NEV. REV. STAT. § 608, which has a limitations period of two years. Accordingly, whether the claim is titled as one pursuant to Minimum Wage Amendment or NEV. REV. STAT. § 608, Plaintiffs should bring forth their claims within the time period already provided for claims that allege a failure to pay the minimum wage, i.e. two years.

This analysis is also consistent with Nevada's rule of construction that a specific statute dealing in detail with a particular subject controls over a general statute relating only in general terms. See, e.g. *Western Realty Co. v. City of Reno*, 63 Nev. 330, 337, 172 P.2d 158, 161 (1946), and *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). Given that the two-year statute of limitation provided by NEV. REV. STAT.

§ 608.260 deals directly with the allegations of non-payment of Nevada's minimum wage asserted in Plaintiffs' First Cause of Action, utilizing applicable precedent that provision controls over the provisions of NEV. REV. STAT. § 11.220, which only provides a general "catch-all" statute of limitation for those claims not otherwise specifically addressed by statute.

Applying a two-year statute of limitations to both types of minimum wage claims in the present case and, thereby, harmonizing the statutory framework with the Minimum Wage Amendment is also supported by sound public policy. Statutes of limitations exist because they provide a necessary, remedial constraint on a Plaintiff's ability to bring stale claims. *State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 694, 709 P.2d 172, 175 (1985). This constraint is inextricably tied to due process considerations. Limitations periods also serve an evidentiary function. Here, the imposition of a four-year statute of limitations could provide a conflict with state and federal record retention requirements, including NEV. REV. STAT. § 608.115, and unfairly prejudice Defendant's due process rights. NEV. REV. STAT. § 608.115 provides the parameters of records that must be maintained by every employer and sets forth that the "[r]ecords of wages must be maintained for a two-year period following the entry of the information in the record." NEV. REV. STAT. § 608.115(3). Pursuant to the Fair Labor Standards Act, federal law also requires that employers maintain, for at least three years, payroll records and records on which wage computations are based should be retained for two years, i.e., time cards, piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. See, 29 U.S.C.A. § 211 (West) and 29 CFR Part 516. If the Minimum Wage Amendment

were to have a four-year statute of limitations, then employers could be liable for wage claims that exceed the time period for which they are required to maintain records of the wages paid to the individual(s) who would be making the claim. To require an employer to maintain records for a longer period than set forth in the statute would also be inconsistent with the statutory record retention requirement.

Based on the forgoing, not only does the language of the Amendment favor a two-year limitations period, the nature of the relief sought as well as public policy also favor a consistent, harmonious, limitations period of two years. Therefore, Plaintiffs' First Cause of Action is DISMISSED in part with prejudice to the extent Plaintiffs' claim for unpaid minimum wage is barred by the applicable two-year statute of limitation provided in NEV. REV. STAT. § 608.260, which, by extension, also applies to minimum wage claims pursuant to the Minimum Wage Amendment.

C. **Defendant's Motion to Dismiss Plaintiffs First and Second Causes of Action Asserting that they are Duplicative**

While the nature of Plaintiffs' First and Second Causes of Action both seek relief for their contention that Defendant failed to pay Plaintiffs Nevada's minimum wage during the time each was employed by Defendant as set forth in more detail infra, pursuant to applicable motion to dismiss standard, the Court cannot determine whether the relief sought is identical or not. Accordingly, the Court finds it appropriate to treat the Motion to Dismiss as one for a More Definite Statement as the nature of the Motion is to determine what relief Plaintiff is seeking in each of the claims. *See Mays v. Dist. Ct.*, 105 Nev. 60, 768 P.2d 877. In reviewing the Motion, pursuant to the appropriate standard as one for a More Definite Statement, the Court GRANTS the Motion for a

More Definite Statement and allows Plaintiffs leave to amend to the extent Plaintiffs wish to amend either their First Cause of Action or their Second Cause of Action or both to clarify what relief they are seeking in both if they deem it appropriate to maintain two causes of action for payment of the minimum wage.

D. Defendant's Motion to Dismiss Plaintiffs' Fourth Cause of Action for Unjust Enrichment

It is a foundational aspect of pleading that relief in the alternative may be demanded. NEV. R. CIV. P. 8(a). "Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Certified Fire Prot. Inc. v. Precision Construction*, 283 P.3d 254 at 256 (Nev. 2012).

Construed liberally, and drawing every fair intendment in favor of the Plaintiff, Count Four states a claim for unjust enrichment by, *inter alia*, alleging Defendant improperly imposed various fees and fines on Plaintiffs as a condition of employment, and required Plaintiffs to give money to managers and other employees. Though a Plaintiff may not recover equitable remedies where a Plaintiff has a full and adequate remedy at law, unjust enrichment is appropriately pled as an alternative equitable basis for relief in addition to the claims for legal relief set forth in the other Counts. NEV. R. CIV. P. 8(a).

Plaintiffs' Fourth Cause of Action asserts a claim in equity against Defendant for Unjust Enrichment. As the Minimum Wage Amendment allows claims to be brought in

equity, and based on the standards a Court must utilize when presented with a Motion to Dismiss, the Court finds that Defendant has failed to meet its burden and hence Defendant's Motion to Dismiss Plaintiffs' Fourth Cause of Action is DENIED without prejudice.[9]

E. Defendant's Motion to Strike Plaintiffs' Prayer for Exemplary and Punitive Damages

NEV. REV. STAT. § 42.005 provides that a Plaintiff may only obtain an award of exemplary and punitive damages in an action for the breach of an obligation not arising from a contract. Further, *Sprouse v. Wentz,* 105 Nev. 597, 603, 181 P.2d 1136, 1139 (1989), requires that an award of exemplary or punitive damages pursuant to NEV. REV. STAT. § 42.005 must be based upon a cause of action sounding in tort and not based on a contract theory.

Plaintiffs' claims are based on Defendant's alleged failure to pay Plaintiffs Nevada's minimum wage while working as alleged employees of Defendant and/or at the time of each Plaintiff's resignation, termination, or discharge. As alleged by Plaintiffs in their First Amended Class Action Complaint, none of these allegations and accompanying causes of action sound in tort, and in fact, are based on a contract theory. Since none of Plaintiffs' causes of action sound in tort, nor have Plaintiffs set forth the appropriate standard for the imposition of punitive or exemplary damages, Plaintiffs' accompanying prayer for an award of exemplary and punitive damages is hereby stricken from Plaintiffs' First Amended Class Action Complaint.

---

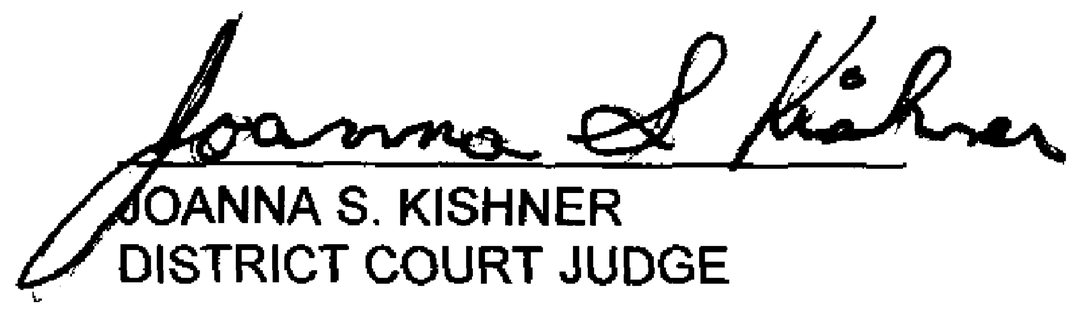
[9] Defendant has also sought to dismiss Plaintiffs' Unjust Enrichment claim on the basis of how it is pled. That portion of the Motion is also DENIED without prejudice. Further, the Motion to Strike part of Plaintiffs Prayer for Relief as irrelevant is also DENIED without prejudice based on the analysis set forth in the pleadings.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Dismiss and/or Strike is GRANTED in part and DENIED in part, without prejudice. The Motion to Dismiss the anonymous Doe Dancer Plaintiffs is GRANTED, without prejudice, and with leave to amend as detailed above. The Motion to Dismiss the First Cause of Action to the extent the relief sought exceeds the two-year statute of limitations period is GRANTED with prejudice. The Motion to Dismiss the First (or Second) Cause of Action to the extent that it is duplicative with the Second (or First) Cause of Action is more properly a Motion for a More Definite Statement with regards to either of these Causes of Action, and in that context, the Court GRANTS the Motion for a More Definite Statement and GRANTS Plaintiffs leave to amend as detailed above. The Motion to Dismiss the Second and Third Causes of Action to the extent they seek relief outside the two-year limitations period is MOOT as Paragraph 27 of the First Amended Class Action Complaint sets forth that Plaintiffs are only seeking relief for claims within a two-year period. The Motions to Dismiss the Fourth Cause of Action for Unjust Enrichment on the grounds stated are DENIED, without prejudice, as set forth above. The Motion to Strike the Request and Prayer for Punitive and/or Exemplary Damages is GRANTED based on the claims alleged in the Amended Complaint as further set forth above. To the extent Defendant sought to dismiss any of the claims set forth above, and in the alternative sought to strike the claim or requested relief, the Court addressed both standards and analyzed the Motion in what it deemed the proper context. Accordingly, with respect to where the Motion to

Dismiss was DENIED, the Motion to Strike was also DENIED based on its applicable standard.

Dated this 25th day of June, 2015.



JOANNA S. KISHNER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below via one, or more, of the following manners: via email, via facsimile, via US mail, via Electronic Service if the Attorney/Party has signed up for Electronic Service, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

Ryan Anderson, Esq.
MORRIS ANDERSON

Jeffery Bendavid, Esq.
MORAN BRANDON BENDAVID MORAN

Gregory Kamer, Esq.
KAMER ZUCKER ABBOTT

Bail M. Geiger for

TRACY CORDOBA
JUDICIAL EXECUTIVE ASSISTANT

EXHIBIT 7

EXHIBIT 7

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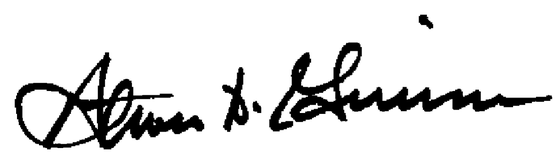

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

MELAKU TESEMA, MINALE M. ABEBE, METASEBIA MMILLION, and ACMETHA GEBERSECASA, Individually and on behalf of others similarly situated, Plaintiffs, vs. LUCKY CAB CO. and LUCKY TRANSPORTATION, INC., Defendants.	CASE NO. A-12-660700-C DEPT. NO. XX

BEFORE THE HONORABLE SENIOR DISTRICT COURT JUDGE,
J. CHARLES THOMPSON

WEDNESDAY, MARCH 4, 2015

RECORDER'S TRANSCRIPT OF HEARING OF STATUS CHECK: DISCOVERY ISSUE

APPEARANCES:

For the Plaintiffs: LEON M. GREENBERG, ESQ.
DANA SNIEGOCKI, ESQ.

For the Defendants: MARIO P. LOVATO, ESQ.

RECORDED BY: SUSAN DOLORFINO, COURT RECORDER/TRANSCRIBER

1 THE COURT: Well, two years might give us enough information as to
2 whether we've got a class.
3 MR. GREENBERG: It certainly will for that -- that time period, Your Honor. If
4 -- if, I mean, a class will be designated presumably in respect to people employed
5 during a particular time period. If the statute only is two years then you can't certify
6 a class earlier, of course, Your Honor. I just don't know if the Court wants to sort of
7 jump into this issue right now. I understand that. Perhaps we would just defer it for
8 --
9 THE COURT: Well, it was the first thing that struck me in looking at this is
10 you wanted documents and information from 2007 to 2014 and that seemed like an
11 awful long time.
12 MR. GREENBERG: Well, Your Honor, there's also an issue here as to
13 whether there should be a toll of the statute of limitations based upon a violation of
14 the notice provision of the constitution. The constitution actually states that the
15 employer has to give written notice to the employee. And it also says that in the
16 event there's a violation of the requirements of the constitution, the employee has a
17 right to all remedies at law or in equity that are available in the courts in the State of
18 Nevada. So that would provide a foundation, at least, to make the claim that they
19 are estopped --
20 THE COURT: Can we decide that at a later point?
21 MR. GREENBERG: I think that might be a --
22 THE COURT: Just do two years now?
23 MR. GREENBERG: That might be a good idea, Your Honor. I'm not -- I'm
24 not disagreeing with that.
25

1 THE COURT: I understand you're not conceding it, but let's just do two years
2 for the time now.
3 MR. GREENBERG: Well then, what I would suggest Your Honor do is simply
4 a -- you can simply strike the references from July 1st, 2007 or -- and, and we can --
5 we can make that to be April 1st, 2010 since this case was commenced in April of
6 2012.
7 MR. LOVATO: I believe it was April 24th if I'm right of 2010.
8 MR. GREENBERG: April 20 -- We can say April 24th.
9 THE COURT: April 24th, 2012.
10 MR. GREENBERG: 2010 would be the appropriate production date because
11 the case was commenced in April 20, 2012.
12 THE COURT: For two years from April, 2010?
13 MR. GREENBERG: Two thousand -- No, the case was commenced on April
14 24th, 2012, so we go back two years from the commencement date --
15 THE COURT: Oh, Okay. I see what you're --
16 MR. GREENBERG: -- for the relevant class period at this limited stage that
17 we're discussing, Your Honor, so --
18 THE COURT: Okay.
19 MR. GREENBERG: So, we would no longer refer to the July 1st. 2007 date.
20 We would --
21 THE COURT: Well, that would make sense.
22 MR. GREENBERG: Yes, Your Honor.
23 THE COURT: Then the question is to what extent --- now the Defendants
24 objected but didn't offer any suggestions as to how the discovery should be
25 permitted. You objected to the discovery saying that they don't need it.

EXHIBIT 8

EXHIBIT 8

SAO
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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

NEAL GOLDEN and ABAIKARIM HASSAN,

Plaintiffs,

-vs-

SUN CAB, INC. doing business as NELLIS CAB CO.,

Defendant.

CASE NO. A-13-678109-C

DEPT. NO. V

STIPULATION FOR EXTENSION OF DISCOVERY SCHEDULE (FIRST REQUEST)

Trial Date: October 12, 2015

Plaintiffs and defendant, by and through their respective counsel, hereby stipulate to extend all discovery deadlines by 90 days. This stipulation is based upon the following:

1. The following discovery has taken place: Plaintiffs propounded their First Request for Production of Documents on September 12, 2014. Defendant responded to plaintiffs' First Request for Production of Documents on October 28, 2014. Plaintiffs' counsel dispatched a meet and confer letter on November 20, 2014 to discuss alleged

deficiencies in defendant's discovery responses, but the parties have yet to hold an EDCR 2.34(d) conference as defendant requested to respond by written letter, which is forthcoming. Defendant has propounded no discovery requests in this matter.

2. Plaintiffs believe additional follow-up document requests will be necessary, but will not know for certain until the issues raised in plaintiffs' counsel's November 20, 2014 meet and confer letter are resolved. Plaintiffs also anticipate serving Interrogatories and Requests for Admission once the requested documents have been provided. Plaintiffs further anticipate the need to take an unknown number of Nev. R. Civ. P. 30(b)(6) depositions.

3. Plaintiffs cannot proceed with depositions of the persons most knowledgeable about certain subjects or further written discovery without first resolving the discovery production issues outlined in plaintiffs' counsel's November 20, 2014 letter.

4. Defendant has objected to plaintiffs' First Request for Production of Documents on numerous grounds including, but not limited to, undue burden, vagueness, ambiguity, overbreadth, prematurity and inappropriateness, and not being reasonably calculated to lead to the discovery of admissible evidence. In addition to these objections, Defendant has specifically objected to Plaintiffs' attempt to obtain discovery beyond the two-year statute of limitations as set in NRS 608.260. The parties disputed the applicable statute of limitations and on December 5, 2014, Judge Ellsworth upheld the applicability of the two-year statute of limitations under NRS 608.260. Thus, in addition to Plaintiffs' assertions above, Defendant believes that additional time for discovery is warranted now that the temporal scope of discovery has been established. Further, Defendant intends to depose the named plaintiffs in relation to phase one's class certification issues.

5. The parties propose the following modifications to the current discovery schedule in this matter:

EVENT	CURRENT DEADLINE	PROPOSED NEW DEADLINE
Phase One: Class Certification Discovery		
Close of Class Certification Discovery	January 16, 2015	April 16, 2015
Dispositive Motions	February 20, 2015	May 21, 2015
Phase Two: Merit Discovery		
Close of Merit Discovery	July 17, 2015	October 15, 2015
Deadline to Amend Pleadings	April 17, 2015	July 16, 2015
Initial Expert Disclosures	April 17, 2015	July 16, 2015
Rebuttal Expert Disclosures	May 18, 2015	August 17, 2015
Dispositive Motions	August 17, 2015	November 16, 2015

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GOLDEN V. SUN CAS
A-13-678109-C

6. The current trial date in this matter is October 12, 2015, which the parties understand will need to be moved if the requested extension of the discovery schedule is granted.

Dated: December 18, 2014

Respectfully submitted,

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DANA SNIEGOCKI, ESQ.
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Fax (702) 385-1827
Attorneys for Plaintiffs

Dated: December 18, 2014

Respectfully submitted,

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KATHRYN B. BLAKEY, ESQ.
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Tel: (702) 862-8800
Attorneys for Defendant

ORDER

The discovery deadlines will be extended as agreed to by the parties herein; a separate amended scheduling order will not be issued; the trial date of 10-12-15 will be vacated and reset in accordance with this stipulation. BB

IT IS SO ORDERED

Dated this 22 day of December, 2014.

HON. BONNIE BULLA

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TRIAL DATE TO BE SET
ON OR AFTER 12-28-15 BB

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CLERK OF THE COURT

MDSM
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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

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' SECOND CLAIM FOR RELIEF

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 Second Claim for Relief in Plaintiffs' First 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 10th day of August, 2015.

RODRIGUEZ LAW OFFICES, P.C.

By: /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

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Tel (702) 320-8400
Fax (702) 320-8401

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant will bring the foregoing Motion on for hearing before this Court on the 15 day of September at 9:00am, 2015, or as soon thereafter as counsel may be heard.

DATED this 10th day of August, 2015.

RODRIGUEZ LAW OFFICES, P.C.

By: /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

POINTS AND AUTHORITIES

I.

FACTUAL BACKGROUND

Plaintiffs Michael Murray and Michael Reno are former employees of Defendant A Cab, LLC ("A Cab"). Michael Murray worked for A Cab from September 6, 2008 to April 6, 2011 as a road supervisor and taxicab driver. Michael Reno worked for A Cab from June 16, 2010 to September 26, 2012 as a taxicab driver. These two former employees allege a claim for an hourly minimum wage.

Plaintiffs filed their initial Complaint on October 8, 2012. Defendant A Cab moved for dismissal of the Complaint for failure to state a claim, but was denied by this Court. Plaintiffs were granted leave to file an amended complaint, and filed their First Amended Complaint on January 30, 2013. Plaintiffs have recently been granted leave to amend their complaint again, this time to assert claims against owner C. J. Nady personally, to include civil conspiracy and unjust enrichment. They have not filed this Second Amended Complaint to date, but their Second Claim for Relief remains: "Claim for Relief Pursuant to Nevada Revised Statutes § 608.040 on Behalf of The Named Plaintiffs and the Putative Class."

Defendants assert this Court lacks subject matter jurisdiction over this claim, and it fails to state a claim upon which relief can be granted.

. . .

. . .

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

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

Plaintiffs' Second Claim for Relief specifies that it is based upon NRS 608.020, NRS 608.030, and NRS 608.040. *First Amended Complaint*, §20. These statutory provisions are specifically delineated under NRS 608.180, as being under the enforcement of the Labor Commissioner. "The Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced, and upon notice from the Labor Commissioner or the representative." **NRS 608.180**. These statutes under the prosecution of the Labor Commissioner are limited to two years. *See* NRS 608.260 and NRS 608.115 requiring two years of record keeping of wage information.

In this instance, Plaintiffs' recourse is to pursue any alleged claim for unpaid wages through Nevada's Labor Commissioner. Plaintiffs' have not pursued their claims through the appropriate forum, and this Court does not have jurisdiction to hear this claim.

NRS 608.040 provides that if an employer fails to pay on the day the wages or compensation are due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned or quit until paid or for 30 days, whichever is less. This statute does not apply to the Minimum Wage Amendment nor to minimum wage.

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Further, NAC 608.155(1) provides:

Before an employee may file a claim for wages unpaid when due, the employee shall make a good faith attempt to collect any wages due the employee from the employer at the normal place and in the normal method that payment is made to employees of the employer.

Neither Murray nor Reno made any such attempt, and no evidence has been produced by the Plaintiffs indicating as such.

Nevertheless, Plaintiffs are seeking in their District Court complaint a 30 day penalty as well as attorney fees and costs against the employer. This is in direct violation of NRS 608.140 which states that before attorney's fees may be recovered, the employee has to make a written demand at least 5 days before suit is brought, for a sum not to exceed the amount so found due..." No such demand has ever been made by Plaintiffs. It is likely the Plaintiffs have no indication what they even think they are owed. Other than catch-all self-serving statements of not being paid for all the hours they worked, because they alleged they were forced to write down false breaks, there has never been any specific accounting of what they believe they were shorted by the Employer.

Had they followed the requirements, they would have filed with the Labor Commissioner. The Labor Commissioner requires that they complete a form in which the **specific days and hours and amounts** of what the Claimant is asserting they were not paid are identified. **Exhibit 1**. Neither Plaintiff completed such a form, nor contacted the Labor Commissioner as required.

The requirement of NRCP 16.1 is the same in that Plaintiffs must put forward some calculation of damages – none has been done in the nearly 3 years since commencing this action.

This has repeatedly been pointed out to the Court, that Plaintiffs have yet to produce any type of damages calculation as required by NRCP 16.1. It is likely because no such sum is owed to either Murray or Reno, and compliance with NRCP 16.1 will reveal this.

C. <u>The Labor Commissioner has exclusive jurisdiction over this claim for relief, and Plaintiffs failed to avail themselves of the appropriate forum</u>.

NRS 607.160(1) provides that the Labor Commissioner shall enforce "all labor laws of the State of Nevada" as long as the enforcement is "not specifically and exclusively vested in any other officer, board or commission." NRS 607.205 grants the Labor Commissioner the power to conduct hearings

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and issue decisions.

See Also, Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 963, 194 P.3d 96, 104-105 (2008), wherein the Nevada Supreme Court indicated the Labor Commissioner's duty to hear and resolve enforcement complaints is not discretionary, and appellants had access to an adequate administrative enforcement mechanism, precluding a finding of legislative intent to create a parallel private remedy.

III.

CONCLUSION

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 Plaintiffs' Second Claim for Relief for lack of jurisdiction, and failure to state a claim upon which relief can be granted..

DATED this 10th day of August, 2015.

RODRIGUEZ LAW OFFICES, P.C.

By: /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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 10th day of August, 2015, I electronically *filed* the foregoing with the Eighth Judicial District Court Clerk of Court using the E-file and Serve System which will send a notice of electronic service to the following:

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.

Rodriguez Law Offices, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Tel (702) 320-8400
Fax (702) 320-8401

EXHIBIT 1

EXHIBIT 1

OFFICE USE ONLY

STATE OF NEVADA
Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER

675 FAIRVIEW DRIVE, SUITE 226
CARSON CITY, NV 89701
(775) 687-4850

555 EAST WASHINGTON AVENUE, # 4100
LAS VEGAS, NEVADA 89101
(702) 486-2650

OFFICE USE ONLY
Claim #
Rcv. by
Inv. Assign

CLAIM FOR WAGES

EMPLOYEE INFORMATION
(Include copy of Photo Identification)

1. Name: _____
First M.I. Last

2. Address: _____
Number
City State Zip

3. Home Phone: ( )

Other Phone: ( )

4. Email address:

5. Will you provide a financial statement if requested? ☐ Yes ☐ No

6. Do you agree to be present at any pre-hearing conferences or administrative hearings scheduled, if necessary, to present information related to your wage claim? ☐ Yes ☐ No

7. Were you offered Health Insurance? ☐ Yes ☐ No

8. Does this claim include NSF checks? ☐Yes ☐No

EMPLOYER INFORMATION

9. Business name _____

10. Name of Employer _____

11. Address of Employer _____
City: State Zip

12. Email Address of Employer

13. Telephone: ( )
Fax: ( )

14. County where you worked:

15. Type of work performed:

16. Type of Business:

JOB INFORMATION

17. Base Pay Rate: $ _____ Date Hired: _____ Last day worked: _____ Reason for leaving: ☐ Discharged/laid off ☐ Quit ☐ Still Employed

18. Employment Agreement ☐ Oral Agreement ☐Written Agreement: Please attach a copy

Basis of pay ☐ Piece work ☐ Salary ☐ Hourly ☐ Commissions

Method of payment ☐ Check ☐ Cash If paid in cash, did you sign a receipt for payment? ☐ Yes ☐ No

WAGES CLAIMED

19. Reason(s) for wage claim:

☐ Nonpayment of regular wages
☐ Nonpayment of overtime
☐ Nonpayment of commissions
☐ Nonpayment of prevailing wage
☐ Bad check(s)
☐ Unauthorized deductions
☐Other_____

20. Evidence submitted to support wage claim (attach copies):

☐ Pay stubs
☐ Time records
☐ Agreement/contract
☐ Tax records (i.e. FORM W-2)
☐ Company documents
☐ Witnesses (attach list)
☐ Other_____

21. Did you ask for your wages? ☐ Yes ☐ No If so, from whom: _____ Date: _____ ☐ Oral ☐ Written demand

22. Dates unpaid/underpaid From _____ To _____ (Show dates worked from Attachment 1(A,B,C or D)

23. Total amount earned from Attachment 1 (A,B,C or D)..... $ _____

24. Total amount paid ..... $ _____

25. Subtotal (subtract line 24 from line 23)..... $ _____

26. Total unauthorized deduction(s) (attach copy of paycheck stubs or other evidence of deduction)..... $ _____

27. Total bank/overdraft fees (Attach original check, if available, and bank statement showing fees)..... $ _____

28. **Total amount claimed (add lines 25, 26 and 27)**..... $ _____

Revised December 2013 OLC

CLAIM FOR WAGES (CONTINUED)

29.	Who hired you?
30.	Who was your supervisor?
31.	Who had control over your work schedule?
32.	Who set your rate of pay?
33.	Who maintained your records of employment?

Briefly state the reason for filing a wage claim:

PLEASE NOTE

IT IS THE CLAIMANT'S RESPONSIBILITY TO NOTIFY THIS OFFICE OF ANY CHANGES IN ADDRESS THAT OCCUR AFTER THE FILING OF THE WAGE CLAIM.

YOU MAY BE SOLICITED BY OUTSIDE LEGAL COUNSEL CONCERNING REPRESENTATION IN THIS AND RELATED MATTERS CONCERNING YOUR CLAIM FOR WAGES. IF YOU ELECT TO RETAIN SUCH COUNSEL, THE OFFICE OF THE LABOR COMMISSIONER MAY ELECT TO CLOSE YOUR WAGE CLAIM.

CERTIFICATION

I hereby certify that this is a true statement of wages due to me under the Labor and Industrial Relations Laws of Nevada, to the best of my knowledge and belief.

I hereby assign all claims and all penalties accruing because of their nonpayment, and all liens or actions securing them, to the Labor Commissioner of the State of Nevada to collect in accordance with the applicable laws and regulations of this state.

I authorize the Labor Commissioner and his deputies to receive any checks, money orders, or cash obtained as payment of this claim. I hereby authorize the mailing of such monies at my own risk or retention thereof until I claim such.

I hereby authorize the Labor Commissioner to approve a proposed settlement of this claim. If I do not request return of any papers submitted by me in connection with this claim, I hereby authorize the Labor Commissioner to destroy them after three years from the date of this claim.

I hereby assign all rights and privileges applicable to me under the Labor and Industrial Relations Laws of Nevada to the Labor Commissioner and request that he act for me in all matters arising thereunder in the manner the Commissioner or his representative choose.

Employer Name_____ Employee Name_____

Date _____ Signed _____

ATTACHMENT 1(A)
SUMMARY OF TIME WORKED

Work Week From: To:

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date								
Regular Hours								
Overtime Hours								
Total Hours								

Hourly pay rate $_____ X Total Regular Hours _____ = Earned $_____

Overtime pay rate $_____ X Total Overtime Hours _____ = Earned $_____

Total $_____

Work Week From: To:

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date								
Regular Hours								
Overtime Hours								
Total Hours								

Hourly pay rate $_____ X Total Regular Hours _____ = Earned $_____

Overtime pay rate $_____ X Total Overtime Hours _____ = Earned $_____

Total $_____

Work Week From: To:

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date								
Regular Hours								
Overtime Hours								
Total Hours								

Hourly pay rate $_____ X Total Regular Hours _____ = Earned $_____

Overtime pay rate $_____ X Total Overtime Hours _____ = Earned $_____

Total $_____

Work Week From: To:

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date								
Regular Hours								
Overtime Hours								
Total Hours								

Hourly pay rate $_____ X Total Regular Hours _____ = Earned $_____

Overtime pay rate $_____ X Total Overtime Hours _____ = Earned $_____

Total $_____

Employer Name_____ Employee Name_____

Revised December 2013 OLC

INSTRUCTIONS FOR COMPLETING WAGE CLAIM FORMS

(December 4, 2013)

Complete each item by number. If you require assistance in completing this form, please telephone or come into the office for assistance. **Attach a copy of your photo i.d. (such as a driver's license).**

EMPLOYEE INFORMATION:

1. Enter your name as shown on your paycheck(s) and/or as your employer knows you.
2. Enter the address to which our correspondence will be mailed to you. Include your apartment number and zip code. It will be your responsibility to advise us if this address (and/or your telephone number) should change prior to the settlement of your claim.
3. Provide at least one telephone number where you may be reached, or a message may be left for you.
4. Enter your e-mail address.
5. Under some circumstances a claimant may be required to provide a financial statement to verify his/her inability to afford an attorney.
6. Indicate whether or not you will be able to attend a pre-hearing conference and/or an administrative hearing, if required.
7. Indicate whether or not you were offered health insurance.
8. Indicate whether or not this claim includes non-sufficient funds (NSF) checks.

EMPLOYER INFORMATION:

9. Enter the name of the business for which you worked. This should be the same as the company name on your paychecks. If it is not, explain the reason for the difference.
10. Enter the name of the employer for whom you worked.
11. Enter the business address of the company for which you worked. If the business is closed, write "business is closed" and provide any additional address information you may have under item 12 below, noting that it is an alternate address where we may be able to contact the employer.
12. Provide the email address of the business.
13. Enter the telephone number of the business and the fax number, if known.
14. Enter the county in Nevada where you worked. If you worked in more than one county, list all counties. We are unable to accept claims for work performed outside Nevada.
15. Indicate the type of work you performed. Be as explicit as possible.
16. Indicate the type of business your employer is in. Be as explicit as possible.

JOB INFORMATION:

17. Enter your base rate of pay you received for the work you normally performed and at your regular rate, not overtime or premium pay. Indicate the date that you were hired. If you do not know the date you were hired, estimate the month and year. Indicate the last day that you worked. Indicate whether you were discharged/laid off, you quit, or you are still employed. If unsure, chose one.
18. Check the appropriate boxes. Did you have a wage agreement: yes/no? If yes, was it written or told to you? If it was a written agreement, attach a copy. If you never received a copy, indicate that the employer has the only copy. Were you paid an hourly rate, piece work, salary, commissions, or a combination? If you were paid by cash, did you sign a receipt: yes/no?

WAGES CLAIMED:

19. Check the appropriate box(es). Why are you filing this claim? Complete Attachment 1(A) for unpaid regular and/or overtime hours, Attachment 1(B) for unpaid commissions, Attachment 1(C) for unpaid piece work, and Attachment 1(D) for unpaid construction work.
20. What evidence do you have to support your claim? Attach copies of supporting documents.
21. With whom did you discuss the money that you feel is due to you? When did you contact them? Did you talk to your employer or did you write a letter to your employer? If you wrote a letter to your employer, attach a copy.
22. What is the date of the first day you worked without pay and the last day you worked without pay? Enter these dates on Attachment 1(A) of the Claim for Wages form.
23. Enter the total amount of money you earned (total from Attachment 1(A)). To claim unpaid commissions, enter the total amount of commissions you feel you earned and then complete the supplemental commissions due form.
24. Enter the total amount of money you were paid. Did you receive an advance, payment for part of the funds due to you, or paid housing, or other items of value in partial payment of the wages you are claiming? If yes, enter that amount.
25. Subtract item 24 from item 23 and enter the amount.
26. To claim unauthorized deductions (or for authorized deductions which were then not paid to the proper agency by your employer), enter the total amount you are claiming and provide copies of paycheck stubs and/or other documents supporting your claim.
27. To claim for bad checks and/or overdraft fees, enter the total net amount of the check(s) and/or fees. You may add charges the bank charged you because your paycheck was returned. You may not add charges that occurred because checks you wrote were unable to clear. We must have the original check(s), not copies. If you deposited a check into your bank account and are now in an overdraft status because your employer's check did not clear, and the bank kept the original check, you may file a claim for unpaid wages. Attach copies of all documents supporting your claim.
28. Add items 25, 26 and 27 and enter the amount. This is the total amount you are claiming. There must be an entry here in order to process your claim.

REVERSE SIDE OF FORM:

29. Enter the name of the person who hired you.
30. Enter the name of your supervisor.
31. Enter the name of the person who had control over your work schedule.
32. Enter the name of the person who set your rate of pay.
33. Enter the name of the person who maintained your employment records.

Briefly state the reason why you are filing a wage claim. For example: "Did not get paid for all hours worked; paid straight time for overtime work; paid incorrect amount for work performed on public works project; employer deducted insurance premiums and did not make payment to the insurance company; did not receive commissions when due; etc." Then indicate the reason the employer gave when you requested the funds you feel are due to you.

Read the certification and assignment. Be sure to sign the form in blue ink and date the form before submitting. Incomplete and/or confusing forms will be returned to you without processing.

ATTACHMENT 1(A):

For each week for which you did not receive payment for hours worked, fill in the date, the number of regular hours worked and the number of overtime hours worked. Add the number of regular hours worked and the number of overtime hours worked and enter the total hours. Fill in your hourly rate of pay and the total number of regular hours worked. Multiply your hourly rate of pay by the total number of regular hours worked and enter that number after "Earned $___." Fill in your overtime rate of pay and the total number of overtime hours worked. Multiply your overtime rate of pay by the total number of overtime hours worked and enter that number after "Earned $___." Add the two "Earned $___" amounts and enter the "Total $___."

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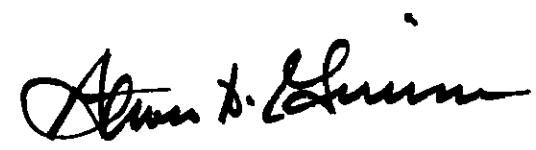

CLERK OF THE COURT

ACOM
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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, A CAB, LLC, and CREIGHTON J. NADY Defendants.	Case No.: A-12-669926-C Dept.: I **SECOND AMENDED AND SUPPLEMENTAL COMPLAINT** **ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE**

MICHAEL MURRAY 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") are residents of the State of Nevada and during all relevant times were residents of Clark County, Nevada, and all plaintiffs are current employees of the defendants.

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

3. The defendant CREIGHTON J. NADY ("NADY") either directly, or through other entities that he controls and owns, is the sole owner of the corporate defendants.

4. The defendant NADY exercises complete control over the activities of the corporate defendants, in that he is the highest level manager and decision maker of the corporate defendants and there are no other officers, directors, owners, members, managers, principals or other employees of the corporate defendants who can override or modify against his will any decision he makes in respect to the conduct of the corporate defendants.

CLASS ACTION ALLEGATIONS

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

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

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

requirements of said Nevada Constitutional Provision, did not equal at least the minimum hourly wage provided for therein.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Defendants, to the extent they believed they had a colorable basis to legitimately contest the applicability of Article 15, Section 16, of the Nevada Constitution to its taxi driver employees, made no effort to seek any judicial declaration of its obligation, or lack of obligation, under such constitutional provision and to pay into an escrow fund any amounts it disputed were so owed under that constitutional provision until such a final judicial determination was made;

(d) Defendants were the subject of an investigation by the United States Department of Labor in respect to defendants' compliance with the minimum wage requirements of the federal Fair Labor Standards Act, 29 U.S.C. § 201-219 which investigation was concluded on April 30, 2009. Such investigation did not determine if any violations of the Fair Labor Standards Act were committed by the defendants, and no claim is made in this case against the defendants under the Fair Labor Standards Act. Such

investigation resulted in defendants on April 30, 2009, being advised by the U.S. Department of Labor that they must keep a record of the actual hours worked by their taxi driver employees and that defendants must pay their taxi drivers the minimum hourly wage, defendants also being told such minimum hourly wage at that time under Nevada law was $6.85 an hour. Rather than follow such advisement, defendants intentionally acted to not institute any system that would keep an express, confirmed, and accurate record of the hours worked by such taxi driver employees, such as a dedicated payroll time clock system. Defendants also acted to force their taxi driver employees to falsely record their activities on their daily taxi driver trip sheets so as to make it appear that the taxi drivers were taking many hours of breaks during their working days, which was not true and defendants knew was not true. Defendants fostered such inaccurate and untrue recording by their taxi drivers of their work activities by refusing to allow taxi drivers to submit accurate daily taxi driver trip sheets that did not have such excessive, and untrue, recordings of break time. Defendants enforced their "break time listings required" policy on their taxi drivers' trip sheets with the intentional goal of making it impossible for those taxi drivers to collect the minimum wages they were owed and to conceal defendants' violations of the Nevada Constitution. Such actions by the defendants included, among other things, actually reviewing the "fares booked" per shift on each taxi driver's trip sheet and requiring additional break time be listed for those shifts where the fare bookings were so low that minimum wages would be owed to the taxi driver if their break times, as listed on their trip sheets,

were not inflated.

18. Defendants engaged in the acts and/or omissions and/or fraudulently conduct detailed in paragraph 17 in an intentional scheme to maliciously, oppressively and fraudulently deprive its taxi driver employees of the hourly minimum wages that were guaranteed to those employees by Article 15, Section 16, of the Nevada Constitution. Defendants so acted in the hope that by the passage of time whatever rights such taxi driver employees had to such minimum hourly wages owed to them by the defendants would expire, in whole or in part, by operation of law. Defendant so acted consciously, willfully, and intentionally to deprive such taxi driver employees of any knowledge that they might be entitled to such minimum hourly wages, despite the defendant's obligation under Article 15, Section 16, of the Nevada Constitution to advise such taxi driver employees of their right to those minimum hourly wages. Defendants' malicious, oppressive and fraudulent conduct is also demonstrated by its failure to make any allowance to pay such minimum hourly wages if they were found to be due, such as through an escrow account, while seeking any judicial determination of its obligation to make those payments.

19. The rights secured to the plaintiffs and the class members under Nevada's Constitution, Article 15, Section 16, for a minimum level of remuneration for their labor as defendants' employees, constitute property rights, in that such level of remuneration constitutes property of the plaintiffs and the class members, to wit, a sum of money that they have a right to possess for the inalienable value of their labor, which labor the defendants obtained from them as employers. Defendants have obtained such property, the minimum wages properly the property of the plaintiffs and the class members, illegally and defendants still possess the same, the defendants having also committed a conversion of such property. As a result defendants should be, and are, subject to all forms of equitable relief and legal sanctions necessary to return such property to the plaintiffs and the class members and/or make them whole, including, without limitation, a suitable Court Order directing that the defendants

make restitution to the plaintiffs and the class members for the full value of all such property taken and held by the defendants, with interest and an award of all proper incidental, consequential and/or punitive damages available under the law or in equity appropriate to remedy such violations of the plaintiffs' and the class members' rights under Nevada's Constitution, Article 15, Section 16.

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

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

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

22. Plaintiffs repeat and reiterate each and every allegation previously made herein.

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

24. The named plaintiffs have been separated from their employment with the

defendants and at the time of such separation were owed unpaid wages by the defendants.

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

26. As a result of the foregoing, the named plaintiffs seek on behalf of themselves and the similarly situated putative plaintiff class members a judgment against the corporate defendants for the wages owed to them and such class members as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorneys' fees.

AS AND FOR A THIRD CLAIM AGAINST DEFENDANT NADY FOR CIVIL CONSPIRACY, AIDING AND ABETTING, CONCERT OF ACTION AND AS THE ALTER EGO OF THE CORPORATE DEFENDANTS

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

28. The named plaintiffs bring this Third Claim for Relief against the defendant NADY for civil conspiracy, concert of action, aiding or abetting the actions of the corporate defendants, and/or as the alter ego of the corporate defendants, on behalf of themselves and the members of the alleged class of all similarly situated employees of the corporate defendants.

29. The corporate defendants, as the employers of the class members, had a legal duty to abide by all laws imposed upon the corporate defendants by the State of

Nevada in respect to their treatment of the class members as such persons' employers, including abiding by the provisions of Nevada's Constitution, Article 15, Section 16 and paying such persons the minimum wages required therein.

30. Defendant NADY exercised his complete control of the corporate defendants to purposefully direct and have the corporate defendants violate Article 15, Section 16 of Nevada's Constitution and not pay the class members the minimum wages they were entitled to receive as employees from the corporate defendants, NADY commanding such action by the corporate defendants despite knowing that such actions were illegal and in violation of Nevada's Constitution.

31. The corporate defendants, although established as legal entities, had no ability to resist NADY's directive to them to violate the provisions of Nevada's Constitution, Article 15, Section 16 and not pay the class members the minimum wages they were entitled to thereunder, as NADY completely controlled the corporate defendants which control he could, and did, use to direct such non-payment of minimum wages by the corporate defendants.

32. Defendant NADY intentionally and knowingly directed the aforesaid violations of Article 15, Section 16 of Nevada's Constitution by the corporate defendant and by doing so caused injury to the class members who did not receive their earned and unpaid minimum wages. NADY directed the corporate defendants commit those violations for the express purpose of enriching NADY, personally, and not as part of any legitimate duty he had as an agent or officer of the corporate defendants. NADY was enriched by those violations as he intended because he received additional distributions, dividends, salary or other earnings and profits from the corporate defendants that he would not have received, and could not have received, except for such violations of Article 15, Section 16 of Nevada's Constitution that he had the corporate defendants commit.

33. While it is alleged in this claim for relief that NADY is personally liable for all unpaid minimum wages owed by the corporate defendants pursuant to Article

15, Section 16 of Nevada's Constitution to the class members, it is also alleged that NADY is liable for those minimum wages so owed for work performed by the class members after January 17, 2013 because of certain additional circumstances. The additional circumstances requiring that NADY be held personally liable for those post January 17, 2013 earned, but unpaid, minimum wages are the following:

(a) On January 17, 2013 the Court in this action held that the class members were entitled to be paid by the corporate defendants the minimum wages specified in Article 15, Section 16 of Nevada's Constitution, which removed any uncertainty that NADY may have had prior to that date as to whether the corporate defendants were required to pay the class members such minimum wages;

(b) Despite such ruling on such date, and NADY's prompt advisement of the same, NADY directed the corporate defendants to continue for over one year to not pay the minimum wages specified in Article 15, Section 16 of Nevada's Constitution to the class members, and by doing so continued to enrich himself after January 17, 2013 with additional distributions, dividends, salary or other earnings and profits from the corporate defendants that he would not have received, and could not have received, except for such violations of Article 15, Section 16 of Nevada's Constitution that he had the corporate defendants continue to commit;

(c) To the extent NADY believed or hoped that the Court's ruling on January 17, 2013, would be overturned or reversed, and the corporate defendants subsequently found to not be legally obligated to pay the class members the minimum wages specified by Article

15, Section 16 of Nevada's Constitution, he purposefully took no steps to have the corporate defendants comply with that January 17, 2013 ruling in the interim. Such steps would have been if not to pay such minimum wages to the class members to at least make arrangements, subject to this Court's approval, for those minimum wage amounts to be paid into an escrow fund and kept secure, and available for the class members' ultimate benefit, until it was determined whether the January 17, 2013 ruling would be overturned or reversed. NADY intentionally failed to take any such steps and directed the corporate defendants to violate this Court's ruling so that NADY could enrich himself with additional distributions, dividends, salary or other earnings and profits from the corporate defendants that he would not have received, and could not have received, if the corporate defendants had taken such proper steps to comply with the Court's January 17, 2013 ruling;

(d) NADY by personally enriching himself with additional distributions, dividends, salary or other earnings and profits from the corporate defendants that he would not have received, and could not have received, if the corporate defendants had taken proper steps to comply with the Court's January 17, 2013 ruling has rendered the corporate defendants financially insolvent and unable to pay the minimum wages owed to the class members for their work performed after January 17, 2013.

34. Defendant NADY has used the corporate defendants as his "alter ego" and is personally liable for the claims made in this case, at least to the extent he has personally enriched himself from the violations of the Nevada Constitution alleged

herein that he has commanded and directed the corporate defendants to commit. Such "alter ego" liability is properly imposed upon him, and the separate legal existence of the corporate defendants as the class members' employer ignored for the purpose of such liability, because (a) NADY has completely influenced and governed the corporate defendants and compelled them to violate the Nevada Constitution and deny the class members the minimum wages they are owed so that NADY could be personally enriched in a commensurate amount, NADY using the corporate defendants as tools for NADY to accomplish such illegal and unconstitutional goals, NADY also expressly directing, planning and causing such illegal conduct that took place including the intentional conduct by the defendants alleged in paragraph 17; (b) There is no actual or effective separation of interests between NADY and the corporate defendants as NADY completely owns and controls the corporate defendants; and (c) The continued adherence to the fiction that NADY and the corporate defendants are separate legal parties, with separate and different liabilities to the class members under Nevada's Constitution, would promote a fraud and an injustice, at least to the extent that NADY has personally enriched himself from the violations of the Nevada Constitution alleged in this complaint and the corporate defendants are otherwise insolvent and unable to make sufficient restitution to the class members to remedy such violations.

35. Defendant NADY has conspired with the corporate defendants to personally enrich himself from the violations of the Nevada Constitution alleged herein that he has commanded the corporate defendants to perform. Such civil conspiracy by NADY occurred, and results in liability by NADY to the class members for such violations, because NADY acted with the corporate defendants to have such violations performed and personally took affirmative steps to have them so performed; NADY intended for such activities to violate Nevada's Constitution, they did in fact violate Nevada's Constitution, and NADY intended for the class members to be deprived of the minimum wages guaranteed to them under Nevada's Constitution and

the class members were so deprived and damaged by their denial of those minimum wages; and NADY performed such actions not as an agent or officer of the corporate defendants or in the furtherance of any duty or lawful goal in his official capacity on behalf of the corporate defendants but solely for his own personal individual advantage and enrichment as alleged herein.

36. That NADY has acted in concert with or aided and abetted the conduct of the corporate defendants in that he acted in concert with the corporate defendants to have them violate their duties to the class members as employers under Nevada's Constitution and NADY knew such actions that he aided and abetted by the corporate defendants were breaches of those duties. NADY has also personally enriched himself from the violations of the Nevada Constitution alleged in this complaint that he aided and abetted the corporate defendants in performing and acted in concert with them to perform and as a result is personally liable to the class members for the damages caused to the class members from such violations, to the extent the corporate defendants are otherwise insolvent and unable to make sufficient restitution to the class members to remedy such violations.

37. That NADY engaged in the forgoing alleged course of conduct with the express intent of leaving the corporate defendants insolvent, bereft of assets, and unable to pay the class members the minimum wages they are owed by the corporate defendants and to enrich NADY, personally, by an equal amount.

38. The named plaintiffs on behalf of themselves and the proposed plaintiff class members, seek, on this Third Claim for Relief, a judgment against the defendant NADY for minimum wages and restitution, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiffs and the class members, at least to the extent the corporate defendants are unable to pay such sums to the class members, along with other suitable equitable relief, a suitable award of punitive damages, and an award of attorney's fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

AS AND FOR A FOURTH CLAIM AGAINST DEFENDANT NADY FOR UNJUST ENRICHMENT

39. Plaintiffs repeat and reiterate each and every allegation previously made herein.

40. The minimum wages that were owed to the class members by the corporate defendants, as alleged herein and in paragraph 19, were the property of the class members and the corporate defendants owed such property, which were sums of money, to the class members when those minimum wages were earned; the corporate defendants actually possessed money sufficient to pay those minimum wages to the class members and could have paid those wages to the class members when they were earned by and due to the class members; and the corporate defendants had no legal right to refuse to pay those minimum wages to the class members when they were earned or pay sums of money equal to those minimum wages to someone else besides the class members who were owed those minimum wages without also paying the class members, at that time, those earned and owed minimum wages.

41. The defendant NADY received sums of money from the corporate defendants that were equal to the minimum wages owed by the corporate defendants to the class members but not paid to the class members by the corporate defendants, NADY receiving those sums of money from the corporate defendants only because he used his complete control over the corporate defendants to have such sums of money paid to him, and not the class members, by the corporate defendants.

42. The aforesaid sums of money in paragraph 41 received by NADY should not have been paid to him but used by the corporate defendants to meet their legal obligation under Nevada's Constitution to pay the class members the minimum wages they were owed and NADY would not have received those monies from the corporate defendants if he had not commanded the corporate defendants to pay those monies to him and if the corporate defendants had acted properly and used those monies to pay the class members such owed, but unpaid, minimum wages.

43. Although plaintiffs do not allege it was necessary for NADY to have such knowledge for them to be granted the relief sought in this fourth claim for relief, they expressly allege, if the Court finds such knowledge must be established for such relief to be granted, that NADY commanded the payment by the corporate defendants to him of the monies discussed in paragraphs 41 and 42 with full knowledge that the corporate defendants only had such funds available to pay him because the class members had not been paid an equal amount of minimum wages they were owed by the corporate defendants.

44. NADY'S retention of the monies he received from the corporate defendants as alleged in paragraphs 41 and 42, such monies that should have been properly used by the corporate defendants to pay the class members their owed, but unpaid, minimum wages, such monies also being the *de facto* property of the class members, would be against fundamental principles of equity, justice and good conscience, to the extent the corporate defendants, owing to their payment of such monies to NADY, are now insolvent and unable to pay the class members the minimum wages they are owed.

45. The named plaintiffs on behalf of themselves and the proposed plaintiff class members, seek, on this Fourth Claim for Relief, a judgment against the defendant NADY for restitution to the class of the amount of NADY'S unjust enrichment, such amount to be determined based upon how much the corporate defendants are found to owe the class members for unpaid minimum wages that the corporate defendants are unable to pay the class members (the "deficiency amount") and how much NADY has been unjustly enriched as alleged in this claim for relief up to, but not in excess of, that deficiency amount, along with other suitable equitable relief and an award of attorney's fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

WHEREFORE, plaintiffs demand the relief on each cause of action as alleged

aforesaid.

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

Dated this 22nd day of June, 2015.

Leon Greenberg Professional Corporation

By: /s/ *Leon Greenberg*

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CERTIFICATE OF MAILING

The undersigned certifies that on August 19, 2015, she served the within:

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

by court electronic service to:

TO:

Esther C. Rodriguez, Esq.
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
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/s/ *Dana Sniegocki*

Dana Sniegocki