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

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| A CAB, LLC; AND A CAB SERIES, LLC,<br><br>Appellants,<br><br>v.<br><br>MICHAEL MURRAY; AND MICHAEL RENO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,<br><br>Respondents. | ) | Supreme Court No. 77050 |



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

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

HUTCHISON & STEFFEN, PLLC

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| 65 | Plaintiffs' Motion on OST to Expedite Issuance of Order Granting Motion Filed on 10/14/2016 to Enjoin Defendants from Seeking Settlement of Any Unpaid Wage Claims Involving any Class Members Except as Part of this Lawsuit and for Other Relief and for Sanctions, filed 02/03/2017 | XVII, XVIII | AA003194-AA003548 |
| 125 | Plaintiffs' Motion on OST to Lift Stay, Hold Defendants in Contempt, Strike Their Answer, Grant Partial Summary Judgment, Direct a Prove Up Hearing, and Coordinate Cases, filed 04/17/2018 | XXXIII, XXXIV | AA006681-AA006897 |
| 176 | Plaintiffs' Motion to File a Supplement in Support of an Award of Attorneys Fees and Costs as Per NRCP Rule 54 and the Nevada Constitution, filed 10/29/2018 | XLVI | AA009401-AA009413 |
| 84 | Plaintiffs' Motion to Impose Sanctions Against Defendants for Violating this Court's Order of March 9, 2017 and Compelling Compliance with that Order, filed 07/12/2017 | XXII | AA004245-AA004298 |
| 167 | Plaintiffs' Objections to Claims from Exemption from Execution and Notice of Hearing, filed 10/15/2018 | XLV | AA009168-AA009256 |
| 195 | Plaintiffs' Objections to Claims of Exemption from Execution and Notice of Hearing, filed 12/19/2018 | XLIX | AA009892-AA009915 |
| 103 | Plaintiffs' Omnibus Motion in Limine # 1- | XXVIII, | AA005565- |

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| | 25, filed 12/22/2017 | XXIV | AA005710 |
| 132 | Plaintiffs' Reply to A Cab and Nady's Opposition to Plaintiff's Motion for Miscellaneous Relief, filed 05/21/2018 | XXXV | AA007093-AA007231 |
| 97 | Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motions for Partial Summary Judgment and to Place Evidentiary Burden on Defendants to Establish "Lower Tier" Minimum Wage and Declare NAC 608.102(2)(b) Invalid, filed 11/29/2017 | XXVI, XXVII | AA005166-AA005276 |
| 98 | Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Bifurcation and/or to Limit Issues for Trial Per NRCP 42(b), filed 12/01/2017 | XXVII | AA005277-AA005369 |
| 52 | Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Enjoin Defendants From Seeking Settlement of any Unpaid Wage Claims Involving any Class Members Except as Part of this Lawsuit and for Other Relief, filed 11/10/2016 | VIII | AA001545-AA001586 |
| 74 | Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed 02/22/2017 | XIX, XX | AA003783-AA003846 |
| 110 | Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion in Limine #1-#25, filed 01/17/2018 | XXXI | AA006118-AA006179 |
| 151 | Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Amend Judgment, filed 09/20/2018 | XLIII, XLIV | AA008835-AA008891 |
| 19 | 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 Rile 53, filed 07/13/2018 | III | AA000447-AA000469 |

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| 180 | Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for an Award of Attorneys Fees and Costs as Per NRCP Rule 54 and the Nevada Constitution, filed 11/08/2018 | XLVII | AA009605-AA009613 |
| 185 | Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to File a Supplement in Support of an Award of Attorneys Fees and Costs as Per NRCP Rule 54 and the Nevada Constitution, filed 11/28/2018 | XLVII | AA009668-AA009674 |
| 169 | Plaintiffs' Reply to Defendants' Response to Plaintiffs' Counter-Motion for Appropriate Judgment Enforcement Relief, filed 10/16/2018 | XLV | AA009264-AA009271 |
| 68 | Plaintiffs' Reply to Defendants's Opposition to Plaintiffs' Motion on OST to Expedite Issuance of Order Granting Motion Filed on 10/14/2016 to Enjoin Defendants From Seeking Settlement of Any Unpaid Wage Claims Involving Any Class Members Except as Part of This Lawsuit and For Other Relief and for Sanctions, filed 02/10/2017 | XIX | AA003621-AA003624 |
| 128 | Plaintiffs' Reply to Jasminka Dubric's Opposition to Plaintiffs' Motion for Miscellaneous Relief, filed 04/26/2018 | XXXIV | AA006931-AA006980 |
| 45 | Plaintiffs' Response in Opposition to Defendants' Motion Seeking Reconsideration of the Court's Order Granting Class Certification, filed 03/14/2016 | VII | AA001232-AA001236 |
| 203 | Plaintiffs' Response in Opposition to Defendants' Motion to Pay Special Master on an Order Shortening Time and Counter-Motion for an Order to Turn Over Property, filed 01/30/2019 | L | AA010115-AA010200 |

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| 155 | Plaintiffs' Response in Opposition to Defendants' Motion for Reconsideration, Amendment, for New Trial and for Dismissal of Claims, filed 09/27/2018 | XLIV | AA008995-AA009008 |
| 11 | Plaintiffs' Response in Opposition to Defendants' Motion to Strike First Amended Complaint and Counter-Motion for a Default Judgment or Sanctions Pursuant to EDCR 7.60(b), filed 04/11/2013 | II | AA000202-AA000231 |
| 24 | Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Claim for Relief, filed 08/28/2015 | IV | AA000651-AA000668 |
| 23 | Plaintiffs' Response in Opposition to Defendants' Motion for Declaratory Order Regarding Statue of Limitations, filed 08/28/2015 | IV | AA000600-AA000650 |
| 172 | Plaintiffs' Response in Opposition to Defendants' Motion for Dismissal of Claims on an Order Shortening Time, filed 10/17/2018 | XLVI | AA009289-AA009297 |
| 8 | Plaintiffs' Response in Opposition to Defendants' Motion Seeking Reconsideration of the Court's February 8, 2013 Order Denying Defendants' Motion to Dismiss, filed 03/18/2013 | I | AA000181-AA000187 |
| 154 | Plaintiffs' Response to Defendants' Ex-Parte Motion to Quash Writ of Execution on an OST and Counter-Motion for Appropriate Judgment Enforcement Relief, filed 09/24/2018 | XLIV | AA008919-AA008994 |
| 109 | Plaintiffs' Response to Defendants' Motion in Limine to Exclude Expert Testimony, filed 01/12/2018 | XXX, XXXI | AA006002-AA006117 |
| 184 | Plaintiffs' Response to Special Master's | XLVII | AA009665- |

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| | 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 |

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| 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 |

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| | 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 |

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| 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 XXXVI of LII** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 S. Jones Blvd., Ste. E3
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Telephone: (702) 383-6085
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leongreenberg@overtimelaw.com
Dana@overtimelaw.com

*Attorneys for Respondents*

DATED this 5th day of August, 2020.

***/s/ Kaylee Conradi***

An employee of Hutchison & Steffen, PLLC

**RSPN**
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*Attorneys for Defendants*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
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| MICHAEL MURRAY and MICHAEL RENO, Individually and on behalf of others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>A CAB TAXI SERVICE LLC and A CAB, LLC, and CREIGHTON J. NADY,<br><br>Defendants. | Case No.: A-12-669926-C<br>Dept. No. I<br><br>Hearing Date: June 1, 2018<br>Hearing Time: 10:00 a.m. |

**DEFENDANTS' RESPONSE TO PLAINTIFFS' ADDITIONAL DECLARATION**

Defendants A Cab, LLC and Creighton J. Nady, by and through their attorneys of record, ESTHER C. RODRIGUEZ, ESQ., of RODRIGUEZ LAW OFFICES, P.C., and MICHAEL K. WALL, ESQ., of HUTCHISON & STEFFEN, LLC, hereby submit this Response to Plaintiffs' additional Declaration filed and served yesterday May 30, 2018 requesting various relief.

**1. Rehearing on Summary Judgment.**

In the most recent round of declarations, Plaintiffs' counsel has sought various forms of relief including the rehearing of a partial summary judgment which has come before the Court on

several occasions. At the most recent hearing of this matter on May 23, 2018, this Court indicated it would not entertain this hearing again on June 1, 2018. Accordingly, Defendants will not address this requested relief in this response.

**2. Request for Contempt and Striking of Answer**

Plaintiffs request the Court find Defendants in contempt for not making payments to the Special Master during the stay, and which the Court already addressed in its minute order "the Court GRANTS a temporary stay to resolve the Defendants' claimed inability to pay the Special Master the initial $25,000 required by previous court order"; *Minute Order of March 6, 2018*, p. 1, attached hereto as **Exhibit A.**

As this Court will recall, Defendants requested a stay of proceedings pending the oral argument that was scheduled before the Nevada Supreme Court on April 4, 2018. (*Defendants' Motion on OST for Stay of Proceedings* filed March 2, 2018). In said motion, Defendants highlighted to the Court that it was financially unable to make the initial $25,000 deposit to a Special Master ordered by the Court. On the eve of trial, Department 1 ordered the appointment of a Special Master over the objections of Defendants. The Court further ordered that Defendants were required to pay the estimated $250,000 fees of the Special Master. The Court ordered that it would not entertain any motion for reconsideration of this order.

Defendants stated that given the appellate arguments that were pending before the Nevada Supreme Court to reverse an injunction that was prohibiting them from settling many of the claims in Department 25, that the work of the Special Master may become moot, and change the disposition of the matter in Department 1. Accordingly, a stay of proceedings was appropriate.

The Honorable Court in Department 1 did indeed grant the stay, indicating that the Court had health considerations, but at the same time a stay of all proceedings would allow Defendants additional time to accumulate monies for a deposit to a Special Master. The Court ordered the Special Master to cease all work. *Minute Order of March 6, 2018*, **Exhibit A**, p. 1.

Since that time, on April 6, 2018, the Nevada Supreme Court has indeed reversed the injunction prohibiting Defendants from resolving many of the minimum wage claims; and the work and scope of the Special Master must therefore be readdressed by the Court.

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Accordingly, Defendants are not in contempt, per the Court's instruction and orders. As detailed above (and documented in the Court's Minute Order), when Defendants were unable to financially pay the deposit to the Special Master, Defendants sought relief from this Court in the form of a stay. The Court granted the relief, and a stay remained in place until last week when the Court lifted the stay to hear Plaintiffs' Motion on Order Shortening Time. Therefore, Plaintiffs' assertions that Defendants are in contempt are false and inaccurate statements. Further, as detailed in the attached Affidavit of Creighton J. Nady, there is no deliberate intent not to comply with the Court's directive; it is a financial reality of the business. **Exhibit B**.

**3. The Reality of the Class Action Cases is a Basis for this Court to Reconsider the Scope of the Work of the Special Master.**

At the same time as bringing their Motion on Order Shortening Time for this Court to Coordinate the two class action cases, *Dubric*[1] and *Murray*, Plaintiffs also sought relief from the Nevada Supreme Court on an emergency basis. (*Plaintiffs' Emergency Motion For Stay of District Court Proceedings Pending Writ Proceedings Resolution*"). (*See* **Exhibit C**)

The Nevada Supreme Court denied Plaintiffs' requested relief to stay the *Dubric* matter. *Order Denying Stay*, May 25, 2018, **Exhibit D.** This Court also denied Plaintiffs' motion to coordinate the two class cases.

Accordingly, the *Dubric* hearing on the parties' Joint Motion for Conditionally Certifying Class Settlement and Preliminary Approval of Class Settlement Agreement was heard on May 24, 2018. After extensive testimony and documentation was taken into evidence by the Court, the Court granted the parties' Joint Motion. Such evidence included the fact that this settlement was on the higher end of the spectrum when compared to those settlements reached by the other taxicab drivers, some of whom have altogether failed to obtain class certification.

*See* Order Denying Class Certification, Department 7, wherein the Honorable Linda Bell has denied class certification altogether. *Perrera v. Western Cab Company*, District Court Case No. A-14-707425-C. **Exhibit E**.

[1] *Dubric v. A Cab, LLC, et.al.*, District Court Case No. A-15-721063-C.

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*See* Order approving settlement of Nellis Cab for 1133 drivers, with a net settlement of $195,000, of which Defendant agreed to pay at least 40% or $78,000.00 to the drivers. Order and Joint Motion, *Golden v. Sun Cab, Inc.*, District Court Case No. A-13-678109-C, page 8: 22-25. **Exhibit F**.

In the matter of *Dubric v. A Cab*, the Court approved a preliminary settlement for $225,000 **plus** attorney fees and costs for approximately 800 drivers in the class. **Exhibit G.**

At this Court's request at the hearing of May 23, 2018, Counsel for Jasminka Dubric, Trent Richards, Esq., presented evidence demonstrating the overlap of class members between the *Dubric* class and the *Murray* class. Following Judge Delaney's preliminary approval, these class members will now receive notification of the settlement, and have the opportunity to opt out of the settlement if they so choose. If the driver wishes to proceed in litigation and a trial, he or she is free to do so. However, those same drivers will have the opportunity to receive monies in their pockets without further delay.

Pursuant to NRCP 23 and Judge Delaney's ruling, a hearing for final approval of settlement will be held in approximately 90 days. At that time, it will be determined which drivers have opted out of the class, as well as whether the final settlement will be approved. After that time, all parties will know with specificity who remains as a litigant in the *Murray* case.

It is nonsensical to have the Special Master prepare the calculations for a litigant who has settled his or her claim. It makes even less sense that A Cab will have to pay for the Special Master's time in doing so, when part of the reason a Defendant settles is to "buy their peace" and to stop escalating costs of defense. Accordingly, the logical step is to stay the work of the Special Master until final approval in the *Dubric* matter, or approximately 90 days.

Here the argument for staying the work of the Special Master is even stronger due to A Cab's financial difficulties. **The funds paid to the Special Master have the direct effect of "de-funding" a settlement to the driver claimants.** Affidavit of Creighton J. Nady with attachments, **Exhibit B**.

The estimated cost of a Special Master at $250,000 exceeds the settlement reached for these driver claimants (which has been deemed to be higher than those reached in other comparable

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matters). As was indicated at the hearing of May 23, 2018, the remaining class members in the *Murray* action, in addition to the named representative Plaintiffs, may be limited in time periods to 2007-2009 and after September 2016. If this is the reality, it is irrational to have the Special Master perform calculations for all times in between which are resolved and dismissed, especially given the adverse financial effect upon settlement funds. This Court has always been clear in its message that it seeks to have the drivers receive monies. Diverting monies to the Special Master will have the opposite effect. The drivers have already received $139,998.80 for the time period of October 2010 - October 2012 through a settlement with the Department of Labor. **Exhibit H.** Through the *Dubric* settlement, the drivers will receive another $224,529.00 for the time period of April 1, 2009 through September 30, 2016.

To further order a company to pay a third party for the work Plaintiffs' counsel failed to do throughout the discovery period is simply unjust and without basis, given that the majority of the data is moot.

## II.

## CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court deny in its entirety *Plaintiffs' Motion and Declarations* to find Defendants in contempt or to strike their answer. In the alternative, this Court should reinstate the stay in this matter until final approval is completed in the *Dubric* matter. After that time, certainty as to the class members in the *Murray* case can be determined; as well as the necessity of a Special Master.

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Plaintiffs will not be harmed nor prejudiced in this matter, as the stay will toll their 5 year rule concerns. Further, it is likely that as in most instances, the majority of litigants will want to accept monies to resolve their claims, rather than to pursue an action which is speculative and has its risks.

DATED this 31st day of May, 2018.

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

/s/ Esther C. Rodriguez, Esq.
Esther C. Rodriguez, Esq.
Nevada State Bar No. 006473
10161 Park Run Drive, Suite 150
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*Attorneys for Defendants*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY on this 31st day of May, 2018, 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
*Co-Counsel for Plaintiffs*

Christian Gabroy, Esq.
Gabroy Law Offices
170 South Green Valley Parkway # 280
Henderson, Nevada 89012
*Co-Counsel for Plaintiffs*

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

# EXHIBIT A

# EXHIBIT A

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

| Other Civil Filing | COURT MINUTES | March 06, 2018 |
|---|---|---|

A-12-669926-C Michael Murray, Plaintiff(s)
vs.
A Cab Taxi Service LLC, Defendant(s)

**March 06, 2018** **Minute Order**

HEARD BY: Cory, Kenneth COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

**JOURNAL ENTRIES**

The Court has reviewed Defendant s Motion on OST for Stay, received on March 2, 2018, Plaintiffs' Response to Defendant s Motion, Plaintiffs' Motion on OST to enforce the Court's Orders, and the e-mail correspondence from counsel and the Special Master, Dr. Saad.

For the reasons stated herein the Court GRANTS a temporary stay to resolve the Defendants' claimed inability to pay the Special Master the initial $25,000 required by previous court order.

In addition to Defendants' protestations of their temporary inability to pay the initial $25,000, the Court also GRANTS a temporary Stay due to health considerations of the Court. The Court has scheduled a necessary surgery for March 8, 2018, which surgery will require a relatively brief recuperation period. The Court is therefore entering an indefinite stay for both reasons, which the Court anticipates will not last longer than approximately 3 weeks.

The Court has considered whether it would make more sense to recuse from the case, and/or request a reassignment by the Chief Judge of the Eighth Judicial District Court. However, the duplication of the time and effort it would take for another judge to become adequately conversant with this case would likely protract this case yet again, and would likely cost the parties more in attorney fees; nor would it facilitate an economical and fair management of this litigation. Recusal or reassignment would necessitate such delay that it should only come as a last resort.

Inasmuch as the anticipated calendared surgery is laparoscopic in nature, the Court feels confident that it will be fully functional and able to proceed ahead within three weeks.

In the meantime, the Special Master is directed to cease all efforts to complete the task previously

ordered by this Court until further order of this Court. Additionally, because there will be a breathing space of approximately three weeks the Defendants should well be able to set aside the initial $25,000 deposit, and are ORDERED to do so.

The court anticipates setting a hearing date to accomplish the following:
1. Dissolve the stay;
2. Argue and rule on the various motions which have been filed; and
3. Reset the Rule 41(e), i.e., 5-year Rule, date by which this matter must be concluded.

CLERK S NOTE: The above minute order has been distributed to: Lean Greenberg, Esq. (leongreenberg@overtimelaw.com), Esther Rodriguez, Esq. (esther@rodriguezlaw.com), Michael Wall, Esq. (mwall@hutchlegal.com) and Special Master Dr. Saad (ASaad@resecon.com). /mlt

# EXHIBIT B

# EXHIBIT B

**AFFIDAVIT OF CREIGHTON J. NADY**

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

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

1. I am the managing member of A Cab, LLC ("A Cab").

2. I have not engaged in willful disobedience of any of this Court's orders, including the ordered monetary deposit of $25,000 to a Special Master.

3. Because I was unable to make this payment of $25,000, my counsel requested relief from this Court in the form of a stay of proceedings.

4. It is my understanding that the Court has now ordered a deposit of $41,000 to be made by June 1, 2018. I am unable to make this deposit.

5. Attached hereto are the financial statements of A Cab, LLC, demonstrating the company's financial struggles. A Cab had a loss for the year 2017 of $466,433.22. In this year 2018, the company has lost over $29,000 per month or $87,215 as of the first quarter. As a result, I have had to make the unfortunate decisions to lay off personnel, as well as to severely cut-down on the hours worked by my administrative and management personnel. I have also sold many personal assets in order to continue to have operating capital and to keep the doors open.

6. I am a 50+ year resident of Nevada, living here with my wife and family since 1966 except for my time in the U.S. Army as a Captain. I started this company in 2001. I have always strived to comply with all State and Federal laws and regulations, including the orders of this Court. There was never any deliberate intent to underpay my drivers, as I took all steps including meeting with the State Labor Commissioner's office to make sure I was acting lawfully and properly. It is my understanding that I am the only cab owner who took such steps to seek out guidance on these issues from the State.

7. When A Cab was audited by the Federal Department of Labor in 2009, I understood the company to have received a clean bill with no violations. It was my understanding that this was an assurance from the federal government that A Cab was acting properly and lawfully.

. . .

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8. When A Cab was audited again for the time period of 2010-2012, and after escalating costs of defending the audit, I chose to settle the matter with the understanding that the monies would go into the pockets of my drivers. This settlement was $139,998.80 that would be paid to drivers.

9. I also entered into a settlement agreement in the *Dubric v. A Cab* matter in December 2016, which will allow additional funds to go into the pockets of my drivers.

10. I am aware that amounts in excess of the *Dubric* settlement have been offered to the class members in the *Murray* matter who rejected a resolution.

11. The financial statements attached hereto are true and accurate.

12. I am unable to pay $250,000 for the work of the Special Master; and further cannot pay $41,000 by June 1, 2018. Any monies paid to the Special Master will come from funds intended for the drivers.

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 31st day of May, 2018.

CREIGHTON J. NADY

SUBSCRIBED and SWORN to before me this 31st day of May, 2018

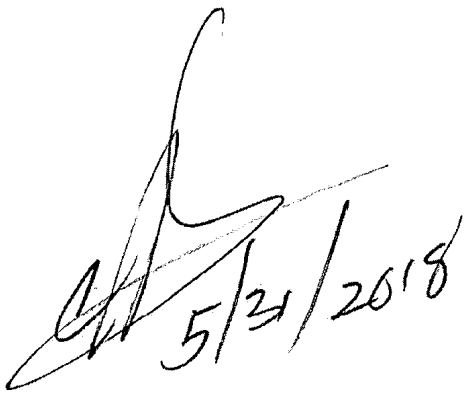
NOTARY PUBLIC in and for the State of Nevada

NOTARY PUBLIC
SUSAN R. DILLOW
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. JAN 30, 2021
No: 97-0296-1

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

A Cab, LLC
**Balance Sheet**
As of December 31, 2017

| | |
|---|---|
| ASSETS | |
| Current Assets | |
| Total Cash | 158,543.75 |
| Total Other Current Assets | 226,408.19 |
| Total Current Assets | 384,951.94 |
| Total Fixed Assets | 1,119,511.10 |
| TOTAL ASSETS | 1,504,463.04 |
| LIABILITIES & EQUITY | |
| Liabilities | |
| Current Liabilities | |
| Total Accounts Payable | 552,359.85 |
| Total Payroll Liabilities | 16,518.43 |
| Total Other Current Liabilities | 362,683.10 |
| Total Current Liabilities | 931,561.38 |
| Total Long Term Liabilities | 209,390.97 |
| Total Liabilities | 1,140,952.35 |
| Total Equity | 363,510.69 |
| TOTAL LIABILITIES & EQUITY | 1,504,463.04 |



A Cab, LLC
**Profit & Loss**
Year Ended December 31, 2017

| | | |
|---|---|---|
| Ordinary Income/Expense | | |
| Gross Profit | | 9,734,620.37 |
| Expenses | | |
| Total Taxi Expenses | 1,270,830.28 | |
| Total Payroll Expenses | 5,024,194.81 | |
| Total Administrative Expenses | 4,431,927.83 | |
| Total Expenses | | 10,726,952.92 |
| Net Ordinary Income | | (992,332.55) |
| Other Income/Expense | | |
| Total Other Income | | 436,704.39 |
| Total Gain/Loss Asset Disposal | | 222,240.32 |
| Total Other Expense | | 133,045.38 |
| Net Other Income | | 525,899.33 |
| Net Income | | (466,433.22) |

A Cab, LLC
**Balance Sheet**
As of March 31, 2018

| | |
|---|---|
| ASSETS | |
| Current Assets | |
| Total Cash | 187,195.87 |
| Total Other Current Assets | 184,033.45 |
| Total Current Assets | 371,229.32 |
| Total Fixed Assets | 971,740.28 |
| TOTAL ASSETS | 1,342,969.60 |
| LIABILITIES & EQUITY | |
| Liabilities | |
| Current Liabilities | |
| Total Accounts Payable | 646,367.81 |
| Total Payroll Liabilities | 67,135.69 |
| Total Other Current Liabilities | 325,242.69 |
| Total Current Liabilities | 1,038,746.19 |
| Total Long Term Liabilities | 117,564.05 |
| Total Liabilities | 1,156,310.24 |
| Total Equity | 186,659.36 |
| TOTAL LIABILITIES & EQUITY | 1,342,969.60 |

5/31/18

A Cab, LLC
**Profit & Loss**
January through March 2018

| | | |
|---|---|---|
| Ordinary Income/Expense | | |
| Gross Profit | | 2,058,490.04 |
| Expenses | | |
| Total Taxi Expenses | 340,395.56 | |
| Total Payroll Expenses | 1,131,081.61 | |
| Total Administrative Expenses | 777,391.74 | |
| Total Expenses | | 2,248,868.91 |
| Net Ordinary Income | | (190,378.87) |
| Other Income/Expense | | |
| Total Other Income | | 102,868.41 |
| Total Other Expense | | (294.82) |
| Net Other Income | | 103,163.23 |
| Net Income | | (87,215.64) |

5/31/18

# EXHIBIT C

# EXHIBIT C

**IN THE SUPREME COURT OF NEVADA**

| | |
|---|---|
| MICHAEL MURRAY and MICHAEL RENO, Individually and on behalf of others similarly situated,<br><br>Petitioners,<br><br>vs.<br><br>THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and For the County of Clark, and THE HONORABLE, District Judge Kathleen E. Delaney,<br><br>Respondents,<br><br>AND<br><br>JASMINKA DUBRIC, A CAB LLC, A CAB SERIES LLC, EMPLOYEE LEASING COMPANY, CREIGHTON J. NADY and DOES 3 through 20,<br><br>Real Parties in Interest | Sup. Ct. No.<br><br>Dist. Ct No.: A-15-721063-C<br><br>Dept.:<br><br>EMERGENCY MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS PENDING WRIT PROCEEDINGS RESOLUTION AS PER NRAP 8(a) AND NRAP 27(e) |

EMERGENCY MOTION UNDER NRAP 27(e)

Action Needed on or by May 24, 2018

NRAP 27(e) CERTIFICATE

Leon Greenberg, an attorney duly licensed to practice law in the State of Nevada, and the attorney for the Petitioners, hereby affirms, under penalty of perjury, the following:

1. The telephone numbers and office addresses of the attorneys for all of the parties are the following:

Petitioners Michael Murray and Michael Reno:

Leon Greenberg and Dana Sniegocki, Attorneys
Leon Greenberg Professional Corporation
2965 South Jones Boulevard, Suite E-3
Las Vegas, NV 89146
(702) 383-6085

Real Party in Interest Jasminka Dubric:

Mark J. Bourassa and Trent L. Richards, Attorneys
Bourassa Law Group
8868 Spring Mountain Road - Suite 101
Las Vegas, NV 89117
(702) 851-2180

Real Parties in Interest A Cab LLC, A Cab Series LLC, Employee Leasing Company, Creighton J. Nady:

Esther C. Rodriguez, Esq.
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145
702 320-8400

2. The facts showing the existence and nature of the claimed emergency:

As discussed in the Writ Petition submitted with this motion, on February 10, 2016, the Murray Petitioners were appointed as class representatives for a certified class under NRCP Rule 23(b)(2) and (b)(3) in *Michael Murray v. A-Cab Taxi Service LLC and A Cab LLC*, Case no. A-12-669926-C by Judge Kenneth Cory of Department 1 of the Eighth Judicial District Court. PA 18-34. District Court Judge Delaney, of Department 25 of the Eighth Judicial District Court, on May 16, 2018 issued an Order denying the Murray Petitioners' motion to intervene in *Jasminka Dubric v. A Cab LLC,* Case no. A-15-721063-C, Department 25, of the Eighth Judicial District Court. PA 630-632. Judge Delaney has set a hearing for May 24, 2018 to grant class certification and preliminary class settlement approval in *Dubric* for the same claims already subject to class action certification

in *Murray*. As stated in her Order of May 16, 2018 she will not hear any opposition from the Murray Petitioners to that class action settlement, on the basis that she has denied them intervention. That settlement, if entered as a final judgment, will destroy the class claims the Murray Petitioners were appointed to represent in *Murray*.

It is my belief irreparable harm will arise to the interests of the class members the Murray Petitioners represent if opposition to the proposed class action settlement is not considered in *Dubric* at the May 24, 2018 hearing. While it is conceivable this Court might intervene at a later date to correct the injury to the class members arising from the hearing on May 24, 2018, such intervention is highly likely to be unable to fully cure such injury. That is because upon the conclusion of that hearing, and the grant of preliminary class action settlement approval, the class members will be misled and misinformed by the notice that will be dispatched to the class about that settlement and the nature of their class claims. That misleading understanding by the class members cannot be fully remedied. Such notice, and class settlement, being the product of process that did not consider the views of the class members' already appointed NRCP Rule 23 class representatives, the Murray Petitioners, will have to be set aside. Significant resources, that will no longer be available to satisfy the class members' claims, will be dissipated by Real Party in Interest A-Cab's pursuit of that improper settlement. As a result, conservation of the class members' ability to secure a monetary remedy for the class claims will be needlessly impaired if a stay is denied and the May 24, 2018 hearing proceeds.

3. When and how counsel for the other parties were notified and whether they have been served with the motion:

This motion was sent by email to counsel for all of the parties on May 18,

2018, prior to its filing with the Nevada Supreme Court.

4. Whether the relief sought in the motion was available in the district court and whether all grounds in support of the relief were presented to the district:

I requested on May 15, 2018 that the district court continue the hearing scheduled for May 24, 2018 or otherwise stay proceedings in the district court so that a petition for intervention by this Court could be filed in the normal course and to avoid the need for this emergency motion. I presented all grounds that I could in support of that request. That request was denied by District Court Judge Delaney.

ADDITIONAL REASONS FOR THE GRANT OF THE STAY

The requested stay would overwhelmingly advance the interests of justice and inure to the detriment of no one. The Real Parties in Interest have no interest in securing the expedited approval of the proposed class action settlement *except* to avoid the proper deliberative process required by NRCP Rule 23 and the consideration of the concerns of the Murray Petitioners. If the Murray Petitioners' concerns are found, after proper consideration, to be without merit, the Real Parties in Interest will secure the class settlement they seek in due course. Any delay in that process would be immaterial. On the other hand, the risk of injury to the class members if the district court proceeds without considering the concerns of the Murray Petitioners is manifest. Accordingly, the stay should be granted.

I have read the foregoing and affirm the same is true and correct.

Affirmed this 18th day of May, 2018

*/s/ Leon Greenberg*
Leon Greenberg

# EXHIBIT D

# EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MURRAY; AND MICHAEL RENO, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE,
Respondents,
and
JASMINKA DUBRIC; A CAB, LLC; A CAB SERIES LLC; EMPLOYEE LEASING COMPANY; AND CREIGHTON J. NADY,
Real Parties in Interest.

No. 75877



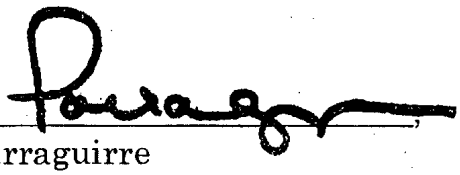
*ORDER DENYING STAY*

This original petition for a writ of mandamus challenges a district court order denying petitioners' motion for leave to intervene. Petitioners have moved to stay the district court proceedings pending our resolution of this petition.

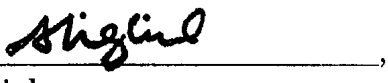
In determining whether to grant a stay pending resolution of a writ petition, this court considers the following factors: (1) whether the object of the petition will be defeated if the stay is denied; (2) whether petitioners will suffer irreparable or serious injury if the stay is denied; (3) whether real parties in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether petitioners are likely to prevail on the

merits of the petition. Having considered the motion, the oppositions thereto, and the reply, we conclude that appellants have not demonstrated that these factors militate in favor of a stay at this time, especially as the district court must consider other pending actions when determining class certification questions, *see* NRCP 23(b)(3)(B), and any intervention may be effective even at a later date. Accordingly, we deny the motion for stay.

It is so ORDERED.



_____, J.
Parraguirre



_____, J.
Stiglich

CHERRY, J., dissenting:

It appears to me that, while the object of the petition will not be completely defeated absent a stay, whether intervention is warranted is best determined before the district court formally rules on the class certification and preliminary settlement approval questions and the parties then undertake further actions in accordance with the court's orders. To fail to do so limits the purpose of intervening, should intervention later be allowed. Petitioners have raised a substantial case on the merits, and I believe that the balance of equities weighs in favor of granting a stay. *See*

*Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 655, 6 P.3d 982, 985 (2000). Therefore, I dissent.

Cherry, J.
Cherry

cc: Hon. Kathleen E. Delaney, District Judge
Leon Greenberg Professional Corporation
Rodriguez Law Offices, P.C.
Bourassa Law Group, LLC
Eighth District Court Clerk

# EXHIBIT E

# EXHIBIT E

ORDR
MALANI L. KOTCHKA
Nevada Bar No. 283
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520 South Fourth Street, Suite 320
Las Vegas, NV 89101
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Facsimile: (702) 834-5262
mlk@hmlawlv.com

*Attorneys for Defendant*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| LAKSIRI PERERA, IRSHAD AHMED, and MICHAEL SARGEANT, individually,<br><br>Plaintiffs,<br><br>v.<br><br>WESTERN CAB COMPANY,<br><br>Defendant. | **Case No.: A-14-707425-C**<br><br>**Dep't. No.: VII**<br><br>**ORDER DENYING CLASS CERTIFICATION, INJUNCTIVE RELIEF AND APPOINTMENT OF A SPECIAL MASTER** |

Plaintiffs' Motion for Injunctive Relief and Class Certification pursuant to NRCP Rule 23(b)(2) and Rule 23(b)(3) having come on for hearing on August 17, 2017, and Plaintiffs' Motion on Order Shortening Time to Enjoin Defendants From Securing Releases and Other Relief having come on for heàring on June 22, 2017, and Leon Greenberg appearing on behalf of Plaintiffs and Malani L. Kotchka appearing on behalf of Defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that both motions are denied. Plaintiffs Laksiri Perera, Irshad Ahmed and Michael Sargeant are former employees of Defendant who ceased working for Defendant in October 2012, July 2013 and June 2014

respectively. September 23, 2012 is the earliest date to fall within the statute of limitations in this action. The three Plaintiffs seek an order: (1) certifying as class members ***all*** of Defendant Western Cab Company's ("Western's") taxi drivers employed between July 1, 2007, and the date of the anticipated order, including current and other former employees; (2) certifying this case as a class action for wages allegedly due on account of Western's purported violation of Nevada's Minimum Wage Amendment ("MWA"); (3) appointing Plaintiffs' attorneys Leon Greenberg and Dana Sniegocki as class counsel; (4) enjoining Western from requiring its drivers to pay for fuel for Western's taxi cabs to the extent doing so would reduce their non-tipped wages paid by Western to an amount less than the amount required by the MWA; (5) enjoining Western to undertake certain so called "necessary" record keeping, reporting and enforcement protocols, all undefined; (6) appointing a Special Master, to be paid by Western "as necessary to vigorously promote [the injunction's] enforcement;" (7) awarding Plaintiffs' counsel fees and costs for securing injunctive relief and imposing monetary sanctions upon defendant; and (8) enjoining Western from securing releases and other relief. The Court denies all of this requested relief. Plaintiffs have failed to demonstrate the need for injunctive relief at this time. Even assuming the Plaintiffs have a reasonable probability of success, monetary back wages would be an adequate remedy. Any issues regarding record keeping and reporting are covered by discovery rules and are better dealt with through the discovery process. The United States Department of Labor did not find in 2013 that Western owed any minimum wage to its drivers. The Court does not believe that the issues presented here are so unique or complex as to warrant appointment of a special master pursuant to NRCP 53.

IT IS FURTHER ORDERED that the Plaintiffs do not meet the requirements under NRCP 23(a) for class certification so the motion to certify the class is denied. *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 538 (2005). Class certification requires

a finding of each of the elements set forth in NRCP 23(a). The first requirement is numerosity, that the class is so numerous a joinder of all members is impractical. There is no definitive number to reach this requirement. Since the filing of this lawsuit, Western has settled with a large portion of the purported class. The remaining members of the potential class are all taxi drivers in the same geographic area. They are asserting claims for which, if proven, they may constitutionally recover attorney's fees. Plaintiffs have not pled that they lack resources to bring

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and maintain individual lawsuits. Since the Court is finding that the numerosity requirement is not met, the Court will not address the remaining factors under NRCP 23(a).

Dated this 14th day of February, 2018.

Honorable Linda Bell
District Court Judge

Submitted by:

Malani L. Kotchka (SBN 0283)
HEJMANOWSKI & McCREA LLC
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
Telephone: (702) 834-8777
Facsimile: (702)834-5262
mlk@hmlawlv.com

*Attorneys for Defendant*

Approved as to form and content by:

Leon Greenberg (SBN 8094)
Dana Sniegocki (SBN 11715)
LEON GREENBERG PROF. CORP.
2965 South Jones Blvd., Suite E-3
Las Vegas, NV 89146
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Facsimile: (702) 385-1827
dana@overtimelaw.com
leongreenberg@overtimelaw.com

*Attorneys for Plaintiffs*

# EXHIBIT F

# EXHIBIT F

Electronically Filed
4/5/2018 1:24 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| NEAL GOLDEN, ABAIKARIM HASSAN and DAWIT ALEMU,<br><br>Plaintiffs,<br><br>vs.<br><br>SUN CAB, INC. doing business as NELLIS CAB CO.,<br><br>Defendant. | CASE NO. A-13-678109-C<br><br>DEPT. NO. XX<br><br>**ORDER**<br><br>**(1) CONFIRMING CERTIFICATION OF CLASS ACTION;**<br><br>**(2) GRANTING FINAL APPROVAL TO CLASS ACTION SETTLEMENT; AND**<br><br>**(3) ENTERING FINAL JUDGMENT** |

On April 4, 2018, the Court, in chambers, considered the joint motion of plaintiffs Neal Golden, Abaikarim Hassan, and Dawit Alemu ("Plaintiffs") and defendant Sun Cab, Inc., doing business as Nellis Cab Co. ("Nellis Cab"), for final approval of their class settlement (the "Settlement") and payments to the Settlement Administrator. No appearance of counsel was necessary.

The Parties have submitted their Settlement, which this Court preliminarily approved by its December 1, 2017 order (the "Preliminary Approval Order"). In accordance with the Preliminary Approval Order, Class Members have been given notice of the terms of the

Settlement and an opportunity to comment, and Class Members have been given the opportunity to object to it or to opt out. Class Members have also been provided with a Claim Form.

Having received and considered the Settlement, the supporting papers filed by the Parties, and the evidence and argument received by the Court before entering the Preliminary Approval Order and at the final approval hearing, the Court grants final approval of the Settlement, enters this Final Approval Order, and HEREBY ORDERS and MAKES DETERMINATIONS as follows:

1. The Court has jurisdiction over this action and the parties' proposed settlement under Nev. Const. Art. 15, Sec. 16 and NRS 608, as Plaintiffs' complaint was brought under Nevada wage-and-hour law and related contract claims.

2. Pursuant to this Court's Preliminary Approval Order, a Class Notice Packet consisting of a (i) Notice of Proposed Settlement of Class, (ii) Claim Form was sent to each Class Member by first-class mail. These papers informed Class Members of the terms of the Settlement, their right to receive a proportionate Settlement Share, their right to object to the Settlement or to opt out of the Settlement and pursue their own remedies, and their right to appear in person or by counsel at the final approval hearing and be heard regarding approval of the Settlement. Adequate periods of time were provided by each of these procedures.

3. The Court finds and determines that this notice procedure afforded adequate protections to all class members and provides the basis for the Court to make an informed decision regarding approval of the Settlement based on the responses of class members. The Court finds and determines that the notice provided in this case was the best notice practicable, which satisfied the requirements of law and due process.

4. Zero (0) Class Members filed written objections to the proposed settlement as part of this notice process or stated an intent to appear at the final approval hearing. Only one (1) potential Class Member, Djem V. Outkou, elected to file an exclusion request. For the reasons stated in the Preliminary Approval Order, this Court finds and determines that the Class, as defined in the definitions section of the Settlement, meets all of the legal requirements for

certification as a class action under Rule 23 of the Nevada Rules of Civil Procedure, and it is hereby ordered that the Class is certified for purposes of settlement of this action.

5. The Court further finds and determines that the terms of the Settlement are fair, reasonable and adequate to the class and to each class member, that the class members who have not opted out will be bound by the Settlement, that the Settlement is finally approved, and that all terms and provisions of the Settlement should be and hereby are ordered to be consummated.

6. The Court finds and determines that the Settlement Shares to be paid to the Claimants as provided for by the Settlement are fair and reasonable. The Court hereby gives final approval to and orders the payment of those amounts be made to the Claimants out of the Net Settlement Amount in accordance with the Settlement.

7. The Court finds and determines that the fees and expenses of Simipluris in administrating the settlement, in the amount of $13,573.00 are fair and reasonable. The Court hereby gives final approval to and orders that the payment of that amount be paid out of the Gross Settlement Amount in accordance with the Settlement.

8. The Court determines that payment from the Settlement of $91,400.00 to Class Counsel as a fee and expense award for their services to the class and payment of the amount of $5,000.00 each ($15,000.00 total) to Neal Golden, Abaikarim Hassan, and Dawit Alemu as representative plaintiffs from the Settlement to compensate them for their efforts on behalf of the Class, are fair and adequate and shall be made. Nothing in this order shall preclude any action to enforce the Parties' obligations under the Settlement or under this order, including the requirement that Nellis Cab make payments to the Claimants in accordance with the Settlement.

9. Upon completion of administration of the settlement, the Settlement Administrator will provide written certification of such completion to the Court and counsel for the Parties.

10. By operation of the entry of this Final Approval Order, Plaintiffs and Class Members are permanently barred from prosecuting against Nellis Cab and the Released Parties any of the released claims as specified in the Settlement Agreement, except for Djem V. Outkou, who elected to, and did, file a timely request to be excluded from the Settlement.

11. If, for any reason, the Settlement ultimately does not become Final (as defined by the Settlement), this Final Approval Order will be vacated; the Parties will return to their respective positions in this action as those positions existed immediately before the Parties executed the Settlement; and nothing stated in the Settlement or any other papers filed with this Court in connection with the Settlement will be deemed an admission of any kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties for any purpose in this action or in any other action.

12. By means of this Final Approval Order, this Court hereby enters final judgment in this action, as defined in Rule 54 of the Nevada Rules of Civil Procedure.

13. Without affecting the finality of this Final Approval Order in any way, the Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this order and the Settlement.

14. The Parties are hereby ordered to comply with the terms of the Settlement.

15. This action is dismissed with prejudice, each side to bear its own costs and attorneys' fees except as provided by the Settlement and this Order. .

Dated: 4-4, 2018.

District Court Judge J.T.

ERIC JOHNSON

**MODR**
LEON GREENBERG, ESQ.
Nevada State Bar No. 8094
DANA SNIEGOCKI, ESQ.
Nevada State Bar No. 11715
**LEON GREENBERG PROFESSIONAL CORPORATION**
2965 South Jones Boulevard - Suite E3
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*Attorneys for Plaintiffs*

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
**LITTLER MENDELSON**
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Tel: (702) 862-8800
Fax: (702) 862-8811
*Attorneys for Defendant*

**EIGHTH JUDICIAL DISTRICT COURT**

**IN AND FOR CLARK COUNTY, STATE OF NEVADA**

NEAL GOLDEN, ABAIKARIM HASSAN, and DAWIT ALEMU,

Plaintiffs,

vs.

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

Defendant.

Case No.: A-13-678109-C
Dept. No.: XX

**JOINT MOTION FOR AN ORDER: (1) CONDITIONALLY CERTIFYING CLASS; (2) PRELIMINARILY APPROVING CLASS SETTLEMENT; (3) DIRECTING NOTICE TO CLASS MEMBERS; AND (4) SCHEDULING FINAL FAIRNESS HEARING**

COME NOW Plaintiffs NEAL GOLDEN, ABAIKARIM HASSAN, and DAWIT ALEMU and Defendant SUN CAB INC., doing business as NELLIS CAB CO. ("Defendant", and collectively with Plaintiffs, the "Parties"), by and through their respective counsel of record, hereby jointly and respectfully move this Court for an order: (1) conditionally certifying the plaintiff Class as further defined herein; (2) granting preliminary approval of the proposed settlement of this class action; (3) directing that notice of the proposed settlement be mailed to the Class Members; and (4) scheduling a final fairness hearing for final approval of settlement. The Parties have stipulated to the treatment of this matter as a class action for settlement purposes only and have reached an agreement in principle to settle this matter which is fair, adequate, and reasonable, and in the best interests of the Plaintiffs and the Class.

This Joint Motion is based on the Memorandum of Points and Authorities below, any affidavits and exhibits attached hereto, all papers and pleadings on file,

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and any oral argument this Court sees fit to allow at hearing on this matter.

DATED this 1st day of November, 2017.

**LEON GREENBERG PROFESSIONAL CORPORATION**

By: *s/ Leon Greenberg*

LEON GREENBERG, ESQ.
DANA SNIEGOCKI, ESQ.
2965 South Jones Boulevard, Suite E3
Las Vegas, Nevada 89146
*Attorneys for Plaintiffs*

**LITTLER MENDELSON**

By: */s/ Montgomery Y. Paek*

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
3960 Howard Hughes Pkwy - Suite 300
Las Vegas, NV 89169
*Attorneys for Defendant*

**NOTICE OF MOTION**

**TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that the Parties will bring on for hearing its **JOINT MOTION FOR AN ORDER: (1) CONDITIONALLY CERTIFYING SETTLEMENT CLASS; (2) PRELIMINARILY APPROVING OF CLASS SETTLEMENT AGREEMENT; (3) DIRECTING NOTICE TO CLASS MEMBERS; AND (4) SCHEDULING FINAL FAIRNESS HEARING;** on for hearing on the 6th day of DECEMBER, 2017, at 8:30 a.m., in Department XX, or as soon thereafter as the Court deems necessary.

DATED this 1st day of November, 2017.

**LEON GREENBERG PROFESSIONAL CORPORATION**

By: */s/ Leon Greenberg*

LEON GREENBERG, ESQ.
DANA SNIEGOCKI, ESQ.
2965 South Jones Boulevard, Suite E3
Las Vegas, Nevada 89146
*Attorneys for Plaintiffs*

**LITTLER MENDELSON**

By: */s/ Montgomery Y. Paek,*

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
3960 Howard Hughes Pkwy - Suite 300
Las Vegas, NV 89169
*Attorneys for Defendant*

MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

This action involves allegations by the three Plaintiffs, on behalf of themselves individually and on behalf of an alleged class of current and former taxi drivers employed by the Defendant, that Defendant failed to pay Plaintiffs and the Class Members the minimum wage rate under article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "MWA"). Related claims are made for continuing severance pay penalties for certain class members under NRS 608.040.

Following a successful mediation conducted with the assistance of private mediator Francine Schlaks on June 8, 2017, the Parties agreed to stipulate to class certification for the purposes of settlement, and arrived at a mutually agreeable Class Action Settlement Agreement ("Settlement Agreement"). A true and correct copy of the executed Settlement Agreement is attached to the Declaration of Leon Greenberg, plaintiffs' counsel, as Exhibit A. Consistent with the Settlement Agreement, the Parties have lodged with the Court a proposed Order (1) preliminarily approving the class action settlement; (2) certifying, for settlement purposes only, the Class as further defined here pursuant to N.R.C.P 23(a) and (b)(3); (3) directing the mailing of class notice; (4) scheduling a final fairness hearing ("Final Fairness Hearing"); and (5) related relief. Moreover, the Parties request that

the Court establish certain dates for the mailing of notice to the Class and the procedure and timing for the submission by class members of a Claim Form, of any election they may make to exclude themselves from the Class, or for their filing of objections, if any, to the settlement. True and correct copies of the Parties' proposed Notice of Proposed Class Action Settlement, Claim Form, and proposed Second Amended Complaint, are attached to the Settlement Agreement as Exhibits D, B, and A respectively.

While the Parties believe the proposed Settlement Agreement merits final approval, the Court is not being asked to make that determination at this time. The Court is being asked to conditionally certify the Class as further defined herein for settlement purposes only, to preliminarily approve the Settlement Agreement, to permit notice of the terms of the proposed Settlement Agreement to be given to the Class, and to schedule a hearing to consider any views by Class members of the fairness of the proposed Settlement Agreement. Given the nature of the dispute and the uncertainties inherent in any class action litigation, the proposed Settlement Agreement eliminates the risk that the action would be dismissed without any benefit or relief to the Class. The proposed Settlement Agreement is also well within the range of possible approval in that its terms are fair, reasonable, and adequate, and in the best interests of the Class.

Accordingly, Plaintiffs and Defendant submit that preliminary approval of the Settlement Agreement is warranted, and that the Court should direct that notice be

provided to the Class and that a Fairness Hearing be scheduled.

## II. NATURE OF CASE AND PROCEDURAL HISTORY

On March 11, 2013, the plaintiffs Golden and Hassan filed a complaint against Defendant alleging that Defendant failed to pay them and members of the Class the minimum wage required by the MWA and for breach of contract. They also made claims for severance pay penalties, 30 day "waiting time" wage penalties, under NRS 608.040. On March 23, 2016 they filed a First Amended Complaint adding plaintiff Alemu. This litigation remained largely inactive and was subject to an extensive stay at the agreement of both parties to await the outcome of the Nevada Supreme Court proceedings determining the scope of the Nevada taxi cab industry's liability under the MWA. Those proceedings concluded in October of 2016 and the parties then proceeded to mediation and an agreed class action resolution of this case, subject to the Court's approval.

## III. TERMS OF THE PROPOSED SETTLEMENT

As a direct result of the litigation of this action, the negotiations between the Parties, and with the assistance of their experienced private mediator Francine Schlaks, the Parties reached a proposed Settlement Agreement. The complete terms of the settlement are set forth in the Settlement Agreement (Exhibit A to plaintiffs'

counsel's declaration). A summary of the key term follows.

A. **The Settlement Class**

The Class and the Class Members to whom the proposed Settlement applies are expressly defined as the three named plaintiffs and is otherwise limited to the 1,133 persons who are identified on Exhibit "C" to the Settlement Agreement who have also been determined to have at least $0.01 in alleged damages. *See,* Settlement Agreement at I(E). Moreover, in furtherance of the settlement, Plaintiffs and Defendant have agreed that this action shall be conditionally certified for settlement purposes only. *Id.* at III(G)(1)(b).

B. **The Settlement Award**

Defendant agrees to make available a maximum Gross Settlement Amount of three hundred and twenty thousand dollars and zero cents ($320,000) (the "Gross Settlement Amount") for, *inter alia*, a release of the claims of three Plaintiffs and members of the Class who do not exclude themselves from the Settlement. *Id.* at III(A). The Gross Settlement Amount is all-inclusive of all payments contemplated in this resolution and, therefore, inclusive of all settlement payments to Class Members eligible for settlement payments; all employee taxes applicable to the settlement payments; Plaintiff's Class Representative Payment; Class Counsel's Fees Payment and Litigation Expenses Payment. The Gross Settlement Amount is reversionary, meaning that any unclaimed portion of the Net Settlement Amount will

be returned to Defendant.

The Parties agree that, subject to Court approval, Leon Greenberg and Dana Sniegocki of Leon Greenberg Professional Corporation shall be appointed Class Counsel. Class Counsel may petition the Court for a request for attorneys' fees not to exceed ninety-one thousand four hundred dollars ($91,400) which is 28.562% of the Gross Settlement Amount, and costs not to exceed five thousand dollars ($5,000), each to be paid from the Gross Settlement Amount, and no other source. *Id.* at III(B). Class Counsel also requests a class representative service award in the amount of five thousand dollars ($5,000) for each of the three Plaintiffs to be paid from the Gross Settlement Amount. *Id.* A third-party administrator will administer the notice, and all settlement administrative costs will be paid out of the Gross Settlement Amount and are not expected to exceed thirteen thousand six hundred dollars ($13,600) with any such costs in excess of that amount to reduce the amount of fees otherwise awarded to Class Counsel. *Id.* Defendant does not object to any of these applications for fees and costs and do not object to the amount of any of these fees and costs. Assuming all applications for fees, costs, and the service awards are granted in full, the Net Settlement Amount is one hundred ninety-five thousand dollars ($195,000). Irrespective of the claims made, Defendant is agreeing to pay at least 40% of that Net Settlement Amount to the Class Members who elect to file claims and participate in the settlement. In the event that a Putative Class member excludes him/herself from the Class, or elects to be a Class Member by not excluding

themselves but declines to file a Claim Form, the amount paid to Class Members who elect to file claims will, if necessary, be increased to ensure that at least 40% of the Net Settlement Amount is actually paid to claiming Class Members with any unclaimed portion of the Net Settlement Amount will be returned to Defendant. *Id.*

C. **Notice and Right To Opt Out**

The settlement provides that the Court-designated Settlement Administrator shall mail the Notice of Proposed Class Action to members of the Class whose names shall be provided to the Settlement Administrator. The mailing addresses for the members of the Class will be identified by Defendant following a diligent search and reasonable inquiry of its records. *Id.* at III(D)(2)(a).

Members of the Class will be entitled to submit a Claim Form (*See* Exhibit B to the Settlement Agreement) to receive a settlement payment by completing, signing, and returning the Claim Form to the Settlement Administrator within the time approved by this Court. Unless a member of the Class exercises his/her right to be excluded from the Class by notifying the Settlement Administrator within the time approved by this Court, each member of the Class will be bound by the Settlement Agreement. Settlement Agreement at III(D)(4).

The Settlement Administrator shall allocate individual payments to Participating Class Members on a *pro rata* basis as provided in Exhibit "C" to the Settlement Agreement and pursuant to the process set forth in the Settlement

Agreement at III(B)(4) with every Participating Class Member also being assured a minimum payment of at least $25.00. That *pro rata* division is, in turn, based upon a careful review of the defendant's records of hours worked by, and wages paid to, the Class Members that was conducted by Class Counsel. *See*, Greenberg Dec. at Para. 3. That division creates a distribution of the class funds that strongly correlates with the probable amount of individual damages, which vary, that each Class Member would receive if this litigation proceeded to a successful resolution by the Court on behalf of the Class. *Id.*

In return for the consideration provided for in the Settlement Agreement, the Class agrees to release, upon final approval, Defendant and their respective past, present, and future parents, subsidiaries, joint ventures, and affiliates; their past, present, and future shareholders, directors, officers, members, managers, agents, employees, attorneys, insurers, predecessors, successors, and assigns; and any individual or entity which could be jointly liable for the Released Claims. Settlement Agreement, 1(z). The Released Claims include all claims and causes of action relating to or in connection with any facts, transactions, events, policies, occurrences, acts, disclosures, statements, payments, omissions, or failures to act which are or could be the basis of claims alleged in the Complaint on file in this Action which alleges that the Released Parties failed to pay the minimum wage due under the Nevada Minimum Wage Act, Nevada Constitution, Article 15, § 16 ("MWA"), failed to pay penalties under NRS 608.040 for allegedly not paying the correct wages, or

any other penalties, interest, attorneys' fees, and costs under the MWA, under any other state statute or regulation as well as any and all other claims and allegations made in the Action and that arise out of the facts alleged in the Action from the beginning of time through the end of the Class Period. Settlement Agreement, 1(y).

The Settlement Agreement and proposed Notice of Proposed Class Action Settlement also set forth the manner in which Class Members may elect to exclude themselves from the binding effect of the Settlement Agreement or to make objections to the proposed Settlement. Settlement Agreement III(D)(4) and Exhibit "D" thereto.

## IV. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE

When a proposed class settlement involves a class that has not yet been certified, a court must provisionally certify the proposed class before it can approve the class settlement. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-23 (9th Cir. 1999).[1] A court may certify a putative class if it has met all four requirements of Rule 23(a) of the Nevada Rules of Civil Procedure ("N.R.C.P."), as well as at least one of the three requirements of Rule 23(b). *See* N.R.C.P. 23(a)-(b); *Hanlon*, 150 F.3d at 1019-22.

Rule 23(a) requires: (1) that the proposed class be "so numerous that joinder of

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[1] Federal cases interpreting the Federal Rules of Civil Procedure "are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

all members is impracticable"; (2) that there be "questions of law or fact common to the class"; (3) that the representative plaintiff's claims be typical of the class's claims; and (4) that the representative plaintiff will "fairly and adequately protect the interests of the class." N.R.C.P. 23(a). These four elements are mandatory prerequisites to a class being certified. *Id.*; *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P.3d 530 (2005).

"In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under N.R.C.P. 23(b)(1), (2) or (3)." *See* N.R.C.P. 23(b); *Shuette*, 121 Nev. at 850. Here, the Parties submit that certification is appropriate for the purposes of settlement only under Rule 23(b)(3). In order to qualify under that subsection, a class must satisfy two conditions in addition to the Rule 23(a) prerequisites: common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." *See* N.R.C.P. 23(b)(3). In making the latter determination, the courts are advised to consider: (1) the class members' interests, if any, in individually controlling the prosecution of separate actions; (2) the extent and nature of any lawsuits concerning the controversy already begun by members of the proposed class; (3) the desirability of concentrating the litigation in the particular judicial forum; and (4) "the likely difficulties in managing a class action." *Id.*

A. **The Proposed Class Is Sufficiently Numerous**

The numerosity requirement means the class is so numerous that joinder of all members would be impracticable. N.R.C.P. 23(a)(1). Although courts agree that numerosity mandates no minimum number of class members, a putative class of forty or more generally will be found to satisfy this requirement. *See Shuette*, 121 Nev. at 847 (holding that numerosity is generally satisfied when there are at least 40 or more class members) and *Mazza v. AM. Honda Motor Co.*, 254 F.R.D. 610, 617 (C.D. Cal. 2008) ("As a general rule, classes of forty or more are considered sufficiently numerous.").

As defined here, the proposed Class consists of the three named plaintiffs and a total of 1,131 other persons who are current or former taxi driver employees of Defendant who, based upon a review of the defendant's records conducted by Class Counsel, were at any time were paid less than $8.25 an hour during the relevant period. Greenberg Dec., Para. 3. Joinder of all members would be exceedingly difficult given the large number of individual claimants. The Plaintiffs and Defendant agree that for purposes of settlement only, the numerosity requirement is met.

B. **There Are Questions Of Law And Fact Common To The Class**

Second, Rule 23(a)(2) mandates that there be commonality of questions of law or fact between the class members. *See Shuette,* 121 Nev. at 848. Either shared legal

issues with divergent facts or common facts with "disparate legal remedies within the class" will satisfy the requirement. *See Hanlon*, 170 F.3d at 1019. This prerequisite may be satisfied by a single common question of law or fact. *See Shuette*, 121 Nev. at 848; *see also Wal-Mart Stores, Inc.*, 131 S. Ct. 2541, 2556 (2011).

Here, the claims of both the Plaintiffs and the Class Members all stem from the same alleged conduct: the alleged failure on the part of Defendant to pay Plaintiffs and the Class Members minimum wages. Whether Defendant's conduct was proper under the applicable Nevada law, which is central to the validity of all claims in this action, can be determined by reviewing Defendant's payroll records (or to the extent the accuracy of those records are disputed making common findings as to the extent of such inaccuracy). This is a common factual and legal issue that is common to each member of the Class. The Plaintiffs and Defendant agree that for purposes of settlement only, the commonality requirement is met.

C. **The Settlement Class Representative's Claims Are Typical**

Rule 23(a)(3) requires that a representative plaintiff's claims be typical of the claims or defenses of the class. *See Shuette*, 121 Nev. at 848; N.R.C.P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The typicality requirement is met if the claims of the named representatives are typical of those of the class, though "they need not be

substantially identical." *Hanlon*, 150 F.3d at 1020; *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) ("Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory."). Factual differences may exist between the class members and the class representatives so long as the claims arise from the same events or course of conduct and are based on the same legal theories. *Hanlon*, 159 F.3d at 1020.

Here, all Plaintiffs, similar to the Class Members, were paid less than $8.25 per hour by Defendant during some point while employed as a taxi driver based upon a review of Defendant's records. *See*, Greenberg Dec. at Para. 3. Plaintiffs' claims, therefore, are typical of those of the Class. All have claims for underpayment of the minimum wage and damages associated with the MWA violations of Defendant. Thus, Plaintiffs' claims are sufficiently similar to the claims of the Class, such that their interests are aligned with the Class. The Plaintiffs and Defendant agree that for purposes of settlement only, the typicality requirement is met.

Rule 23(a)(4) also requires that the representative plaintiff adequately protect the interests of the class. See N.R.C.P. 23(a)(4). In the Ninth Circuit, courts look for any conflicts of interest that the representative plaintiff and his or her counsel might have with the other class members, as well as ask if the representative plaintiff and his or her counsel will "prosecute the action vigorously on behalf of the class." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020.

There is no standard to assess "vigor," but "considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation." *Hanlon*, 150 F.3d at 1021.

Here, under the proposed Settlement Agreement, the Class Representatives will receive a reasonable award for their time and the assistance they have given to class counsel and in recognition of the benefit they have secured for the class members, and the risks they have undertaken, by prosecuting this case. Other than this specific payment, all of the Claiming Class Members will receive a calculated share of the Net Settlement Amount. *See*, Greenberg Dec. at Para. 3. Furthermore, there is sufficient basis to settle—namely, the cost of litigation balanced against the risks that Plaintiffs' claims might not ultimately prevail at trial or prevail for an amount less than the proposed settlement. The Parties recognize and acknowledge the expense and time associated with continuing with further proceedings, including trial, appeals, and ancillary actions. Plaintiffs' counsel is also competent to represent the Putative Class and they have had expensive prior class action litigation experience. *S See*, Greenberg Dec. at Para. 3. The Plaintiffs and Defendant agree that for purposes of settlement only, the adequacy requirement is met.

D. **The Plaintiffs Will Adequately Represent the Class Interests**

Under Rule 23(b)(3) a court must first look to whether common questions "predominate over any questions affecting only individual members[.]" N.R.C.P.

23(b)(3). The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

Here, the common issues—whether Plaintiffs and the Class Members were appropriately compensated—predominate over any potential individual issues. Because the claims in this case can be resolved for all members in a single adjudication, either by examining Defendant's records of hours worked and wages paid or by make findings on those issues, Rule 23(b)(3)'s predominance requirement is met. The Plaintiffs and Defendant also agree that for purposes of settlement only, the predominance requirement is met.

If the predominance test is met, the Court then must ask if a class action lawsuit would be a "superior" method of adjudicating the various claims. N.R.C.P. 23(b). In evaluating superiority, Rule 23(b) directs the court to consider (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing the class action. *See Shuette*, 121 Nev. at 852; *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001). The Ninth Circuit, for its part, has held that superiority is established where the small size of individual claims effectively precludes individual action. *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th

Cir. 2001).

Particularly in the settlement context, class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. *Hanlon*, 150 F.3d at 1023. Here, as in *Hanlon*, the alternative method of resolution is hundreds of individual claims for relatively small amounts of damages, proving uneconomical for potential plaintiffs because the cost of litigation dwarfs potential recovery, risking not only significant expense but also inconsistent judgments. More than likely, it will result in abandonment of claims by most Class members because the amount of individual recovery is relatively small. Under these circumstances, a class action is clearly the superior vehicle for addressing these claims. Finally, because this case is in a settlement posture, the fourth factor does not apply because the case will not be going to trial. *Amchem*, 521 U.S. at 620. Therefore, a class action is the preferred method of resolution. The Plaintiffs and Defendant also agree that for purposes of settlement only, a class action is the superior mechanism for adjudication of the Class' claims.

The Class satisfies each of the requirements for certification, and the Parties request that the Court certify it in connection with the settlement.

## V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Rule 23(e) of the Nevada Rules of Civil Procedure provides that a class action shall not be dismissed or compromised without the approval of the court and notice

of the proposed compromise must be given to all members of the class in such a manner as the court directs. N.R.C.P. 23(e). This is a two-step process: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to class members for their comment and objections. However, on preliminary approval, the court does not make a full and final determination regarding fairness. "Because class members will subsequently receive notice and have an opportunity to be heard," the court "need not review the settlement in detail at this juncture." *In re M.L. Stern Overtime Litigation*, 2009 WL 995864, at *3 (S.D. Cal. 2009). *See also* Manual for Complex Litigation (Fourth) § 21.632 ("The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing."). The ultimate question of whether the proposed settlement is fair, reasonable, and adequate is made after notice of the settlement is given to the class members and a final settlement hearing is held.

A. **Factors To Be Considered In Granting Preliminary Approval**

The court "may consider some or all of the following factors" in its analysis of the Settlement Agreement:

> [1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a

> governmental participant; and [8] the reaction of the class members to the proposed settlement.

*Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). In this respect, "[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002). As such, "[t]he court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing." *Id.* Additionally, the court must ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625.

In short, "[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *see also Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-02 (E.D. Cal. 2011).

This Court should be guided foremost by the general principle that settlements of class actions are favored. By their very nature, because of the uncertainties of

outcome, difficulties of proof, and lengthy duration, class action suits readily lend themselves to compromise. *Pfizer, Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[p]articularly in class action suits, there is an overriding public interest in favor of settlement"). Moreover, the Court should give a presumption of fairness to arms-length settlements reached by experienced counsel. *Rodriguez v. West Publishing Corp.*, *supra*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.").

The Court is not required at this time to make a final determination as to the fairness of the proposed Settlement Agreement. It need only make a finding that the proposed settlement is "within the range of possible approval" and that preliminary approval is proper so that the necessary final scrutiny of the proposed Settlement Agreement can be conducted after notice to the Class. The parties submit that such a finding is more than adequately supported by the record before the Court

1. <u>The settlement is the product of serious, informed, and non-collusive negotiations</u>

This settlement is the result of extensive and hard-fought negotiations between capable advocates on both sides and the efforts of an experienced private mediator. Defendant has denied and continues to deny all of the Plaintiffs' claims as to liability and damages, as well as the Plaintiffs' class allegations. Nonetheless, Defendant has concluded that it is desirable that this action be settled and upon the terms set forth in

the Settlement Agreement to avoid the expense and burden of further legal proceedings, and the uncertainties of trial and appeals.

Plaintiffs, on the other hand, believe that their claims asserted in this action have merit and that the evidence developed to date supports their claims. However, Plaintiffs and their counsel recognize that the expense and length of a trial in this case against Defendant through possible appeals could take several years. Plaintiffs' counsel is also mindful of and recognizes the uncertainties of trial and appeals. Plaintiffs and their counsel believe that the Settlement Agreement confers substantial benefits upon the Class. Based upon their evaluation, Plaintiffs and their counsel have determined that the Settlement Agreement is in the best interest of the Class.

An evaluation of the benefits of the settlement must be tempered by the recognition that any compromise involves concessions by the settling parties. Indeed, "the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Officers for Justice*, 688 F.2d at 624 (internal quotations and citations omitted). "The parties … save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something that they might have won had they proceeded with litigation." *Id.* (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)).

With regard to class action settlements, the opinions of counsel should be

given considerable weight both because of counsel's familiarity with the particular litigation and previous class action litigation experience. *See Officers for Justice*, 688 F.2d at 625. Here, counsel for Plaintiffs are experienced attorneys with extensive prior class action litigation experience. Moreover, based upon their familiarity with the factual and legal issues of this litigation, counsel for the Parties were ultimately able to negotiate a fair settlement that benefits to the Class and appropriately considers the costs and risks of continued litigation, and the desire for a resolution by compromise rather than prolonged, costly, and uncertain litigation. There is every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence.

2. The settlement does not improperly grant preferential treatment to Class representatives or members of the Class

The relief provided in the Settlement Agreement will benefit all Class members to the same proportional and calculated level. The Settlement Agreement permits the three Plaintiffs who will serve as Class Representatives to seek individual awards in the amount of $5,000.00. Class Counsel believes that such an award is warranted given Plaintiffs' efforts to further the interests of the Class as well as the risk inherent in lending their names to this class action. When there is a wage and hour class action settlement, class representatives are often awarded a "service" payment to compensate them for the extra work they performed and risks they took on in bringing the case and in creating a benefiting the Class. Awarding such class

representative such compensation is well within a court's sound discretion. *See Thornton v. E. Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) ("We also think there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been the victims of discrimination."). "A class representative is entitled to some compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action." *In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994).

Here, the Settlement Agreement contemplates that the three Plaintiffs each receive a class representative payment in the amount of $5,000.00, which is not excessive and falls within the range of permissible awards. Accordingly, the Parties submit that the proposed settlement does not improperly grant preferential treatment to the Class Representatives nor members of the Class.

3. The settlement has no obvious deficiencies and falls within the range for approval

The proposed settlement is well within the range of possible approval. Plaintiffs and Participating Class members will receive a substantial measure of what they sought by way of this lawsuit, unpaid minimum wages. Greenberg Dec. Para. 6. Given the complexities of this case, the legal issues, potential offsets, along with the uncertainties of proof and appeal, the proposed settlement in Plaintiffs' and their counsel's view is well within the range of possible approval and has no obvious

deficiencies. *Id.* The Settlement Agreement will provide significate relief to Plaintiffs and the Class Members.

4. Plaintiffs' counsel's attorneys' fees and costs are reasonable

Of the $320,000 Gross Settlement Amount, Plaintiffs' counsel will seek to recover an amount of attorneys' fees not to exceed $91,400 which is 28.562% of the Gross Settlement Amount, and costs not to exceed five thousand dollars ($5,000). This Court has broad discretion in awarding attorney's fees in class actions and must consider several factors before awarding such fees. *Lobatz v. U.S. W. Cellular of California, Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000). These factors include: "(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Harris v. U.S. Physical Therapy, Inc.*, 2012 WL 6900931, at *13 (D. Nev. Dec. 26, 2012), *report and recommendation adopted*, 2013 WL 211085 (D. Nev. Jan. 18, 2013).

The amount allocated for attorneys' fees and costs from the Settlement Amount does not constitute a disproportionate distribution to Plaintiffs' counsel.

Defendant's agreement to not oppose Plaintiffs' counsel's fee request of up to the amounts permitted by the Settlement Agreement is appropriate counsel's request for fees from the Gross Settlement Amount is reasonable and proportionate to the total fund amount. *See Rodriguez v. West Publishing Corp.*, *supra*, 563 F.3d at 961 n. 5 (agreement not to oppose fees does not signal collusion when fees will be paid from settlement fund); *Vanwagoner v. Siemens Indus., Inc.*, 2014 WL 7273642, at *9 (E.D. Cal. Dec. 17, 2014) (same); *See In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 948-49 (9th Cir. 2011) (recognizing "clear sailing" provisions are not prohibited but require court to be "careful to avoid awarding 'unreasonably high' fees simply because they are uncontested").

Accordingly, the proposed Settlement herein has no "obvious deficiencies" and is well within the range of possible approval. The Parties request that this Court approve of their stipulation to certify the Class for the purposes of this settlement. All Class members will receive the same opportunity to participate in and receive payment. Clearly the goal of this litigation, to seek redress for the Class, will be met upon final approval of this Settlement.

The Parties respectfully request that this Court take the initial steps in this process by granting preliminary approval of the Settlement Agreement.

## VI. THE PROPOSED SETTLEMENT CLASS NOTICE

Rule 23(e) states that "notice of the proposed ... compromise shall be given to

all members of the class in such manner as the court directs." N.R.C.P. 23(e). Further, the court must "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." N.R.C.P. 23(c)(2). The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through the member's counsel. *Id.*

In furtherance of this Joint Motion, the Parties have agreed to a proposed Notice of Proposed Class Action Settlement and Claim Form. Exhibits "B" and "D" to the Settlement Agreement. The Parties submit that the form and content of the proposed Notice form, as well as the method for communicating notice to the Class Members, satisfies the applicable standards.

The terms of the proposed Settlement Agreement, including the right to object to the Settlement, or to opt out of the Class entirely, will be disseminated via a mailed notice with first class postage prepaid in a form approved by the Parties and by the Court to persons who are members of the Class. The aggregate amount of settlement, and the formula used to determine the amount each Class Member recovers if they file a settlement claim, and the minimum amount each will be paid, and is included in the Notice. The cost of the claims administration will come out of

the Gross Settlement Amount and is estimated at $13,600 with any cost in excess of that amount to create a reduction in fee received by Class Counsel. Settlement Agreement III(B)(3). Simpluris has been selected as the Settlement Administrator and has estimated the administration costs at $13,600. Simpluris is an experienced class case administrator based in California that has administered over 3,000 class settlements in the last 10 years.

## VII. CONCLUSION

Counsel for the Parties committed substantial amounts of time, energy, and resources litigating and ultimately settling this case. In the judgment of the Parties, the proposed Settlement Agreement is a fair, reasonable, and adequate compromise of the issues in dispute in light of the strengths and weaknesses of each party's case. Moreover, after weighing the substantial, certain, and immediate benefit of this settlement against the uncertainty of trial and appeal, the Parties believe that the proposed Settlement Agreement is fair, reasonable and adequate, and in the best interests of the Settlement Class. Accordingly, the parties respectfully request that the Court grant the Proposed Order of Preliminary Approval that:

1. Certifies, for settlement purposes only, the Class pursuant to N.R.C.P 23(a) and (b)(3);
2. Preliminarily approves the proposed Settlement Agreement;
3. Approves the proposed Notice of Proposed Class Action Settlement, and

Claim Form and the filing of the parties' Second Amended Complaint;

4. Directs that notice of the proposed settlement be provided to the Settlement Class;

5. Establishes a schedule for dissemination of the Notice of Proposed Class Action Settlement as well as the deadlines for the Settlement Class members to submit a valid Claim Form or to exclude themselves from the Class or object to the settlement;

6. Approves and appoints the Plaintiffs as representatives of the Class;

7. Approves and appoints Plaintiffs' counsel as Class Counsel;

8. Approves and appoints Simpluris as the Settlement Administrator; and

9. Schedules a Final Fairness Hearing for Final Approval of the Settlement.

DATED this 1st day of November, 2017.

LEON GREENBERG PROFESSIONAL CORPORATION

By: */s/ Leon Greenberg*

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DANA SNIEGOCKI, ESQ.
2965 South Jones Boulevard, Suite E3
Las Vegas, Nevada 89146
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LITTLER MENDELSON

By: */s/ Montgomery Y. Paek*

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Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| NEAL GOLDEN ABAIKARIM HASSAN and DAWIT ALEMU<br><br>Plaintiffs,<br><br>vs.<br><br>SUN CAB, INC. doing business as NELLIS CAB CO.,<br><br>Defendant. | Case No.: A-13-678109-C<br><br>Dept.: XX<br><br>**CERTIFICATE OF SERVICE** |

The undersigned certifies that on November 1, 2017, she served the within:

JOINT MOTION FOR AN ORDER: (1) CONDITIONALLY CERTIFYING CLASS; (2) PRELIMINARILY APPROVING CLASS SETTLEMENT; (3) DIRECTING NOTICE TO CLASS MEMBERS; AND (4) SCHEDULING FINAL FAIRNESS HEARING

by court electronic service to:

Rick Roskelley
Roger Grandgenett
Montgomery Paek
LITTLER MENDELSON
3960 Howard Hughes Parkway
Suite 300
Las Vegas, NV 89169-5937

/s/ Teo Tvds
Sydney Saucier

# EXHIBIT G

# EXHIBIT G

## CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release (hereinafter "Agreement") is entered into by and between Jasminka Dubric ("Plaintiff") on behalf of herself and as class representative on behalf of the Class as further defined herein and defendants A Cab LLC, A Cab Series LLC, Employee Leasing Company, and Creighton J. Nady (collectively, "Defendants") in the class action lawsuit entitled *Jasminka Dubric v. A Cab LLC.*, Clark County, Nevada District Court Case No. A721063 (the "Class Action"). Plaintiff and Defendants shall sometimes be collectively referred to herein as the "Parties." This Agreement is made effective as of October 5, 2016 ("Effective Date").

## RECITALS

**1.1 WHEREAS,** on July 7, 2015, Plaintiff filed her original Class Action Complaint, on behalf of herself and a class consisting of consists of "all persons who were employed by A Cab LLC during the applicable statutory period prior to the filing of this Complaint continuing until date of judgment as Drivers in the State of Nevada." Complaint ¶ 14. Plaintiff's Complaint contains two causes of action: (1) Failure to Pay Minimum Wage in violation of Article 15, Section 16 of the Nevada Constitution and (2) Conversion. A Cab LLC responded with an Answer in August of 2015, denying the claims;

**WHEREAS,** on November 30, 2016, Plaintiff filed a First Amended Complaint adding A Cab Series LLC, Employee Leasing Company and Creighton J. Nady as Defendants;

**WHEREAS,** the Parties have conducted a thorough examination and investigation of the facts of this case, including written discovery and depositions, and have jointly retained the services of Beta Consulting, a CPA firm, to prepare a report regarding the dollar amounts of the allegedly unpaid wages for all potential class members; and

**WHEREAS**, the Parties engaged in a settlement conference with Judge Jerry A. Wiese, II on October 5, 2016 regarding settlement of the claims asserted in the Amended Complaint, and wish to settle completely and totally all claims and potential claims against Defendants arising out of or in any way connected thereto. Plaintiff believes that this settlement confers substantial benefits upon both Plaintiff and the Class and that the settlement set forth in this Agreement is in the best interest of the Plaintiff and the Class. The Parties recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the claims through trial and through appeals and other ancillary actions. The Parties also have taken into account the uncertain outcome and the risk of any litigation, especially in multi-party actions such as this proceeding, as well as the difficulties and delays inherent in such litigation. The Parties also are mindful of the potential problems of proof in establishing the claims and defenses asserted in this proceeding.

**NOW THEREFORE**, subject to approval by the Court of the Eighth Judicial District, Clark County, Nevada, as hereinafter provided, it is hereby agreed by the Parties that, in consideration of the promises and covenants set forth in this Agreement and upon the entry by the Court of a final order approving the settlement and directing the implementation of the terms and conditions of the settlement as set forth in this Agreement, the Class Action shall be settled and compromised upon the terms and conditions contained herein.

## 2. DEFINITIONS

The definitions contained herein shall apply only to this Agreement and shall not apply to any other agreement, including, without limitation, any other settlement agreement, nor shall they be used as evidence, except with respect to this Agreement, of the meaning of any term. Furthermore, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the

singular form. As used in this Agreement, in addition to any definitions elsewhere in this Agreement, the following terms shall have the meanings set forth below:

**2.1** **"Action"** or "**Class Action**" means and refers to the putative class action lawsuit entitled *Jasminka Dubric v. A Cab LLC.*, Clark County, Nevada District Court Case No. A721063.

**2.2** **"Agreement"** means and refers to this Settlement Agreement.

**2.3** **"Opt-Out Period"** means and refers to the period of time between the commencement of the notice program and an agreed date certain approximately forty-five (45) days later during which Settlement Class members may exercise the right to or affirmatively request to be excluded from this Agreement pursuant to the provisions of Sections 8 below.

**2.4** **"Court"** means and refers to the Clark County, Nevada District Court.

**2.5** **"Class"** means all persons who were employed by Defendants during the applicable statutory period prior to the filing of this Complaint continuing until date of judgment as Drivers in the State of Nevada.

**2.6** **"Class Counsel"** means Mark J. Bourassa of the Bourassa Law Group, together with such other attorneys who represented, in any capacity, any Plaintiff in the Class Action.

**2.7** **"Class Notice"** means the form of notice attached hereto as Exhibit 1 or a similar form as approved by the Court.

**2.8** **"Defendants"** means and refers to A Cab LLC, A Cab Series LLC, Employee Leasing Company, and Creighton J. Nady.

**2.9** **"Fairness Hearing"** means the final hearing, held after the Preliminary Approval Order is issued and the Settlement Class has been given notice and an opportunity to opt out and object pursuant to the Settlement, in which the Court will consider whether this Settlement should be approved as fair, reasonable and adequate

pursuant to Nevada Rule of Civil Procedure 23; whether the proposed Final Order and Judgment should be entered; and whether Class Counsel's application for attorneys' fees, expenses and costs and Class Representative incentive should be approved;

**2.10** "**Final Approval Order**" means the Final Order and Judgment entered by the Court at the Fairness Hearing.

**2.11** "**Plaintiff**" means and refers to Jasminka Dubric.

**2.12** "**Judgment**" means a Judgment on Order of Final Approval of Settlement to be executed by the Court and entered in the Court records.

**2.13** "**Preliminary Approval Order**" means and refers to the Court's order entered following and in connection with the Parties' motion for preliminary approval of this Settlement Agreement.

**2.14** "**Parties**" means and refers to Plaintiff and Defendants, collectively.

**2.15** "**Person**" means and refers to any individual, family, proprietorship, corporation, company, partnership, association, trustee, administrator, unincorporated association, estate, insurer, or any other type of legal entity.

**2.16** "**Released Claims**" means and refers to each and all of the claims that are released by this Agreement as described in Section 13 below.

**2.17** "**Released Parties**" means and refers to the following Persons: A Cab LLC, A Cab Series LLC, Employee Leasing Company, Creighton J. Nady, and their past, present, and future subsidiaries, parent companies, their predecessors in interest and/or ownership, successors in interest and/or ownership, partners, licensees, assignees, managing members, Insurers, including claims under any and all insurance policies, estates, and other affiliates and/or related entities, and each of the foregoing Persons' respective past, present, and future officers, directors, attorneys, shareholders, indemnitees, predecessors, successors, trusts, trustees, partners, associates, principals, divisions, employees, Insurers, any and all insurance policies, members, agents,

Representatives, brokers, consultants, heirs, and assigns.

**2.18 "Releasing Parties"** means and refers to Plaintiff and her agents, representatives, attorneys, predecessors, successors, heirs, assigns, and any Persons or entities claiming by or through the Settlement Class, in their capacities as such.

**2.19 "Settled Claims"** means and refers to any and all claims, demands, controversies, actions, causes of action, debts, liabilities, rights, contracts, damages, costs (including attorney's fees and court and litigation expenses), expenditures, indemnities, obligations and alleged losses of every kind or nature whatsoever known or unknown, anticipated or unanticipated, direct or indirect, fixed or contingent, asserted or unasserted, patent or latent, individually or on behalf of the general public, which Releasing Parties asserted, have ever had, now have, or may hereafter have, related to, arising out of, or which could have been asserted, inferred, implied, included or connected in any way with, any of the allegations in the Action, including, without limitation, any claims, whether they arise under federal law, common law, or under the laws of any state, pertaining to Defendants.

**2.20 "Settlement Class"** means all members of the Class as defined in Section 2.5 above who do not elect to "opt out."

**2.21 "Settlement Class Representative"** means and refers to Plaintiff.

**2.22 "Settlement Termination Date"** means and refers to the date, if any, that any Party exercises its right to terminate this Agreement under the terms thereof.

## 3. SETTLEMENT PURPOSES ONLY

**3.1 General.** This Agreement is made for the sole purpose of settlement of the Class Action on a class-wide basis, as well as the settlement of all related individual claims made by Plaintiff. The settlement of the Class Action is expressly conditioned upon the entry of a Preliminary Approval Order and a Final Approval Order by the Court. In the event that the Court does not execute and file the Order of Final Approval, or in the

event the Order of Final Approval does not become final for any reason, or is modified in any material respect, or in the event that the Final Effective Date, as defined herein, does not occur, this Agreement shall be deemed null and void *ab initio* and shall be of no force and effect whatsoever, and shall not be referred to or utilized for any purpose whatsoever.

**3.2 Settlement Class Only.** Any certification of a preliminary or final Settlement Class pursuant to the terms of this Agreement shall not constitute, shall not be construed as, and shall not be admissible in any proceeding as an admission on the part of the Defendants or any other Person that the Class Action or any other action is appropriate for class treatment at trial pursuant to Rule 23 of the Nevada Rules of Civil Procedure or any other class or representative action statute or rule. This Agreement shall not prejudice Defendants' rights or any other Person's rights: (a) to oppose class certification in this Action other than for purposes of settlement pursuant to this Agreement; or (b) to oppose class certification in any other action or proceeding. Certification of the Settlement Class is stipulated to as a part of and for the purposes of this Agreement only. For the purposes of settlement and the proceedings contemplated herein for effectuating settlement *only*, the Parties stipulate and agree that Plaintiff shall represent the Class for settlement purposes and shall be the Settlement Class Representative, and that Class Counsel shall be appointed as counsel for the Settlement Class.

**3.3 Admissibility.** Additionally, this Agreement, any negotiations or proceedings related hereto, the implementation hereof, and any papers submitted in support of the motions for approval hereof (collectively, the "Settlement Proceedings") shall not be construed as, or deemed to be evidence of, any admission or concession by any of the Parties or any other Person regarding liability, damages, or the appropriateness of class treatment, and shall not be offered or received in evidence in any action or proceeding for any purpose whatsoever; provided, however, that this Agreement and the

Settlement Proceedings may be presented to the Court in connection with the implementation or enforcement of this Agreement, or as may be necessary or appropriate to further the purposes sought to be achieved by this Agreement.

**3.4 Denial Of Liability.** By entering into this Agreement, it is understood that the Released Parties, including Defendants, do not admit and, to the contrary, expressly deny that they have breached any duty, obligation, or agreement; that they have engaged in any illegal, tortious, or wrongful activity; that they are liable to Class members or any other Person; and/or, that any damages have been sustained by any Class Member or by any other Person in any way arising out of or relating to the conduct alleged in the Class Action. Defendants expressly reserve all rights to challenge Plaintiff's claims on all factual and procedural grounds, including but not limited to the assertion of any and all defenses.

## 4. CONDITIONS OF SETTLEMENT

Performance by Defendants of the obligations set forth in this Agreement is subject to all of the following material conditions:

a. The delivery to counsel for Defendants of this Agreement, fully executed by all Plaintiffs and by Class Counsel.

b. Execution and filing by the Court of the Preliminary Approval Order.

c. Mailing and publication of the notices, described in Section 7 below.

d. The Court conducting a Fairness Hearing.

e. Execution and filing by the Court of the Final Approval Order.

f. Execution and entry of Judgment by the Court.

g. Mailing of the notice following Final Approval.

h. Funding of the Settlement in accordance with the terms of this

Agreement.

The Parties hereby covenant and agree to cooperate reasonably and in good faith for the purpose of achieving occurrence of the conditions set forth above, including, without limitation, timely filing of all motions, papers and evidence necessary to do so, and refraining from causing or encouraging directly or indirectly any appeal or petition for writ proceedings seeking review of any Order contemplated by this Agreement. Class Counsel represent and warrant that they have authority to take all such actions required of them pursuant to this Agreement, and that by doing so they are not in breach or violation of any agreement with any Plaintiff or any third party.

## 5. JURISDICTION

The Parties agree that the Court has, and shall continue to have, jurisdiction to make any orders as may be appropriate to effectuate, consummate, and enforce the terms of this Agreement, to approve awards of attorney's fees and costs pursuant hereto, and to supervise the administration of and the distribution of money funded pursuant to this Agreement. Except for those matters specifically identified in this Agreement as being subjects for decision by a neutral third party, and any other matters which counsel for Plaintiffs and Defendants later agree in writing to refer to any neutral third party, any dispute or question relating to or concerning the interpretation, enforcement, or application of this Agreement shall be presented to the Court for resolution.

## 6. COURT APPROVAL OF THE SETTLEMENT

**6.1 Preliminary Approval And Notice.** Promptly after execution of this Agreement, the Parties, through their counsel, shall, by stipulation, jointly move the Court for an order certifying the class for settlement purposes and granting preliminary approval of this Agreement under the legal standards relating to the preliminary approval of class action settlements. In connection therewith, the Parties, through their counsel, shall submit to the Court a mutually acceptable proposed Preliminary Approval Order

and Notice Order, which shall provide, among other things, for the conditional certification for purposes of settlement only of the Class as to damages, and the approval of the Parties' proposed notice program as set forth in Section 7 below and their proposed claim form. The Parties shall also cooperate in the preparation and filing of a Motion for Final Approval.

**6.2 Objection And Opt-Out Periods.** The Preliminary Approval Order shall specify that Settlement Class members shall have until an agreed date certain, which shall be approximately forty-five (45) days from the commencement of the notice program pursuant to Section 7 below, to affirmatively request to be excluded from this Settlement or file and serve objections to this Agreement.

**6.3 Final Approval.** After the expiration of the Opt-Out Period, if the Agreement has not been validly terminated under Section 8 below, the Court shall conduct a hearing regarding final approval of this Agreement. The Final Approval Hearing shall be set one hundred and five (105) days after the Opt-Out Period expires, subject to the schedule of the Court. In connection therewith, the Settlement Class, through their counsel, shall file a motion for final approval and submit a mutually acceptable proposed Final Approval Order, which shall provide, among other things, for the final approval of this Agreement, certification of the Settlement Class, and a complete release of the Released Parties of and from all Settled Claims, and then take all steps necessary to terminate the Class Action with prejudice.

## 7. CLASS NOTICE PROCEDURES

**7.1 Mailed Notice To Settlement Class.** Promptly after entry of the Preliminary Approval Order and the Notice Order, Class Counsel or their designee shall send to the Class by first class postage prepaid a mailed notice in a form approved by the Parties and by the Court. In a good faith effort towards cooperation, counsel for Defendants shall review Defendants' records and use their best efforts, consisting of a

diligent search and reasonable inquiry of the records in its possession and believed to hold such information, to provide to Class Counsel a list containing as many names and addresses of such Class members that Defendants is able to identify in Microsoft Excel format. The first date of the issuance of these notices shall be deemed the commencement date for the purposes of this Agreement.

**7.2 Remailing of Notices.** Any notices to Class Members returned as "undeliverable" will be promptly skip-traced by Class Counsel or their designee and re-mailed using any additional information obtained in the skip-tracing process.

**7.3 Records Of Notice.** Class Counsel or their designee shall keep records of all notices, and the cost thereof, and any remailing thereof. Promptly upon request, Class Counsel or its designee shall make such records available for inspection and shall provide a sworn proof of mailing that identifies each address where class notice was mailed and/or re-mailed, as applicable.

## 8. RIGHT OF EXCLUSION

**8.1 Procedure.** Any member of the Class may request to be excluded from the Settlement Class at any time during the Opt-Out Period. The Notice sent to the Class Members pursuant to Section 7 will include a mutually-agreeable form that Class Members can use to request exclusion. A Class member may also submit any written request to exclude himself or herself from this Agreement, provided that the request shall contain, at a minimum, the Settlement Class member's name, address, telephone number, and email address (if available). Such requests for exclusion must be sent by regular U.S. mail to the Claims Administrator, and must be postmarked on or before the end of the Claims Period. All Class members who do not request exclusion in accordance with this Agreement during the Claims Period will be deemed Settlement Class members for all purposes under this Agreement and will be irrevocably bound by this Agreement except as otherwise provided herein. Any Person who timely and properly seeks exclusion shall

not be entitled to any individual relief under this Agreement and shall not be deemed a party to this Agreement.

**8.2 Withdrawal Of Election To Be Excluded.** Prior to the entry of the Final Approval Order, any Person who has elected to be excluded may withdraw that election by notifying the Claims Administrator by telephone (to be confirmed in a letter and copied to other counsel identified in Section 14) or in writing that he or she wishes to be a member of the Settlement Class. The Claims Administrator shall each maintain records of all withdrawn exclusions, and shall provide such information to the Parties and to the Court. At any time after the entry of the Final Approval Order, any Person who has elected to be excluded from this Agreement may withdraw that election only upon receiving the written consent of Defendants, through its counsel, and Court approval.

**8.3 Persons To Be Expressly Excluded**. Michael Murray, Michael Reno, and Michael Sargent are plaintiffs in a separate action entitled *Murray et al. v. A Cab Taxi Service LLC et al.*, Clark County Nevada District Court Case No. A-12-669926-C, which also alleges claims of unpaid minimum wages against A Cab Taxi Service LLC, A Cab LLC, and Creighton J. Nady, as well as associated penalties pursuant to NRS 608.040. These individuals are expressly excluded from this Settlement for all purposes.

## 9. SETTLEMENT TERMINATION AND/OR MODIFICATION

**9.1 Termination Prior To Funding.** This Agreement, and each of the obligations set forth herein, are subject to and expressly conditioned upon the funding on terms and conditions acceptable to Defendants, as set forth in Section 10 below. If such funding is not fully performed as set forth in this Agreement, and such non-performance is not cured within twenty-one (21) business days following notice given by Class Counsel, either of which deadline(s) may be extended upon an agreement of the Parties, through their counsel, this Agreement shall be voidable.

**9.2 Termination Prior To Final Approval.** This Agreement is expressly

conditioned upon Court approval of all aspects of this Agreement, and the entry of the Preliminary Approval Order and the Final Approval Order, all in accordance with the terms of this Agreement. If the Court declines to enter any of the Orders identified in this Section 9.2, or modifies in what any Party reasonably determines to be a material way any aspect of this Agreement or of such Orders, such Party may declare this Agreement null and void by giving written notice to counsel for the other Parties within twenty (20) days after such refusal or modification. Prior to giving such notice, the Parties shall consult with the Court on the issue of whether there is a reasonable way to avoid any Party exercising its right to declare this Agreement void under this Section; the twenty-day period is tolled during any such consultations.

**9.3 Termination After Appeal.** If a court declares unenforceable, reverses, vacates, or modifies on appeal any aspect of this Agreement, in what any Party reasonably determines to be a material way, such Party may declare this Agreement null and void by giving written notice to counsel for the other Parties within twenty days after notice of such ruling. Prior to giving such notice, the Party seeking to terminate this Agreement shall consult with the trial court on the issue of whether there is any reasonable way to avoid exercising its right to declare this Agreement null and void under this Section.

**9.4 Procedures For Settlement Termination.** In the event that a Party gives proper notice of termination pursuant to the terms of this Agreement, all monies paid into the Settlement Account (except for notice and/or administration costs already expended) shall be returned to Defendants, and none of the Parties shall have any further obligations under this Agreement.

## 10. SETTLEMENT PAYMENTS

**10.1 Settlement Amount.** Defendants agree to pay a total sum of Two Hundred Twenty-Four Thousand Five Hundred Twenty-Nine Dollars ($224,529.00 USD)

as a fund for the Class. Defendants shall have no further obligation to make any payment or to provide any benefit referenced in this Agreement or relative to the Class Action except as expressly set forth herein. Any remaining portion of the Settlement Fund following payments referenced under in Section 11 below shall revert to Defendants.

**10.2 Funding Commitment.** Defendants shall use their best efforts to fund the obligations of this Agreement in accordance with the procedures set forth herein.

**10.3 Funding Upon Preliminary Approval.** Beginning no later than thirty (30) days of the entry of the Preliminary Approval Order, Defendants shall deposit the total amount of Two Hundred Twenty-Four Thousand Five Hundred Twenty-Nine Dollars ($224,529.00) in twelve (12) equal monthly installments of Eighteen Thousand Seven Hundred Ten Dollars and Seventy-Five Cents each ($18,710.75). The checks shall be delivered to the attention of Mark J. Bourassa, Esq. and deposited into Class Counsel's Trust Account.

**10.4 Interest On The Settlement Fund.** If the Final Approval Order is issued (and not reversed on appeal, if any), all interest, if any, generated by the Settlement Fund shall accumulate and shall be the property of the Settlement Class. If the Final Approval Order is not issued, all interest generated by the monies in the Settlement Fund Joint Account shall accumulate and shall be the property of Defendants.

## 11. PROTOCOL FOR ADMINISTERING SETTLEMENT

**11.1 Allocation of Settlement Fund.** The Settlement Fund shall be allocated to the Class Members based upon the number of workweeks each Class Member worked during the statutory period. Within thirty (30) days of the issuance of the Order granting Preliminary Approval of the Settlement, Defendants shall provide Class Counsel and Nicole Omps, CPA of Beta Consulting and provide Class Counsel and Ms. Omps with sufficient information to determine the number of workweeks for each Class Member, and Ms. Omps with be responsible for calculating the amount due to each Class Member.

**11.2 Payment of Settlement Amount.** Upon the Final Approval of the Settlement by the Court and receipt from Defendants of the total Settlement Amount, Class Counsel shall issue checks from the Settlement Fund in amounts calculated pursuant to Section 11.1 of this Agreement to all Class Members who did not elect to exclude themselves from this settlement as set forth in Section 8 of this Agreement. Any checks that are returned as undeliverable with be skip-traced and remailed. All checks not negotiated within 180 days of the last date of mailing will be considered null and void.

**11.3 Ineligible Settlement Class Members.** Notwithstanding this Section 11, or any other provision of this Agreement, the following Settlement Class members are not entitled to receive any benefit under this Agreement: (a) Persons who previously settled, adjudicated, dismissed with prejudice, assigned any or all rights and/or claims relating to or arising out of an alleged failure to pay minimum wage with Defendants, and/or previously received a payment in connection with an alleged claim against Defendants; and (b) those persons specifically set forth in Section 8.3 of this Agreement.

**11.7 Maintenance Of Records.** Class Counsel shall maintain complete, accurate, and detailed records regarding the administration of the Settlement Fund, including: any and all written requests for exclusion; any objection to proposed benefits and the resolution thereof; and any and all receipts by and disbursements from the Settlement Amount.

## 12. CLASS ATTORNEYS' FEES AND COSTS

**12.1 Plaintiff's Attorney Fees And Costs.** Class Counsel shall submit a petition to the Court, in connection with the motion for final approval, seeking approval of an award of attorneys' fees and seeking approval of an award for reimbursement of all necessary and reasonable costs and other expenses incurred by counsel for the Settlement Class. Plaintiff shall be entitled to seek an award of reasonable attorneys' fees, costs, or

other expenses claimed by Class Counsel relative to the Action separate from the Settlement Amount up to the total amount of Fifty-Seven Thousand Five Hundred Dollars ($57,500.00). Any award of attorneys' fees and costs shall be due and payable within thirty (30) days after notice of entry of order awarding the fees and costs.

**12.2 Incentive Payment.** Class Counsel shall submit a request to the Court, in connection with the motion for final approval, seeking approval for an award of an incentive payment in the amount of Five Thousand Dollars ($5,000.00) for Plaintiff, to be paid from the Settlement Fund. Defendants will not oppose such a request. The incentive award from the Court, if any, shall be paid to Plaintiff concurrently with any disbursement to her from the Settlement Fund as set forth in Section 11 above.

## 13. RELEASES

**13.1 Final Approval Order.** The Final Approval Order shall include a full, general release by the Releasing Parties of Defendants and the other Released Parties defined above from any and all Settled Claims.

**13.2 Release of Defendants by Settlement Class.** Except for the obligations and rights created by this Agreement, and upon Final Approval of the Settlement, the Settlement Class hereby releases and absolutely and forever discharges Defendants and each of its predecessors, successors, subsidiaries, parent companies, affiliates, assigns, agents, directors, officers, employees, representatives, trustees, beneficiaries, and associates from any and all Settled Claims.

**13.3 Mutual Releases.** The Releasing Parties acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those now known or believed to be true with respect to the subject matter of this Agreement and/or the Settled Claims. The Releasing Parties acknowledge that they intend to and will fully, finally, and forever settle and release any and all Settled Claims described herein, whether known or unknown, suspected or unsuspected, which

now exist, hereinafter may exist, or heretofore may have existed. In furtherance of this intention, the releases contained in this Agreement shall be and remain in effect as full and complete releases of the Settled Claims by the Releasing Parties without regard to the subsequent discovery or existence of such different or additional claims or facts. Furthermore, upon the expiration of the Claims Period, each and every Releasing Party and all successors in interest shall be permanently enjoined and forever barred from prosecuting any and all Settled Claims against Defendants, and each of its predecessors, successors, subsidiaries, parent companies, affiliates, assigns, agents, directors, officers, employees, representatives, trustees, beneficiaries, and associates.

## 14. NOTICES

**14.1 Designated Recipients.** Unless otherwise specified in this Agreement or agreed to in writing by the party receiving such communication, all notices, requests, or other required communications hereunder shall be in writing and shall be sent by one of the following methods: (a) by registered or certified, first class mail, postage prepaid; (b) by facsimile, with the original by first class mail, postage prepaid; or (c) by personal delivery (including by Federal Express or other courier service). All such communications shall be sent to the undersigned persons at their respective addresses as set forth herein.

Class Counsel:

Mark J. Bourassa, Esq.
The Bourassa Law Group
8668 Spring Mountain Road, Suite 101
Las Vegas, NV 89117
702-851-2180 (tel.)
702-851-2189 (fax)

Counsel for Defendants:

Esther C. Rodriguez, Esq.
Rodriguez Law Offices, PC
10161 Park Run Dr, Suite 150

Las Vegas, Nevada 89145
702-320-8400 (tel.)
702-320-8401 (fax)

Notice shall be deemed effective: (1) if given by mail or personal delivery, when signed for or when delivery is refused; and (2) if given by facsimile, when received as evidenced by a confirmation or evidence of delivery.

**14.2 Changes In Designated Recipients.** Any Party may re-designate the Person to receive notices, requests, demands, or other communications required or permitted by this Agreement by providing written notice to the other Parties, the Claims Administrator, and the Court.

## 13. MISCELLANEOUS

**13.1 Entire Agreement.** This Agreement supersedes and replaces any and all other prior agreements and all negotiations leading up to the execution of this Agreement, whether oral or in writing, between the Parties with respect to the subject matter hereof. The Parties acknowledge that no representations, inducements, promises, or statements, oral or otherwise, have been made or relied upon by any of the Parties or by anyone acting on behalf of the Parties which are not embodied or incorporated by reference herein, and further agree that no other covenant, representation, inducement, promise or statement not set forth in writing in this Agreement shall be valid or binding.

**13.2 Modification Or Amendment.** This Agreement may not be modified or amended except in a writing signed by counsel for Plaintiff and Defendants, respectively, and approved by the Court.

**13.3 Execution In Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original.

**13.4 Headings.** The headings of the sections, paragraphs, and subparagraphs of this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

**13.5 Corporate Status.** If any Party is or becomes during the Settlement Proceedings a suspended, forfeited, merged, or dissolved corporation, it is herein represented that that Party's authorized agent enters this Agreement on that Party's behalf to the full extent of the applicable laws.

**13.7 Gender.** Whenever in this Agreement the context so requires, the neuter gender shall refer to and include the masculine or feminine, and the singular shall refer to and include the plural.

**13.8 Further Acts.** The Parties shall perform such further acts and execute such further documents as may be reasonably necessary or appropriate to effectuate the terms and purposes of this Agreement.

**13.9 Heirs, Successors, And Assignees.** This Agreement shall be binding upon and shall inure to the benefit of the Parties' respective heirs, successors, and assignees.

**13.10 Choice Of Law.** This Agreement in all respects shall be interpreted, enforced, and governed by and under the laws of the State of Nevada applicable to instruments, persons, and transactions which have legal contacts and relationships solely within the State of Nevada. Any action pertaining to the terms of this Agreement shall be brought in the Court defined herein.

**13.11 Warranty Regarding Advice.** Class Counsel represents and warrants that the Individual Plaintiffs have been fully advised of and agree to the terms of this Agreement. The Parties hereby acknowledge that they have been represented by independent legal counsel throughout all negotiations which preceded the execution of this Agreement, and that this Agreement has been executed with the consent and on the advice of said counsel.

**13.12 Fair, Adequate and Reasonable Settlement.** The Parties believe this Settlement is a fair, adequate and reasonable settlement of the Action and have arrived at

this Settlement in arms-length negotiations, taking into account all relevant factors, present and potential. This Settlement was reached after a settlement conference before Judge Jerry A. Wiese II with the assistance of a neutral CPA, Nicole Omps of Beta Consulting.

**13.14 Voluntary Agreement.** This Agreement is executed voluntarily and without duress or undue influence on the part or on behalf of the Parties, or of any other person or entity.

**AGREED TO AND ACCEPTED.**

DATED: 12/28/16

By: _____
Jasminka Dubric

DATED: 12/28/16

By: _____
~~A Cab LLC~~

DATED: 12/28/16

By: _____
~~A Cab Series LLC~~, Employee Leasing Company

DATED: 12/28/16

By: _____
Creighton J. Nady

**APPROVED AS TO FORM AND CONTENT:**

DATED: _____

BOURASSA LAW GROUP, LLC

By: _____
Mark J. Bourassa, Esq.
Attorneys for Plaintiff

DATED: 12/28/16

RODRIGUEZ LAW OFFICES, PC

By: _____
Esther C. Rodriguez, Esq.
Attorneys for Defendants

# EXHIBIT H

# EXHIBIT H

JANET M. HEROLD, Regional Solicitor
SUSAN SELETSKY, FLSA Counsel
ANDREW J. SCHULTZ, Trial Attorney
California State Bar Number 237231
United States Department of Labor
Office of the Solicitor
90 Seventh Street, Suite 3-700
San Francisco, California 94103
Telephone: (415) 625-7745
Facsimile: (415) 625-7772
email:. schultz.andrew@dol.gov

Attorneys for Plaintiff, Thomas E. Perez,
United States Department of Labor

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

| | |
|---|---|
| THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,<br><br>Plaintiff,<br>v.<br><br>A CAB, LLC; and,<br>CREIGHTON J. NADY an individual,<br><br>Defendants. | Case No.: 2:14-cv-01615-JCM-VCF<br><br>CONSENT JUDGMENT AGAINST ALL DEFENDANTS |

Plaintiff, THOMAS PEREZ, Secretary of Labor, United States Department of Labor (the "Secretary"); Defendant A CAB LLC, and CREIGHTON J. NADY, an individual, (collectively, "Defendants") having appeared through counsel, and having been duly advised on the proceedings, waive their right to answer the Secretary's Complaint and agree to resolve the matters in controversy in this civil action, and consent to the entry of this Consent Judgment in accordance herewith:

A. The Secretary filed a Complaint alleging that Defendants violated provisions of Sections 6, 11(c), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended ("FLSA" or the "Act"). 29 U.S.C. § 206, 211(c), 215(a)(2), and (5). The Secretary's Complaint alleged that Defendants violated Sections 6 and 15(a)(2) of the FLSA by paying its employees' wages at rates less than the applicable federal minimum wage in workweeks when said employees were engaged in commerce or in the production of goods for commerce or were employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the FLSA; and Defendants violated Sections 11(c) and 15(a)(5) of the FLSA by failing to make, keep and preserve records of their employees and of the wages, hours, and other conditions and practices of employment maintained by them as prescribed by the regulations found in 29 CFR part 516 that are issued, and from time to time amended, pursuant to section 11(c) of the FLSA.

B. Defendants understand and agree that demanding or accepting any of the funds due employees under this Consent Judgment ("Consent Judgment" or "Judgment") or threatening any employee for accepting money due under this Consent Judgment or for exercising any of their rights under the Fair Labor Standards Act of 1938, as amended ("FLSA" or "the Act"), 29 U.S.C. §201, *et seq.* is specifically prohibited by this Consent Judgment and may subject Defendants to equitable and legal damages, including punitive damages and civil contempt.

C. Defendants waive Findings of Fact and Conclusions of Law, and agree to the entry of this Consent Judgment in settlement of this action, without further contest.

Therefore, upon motion of the attorneys for the Secretary, and for cause shown:

IT IS HEREBY **ORDERED, ADJUDGED, AND DECREED** that pursuant to Section 17 of the FLSA, 29 U.S.C. § 217, Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them be, and they hereby are, permanently enjoined and restrained from violating the provisions of the Act, in any of the following manners:

1. Defendants shall not, contrary to Sections 6 and 15(a)(2) of the Act, 29 U.S.C. §§ 206 and 215(a)(2), employ any of their employees at rates less than the applicable federal minimum wage in workweeks when said employees are engaged in commerce or in the production of goods for commerce or are employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the FLSA.

2. Defendants shall not, contrary to Sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c) and 215(a)(5), fail to make, keep and preserve records of their employees and of the wages, hours, and other conditions and practices of employment maintained by them as prescribed by the regulations found in 29 CFR part 516 that are issued, and from time to time amended, pursuant to section 11(c) of the Act.

3. Defendants, jointly and severally, shall not continue to withhold payment of $139,834.80, plus interest of $154.00, which represents the unpaid minimum wage compensation hereby found to be due for the period from October 1, 2010, through October 1, 2012, to the present and former employees named in Exhibit A, attached hereto and made a part hereof, in the amounts set forth therein.

FURTHER, **JUDGMENT IS HEREBY ENTERED**, pursuant to Section 16(c) of the Act, 29 U.S.C. § 216(c), in favor of the Secretary and against the Defendants, jointly and severally, in the total amount of $139,988.80

4. The provisions of paragraphs 3 of this Consent Judgment will be deemed satisfied when Defendants deliver the following to District Director, Wage and Hour Division, United States Department of Labor, 600 Las Vegas Blvd. S., Suite 750 Las Vegas, NV 89101-6654.

a. Within fourteen calendar days of the entry of this Consent Judgment, Defendants shall deliver a schedule containing the last known (home) address, social security number, home telephone number (if known), and cell phone number of those persons listed in Exhibit A.

b. PAYMENT TERMS. No later than January 2, 2015, Defendants shall deliver a cashier's check or money order in the amount of $39,988.84 payable to the

order of the "Wage & Hour Div., Labor," with the term "A Cab, LLC" written thereon, as the first of thirteen payments towards the back wages found due hereunder.

c. On or before the first day of each of the following 12 consecutive months, Defendants shall deliver a cashier's check or money order payable to "Wage & Hour Div., Labor," with the term "A Cab, LLC" written thereon, in the amount of $8,333.33, until the total amount due under the backwage provisions of this Consent Judgment has been paid in full.

5. The Secretary shall allocate and distribute the remittances, or the proceeds thereof, less deductions for employees' share of Social Security and federal withholding taxes to the persons named in the attached Exhibit A, or to their estates if that be necessary, in his sole discretion, and any money not so paid within a period of three years from the date of its receipt, because of an inability to locate the proper persons or because of their refusal to accept it, shall be then deposited in the Treasury of the United States, as miscellaneous receipts, pursuant to 29 U.S.C. § 216(c). The Secretary shall be responsible for deducting the employee's share of FICA and federal income taxes from the amounts paid to the persons named in the attached Exhibit A, and for remitting said deductions to the appropriate federal agencies.

6. Defendants shall not request, solicit, suggest, or coerce, directly, or indirectly, any employee to return or to offer to return to any Defendant or to any person acting on behalf of any Defendant, any money in the form of cash, check, or any other form, for wages previously due or to become due in the future to said employee under the provisions of this judgment or the Act; nor shall any Defendant accept, or receive from any employee, either directly or indirectly, any money in the form of cash, check, or any other form, for wages heretofore or hereafter paid to said employee under the provisions of this judgment or the Act; nor shall Defendants discharge or in any other manner discriminate, nor solicit or encourage anyone else to discriminate, against any such employee because such employee has received or retained money due to him from the Defendants under the provisions of this judgment or the Act. Defendants shall pay all wages owed to their employees "free and clear," as required by 29 C.F.R. § 531.35.

7. In the event of a default in the timely making of any of the payments specified herein, the full gross amount outstanding due under this Consent Judgment, plus liquidated damages due under FLSA Section 16(c), 29 U.S.C. § 216(c), in the amount of $139,834.80, plus post-judgment interest at the rate of 10% per year from the date of this Consent Judgment until the full amount of this Consent Judgment is paid in full, shall become immediately due and payable directly to the U.S. Department of Labor by certified check to the District Director of the Wage and Hour Division at the address in paragraph 4. For the purposes of this paragraph, a "default" is deemed to occur if payment is not delivered within five calendar days of the due date.

8. Defendants shall make and keep records demonstrating the total number of hours worked for each driver for each day and each week.

9. Defendants shall not claim that any portion of a driver's work shift is break time to be excluded from hours worked unless the driver is completely relieved from all duties for at least 30 consecutive minutes.

10. The filing, pursuit, and/or resolution of this proceeding with the filing of this Consent Judgment shall not act as or be asserted as a bar to any action under Section 16(b) of the FLSA, 29 U.S.C. § 216(b), as to any employee not named on the Exhibit A attached to the Consent Judgment and incorporated hereto by reference, nor as to any employee named on the Exhibit A for any period not specified herein for the back wage recovery provisions.

11. 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.

12. Each party shall bear all fees and other expenses (including court costs) incurred by such party in connection with any stage of this proceeding to date; and it is further,

**ORDERED** that the parties to the instant complaint shall comply with the terms of this Consent Judgment;

**ORDERED** that this Court shall retain jurisdiction of this action for purposes of enforcing compliance with the terms of this Consent Judgment; and

Dated November 5, 2014.

UNITED STATES DISTRICT JUDGE

Consented to By:

| For Plaintiffs: | For Defendants: |
|---|---|
| M. PATRICIA SMITH<br>Solicitor of Labor<br><br>JANET M. HEROLD<br>Regional Solicitor<br><br>SUSAN SELETSKY<br>FLSA Counsel<br><br>ANDREW J. SCHULTZ<br>Trial Attorney<br>Attorneys for U.S. Department of Labor<br><br>Dated: October 1, 2014 | Dated: September 30, 2014<br><br>CREIGHTON J. NADY, as an individual and on behalf of A CAB LLC<br><br>Approved as to Form:<br><br>Dated: 9/30/14<br>ESTHER C. RODRIGUEZ, Esq.<br>Rodriguez Law Offices, P.C.<br>10161 Park Run Drive, Suite 150<br>Las Vegas, Nevada 89145<br><br>Dated: 9/30/2014<br>GREGORY J. KAMER<br>Kamer Zucker Abbott<br>3000 West Charleston Blvd., Suite 3<br>Las Vegas, NV 89102<br><br>Attorneys for Defendants |

EXHIBIT A

**NAME**

**Abdella, Juhar M**
**Abebe, Tamrat**
**Abraha, Tesfalem B**
**Abuel, Alan B**
**Abuhay, Fasil M**
**Acosta, Lorrie F**
**Adamian, Robert**
**Adams, Michael J**
**Adamson, Nicole K**
**Agacevic, Ibnel**
**Ahmed, Ahmed A**
**Alemayhu, Tewodros D**
**Alexander, Darvious N**
**Ali, Abraham A**
**Allen, Otis L**
**Alnaif, Abdul S**
**Altamura, Vincent T**
**Alves, Mary A**
**Ameha, Samuale B**
**Anastasio, James**
**Anderson, Jason E**
**Anderson, Roosevelt A**
**Anif, Janeid M**
**Appel, Howard J**
**Applegate, Angela M**
**Arar, Isam K**
**Arell, Roger D**
**Arellano, Miguel A**
**Arnwine, Howard B**
**Asad, Tassawar A**
**Aseffa, Mulubahan Z**

EXHIBIT A

**Assena, Zenebech K**
**Atanasov, Nikolay P**
**Atterbury, Joseph A**
**Aurich, Juan P**
**Awalom, Alemayehu G**
**Azzouay, El Houcine**
**Baca-Paez, Sergio A**
**Baker, Timothy J**
**Bakhtiari, Marco L**
**Barbu, Ion D**
**Bardo, Timothy F**
**Barich, Edward C**
**Barnes, Benjamin**
**Barr, Kenneth W**
**Barrett, Jon A**
**Barseghyan, Artur**
**Bartunek, Johnny W**
**Batista, Eugenio L**
**Bellegarde, Josue**
**Benel, Christian E**
**Bey, Ronald A**
**Bialorucki, Richard M**
**Black, Burton J**
**Blanco, Mario L**
**Blanusa, Zeljko**
**Boling, Freddy D**
**Borges, Antonio G**
**Borja, Virginia**
**Bowen, Christopher T**
**Bozic, Nebojsa**
**Bradley, Leroy V**
**Brauchle, Michael**
**Brimhall, Tracy L**
**Brisco, Allen L**
**Briski, Louis**

EXHIBIT A

**Brown, Maurice**
**Buergey, Christopher M**
**Butler, Bonnie J**
**Caldwell Jr., Paul M**
**Calise, Domenic R**
**Cancio-Betancourt, Rene S**
**Carr, Jamaal C**
**Casiello, Anthony R**
**Catoggio, Alfred T**
**Caymite, Luc**
**Chang, Yun-Yu**
**Chasteen, Jeffrey T**
**Chatrizeh, Shahin**
**Chau, Phi V**
**Chico, David**
**Choudhary, Krishna M**
**Christensen, Rosa L**
**Christodoulou, Panos**
**Cohoon, Thomas S**
**Coizeau, Leonardo R**
**Collier, Ella R**
**Collins, Donald V**
**Collins, Lincoln**
**Coney-Cummings, Keisha T**
**Conway, James H**
**Costello, Brad**
**Craddock, Charles P**
**Crawford, Darryl W**
**Daniels, Donald W**
**Daniels, Katherine A**
**Danielsen, Danny**
**D'Arcy, Timothy C**
**Davis, Bradley C**
**Deguzman, Fermin B**
**Deguzman, Leloi S**

EXHIBIT A

**DeMarco, William J**
**Deocampo, Michael M**
**Desta, Fissehaye S**
**Diaz, Aiser L**
**Dibaba, Desta T**
**Diemoz, Ernest D**
**Dillard, Corey L**
**Dinok, Ildiko**
**Disbrow, Ronald L**
**Dobszewicz, Gary S**
**Donahoe, Stephen L**
**Dontchev, Nedeltcho**
**Dotson, Contessa R**
**Dotson, Eugene B**
**Draper, Ivan L**
**Dudek, Anthony R**
**Durey, Robert J**
**Durtschi, Jeffrey**
**Edwards, Jeffrey A**
**Egan, Joseph W**
**Ekoue, Ayi**
**Ellis, Charles C**
**Emling, Paul E**
**Ernst, William L**
**Eshaghi, Mohammad**
**Estrada, Michael S**
**Evans, Pamela D**
**Fadlallah, Michel J**
**Farah, Yohannes M**
**Fears, Thomas A**
**Feleke, Melak M**
**Fesehazion, Teabe**
**Filfel, Kamal A**
**Fleming, Gary G**
**Frankenberger, Grant R**

EXHIBIT A

**Furst III, James P**
**Garcia, John E**
**Garcia, Miguel B**
**Gardea, Alfred E**
**Gared, Yaekob G**
**Garras, Bill G**
**Gaumond, Gerard J**
**Gebrayes, Henock L**
**Gebremariam, Meley A**
**Gebreyes, Fanuel H**
**Gelane, Samuel G**
**Ghori, Azhar**
**Gianopoulos, Samuel N**
**Gillett, David C**
**Gilmore, Paula J**
**Gleason, John T**
**Glogovac, Goran**
**Godsey, Kelly L**
**Golden, Theresa M**
**Golla, Dawit A**
**Gomez-Gomez, Arlene R**
**Gonzalez, Luis A**
**Gonzalez, Ramon**
**Goolsby, Victor**
**Grafton, Natasha D**
**Gray, Gary D**
**Green, Tony D**
**Greever, Rickey E**
**Gross, Timothy S**
**Guil, Inessa**
**Guinan, William J**
**Gyuro, John H**
**Habtom, Ermias**
**Hadley, Aaron S**
**Haigh III, Walter E**

EXHIBIT A

**Hanna, Christopher S**
**Hansen, Jordan Z**
**Haralambov, Valko G**
**Harms, Michael**
**Harrell, Mark K**
**Harris III, Reggie W**
**Harris, Dennis R**
**Harris, Jason B**
**Harris, Jay L**
**Harun, Idris Y**
**Hasen, Akmel W**
**Haskell, William L**
**Hays, Larry M**
**Herbert, Christopher L**
**Herga, Ryan A**
**Hinks, Dana**
**Holcomb, Dalton E**
**Holler, Alfonso**
**Hollis, James L**
**Holt, John R**
**Hooper, Donald L**
**Hoschouer, Christina A**
**Hughes, Jerry**
**Hunter, James A**
**Huntington, Walter D**
**Hurd, Donald P**
**Hurley, Robert A**
**Hurtado, Hubert B**
**Hussien, Leykun E**
**Inman, Christopher W**
**Ivey, Timothy**
**Jackson, Frederick D**
**Jackson, Willie J**
**Jarmosco, John J**
**Jelancic, Vladko**

EXHIBIT A

**Jellison, Charles S**
**Jimenez, Michael J**
**Johnson, Kennard T**
**Johnson, Richard B**
**Johnson, Rodney L**
**Jones, Glenn O**
**Joseph, Leroy A**
**Kaiyoorawongs, Chaipan**
**Kang, Chong**
**Kang, Dae Ik**
**Kaplon, Mark S**
**Karner, Adam M**
**Keba, Woldmarim G**
**Kenary, Brian T**
**Kennerly, Bridgett N**
**Kern, Gary F**
**Key, Roy F**
**King Jr., John**
**Klein, Phillip N**
**Knight, Tyree D**
**Kogan, Martin J**
**Krouse, Stephen P**
**Kunik, Robert**
**Laico, Paul T**
**Lantis, Glen**
**Leacock, Brian**
**Leal, Jill I**
**Lee, Thomas J**
**Legesse, Dereje G**
**Ligus, Thomas J**
**Link, Peter J**
**Linn, Ronald M**
**Linzer, Steven A**
**Little, Dennis P**
**Lonbani, Khosro D**

EXHIBIT A

**Lovelady, Warren S**
**Lovin, Charles E**
**Lydick, Chip S**
**Macato, Jaime L**
**Magana, Luis Antonio**
**Magazin, Milorad**
**Mahoney, Kevin J**
**Mainwaring, David C**
**Majors, John N**
**Manor, Quincy A**
**Maras, Maria M**
**Martinez-Ramirez, Eduardo**
**Mastrio, Angelo M**
**Maza, Inez E**
**McCarter, Patrick E**
**McCarthy, John L**
**McConnell, Therral R**
**McCoubrey, Earl E**
**McGowan, Sean**
**McGregor, Matthew E**
**McLandaum, Antonio O**
**McNeece, James J**
**Medina, Taurean S**
**Mekonen, Solomon**
**Melesse, Abebe B**
**Meloro, Paul M**
**Mengesha, Alemayehu**
**Menocal, Pedro P**
**Mezzenasco, Pedro J**
**Milliron, Darrol Q**
**Mindyas, James B**
**Mirkulovski, Danny**
**Mitrikov, Ilko I**
**Mogeeth, Ehab K**
**Monforte II, Peter R**

EXHIBIT A

**Monteagudo, Oscar C**
**Montoya, Francisco J**
**Moore, Aileen L**
**Moore, Jerry**
**Moreno, James M**
**Moretti, Bryan J**
**Morley, David L**
**Morris, Robert**
**Morris, Thomas J**
**Mostafa, Ahmed M**
**Murawski, Richard F**
**Murray, Mark A**
**Murray, Michael P**
**Nazarov, Mikael A**
**Ndichu, Simon K**
**Negashe, Legesse M**
**Netrayana, Kanchalee**
**Newell, John D**
**Ngo, Tuan T**
**Nichols, Keith**
**Nigussie, Gulilat T**
**Norberg, Christopher R**
**Norvell, Chris D**
**Ocampo, Leonardo O**
**Ogbazghi, Dawit**
**Ohlson, Ryan E**
**Olen, Virginia F**
**Oliveros, Mario**
**Ontura, Tesfalem B**
**O'Shea, Kevin M**
**Osterman, Victor L**
**Overson, Michael T**
**Oyebade, Vincent O**
**Ozgulgec, Tunc**
**Pak, Sam U**

EXHIBIT A

**Pariso, David J**
**Parker, Shawnette M**
**Paros, Nicholas**
**Patry, Michael J**
**Pearson, Jon C**
**Penera, Eric S**
**Perrotti, Dominic W**
**Peterson, Kenneth C**
**Peterson, Steven A**
**Petrossian, Robert**
**Phonesavanh, Paul**
**Pilkington, Margaret A**
**Pitts, Amir G**
**Platania, John A**
**Pletz, David E**
**Pohl, Daniel**
**Portillo, Mario E**
**Presnall, Darryl L**
**Price, Allen D**
**Price, James L**
**Prifti, Ilia K**
**Purdue, Robert H**
**Pyles, Joseph P**
**Ramirez, Erney M**
**Rasheed, Willie A**
**Ray, William A**
**Reid, Marvin D**
**Relopez, Craig M**
**Reno, Michael A**
**Rivas, Victor M**
**Roach, Jayson R**
**Roberson, Ronnie**
**Roberts, James**
**Robles, Mark A**
**Rockett Jr., Roosevelt**

EXHIBIT A

**Rohlas, Polly A**
**Romano, Anthony L**
**Romero, Ruben J**
**Rosenthal, John S**
**Ross, Larry W**
**Rothenberg, Edward L**
**Rotich, Emertha**
**Rousseau, James R**
**Ruby, Melissa F**
**Ruiz, Travis C**
**Russell, Darrell L**
**Saevitz, Neil R**
**Salameh, George S**
**Saleh, Jemal**
**Sampson, James M**
**Sanders, Acy**
**Saravanos, John T**
**Sayed, Jamil A**
**Schoeb, Kirk C**
**Schroeder, William L**
**Schwartz, George H**
**Schwartz, Steven**
**Sedgwick, Anthony A**
**Serio, John A**
**Serrano, Hector N**
**Sevillet, Otto E**
**Sexner, Alexis L**
**Shallufa, Azmy**
**Shein, Efraim**
**Sherman, Jason C**
**Shinn, Kevin H**
**Shoyombo, Rilwan O**
**Siasat, Manuel N**
**Siegel, Jeffrey M**
**Siljak, Lidija**

EXHIBIT A

**Siljkovic, Becir**
**Simmons, John D**
**Sinay, Abraham**
**Singh, Baldev**
**Sitotaw, Haileab T**
**Smale, Charles J**
**Smith Jr., Willie**
**Smith, Jepthy L**
**Smith, Lisa**
**Smith, Lottie M**
**Smith, Robert J**
**Solis, Brigido D**
**Sorbi, Nina F**
**Soree, Mladen V**
**Sorrosa-Paulin, Juan**
**Soto, Jacob D**
**Soto, Johnny**
**Sparks, Cody J**
**Spaulding, Ross X**
**Spilmon, Mark A**
**Springer, Marvin L**
**Stauff, John E**
**Stayton, William P**
**Steck, Gregory C**
**Stern, Robert H**
**Stevenson, John F**
**Stockton, Clarence W**
**Stonebreaker, Dawn M**
**Talley, George A**
**Tarragano, Stephen G**
**Terry, James J**
**Thomas, Scott R**
**Thompson, Glen R**
**Thompson, Michael B**
**Ticheste, Biserot G**

EXHIBIT A

**Yesayan, Razmik**
**Yihdego, Abdulkadir M**
**Yimer, Yidersal Z**
**Younes, Ahmed**
**Zabadneh, Randa**
**Zafar, John A**
**Zawoudie, Masfen B**
**Zeleke, Abraham A**
**Zhen, Yong Q**

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DANA SNIEGOCKI, ESQ., SBN 11715
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dana@overtimelaw.com
Attorneys for Plaintiffs

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

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|---|---|
| MICHAEL MURRAY, and MICHAEL RENO, Individually and on behalf of others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>A CAB TAXI SERVICE LLC, A CAB, LLC and CREIGHTON J. NADY,<br><br>Defendants. | Case No.: A-12-669926-C<br><br>Dept.: I<br><br>**MEMORANDUM**<br><br>Re: **Legal Authorities on the Court's Power to Grant a Default Judgment as a Contempt or Sanctions Response to Defendants' Failure to Pay the Special Master**<br><br>Hearing Date: June 5, 2018<br>Hearing Time: 3:00 p.m. |

Plaintiffs, pursuant to the Court's instructions of June 1, 2018, provide the following authorities to the Court confirming its power to make a contempt finding (or equivalent "sanctions type" finding) against defendants and striking their answer and granting a default judgment in response to their failure to pay the Special Master as per the Court's prior Orders.

## THIS COURT HAS THE INHERENT POWER TO ENTER A DEFAULT JUDGMENT IN RESPONSE TO DEFENDANTS' ABUSIVE LITIGATION PRACTICES

Nevada's district courts may grant default judgments pursuant to their inherent powers against defendants who engage in abusive litigation practices. *See, Young v. Johnny Ribeiro* 787 P.2d 777, 779 (Nev. Sup. Ct. 1990) ("Litigants and attorneys alike should be aware that these [inherent] powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute.") The presence of this inherent power to grant default judgments has been re-affirmed, by citation to *Young*,

in a slew of recent Nevada Supreme Court decisions: *Hawkins v. Dist. Ct.*, 407 P.3d 766, 769 (2017); *Abid v. Abid*, 406 P.3d 476, 480 (2017); *Blanco v. Blanco*, 311 P.3d, 1170, 1174 (2013); *Emerson v. Dist. Ct.*, 263 P.3d 224, 229-230 (2011) and *Bahena v. Goodyear Tire & Rubber*, 235 P.3d 592, 594 (2010).

**NEVADA'S BROAD GRANT OF CONTEMPT POWERS TO THE DISTRICT COURTS**

Pursuant to NRS 22.010(3) "disobedience" of any "lawful writ, order, rule or process issued by the Court" constitutes contempt of a civil proceeding. This Court's power to take appropriate actions in response to such contemptuous conduct is not limited to the penalties (a $500 fine and potential imprisonment) specified in NRS 22.100 and 22.110. *See, S. Fork Band of the Te-Moak Tribe v. State Engineer,* 59 P.3d 1226, 1230-31 (Nev. Sup. Ct. 2002) (Re-affirming Nevada's Courts' "inherent power to enforce their decrees through civil contempt proceedings, and this power cannot be abridged by statute," citing *Noble v. Noble* 470 P.2d 430, 432 (Nev. Sup. Ct. 1970), and approving of a district court order requiring a $10,000 bond be posted in a civil contempt situation, a remedy not specifically provided for by statute).

**NEVADA'S BROAD GRANT OF SANCTION POWERS TO THE DISTRICT COURTS IN RESPECT TO PRE-TRIAL CIVIL PROCEEDINGS**

NRCP Rule 37(a) authorizes a motion "for an order compelling disclosure or discovery." NRCP Rule 37(b)(2)(C) authorizes the sanction of a default judgment against any party who fails to comply with an any order issued under Rule 37(a) to compel disclosure. In this case, the Court's Order directing the defendants to pay for the Special Master appointed under NRCP Rule 52 was "compelling disclosure" per NRCP Rule 37(a) of the class members' time worked information defendants were required to maintain under NRS 608.115. The defendants' failure to pay the Special Master, who was tasked by the Court with performing that "disclosure" for the defendants, was a violation of an NRCP Rule 37(a) order compelling "disclosure." The Nevada Supreme Court discusses the broad powers of the district court to grant default judgments under NRCP Rule 37(b) for violations of orders compelling

disclosures under NRCP Rule 37(a) in *Temora Trading*, 646 P.2d 436 (1982); *Foster*, 227 P.3d 1042 (2010); and the above cases of *Young* and those that cite *Young* in respect to the Court's inherent powers.

**NRCP 53 GRANTS THE SPECIAL MASTER A RIGHT TO A WRIT OF EXECUTION AGAINST DEFENDANTS FOR THEIR UNPAID FEE**

The Court may wish to take note of NRCP 53(a)(1) which provides, in part, that: "....when the party ordered to pay [to the Special Master] the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

**IF THE COURT HAS CONCERNS AS TO WHETHER IT CAN MAKE THE FINDINGS REQUIRED BY *YOUNG* THAT WOULD ALLOW IT TO GRANT A DEFAULT JUDGMENT, LEAVE IS REQUESTED TO ADDRESS THAT ISSUE**

This memorandum, as directed by the Court, is limited to addressing **whether the Court has the power to grant a default judgment in response to defendants' failure to pay the Special Master's fees.** As discussed, it has that power if the circumstances presented constitute a "litigation abuse" by defendants warranting such action, as per the standard discussed in *Young* and its progeny or as otherwise justified in response to defendants' contempt of the Court's order or as a discovery sanction. If the Court is unsure whether the circumstances meet such a standard, plaintiffs request leave to document that they do and propose findings to the Court to that effect, that issue being outside the scope of this memorandum.

The Court also requested citations to specific cases holding that contempt sanctions and a default judgment either were, or were not, warranted for a failure to pay a Special Master's fees. Such a contempt finding (and order of incarceration) was issued by the trial court in *Patel v. Patel* 342 Ga. App. 81, 85-86 (Georgia Ct. App. 2017) but that case (where the initial Special Master appointment was found on appeal to be improper) is not informative. Under Nevada Law there is no "bright line" rule holding that such action by the district court for failure to abide by an order to pay a Special Master either is, or is not, proper in a particular case. Rather, the power exists

for the district court to grant such a default judgment, the question being whether the particular circumstances justify the exercise of such power.

Dated: June 4, 2018

LEON GREENBERG PROFESSIONAL CORP.

/s/ *Leon Greenberg*
Leon Greenberg, Esq.
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PROOF OF SERVICE

The undersigned certifies that on June 4, 2018, she served the within:

**MEMORANDUM Re: Legal Authorities on the Court's Power to Grant a Default Judgment as a Contempt or Sanctions Response to Defendants' Failure to Pay the Special Master**

by court electronic service to:

TO:

Esther C. Rodriguez, Esq.
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/s/ *Dana Sniegocki*
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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|---|---|
| MICHAEL MURRAY and MICHAEL RENO, Individually and on behalf of others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>A CAB TAXI SERVICE LLC and A CAB, LLC, and CREIGHTON J. NADY,<br><br>Defendants. | Case No.: A-12-669926-C<br>Dept. No. I<br><br>Hearing Date: June 5, 2018<br>Hearing Time: 3:00 p.m. |

**DEFENDANTS' SUPPLEMENTAL LIST OF CITATIONS PER COURT ORDER**

Defendants A Cab, LLC and Creighton J. Nady, by and through their attorneys of record, ESTHER C. RODRIGUEZ, ESQ., of RODRIGUEZ LAW OFFICES, P.C., and MICHAEL K. WALL, ESQ., of HUTCHISON & STEFFEN, LLC, hereby submit this Supplemental List of Citations as ordered by the Court on June 1, 2018.

**1. Cases addressing "inability to pay" as a defense to contempt; and Constitutional rights that should be considered by the Court before taking of A Cab's business and property.**

**a. Nevada Cases:**

Nevada cases addressing the Court's concern as to "inability to pay" as a defense to contempt arise in the context of child support payments:

*Rodriguez v. Eighth Judicial District Court of State of Nevada*, 120 Nev. Adv. Op. No. 87 (NV 12/9/2004), 120 Nev. Adv. Op. No. 87 (NV, 2004):

In the context of civil litigation, the general rule is that courts look to a party's current financial status, including the party's income, property, and other resources, to determine that party's present ability or, more importantly, inability to prosecute or defend an action. When considering an indigency application, a trial judge must consider a party's complete financial picture, balancing income and assets against debts and liabilities, taking into account the cost of a party's basic needs and living expenses. Particularly relevant to this inquiry are (1) the party's employment status and income, including income from government sources such as social security and unemployment benefits, (2) the ownership of any unencumbered assets, including real or personal property and monies on deposit, and finally, (3) the party's total indebtedness and any financial assistance received from family or close friends. Additionally, when confronted with a party who is willfully underemployed, especially for purposes of avoiding court ordered support payments, additional inquiry is required. In such a case, it is prudent for the court to consider the employability of the nonpaying party and what his or her ability to pay would be if employment were pursued and obtained. We note that while the determination of a party's indigency status is generally within the trial court's sound discretion and, therefore, entitled to great deference on review, it is also subject to careful scrutiny when it involves the protection of basic constitutional rights. *Id.*, p. 4-5.

The language in Article 1, Section 8(5) of the Nevada Constitution mirrors the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution: "No person shall be deprived of life, liberty, or property, without due process of law." *Id.*, p. 5, fn 22.

**b. Ninth Circuit Cases:**

*Jura v. County of Maui* (D. Haw., 2014) *citing Cutting v. Van Fleet*, 252 F. 100 (9th Cir. 1918) and *United States v. Drollinger*, 80 F.3d 389, 393 (9th cir. 1996) (attached hereto as **Exhibit A**):





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In *Cutting*, the Ninth Circuit ruled that, if a person makes a showing that he or she is financially unable to comply with an order to pay money, and that showing is "satisfactory" because "the inability to pay . . . clearly appear[s]," the person has a defense to a civil contempt proceeding for failure to comply with the order. *Id.*, p. 6.

As the Ninth Circuit noted in *United States v. Drollinger*, 80 F.3d 389, 393 (9th cir. 1996), this "court should weigh all the evidence" when determining whether Jura has the present ability to pay the sanctions, which is a complete defense to civil contempt. *Id.*, p. 14. When the court weighs all the evidence before it, including Jura's two declarations and her deposition testimony, the court concludes that Jura has met her burden of satisfactorily and clearly demonstrating that she currently lacks the present ability to pay the original sanction. *Id.*

**c. <u>Other Circuit Cases</u>**

i. *Voso v. Ewton* (N.D. Ill., 2017) Memorandum Opinion and Order (attached hereto as **Exhibit B**):

The Seventh Circuit has held that "[i]nability to pay is a valid defense in a contempt proceeding, but the party raising the defense has the burden of proving its inability to pay." *In re Res. Tech. Corp.*, 624 F.3d 376, 387 (7th Cir. 2010) (*citing United States v. Rylander*, 460 U.S. 752, 757 (1983)). *Id.*, p. 4.

ii. *First Mariner Bank v. The Resolution Law Group* (D. Md., 2014) Memorandum (attached hereto as **Exhibit C**):

A party facing sanctions for civil contempt may assert the defense of "a present inability to comply with the order in question." *U.S. v. Rylander*, 460 U.S. 752, 757 (1983) (citations omitted) (emphasis in original). A court shall not be blind to evidence that compliance with the court's order is now factually impossible. *Id.* In such an instance, "neither the moving party nor the court has any reason to proceed with the civil contempt action." *Id.* It is well settled, however, that in raising this defense, it is the defendant who bears the burden of production. *Id*. Thus, in order to purge himself of civil contempt, a defendant must affirmatively produce evidence showing a present inability to comply with the order in question. *See U.S. v. Butler*, 211 F.3d 826, 831 (4th Cir. 2000). "Conclusory assertions of financial inability, unsustained by supporting documentation, are

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insufficient to satisfy this burden." *S.E.C. v. SBM Inv. Certificates, Inc.*, No. 1:06-cv-0866-DKC, 2012 WL 706999, *11 (D. Md. Mar. 2, 2012) (citations omitted). "Rather, the companies must show that they acted in good faith and took all reasonable efforts to comply with the court's order." *Id.* Further, inability to comply is only a "complete defense" if the party is unable to comply in any manner with a court's order. "[O]therwise, in order to demonstrate that they have undertaken reasonable and good faith efforts to comply, [] the party must pay to the extent that [its] finances would allow." *Id.* (*citing Loftus v. Se. Pa. Transp. Auth*, 8 F. Supp.2d 464, 468 (E.D. Pa. 1998), aff'd, 187 F.3d 626 (3rd Cir. 1999); *SEC v. Musella*, 818 F. Supp. 600, 602 (S.D.N.Y 1993)("When a party is absolutely unable to comply due to poverty or insolvency, inability to comply is a complete defense. Otherwise, the party must pay what [it] can.")). *Id.*, p.4.

**2. Appointment of Receiver held to be harsh and extreme remedy to be used sparingly**

*Hines v. Plante*, 99 Nev. 259, 661 P.2d 880 (1983).

The Nevada Supreme Court reversing Court for abuse of discretion in appointing a receiver:

The sole issue on appeal is whether the district court abused its discretion in establishing and maintaining the receivership. The appointment of a receiver pendente lite is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it. *Id.*, 99 Nev. at 881-882, citing *Bowler v. Leonard*, 70 Nev. 370, 269 P.2d 833 (1954).

A corollary of this rule is that if the desired outcome may be achieved by some method other than appointing a receiver, then this course should be followed. *State v. District Court*, 146 Mont. 362, 406 P.2d 828 (Mont.1965); *see also Hawkins v. Aldridge*, 211 Ind. 332, 7 N.E.2d 34 (Ind.1937). *Id.* at 882.

The reasons for the above rules are fundamental: appointing a receiver to supervise the affairs of a business is potentially costly, as the receiver typically must be paid for his or her services. A receivership also significantly impinges on the right of individuals or corporations to conduct their business affairs as they see fit, and may endanger the viability of a business. The existence of a receivership can also impose a substantial administrative burden on the court. *Id.*

. . .

. . .

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## II.

## CONCLUSION

Here there is a simple solution for the Court to merely stay the matter for 90 days to allow claimants to settle their claims, thereby reducing the work of the Special Master. Rather than de-funding a resolution for many claimants, and having the net effect of closing a business in this State, the Court can permit Defendants to make payments towards a settlement without any prejudice or harm to those claimants who choose to proceed to trial.

There has been no contempt or intent to disobey this Court's orders by Defendants. Rather, Defendants are proceeding to attempt to resolve the claims against them, as is encouraged by the Eighth Judicial Courts. The estimated cost of a Special Master at $250,000 exceeds the settlement reached for these driver claimants (which has been deemed to be higher than those reached in other comparable matters).

DATED this 4th day of June, 2018.

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

/s/ Esther C. Rodriguez, Esq.
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*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY on this 4th day of June, 2018, 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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/s/ Susan Dillow
An Employee of Rodriguez Law Offices, P.C.

# EXHIBIT A

# EXHIBIT A

**JACKI JURA, Plaintiff,**
**v.**
**COUNTY OF MAUI; BENJAMIN M. ACOB, in his official and individual capacity;**
**and MARIE J. KOSGARTEN, in her official and individual capacity,**
**Defendants.**

**CIV. NO. 11-00338 SOM/RLP**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**DATED: June 13, 2014**

ORDER REJECTING ADDITIONAL SANCTIONS ORDER

**ORDER REJECTING ADDITIONAL SANCTIONS ORDER**

## I. INTRODUCTION.

The court sanctioned Plaintiff Jacki Jura $3,994.20 for failing to attend an independent psychological examination. When Jura failed to pay this sanction or even respond to requests to do so, Defendants County of Maui and Benjamin Acob (collectively, "County of Maui") moved for further sanctions, which the Magistrate Judge granted. Additionally, the Magistrate Judge ordered that Jura would be held in contempt if she failed to make $250 monthly payments. Jura now appeals. Reviewing the matter de novo, this court rejects that decision, determining that, because Jura has clearly demonstrated that she is currently unable to comply with the original sanction, the Magistrate Judge erred in imposing further sanctions on Jura for her failure to

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pay that sanction and erred in forcing Jura to comply with a court-ordered payment schedule or be held in contempt of court.

## II. BACKGROUND.

On November 19, 2012, the court sanctioned Jura $3,994.20 ($2,094.20 for a late cancellation fee and $1,900.00 in attorneys' fees) for having failed to attend an independent psychological examination. See ECF No. 164. Jura did not appeal this order and does not dispute that she is obligated to pay this sanction.

On January 4, 2013, the County of Maui sent a letter to Jura's counsel, demanding payment of the sanction and threatening to file a motion to have Jura held in contempt. See ECF No. 182-2. On September 4, 2013, the County of Maui reiterated its demand for payment and threat to file a motion. See ECF No. 182-3. At a hearing on November 14, 2013, Jura's counsel represented to the Magistrate Judge that these letters had been forwarded to Jura.

There is no dispute that the County did not receive a response to either letter.

On October 1, 2013, the County of Maui moved for further sanctions, arguing that Jura had failed to comply with the original sanction order of November 19, 2012. See ECF No. 182. The further sanctions motion sought an additional $920 sanction for additional attorneys' fees incurred in bringing the

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motion and an order that Jura, herself an attorney, be held in contempt if she failed to pay the sanction by a deadline set by the court. Id.

On October 2, 2013, the Magistrate Judge issued a Notice of Hearing and an Order to Show Cause that required Jura to explain why she should not be held in contempt for having failed to comply with the original sanction order. See ECF No. 183.

On October 16, 2013, Jura filed her written opposition to the motion for further sanctions, arguing that she "was not able to pay the sanctions because she did not have the money to pay." See ECF No. 184 at 2, PageID # 2170. Jura supported this statement by submitting her own declaration, ECF No. 184-1. Her declaration stated:

> 3. I have not paid the monetary sanctions imposed on me by the Court's Order Granting in Part and Denying in Part County Defendants' Motion for Sanctions because I have not been able financially to do so due to lack of funds from which a payment could be made.
> 4. My inability to comply with the Order was caused by extenuating financial circumstances and not by my unwillingness to comply.
> 5. Simply stated, I was not able to pay the sanctions because I did not have the money to pay.
> ....
>
> Page 4
>
> 8. I have diligently sought permanent employment since my termination at the Prosecuting Attorney's Office of the County of Maui, but my efforts have been unsuccessful.
> . . . .
> 11. My last employment was a temporary position as a trust officer with the Alaska USA Trust Company in Anchorage, Alaska, which ended involuntarily on July 31, 2012, due to my lack of the knowledge, skills, and experience that the position required since I am trained as an attorney and not a trust officer.
> 12. After losing the job with the Alaska USA Trust Company I was left with no money and no ability to afford to even travel back to Hawaii.
> 13. I started receiving unemployment benefits in the amount of approximately $800 per month, which was not enough to cover my living expenses, but my unemployment benefits have recently expired.
> 14. I currently have no income and I am not able to pay my living expenses, let alone payment of my debts as they mature.
> 15. Because I was not able to afford to pay the rent of approximately $1,150 plus the utilities, I recently moved out of the apartment I was renting for about a year and I am currently staying with a friend as a guest.
> 16. I have no health insurance and I cannot even afford to pay for a replacement hearing aid which I need due to my hearing impairment.
> 17. I have substantial debts, which in addition to the monetary sanctions imposed by the Court's Order, include prior student loans I took to complete my education and my
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>
> law degree, as well as credit card debts and debts to individuals who assisted me financially during the recent years of my unemployment.

See E.C. No. 184-1. The clear import of Jura's declaration is that she lacks the ability to pay her living expenses and other debts.

Jura then detailed the substantial amounts she owes to various companies and individuals, concluding that she is "financially insolvent due to [her] continuing unemployment" and noting that she "exhausted [her] ability to take on additional debt a long time ago." See ECF. No. 184-1, ¶¶ 18-23. She further stated, "I do not have an income stream that could generate the funds needed to pay the sanctions or to travel to Hawaii to appear at the hearing of the present Motion and answer the Court's Order to Show Cause." Id. ¶ 24.

On November 14, 2013, the further sanctions motion came on for hearing before the Magistrate Judge assigned to this case. The recording of the hearing shows that the Magistrate Judge was rightly troubled by Jura's failure to respond to the letters inquiring about whether she would be paying the sanction order. Because Jura is a member of the Hawaii bar, the Magistrate Judge noted that Jura's failure to obey a court order seemed problematic. Although the Magistrate Judge "hated to impose" additional sanctions on someone who might not have the assets to satisfy the sanction, he stated that he felt obligated to grant

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the motion for further sanctions because Jura's declaration had not satisfied the Ninth Circuit's requirements relating to an "impossibility defense." The Magistrate Judge denied Jura's counsel's request to call her on the phone and did not respond to a suggestion that Jura be allowed to file a supplemental declaration that would clarify her financial situation.

On November 14, 2013, the Magistrate Judge filed a written order granting the motion for further sanctions, sanctioning Jura an additional $920, ordering that she pay $250 per month until the entire sanction was paid, and warning Jura that failure to timely submit the monthly payments would result in her being held in contempt of court. See ECF. No. 189. In so ruling, the Magistrate Judge recognized that, "in cases of civil contempt for failure to comply with an order to pay court-imposed monetary sanctions, a party may use the impossibility defense where he or she is financially unable to comply due to poverty or insolvency." See ECF. No. 189 at 5, PageID # 2202 (citing Cutting v. Van Fleet, 252 F. 100, 102 (9th Cir. 1918)).

In Cutting, the Ninth Circuit examined a contempt order for failure to pay a sanction. Cutting noted that, "in cases of civil contempt for failure to comply with an order to pay money, the defendant may show in defense that he is financially unable to comply." Id. The Ninth Circuit placed the burden of demonstrating an inability to pay on the defendant, saying that a

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showing of inability to pay the sanction must be "satisfactory" and "must clearly appear." Id. The Ninth Circuit held that the defendant in Cutting had not met that burden by submitting an affidavit stating only that he "ha[d] been and [was] now unable to comply with the terms of said order" because during the relevant time he had not had "sufficient means, and is and has been during all of said time financially unable to pay said sum of $500." Id. The Ninth Circuit reasoned that the affidavit was insufficient because it failed "to state that the appellant owns no property, real or personal, out of which $500 could be realized, or that he has no property concealed, or transferred to others, or other resources out of which he might pay the required sum." Id. at 102-03.

Like the Ninth Circuit in Cutting, the Magistrate Judge reasoned that Jura's affidavit was insufficient to meet her burden of demonstrating an inability to pay the sanction order. The Magistrate Judge faulted Jura for having failed to even attempt to take any steps to relieve herself of the burden of

the sanction order or to respond to the County of Maui's letters about it. The Magistrate Judge reasoned that Jura had not met her burden because her affidavit did not specifically discuss whether she owns property or assets that could be used to pay the sanction. See ECF. No. 189 at 8, PageID # 2205. The Magistrate Judge therefore granted the County of Maui's request for further

Page 8

sanctions and ordered Jura to pay the County of Maui $250 per month until the total sanction of $4,914.20 is paid. Id. at 9, PageID # 2206. The Magistrate Judge ordered that, absent timely payments, Jura "will be held in contempt of court." Id.

On November 27, 2013, Jura moved for reconsideration of the further sanctions order. See ECF. No. 190. In support of that motion, Jura attached another declaration in which she further explained her bleak financial situation. See ECF. No. 190-2. In addition to detailing her finances, Jura's declaration states, "I have no assets except for those inherent in my being and a '98 Honda. I do not have any gold, jewelry, stocks, bonds, real estate, land, expectancies, equipment, precious metals, artworks, pleasure crafts, boats, machines, furniture, rugs, musical instruments, treasures, or anything that would fetch even a modest prices. I have nothing." See ECF. No. 190-2, ¶ 8, PageID #s 2227-28.

On January 13, 2014, the Magistrate Judge denied Jura's reconsideration motion, reasoning that Jura had not initially demonstrated an inability to pay the original sanction and noting that, on a reconsideration motion, the court cannot examine new evidence such as Jura's new declaration. See ECF. No. 196 at 6-7, PageID #s 2262-63.

On January 27, 2014, Jura timely appealed the further sanctions order. See ECF. No. 197.

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**III. STANDARD.**

Because this matter involved a post-judgment request, and because no party objected to having a Magistrate Judge handle the matter, the court deems the Magistrate Judge to have determined the matter under 28 U.S.C. § 636(b)(3), which states, "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." See King v. Ionization Intel, Inc., 825 F.2d 1180, 1185 (7th Cir. 1987) ("No provision expressly authorizes the judge to assign a magistrate to post-judgment proceedings, although we can think of no good reason not to allow such assignments and the statute does have a catch-all section: 'A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.' 28 U.S.C. § 636(b)(3).").

It is not entirely clear what level of scrutiny this court applies when reviewing a matter under § 636(b)(3). In an abundance of caution, the court therefore treats the further sanction order as the Magistrate Judge's "findings and recommendation" and reviews this matter de novo. See Estate of Conners by Meredith v. O'Connor, 6 F.3d 656, 659 n.2 (9th Cir. 1993); Rum v. County of Kauai, 2008 WL 2598138, *3 (D. Haw. June 30, 2008).

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**IV. ANALYSIS.**

Because Jura has satisfactorily demonstrated that she is financially unable to comply with the original sanction order of November 19, 2012, ECF. No. 164, the court rejects the further sanction order of

November 14, 2013, ECF. No. 189. In so ruling, the court disagrees with the Magistrate Judge's determination that Jura's original declaration of October 16, 2013, ECF. No. 184-1, was insufficient to demonstrate her inability to pay.

In Cutting, the Ninth Circuit ruled that, if a person makes a showing that he or she is financially unable to comply with an order to pay money, and that showing is "satisfactory" because "the inability to pay . . . clearly appear[s]," the person has a defense to a civil contempt proceeding for failure to comply with the order. Id. The Ninth Circuit determined that a person had not met that burden by submitting an affidavit that simply stated that the person had been and is now unable to comply with the order because he was and is financially unable to pay. Because the person had not stated that he owned no property out of which money to pay the sanction could be realized and that he had not concealed or transferred any property to others, the Ninth Circuit determined that he had not met his burden under the circumstances of that case. Id. at 102-03.

In the present case, Jura's original declaration of October 16, 2013, was much more detailed than the affidavit in

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Cutting. See ECF. No. 184-1. Jura's declaration not only stated that she was financially unable to pay the sanction, but also noted that she had been unemployed since July 2012, that her unemployment benefits had recently expired, that she had no income to pay her living expenses, that she was staying with a friend because she could no longer afford her rent, that she had no health insurance and could not afford to purchase a hearing aid, and that she had substantial debts that she could not pay. See id. The clear import of these statements was that Jura had no money or other property from which she could pay her day-to-day living expenses or other debts. This was simply not a situation in which Jura needed to say in her declaration that she owned no property and had not transferred or hidden any property from which she could pay the original sanction in this case.

Cutting is distinguishable on its facts because Jura's declaration satisfactorily and clearly demonstrated her inability to pay the original sanction. Jura's declaration did not simply say that she had insufficient means to pay the sanction, as in Cutting. The court therefore need not require her to have stated in her declaration that she owned no property from which she could get money to pay the sanction or that she had not otherwise hidden or transferred property to prevent collection on the debt.

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In any event, at the hearing of November 14, 2013, counsel for Jura suggested that Jura be allowed to file a supplemental declaration that would track the language of Cutting. If the Magistrate Judge was concerned that Jura's declaration was misleading in that she might have property, hidden or otherwise, from which the sanction could be paid, he could have allowed her to submit a supplemental declaration like her declaration of November 27, 2013, ECF. No. 190-2. That declaration clearly demonstrates that Jura owns little property. The Magistrate Judge concluded that, because this second declaration included new facts available to Jura at the time of her original declaration, the new facts should not be considered on a motion for reconsideration. While this court sees no error in that conclusion, this court, reviewing the matter de novo, determines that Jura's further explanation of her financial difficulties via her supplemental declaration established that she could not afford the original sanction. Had the Magistrate Judge considered the supplemental declaration, it appears unlikely

that the further sanctions would have been imposed.

On April 14, 2014, in fairness to the County of Maui, the court issued a minute order allowing the County of Maui, at its own expense, to examine Jura under oath concerning her claimed inability to pay the original sanction. See ECF. No. 206. The County of Maui deposed Jura and submitted a

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supplemental brief concerning her inability to pay the sanction. See ECF. No. 210. The court has reviewed that brief and concludes that, even when the court considers the matters it raises, Jura has still satisfactorily demonstrated an inability to pay the original sanction.

The County of Maui complains that Jura has borrowed or received money from friends and family to purchase plane tickets, pay her bar dues, buy groceries, and pay her mobile phone bill, and has convinced a friend to let her live rent free at the friend's house. The County of Maui says that Jura made a student loan payment the month before she signed her declaration. The Magistrate Judge also noted that Jura managed to pay the $455 appeal fee for the underlying case. The County of Maui argues that Jura could have taken the money lent or given to her and used it to pay the sanction. Although there is no dispute that Jura has been able to pay certain bills, Jura has clearly established that she cannot pay all of her debts, and the facts indicate that she has been forced to choose which debts to pay. This court will not punish Jura for choosing how to spend money that her friends and family gave or lent to her, when those choices did not involve luxuries or display a profligate nature. Nor will this court force Jura to ask her friends and family to lend or give her money to pay the original sanction. This court

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also refrains from ordering Jura to "show . . . serious effort to obtain employment" so that she can pay the sanction.

The court is not unsympathetic to the County of Maui's frustration in receiving no response from Jura's counsel to inquiries about payment of the original sanction. However, the court disagrees with the County of Maui's contention that the court should disregard Jura's declarations because she lacks credibility. Even assuming that her declaration was drafted to maximize the appearance of her inability to pay the sanction or to minimize her relationship with her mother, the County of Maui simply fails to demonstrate why her declarations should be completely disregarded. In other words, although the County of Maui takes issue with certain things Jura says in her declarations, it does not demonstrate that Jura was being untruthful in explaining her financial circumstances.

As the Ninth Circuit noted in United States v. Drollinger, 80 F.3d 389, 393 (9th cir. 1996), this "court should weigh all the evidence" when determining whether Jura has the present ability to pay the sanctions, which is a complete defense to civil contempt. When the court weighs all the evidence before it, including Jura's two declarations and her deposition testimony, the court concludes that Jura has met her burden of satisfactorily and clearly demonstrating that she currently lacks the present ability to pay the original sanction. The court

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therefore excuses her failure to comply with the sanction order, rejects the Magistrate Judge's further sanction order, and denies the County of Maui's motion for further sanctions and for a contempt order. Of course, if Jura's financial situation changes, Jura should begin making payments on the original sanction.

## V. CONCLUSION.

Because the court determines that Jura has satisfactorily and clearly demonstrated that she cannot pay the original sanction, the court rules that she cannot be held in contempt of court for having failed to pay the sanction. The court therefore rejects the Magistrate Judge order that imposes further sanctions on Jura for her failure to pay the original sanction and relieves Jura of the obligation to pay $250 per month or be held in civil contempt.

The court leaves it to the County of Maui to collect on the original sanctions, if and/or when Jura is financially able to pay that sanction.

Although the court excuses Jura's noncompliance with the sanction order at this time, the court recognizes that Jura's inability to pay the sanction may change in the future. The court therefore requires Jura for three years from the date of this order or until the original sanction is paid, whichever occurs first, to inform the County of Maui whenever she begins



employment, including providing the County of Maui with the name and address of any employer and the title of her position. Additionally, if Jura becomes financially able to pay the sanction order, she should do so without having to involve the court. In other words, if Jura becomes able to pay the sanction at some time in the future, she will lack the current excuse for her noncompliance and should comply with the terms of the order.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 13, 2014

_____

Susan Oki Mollway
Chief United States District Judge

Jura v. County of Maui, et al., Civ. No. 11-00338 SOM/PLD; ORDER REJECTING ADDITIONAL SANCTIONS ORDER

# EXHIBIT B

# EXHIBIT B

**DOMINICK R. VOSO, Plaintiff,**
**v.**
**SHARON TERESA EWTON, KENNETH FRANK,**
**and FREDERIC W. FRANK, III,**
**Defendants.**

**SHARON TERESA EWTON, KENNETH FRANK,**
**FREDERIC W. FRANK, III, and MATTHEW G. SMITH, Counter-Plaintiffs,**
**v.**
**DOMINICK R. VOSO and PURSUIT BEVERAGE COMPANY, LLC, Counter-Defendants.**

**No. 16-cv-00190**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**June 20, 2017**

Judge Amy J. St. Eve

**MEMORANDUM OPINION AND ORDER**

In May 2016 Counter-Defendants Dominick Voso and Pursuit Beverage Company ("PBC"), collectively, "Counter-Defendants," and Counter-Plaintiffs Sharon Ewton, Kenneth Frank, Frederic Frank, and Matthew Smith ("Counter-Plaintiffs") reached a settlement agreement. After Counter-Defendants failed to meet their obligations under the settlement agreement, Counter-Plaintiffs filed a Motion to Enforce the Settlement Agreement [116], which the Court granted on January 25, 2017 [127, 128]. The Court ordered Counter-Defendants to make a final payment under the settlement agreement within 30 days ("the Court's Order"). Counter-Defendants have failed to make that final payment and now, Counter-Plaintiffs have



brought the present Motion for a Finding of Contempt [129]. Counter-Plaintiffs also filed a supplemental brief with additional financial information in further support of contempt. For the reasons below, the Court grants this motion.

**LEGAL STANDARD**

To prevail on a request for a civil contempt finding, the movant must establish by clear and convincing evidence that: (1) a court order sets forth an unambiguous command; (2) the alleged contemnor violated that command; (3) the violation was significant, meaning the alleged contemnor did not substantially comply with the order; and (4) the alleged contemnor failed to make a reasonable and diligent effort to comply. *Ohr ex rel. Nat'l Labor Relations Bd. v. Latino Exp., Inc.*, 776 F.3d 469, 474 (7th Cir. 2015). A finding of willfulness is not required to hold a party in civil contempt; all that must be shown is that a party has not been reasonably diligent in attempting to accomplish what was ordered. *SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007). "A civil contempt order can . . . be intended to compensate a party who has suffered unnecessary injuries or costs because of contemptuous conduct." *Ohr*, 776 F.3d at 479.

The Court has discretion in its choice of remedies for civil contempt. The power to hold a party in contempt is governed by the requirements of full remedial relief, so the Court can take whatever action is necessary to remedy the contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *see* 11 Wright & Miller § 2960 at 586. Three remedies are commonly imposed by courts. First, the Court may jail a disobedient party. Incarceration can only be used to coerce the party to comply with a court order—once the party complies, she must be released. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911) (noting that civil

contemnor "holds the keys of his prison in his own pocket") (quotations omitted). Second, the Court may impose fines on a party. These fines can be used either to coerce compliance with a court order or to

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compensate an injured party for the damages caused by the contumacious party's failure to comply. *F.T.C. v. Trudeau*, 579 F.3d 754, 769 (7th Cir. 2009). Third, the Court may award attorneys' fees, court costs, and discovery costs to an injured party that has pursued a contempt judgment. *Shakman v. Democratic Org. of Cook Cnty.*, 533 F.2d 344, 351 (7th Cir. 1976) ("An award of costs and attorneys' fees is clearly proper and wholly independent of an award of compensatory damages.").

**ANALYSIS**

Counter-Defendants do not dispute that they have failed comply with the Court's Order and have failed to make even a partial payment to Counter-Plaintiffs. Instead of arguing that Counter-Plaintiffs have not satisfied the elements required for a contempt findings, Counter-Defendants argue that the Court should deny this Motion for three primary reasons: (1) Voso and PBC are attempting to comply with the Court's Order, but they are unable to make final payment due to PBC's financial predicament; (2) Seventh Circuit precedent dictates that a party cannot enforce a settlement agreement through a contempt proceeding; and (3) a finding of contempt would violate Counter-Defendants' Seventh Amendment right to trial by jury. The Court addresses each of these arguments in turn.

**I. Counter-Defendants Have Failed to Demonstrate an Inability to Pay Defense**

Counter-Defendants first argue that they have been attempting to comply with the Court's Order, but they "simply are unable to make the final payment at this time." In support of this argument, Counter-Defendants note that they have provided K-1 forms and PBC's bank records to Counter-Plaintiffs. Counter-Defendants explain that they are working with a consultant to develop a plan to raise the funds necessary to make their final payment to Counter-Plaintiffs. Thus far, they have not been able to raise the necessary funds primarily because according to

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Counter-Defendants, PBC's key investor, Clint Lohman, directed that PBC's available capital be used for operational expenses, licensing fees, to repay high-interest debt, and only after those obligations were met, to make settlement payments. Currently, Lohman is no longer providing capital, and Counter-Defendants argue that PBC cannot make the final payment without becoming insolvent. Counter-Defendants note that they also offered to sell PBC to Counter-Plaintiffs in lieu of making a final settlement payment, but Counter-Plaintiffs rejected this offer.

The Seventh Circuit has held that "[i]nability to pay is a valid defense in a contempt proceeding, but the party raising the defense has the burden of proving its inability to pay." *In re Res. Tech. Corp.*, 624 F.3d 376, 387 (7th Cir. 2010) (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)). "[A] mere assertion of inability to pay . . . [does not] preclude[] a finding of contempt." *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Lewis*, 745 F.3d 283, 287 (7th Cir. 2014) (citations omitted). To succeed on an inability to pay defense, "[t]here must be an adequate factual basis to support the defense, and "where, as here, there has been no effort at even partial compliance with the court's order, the inability-to-pay defense requires a showing of a 'complete inability' to pay." *Res. Tech. Corp.*, 624 F.3d at 387 (citations omitted). Put differently, "under the circumstances here, [Counter-Defendants]

ha[ve] the burden of establishing 'clearly, *plainly*, and *unmistakably*' that compliance is *impossible*." *Id.* (emphasis in original) (citing *Huber v. Marine Midland Bank*, 51 F.3d 5, 10-11 (2d Cir. 1995).

In light of the high standards imposed on parties that have made no effort at even partial compliance, courts regularly reject inability to pay defenses where the party cannot show that payment is plainly impossible. In *Resource Technology Corp.*, 624 F.3d at 387, for example, the Seventh Circuit upheld the district court's rejection of a debtor's inability to pay defense because the debtor had made prior representations about its assets indicating that it would be able to make

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a complete payment as ordered by the court. The debtor submitted financial documents to the court and argued that the money and assets in its accounts were unavailable to make a payment, but the court rejected these arguments and held that the debtor "failed to demonstrate that it had been reasonably diligent and energetic in attempting to accomplish what was ordered . . . and so did not carry its burden of producing sufficient evidence to establish its inability to pay." *Id.* at 388 (citations omitted); *see also Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 712 (7th Cir. 2014) (upholding finding of contempt where party failed to point to any steps it was taking to make final payment owed to opposing party and submitted incomplete financial documents in support of inability to pay argument); *Heyne v. Nick's Am. Pancake & Café, Inc.*, No. 3:11-CV-305 JD, 2016 WL 270110, at *5 (N.D. Ind. Jan. 22, 2016) (rejecting inability to pay defense due to lack of specific financial evidence); *Krumwiede v. Brighton Assocs., L.L.C.*, 2006 WL 2714609, at *4 (N.D. Ill. 2006) (finding plaintiff's bare assertions insufficient to demonstrate an inability to pay).

Here, Counter-Defendants have not made any "effort at even partial compliance with the court's order," and thus, they must show that payment is plainly impossible. *Res. Tech. Corp.*, 624 F.3d at 387. Counter-Defendants included in their response brief excerpts from financial spreadsheets showing PBC's expenditures, capital investments, and debt and equity. As in *Resource Technology Corp.*, however, these financial documents are insufficient to show that Counter-Defendants have "been reasonably diligent and energetic in attempting to accomplish what was ordered," that is, to make its final settlement payment. *Id.* These financial disclosures fall short for several reasons.

First and most importantly, Counter-Defendants did not provide any financial information relating to Voso as an individual. Voso is personally liable in this matter and as

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such, he could use his personal assets and cash on hand to comply with the Court's Order and make a final payment. Voso, however, has not provided his personal credit card or bank account information, much less any information about other personal assets that could be leveraged to make a payment to Counter-Plaintiffs.

Second, the Court finds it troubling that Voso took a compensation draw of $134,000 instead of using some or all of that money to pay Counter-Plaintiffs. While Counter-Defendants argue that this payout was not salary and was instead a "reduction of his member capital account," this argument is unpersuasive—Counter-Defendants easily could have re-allocated this money towards making a final payment in line with the Court's Order. (R. 139, Resp. to Mot. for Contempt 6.) Counter-Plaintiffs supplemental brief provides further evidence that Voso may be personally mismanaging PBC's corporate funds and using PBC corporate funds to pay himself and his family members. (R. 151,

Supplemental Brief.) Bank records indicate, for example, that between April 12, 2016 and March 31, 2017, Voso wrote checks to himself from PBC's operating account in the total amount of $152,653, and in that same time period, Clint Lohman transferred $200,000 into Voso's personal checking account.[1] (*Id.* 3-5.) Additionally, bank records also show credit card payments from PBC's account to Voso's personal credit card, payments to Voso's family from PBC accounts, and unexplained ATM withdrawal transactions involving PBC funds. (*Id.* 5-7.) Counter-Defendants argue that these transactions were related to necessary business expenses and payments that Lohman approved, and while that may be true, the transactions also provide evidence of significant capital that Counter-Defendants could have used, at least in part, to make a settlement payment. (R. 152, Opp'n to Supplemental Brief.)

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Finally, Counter-Defendants' financial excerpts and assertions in their response and supplemental briefs indicate that they have simply prioritized other debt obligations as well as operations costs—first at the direction of Lohman and now at their own direction—over the money owed to Counter-Plaintiffs as part of the settlement agreement. This prioritization with some of the funds may have been sensible from the business perspective of PBC, but Counter-Defendants previously assured the Court that they would use that incoming capital to make settlement payments,[2] and their failure to prioritize these payments provides a clear indication that Counter-Defendants have not been diligent and energetic in their efforts to make final payment as ordered by the Court. In Counter-Defendants' Supplemental Opposition brief, for example, they explain that Voso has recently used his personal funds to make a $13,000 delinquent tax payment and pay $88,000 in legal fees related to this case. (R. 152, Opp'n to Supplemental Brief 6-7.) These payments are once again examples of Counter-Defendants, and Voso individually, prioritizing certain debts over his obligation to pay Counter-Plaintiffs under the Settlement Agreement and under this Court's Order.

Accordingly, Counter-Defendants have failed to meet their burden of proving their inability to pay.

## II. The Court May Find a Party in Contempt for Failure to Comply With Its Order

Contrary to Counter-Defendants' argument, Counter-Plaintiffs are not seeking a finding of contempt to enforce a settlement—the Court has already entered an Order, on January 25, 2017, enforcing the parties' settlement and ordering Counter-Defendants to make their final payment owed under the settlement agreement. Instead, Counter-Plaintiffs are seeking contempt

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for Counter-Defendants' violation of that January 25, 2017 Order because Counter-Defendants have not made a final payment, or any payment for that matter since the Court's January 25 Order. Courts regularly hold parties in contempt, where, as here, a party has failed to comply with a court order to make a payment to the opposing party, even if the payment is part of a settlement agreement. *Towne v. Gee Const., LLC*, No. CIV.A. 11-1884, 2014 WL 4981442, at *2 (E.D. La. Oct. 6, 2014) (finding party in civil contempt in order "to coerce compliance with this Court's order enforcing the specific terms of the settlement agreement and to compensate the plaintiff for the defendants' continued noncompliance"); *In re Res. Tech. Corp.*, No. 08 C 4040, 2008 WL 5411771, at *2 (N.D. Ill. Dec. 23, 2008) (explaining that Court found party in civil contempt, directed party to pay trustee $500,000 immediately, and imposed a civil fine of $5,000 for every calendar day party failed to comply); *Buffalo*

*Wings Factory, Inc. v. Mohd*, 574 F. Supp. 2d 574, 581 (E.D. Va. 2008) (holding party in contempt for failure to comply with consent order enforcing settlement and ordering party to pay damages and attorneys' fees); *Lovell v. Evergreen Res., Inc.*, No. C-88-3467 DLJ, 1995 WL 761269, at *6 (N.D. Cal. Dec. 15, 1995) (holding party in civil contempt for failure to comply with court order requiring him to make settlement payment and ordering party to make final payment and pay attorneys' fees).

Counter-Defendants also cite to Seventh Circuit case law they purport prevents this Court from using its contempt power to enforce a settlement agreement. This case law, however, is inapposite. In two of the cited cases, the movants attempted to rely solely on the terms of the settlement agreement to institute contempt proceedings, and the Seventh Circuit held that a contempt finding was not permissible because the specific terms of the agreement were not set forth in a court order. *See D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455 (7th Cir. 1993); *H.K. Porter Co., Inc. v. Nat'l Friction Prods. Corp.*, 568 F.2d 24 (7th Cir. 1977). Those cases do not

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apply here where Counter-Plaintiffs obtained an explicit Order to enforce the settlement agreement and make a final payment and are now seeking a finding of contempt for Counter-Defendants' violation of that order. Finally, as noted by Counter-Plaintiffs, the other case upon which Counter-Defendants rely, *Tranzact Technologies, Inc. v. 1Source Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005), supports the proposition that the Court may hold Counter-Defendants in contempt, stating:

> It is true that a settlement agreement may not be enforceable through a contempt proceeding when its terms are not expressly set forth in a court order . . . but this is not such a case. The language at issue here is not simply incorporated by reference into the court's order, but specifically set forth in the order itself. It is clear, unambiguous, and perfectly amenable to being enforced through a contempt proceeding.

Here, as in *Tranzact*, the Court did not simply refer to the settlement agreement, but instead explicitly and unambiguously directed Counter-Defendants to make a final payment within 30 days. Accordingly, as in the cases cited above, the Court may hold Counter-Defendants in contempt.

## III. The Seventh Amendment Does Not Prevent the Court from Finding Counter-Defendants in Contempt

Finally, Counter-Defendants argue that the Court may not make a civil contempt finding because it would violate their Seventh Amendment right to a jury trial and because Counter-Plaintiffs have not alleged the elements of a breach of contract. As to the first argument, it is well-established that "civil contempt is an equitable action . . . and litigants have never been entitled to a jury trial for suits in equity." *Trudeau*, 579 F.3d at 775 (citations omitted); *see also Shillitani v. United States*, 384 U.S. 364, 365 (1966) ("We hold that the conditional nature of these sentences renders each of the actions a civil contempt proceeding, for which indictment and jury trial are not constitutionally required."). Counter-Defendants' argument that Counter-Plaintiff must allege the elements of a breach of contract for the Court to make a contempt

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finding also fails. Simply put, a Court may make a finding of contempt when a party violates its unambiguous order, and the Court

need not address the elements of breach of contract or any other underlying cause of action. *See Ohr* 776 F.3d at 474 (describing elements required for contempt finding).

**CONCLUSION**

For the foregoing reasons, the Court grants Counter-Plaintiffs' motion for a finding of contempt and orders Counter-Defendants to take the following remedial actions on or before July 21, 2017: (1) make a good faith payment of $10,000 to Counter-Plaintiffs; (2) submit to the Court a written plan for repayment; (3) provide the Court and Counter-Plaintiffs with bank records for all of Voso's personal accounts; and (4) provide the Court with documentation relating to any of Voso's personal assets with a value of $20,000 or more. The Court also orders Counter-Defendants to provide to the Court weekly written status reports, starting 14 days hereof, updating the steps they have taken to make a final payment to Counter-Plaintiffs.[3]

**Dated:** June 20, 2017

/s/
AMY J. ST. EVE
United States District Court Judge

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Footnotes:

1. While Voso argues that Lohman transferred this money as payment for his shares in PBC, this argument belies the fact that Voso is personally liable as a Counter-Defendant and could have used that money to make payments pursuant to the Settlement Agreement.

2. Counter-Defendants previously asserted that Clint Lohman provided assurances that he would raise the funds for Counter-Defendants to make a final settlement payment. (R. 146, Tr. of March 27, 2017 Hearing, 3: 12-24.)

3. Given Counter-Defendants' financial difficulties, the Court refrains from awarding attorneys' fees and costs.

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# EXHIBIT C

# EXHIBIT C

**FIRST MARINER BANK, Plaintiff**
**v.**
**THE RESOLUTION LAW GROUP, P.C., et al., Defendants.**

**CIVIL NO. MJG-12-1133**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

**Dated: April 28, 2014**

**Memorandum**

By order dated April 22, 2014, the Court granted nunc pro tunc effective February 21, 2014, Plaintiff's motion for entry of civil contempt order (ECF No. 202). (ECF No. 258). This memorandum sets forth the grounds for that order in greater detail. Additionally, Defendants have filed a motion to purge contempt (ECF No. 256), and for the reasons stated herein, Defendants' motion will be GRANTED.

On December 16, 2013, Plaintiff filed its motion for entry of civil contempt order (ECF No. 202), seeking to hold Defendants, The Resolution Law Group, P.C. and R. Geoffrey Broderick, Jr., in civil contempt for failure to comply with this Court's December 4, 2013 Order (ECF No. 191) directing Defendants to pay Plaintiff $23,221.00 in attorneys' fees by

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December 13, 2013. The motion was fully briefed (ECF Nos. 215, 222) and a contempt hearing was held on February 21, 2014 (ECF No. 252). In accordance with the Court's findings during the February 21, hearing, the Court held Defendants in civil contempt, finding that civil contempt was established by clear and convincing evidence and that Defendants failed to meet their burden of proving the asserted defense of a "present inability to pay." (ECF Nos. 252, 258).

**I. Civil Contempt**

Courts have broad discretion to impose punitive measures on any party who fails to obey a discovery order. Fed R. Civ. P. 37(b)(2)(B); Mut. Fed. Sav. & Loan Ass'n v. Richards & Assocs., 872 F.2d 88, 92 (4th Cir. 1989); 8B Charles Alan Wright, et al., Federal Practice & Procedure § 2289 (3d ed. 2010). Rule 37(b)(2)(A)(vii) provides that courts may "treat[] as contempt of court the failure to obey an order except an order to submit to a physical or mental examination." Further, contempt sanctions may be civil or criminal, depending on the nature of the sanctions. Buffington v. Baltimore County, 913 F.2d 113, 133 (4th Cir. 1990).

> When the nature of the relief and the purpose for which the contempt sanction is imposed is remedial and intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, the contempt is civil; if, on the other hand, the relief seeks to vindicate the

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> authority of the court by punishing the contemnor and deterring future litigants' misconduct, the contempt is criminal

Id. To hold a party in civil contempt, a court must find that four elements have been established by clear and convincing evidence:

> (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) that the decree was in the movant's 'favor'; (3) that the alleged contemnor violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations;

> and (4) that [the] movant suffered harm as a result.

Ashcraft v. Conoco, Inc., 218 F.3d 288, 301 (4th Cir. 2000).

Here, Defendants conceded the first three elements required for a finding of civil contempt. (ECF No. 215, 4). Defendants disputed, however, that Plaintiff suffered any "harm" as a result of Defendants' failure to pay the sanction imposed pursuant to this Court's December 4, Order. (Id.). This argument was readily disposed of by the Court, as the very purpose of the monetary sanction in question was to reimburse Plaintiff for expenses unfairly incurred due to Defendants' discovery abuses. As such, the Court found the elements required for a finding of civil contempt established by clear and convincing evidence.

Defendants' only available defense to a finding of civil contempt was to assert a "present inability to pay" the fine in

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question. A party facing sanctions for civil contempt may assert the defense of "a present inability to comply with the order in question." U.S. v. Rylander, 460 U.S. 752, 757 (1983) (citations omitted) (emphasis in original). A court shall not be blind to evidence that compliance with the court's order is now factually impossible. Id. In such an instance, "neither the moving party nor the court has any reason to proceed with the civil contempt action." Id. It is well settled, however, that in raising this defense, it is the defendant who bears the burden of production. Id. Thus, in order to purge himself of civil contempt, a defendant must affirmatively produce evidence showing a present inability to comply with the order in question. See U.S. v. Butler, 211 F.3d 826, 831 (4th Cir. 2000). "Conclusory assertions of financial inability, unsustained by supporting documentation, are insufficient to satisfy this burden." S.E.C. v. SBM Inv. Certificates, Inc., No. 1:06-cv-0866-DKC, 2012 WL 706999, *11 (D. Md. Mar. 2, 2012) (citations omitted). "Rather, the companies must show that they acted in good faith and took all reasonable efforts to comply with the court's order." Id. Further, inability to comply is only a "complete defense" if the party is unable to comply in any manner with a court's order. "[O]therwise, in order to demonstrate that they have undertaken reasonable and good faith efforts to comply, [] the party must pay to the extent that

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[its] finances would allow." Id. (citing Loftus v. Se. Pa. Transp. Auth, 8 F. Supp.2d 464, 468 (E.D. Pa. 1998), aff'd, 187 F.3d 626 (3rd Cir. 1999); SEC v. Musella, 818 F. Supp. 600, 602 (S.D.N.Y 1993)("When a party is absolutely unable to comply due to poverty or insolvency, inability to comply is a complete defense. Otherwise, the party must pay what [it] can.")).

Here, Defendants raised the defense of a "present inability to pay" both in briefing and at the contempt hearing. (ECF No. 215, 5-8). Defendants' brief in opposition to Plaintiff's motion for contempt was accompanied by the affidavit of R. Geoffrey Broderick, on behalf of himself and The Resolution Law Group, P.C. ("RLG"), wherein Mr. Broderick attested to the current financial condition of himself and RLG. (ECF No. 215-1). However, the submission of an affidavit, unsupported by specific credible facts or supporting documentation, does not meet the burden of establishing a present inability to comply. See Butler, 211 F.3d at 833 (wherein Butler "submit[ed] an affidavit attesting to his present economic status and inability to pay the $350,000," yet, "to purge himself of contempt, [Butler] had to produce evidence of his inability to comply with the turnover order. His submission of an affidavit did not meet that burden; his testimony did."); also Rylander, 460 U.S. at 758 (finding the

defendant's ex parte affidavit and uncrossexamined testimony were properly disregarded by the

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District Court). As such, Mr. Broderick chose to testify during the February 21, contempt hearing; however, his testimony likewise failed to satisfy Defendants' burden of proving a "present inability to pay." Specifically, Mr. Broderick could not testify to specific amounts of funds available to himself or RLG nor did Defendants provide any financial documentation supporting his affidavit and testimony regarding Defendants' poor financial straits. For example, no official bank statements or account records were provided. Further, neither Mr. Broderick's testimony nor Defendants' briefing suggested that Defendants' were unable to comply in any manner with the Court's order. In fact, Mr. Broderick's testimony and Defendants' briefing proffered that, on December 12, 2013 (the day before payment was due), Defendants inquired to Plaintiff about establishing a payment plan. (ECF No. 215, 4-5). This contradicts Defendants' "present inability to pay" defense and indicates that Defendants could have complied with the Court's order to the extent their finances would allow, yet, Defendants paid nothing. See SBM Inv. Certificates, 2012 WL 706999 at *11. Mr. Broderick similarly could not explain what "reasonable efforts" were taken to avoid violating the Court's order. In particular, Mr. Broderick's testimony was extremely general and it was unclear to the Court what steps, if any, were actually taken by Defendants to raise or seek funds prior to violating

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the December 4, Order. Further, and most telling, Plaintiff's cross examination of Mr. Broderick revealed bank records demonstrating that Defendants received client fees in excess of $2.6 million dollars between 2011 and 2013. Defendants made no accounting of this enormous sum of money; yet, Mr. Broderick testified that Defendants could not pay the substantially lesser sum of $23,221.00.

Having considered the evidence introduced the parties, in particular the highly probative and uncontroverted evidence that Defendants received in excess of $2.6 million dollars in fees between 2011 and 2013, the Court concluded that Defendants failed satisfy their burden of proving the defense of a "present inability to pay." As such, Defendants failed to purge themselves of civil contempt.

Upon a finding of civil contempt, the court has the inherent authority to impose fines or prison sentences.[1] See Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 537 (D. Md. 2010) (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812)). As indicated in the February 21, contempt hearing, the Court ordered briefing from the parties regarding the appropriate remedy for the contempt of

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Defendants. (ECF No. 233). The parties supplied the ordered briefing (ECF Nos. 239, 247) and on April 9, 2014, the Court held a hearing on the appropriate remedy for Defendants' contempt, as well as Plaintiff's pending motion for sanctions (ECF No. 238). (ECF No. 253).

On April 15, 2014, Defendants filed with the Court their status report regarding discovery sanctions (ECF No. 255), indicating that Defendants tendered to Plaintiff's counsel Mastercard payments totaling $23,781.95, representing payment in full of the ordered sanction, plus the credit card processing fee. On April 22, 2014, Defendants filed their motion to purge contempt (ECF No. 256), which included evidence of

Plaintiff's receipt of the funds tendered by Defendants.

## II. Motion to Purge Civil Contempt

As explained supra, contempt sanctions may be civil or criminal, depending on the nature of the sanctions. Buffington, 913 F.2d at 133. A sanction crafted as "remedial and intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained" is civil. Id. On the other hand, relief which "seeks to vindicate the authority of the court by punishing the contemnor and deterring future litigants' misconduct" is a criminal contempt sanction. Upon a finding of civil contempt, such as the contempt of



Defendants in this case, the Court has the inherent authority to impose sanctions, including fines or prison sentences. See Victor Stanley, 269 F.R.D. at 537 (citations omitted).

Because civil contempt is a remedial remedy that by nature is intended to coerce the contemnor into compliance with court orders, the contemnor may purge his or her contempt through the affirmative act required by the court's order. Hicks, 485 U.S. at 631-32; Buffington, 913 F.2d at 133-34. A sanction imposed following compliance would be punitive, and thus, a remedy for criminal contempt. Here, Defendants have tendered payment of $23,221.00 (plus $560.95 in credit card processing fees) to Plaintiff's counsel, effectively taking the affirmative act required by the Court's December 4, 2013, Order (ECF No. 191), the source of Defendants' civil contempt. As such, the Court orders that Defendants have purged their contempt.

## III. Conclusion

In accordance with the foregoing, Defendants' motion to purge civil contempt (ECF No. 256) is GRANTED.

Susan K. Gauvey
United States Magistrate Judge

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Notes:

[1] In order for a sentence of imprisonment to qualify as civil contempt, the sentence must be "remedial," meaning the defendant must stand committed unless and until he performs the affirmative act required by the court's order; a sentence of imprisonment for a definite period is "punitive," and thus is criminal contempt. Hicks v. Feiock, 485 U.S. 624, 632 (1988).

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LAS VEGAS, NEVADA, TUESDAY, JUNE 5, 2018, 3:14 P.M.

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THE CLERK: Michael Murray versus A Cab Taxi Service. Case Number A669926.

THE COURT: Good afternoon. I received the list of cases with a fair amount of verbiage from both sides; authorities, additional authorities that were provided. And I propose that we hear the argument first on the motion for partial summary judgment and then decide where that leads us in this case.

Is there additional argument that the plaintiff wants to put forward on the motion for partial summary judgment?

MR. GREENBERG: Your Honor --

THE COURT: One of the things that I'm interested in is the basis for calculation. I know it's set forth in your written materials. You ask for partial summary judgment as to the -- and this is only as to the seven dollars and a quarter --

MR. GREENBERG: Yes, Your Honor.

THE COURT: -- amount from 2013 to 2015 in the amount of a hundred and seventy-four and some odd thousand.

MR. GREENBERG: Yes, Your Honor.

THE COURT: And then using that as a basis of the 9.21 hours per shift for the 2007 to 2012 period of $804,000.

MR. GREENBERG: Well, I would propose that that 9.21 standard be applied if Your Honor grants the request to strike the answer and so forth. That's actually sort of a separate piece of what I'm presenting to the Court. The partial summary

judgment motion does not depend on any striking of defendants' answer or any of these issues --

THE COURT: Correct.

MR. GREENBERG: -- regarding the special master default, okay. But Your Honor did recite correctly my position. Candidly, Your Honor, I have nothing new that I would present to the Court on this, okay. I tried --

THE COURT: At last.

MR. GREENBERG: Well --

THE COURT: At last we have stumped the attorneys.

MR. GREENBERG: Your Honor, we did file the supplement on January 9th to try to distill in a somewhat more precise and pointed form what was concerning the Court and what the Court was trying to get clear on in respect to the partial summary judgment for the 2013 to 2015 period, based on our argument on January 2nd. And that partial summary judgment is based upon there being no disputed issue of fact in respect to the QuickBooks records, which for every pay period have a gross wage amount and an hours worked amount. And if we divide the hours worked into the gross wage for the pay period, we get an hourly rate. If that rate is less than $7.25 an hour, there is a deficiency and there is money owed.

Now, the reason why I say there is no disputed issue of material fact in respect to that calculation for that period, which involves about 14,000 separate pay periods, which we've got something like four or five hundred pages that have been introduced into the record here line by line, is that defendants at their deposition swore under oath that those hours worked entered in the QuickBooks records every pay period were in fact accurate. They in fact testified they were

more accurate than the trip sheets and they were based upon a meticulous review of the trip sheets and the actual hours worked by each person each pay period. There is no dispute that the gross wage amount for every pay period is in fact the gross wage amount. Nobody has alleged that the plaintiffs were paid something different by the company in each of those pay periods.

So therefore there is no contested material issue of fact regarding the record itself. In regard to the math, we've just discussed that. You divide the hours into the gross wages. It's either equal to $7.25 or it's less. I mean, that's an issue of law. The math itself is not disputed. They have the 14,000 lines. If we made an error in the multiplication or division calculation of one of those lines, they were free to contest it. They have not. To the extent that their -- and this was provided many months ago, that spreadsheet. Their expert reviewed it. He testified at his deposition that he had examined the math. The math looked correct. He didn't opine on the source materials because he said that wasn't what he was in fact retained to do.

So the only issue that's been raised in contention against the request for the partial summary judgment, it isn't a question of the math in those 14,000 or so lines, there's simply an argument being made by defendants that, well, we don't know if those 14,000 lines actually contain the true information from the QuickBooks records. We don't know if Mr. Greenberg somehow manipulated that information. And this was discussed on January 2nd. And again, that information was produced to me in computer files pursuant to a court order of the Discovery Commissioner, which Your Honor signed over objections of the defendants. It was an original file. We have a declaration in the record from Mr. Bass, who actually took that file and

assembled the spreadsheet and the spreadsheet then being examined by Mr. Clauretie, Dr. Clauretie in terms of -- he opined on its proper functioning.

The defendants haven't pointed out a single error in consistency, conflict between any of the information in those 14,000 lines and the information they produced in discovery. Defendants say, well, we never knew how to produce this QuickBooks and Mr. Greenberg had to give us this way to do it, and therefore we followed what he did but we don't really know if that's accurate. And, Your Honor, this was the subject of a very contentious 15-month process with the Discovery Commissioner getting the electronic production in this case. Defendants didn't want to simply turn over the entirety of the QuickBooks records. They only wanted to turn over the payroll records. They said they didn't know how to do it. I hired a QuickBooks expert who actually gave instructions, which are in the record, a protocol to do this. I gave it to them. They followed those instructions. They were free to follow different instructions. They were free to get another expert to go through this production.

All they've been raising in opposition to the foundation of the partial summary judgment motion, which is, again, their records, Your Honor, is this supposition that somehow they don't know if this is accurate. They need to do more, Your Honor, given the context of this case. I mean, they were ordered to produce this. They do admit they used the QuickBooks for this purpose.

THE COURT: Need to do more in order to present an issue of --

MR. GREENBERG: Of material fact.

THE COURT: -- triable fact.

MR. GREENBERG: To prevent the partial summary judgment to the extent

that those records show a deficiency at $7.25 an hour for those pay periods based on the hours that are present for each pay period in those records as defendants have testified to.

THE COURT: Go ahead.

MR. GREENBERG: And again, Your Honor, in the supplement that I filed you have the relevant deposition testimony that confirms that the QuickBooks records do contain the hours worked. I mean, Mr. Nady was the 30(b)(6) witness on this. He did testify under oath that the accurate hours were put in the QuickBooks records. And defendants were subject to this court order to produce that information and they testified also under oath that the QuickBooks was used to make the payroll and did contain a record of the payroll paid. So there's no question that the source of the information, which is the QuickBooks records here, from defendants' own admissions and contentions is in fact reliable. It's reliable, it's not disputed. The calculations made thereon on those 14,000 pay periods is also not disputed. It's a question of simple arithmetic.

Therefore, 174,000 -- those are amounts that's in excess of ten dollars owed to something like 340 identified persons out of 500 examined. I mean, this is all itemized precisely in the submissions to the record and an order can be entered accordingly to grant an individual judgment to each one of those people for those specified amounts. Again, it's a matter of law. It's all in the records, Your Honor.

THE COURT: Okay.

MR. GREENBERG: Thank you.

THE COURT: All right. Ms. Rodriguez.

MS. RODRIGUEZ: Thank you, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MS. RODRIGUEZ: As I've said on our most recent hearings, we've been here several times on this motion for partial summary judgment and I'm not really clear as to why the Court is even entertaining it again on rehearing or on oral motion because I went back and I would just like to briefly refresh the Court's recollection of what has occurred.

There has been nothing new presented by the plaintiffs since the last hearing on this matter. I pulled this Court's order of July 14th of 2017, and this was the most recent time that the Court denied plaintiffs' motion for partial summary judgment when Mr. Greenberg came in here with the same set of figures, the same spreadsheets, the same time period, asking the Court for partial summary judgment. And in the order drafted and signed by Your Honor, on page 3 the Court said: "Having reviewed the materials presented, including the sample figures provided by plaintiffs' counsel alleging showing how the damages can be calculated as a matter of mathematics, the Court concludes that it cannot grant the motion for partial summary judgment." Paragraph 5: "The Court concludes that there are genuine issues of fact remaining for trial to a trier of fact. Among other things, to determine what the correct calculation would be under any of the scenarios that have been put forth by the plaintiffs." And paragraph number 6: "The Court concludes that getting to a final calculation takes more in the form of an evidentiary nature, more of an evidentiary presentation than simply taking numbers off of the column and that column and performing simple arithmetic."

The same thing that Mr. Greenberg is advocating for today, the Court already denied that motion, reopened discovery, allowed him to -- well, reopened it

in terms of allowing him to retain experts to see if they could further convince the Court based on their opinions whether those spreadsheets had any validity or not. Mr. Greenberg then went and hired not experts, because throughout my motions on this issue they have not been designated as technically experts. There's been this game playing as to whether Mr. Bass is an expert or not, so I filed a motion on these experts. Mr. Bass was actually a cab driver. He's a litigant in another class action matter and he is far from meeting the standard under NRS 50.275 in terms of admission of an expert. Dr. Clauretie, the second alleged expert hired by the plaintiffs, said he did nothing but review Mr. Bass' spreadsheets and figured out that the math seemed to add up.

These are not expert opinions. They are ripe for exclusion and for striking. That motion to exclude those experts was set for January 25th, 2018 of this year. At that time is when the Court did not rule upon that motion to strike the experts. We didn't even get to that. I pulled the transcript from that hearing and at that time the Court indicated -- I think this is when the Court went back and reviewed a number of records, reviewed everything that had happened at the Discovery Commissioner, and indicated -- this is in the transcript of January 25th, 2018, starting at page 4: "The entirety of the litigation process since that time to the present convinces the Court that that indeed is not only an appropriate way to resolve this issue, but is perhaps the only way to accurately -- with any accuracy resolve this issue and for that reason if that motion is renewed at this time, I'm going to grant it." And the Court was speaking in reference to a special master actually reviewing the source documents. The Court again concluded that the Court could not grant the same motion for partial summary judgment based on summaries and

charts, the same Excel spreadsheets that had been before the Court a year earlier; that the only way to find an accurate measure of any underpayment would be the appointment of a special master.

So here we are not only with that transcript, but I would -- one last thing I'd like to cite to Your Honor was the order drafted by Mr. Greenberg appointing the special master. This is on page 2, if there's any clarity that is further needed on that. "The Court finds that the appointment of a special master is the appropriate solution to determine the hours worked each pay period by each member and the amount of minimum wages, if any, that each is owed based upon A Cab's records. The special master is being appointed to report on the hours worked and the wages paid, as documented in A Cab's admittedly accurate records, to what extent the information of those records demonstrates wages of less than minimum wage and the amounts of any minimum wage deficiency."

So the Court already made that determination that that is the only accurate way to come to an analysis of any underpayment. Mr. Greenberg is back before the Court probably for the fifth time asking for partial summary judgment, without offering the Court anything further to allow a rehearing. The Court has already made the determination that there are genuine issues of material fact. We've presented our expert that disputes the methodology, disputes the calculations, has shown the discrepancies, has testified under oath as to why they're unreliable. There are genuine issues of material fact, which the Court has already determined. So I would ask the Court once and for all to again --

THE COURT: Remind me, if you would, where this -- the testimony that you're speaking of.

MS. RODRIGUEZ: From our expert is -- I'm blank on his name. What's our expert's name?

MR. WALL: I don't know, but -- (inaudible).

THE COURT: Just -- but I'm saying, the testimony itself, was this in a hearing before the Court?

MS. RODRIGUEZ: Has it been supplied? Yes, it has been supplied. I just -- I'm sorry, I'm blanking on his name.

THE COURT: Yeah, I don't recall it, either. But I was more interested in --

MR. GREENBERG: That's -- excuse me, that's Mr. Leslie.

MS. RODRIGUEZ: Thank you. Scott Leslie. Scott Leslie. I could picture his face, I just couldn't think of his name.

THE COURT: And that was in a hearing before the Court where he testified?

MS. RODRIGUEZ: No, Your Honor. We've submitted his deposition transcripts.

THE COURT: Deposition. All right. Okay.

MS. RODRIGUEZ: Right. So at this time I would ask the Court to again deny the motion for partial summary judgment for the time period that Mr. Greenberg is asking, relying upon the Court's prior orders of July 14, 2017 and the Court's order appointing the special master where the determination has already been made as to the necessity of a source document rather than charts and summaries. For a summary judgment to go forward with the Court it has to be based on admissible and reliable documentation. Mr. Greenberg is relying on expert reports to ask the Court for summary judgment, and those are subject to being excluded according to the Hallmark case and according to the NRS statutes. Thank you, Your Honor.

THE COURT: Uh-huh. Mr. Greenberg, are you relying on expert reports or are you relying on a calculation based off of the QuickBooks and the 9.21 hours per shift? In other words, in order to prevail on your motion for partial summary judgment, do you have to have an expert report or are you relying on --

MR. GREENBERG: Your Honor --

THE COURT: -- mathematical calculations using those documents?

MR. GREENBERG: Just to clarify, the 9.21 hours you mentioned is an average.

THE COURT: Right.

MR. GREENBERG: That has nothing to do with the partial summary judgment motion. The partial summary judgment motion is based on the actual recorded hours for every pay period, not an average of 9.21 or anything else.

THE COURT: Well, but the rest of your -- and correct me if I'm wrong, the rest of your summary judgment motion asks for some 804,000 for the years 2007 through 2012. I thought it was based on the 9.21. Is is not?

MR. GREENBERG: Your Honor, when we start talking about anything prior to 2013, we're getting the cart before the horse.

THE COURT: Okay.

MR. GREENBERG: The Court could only venture to consider that if it's going to strike defendants' answer in response to their failure to pay the special master. Otherwise there's no request that the Court grant summary judgment based on an average for the period (sic) of 9.21 from 2007 through 2013 in the current posture of this case. The Court has not stricken the defendants' answer. It has not granted a default. If the Court ventures there, I would --

THE COURT: Why would it be admissible if the Court struck the answer but not for purposes of a partial summary judgment motion?

MR. GREENBERG: Your Honor, I'm not submitting it wouldn't be, that it wouldn't be appropriate. I'm just saying that's not the nature of the request that's in the record before the Court by plaintiffs. Plaintiffs moved for partial summary judgment and filed an initial motion and supplement specifically addressing the 2013 to 2015 period where the QuickBooks records --

THE COURT: Okay, then let's deal with that time period.

MR. GREENBERG: Yes, Your Honor.

THE COURT: Does that calculation require in order to prevail that the Court rely upon an expert opinion, or is it a --

MR. GREENBERG: Your Honor, I don't believe it does, but we were before Your Honor last year and I presented to Your Honor the summary that was prepared by Mr. Bass, along with his detailed declaration. Your Honor felt that that was not sufficiently developed in the record that Your Honor felt comfortable relying on that in resolving partial summary judgment as requested at that time.

THE COURT: Well, let me tell you why, then, because also since that time when the Court denied your motion for summary judgment originally, the Court's view was that under the prevailing authority in order to arrive at an accurate determination that there would need to be the tried and true assemblage of massive documents by both sides, expert opinions interpreting it and arriving at an opinion that would tell the Court whether it was accurate or not, and then only then could the Court proceed ahead. Since that time what has become apparent -- well, it was apparent before then but the complication to this process, the trial process, that it

has caused has become even more apparent and that is, A) that the defendant did not maintain those records which are typically contemplated by the minimum wage act and therefore it was not a simple calculation, and the other thing that's become apparent is that the methodology which the Court belatedly agreed with you on, which is a special master, is frustrated because the defendant claims that he cannot pay that money.

MR. GREENBERG: That is --

THE COURT: So --

MR. GREENBERG: Yes, Your Honor.

THE COURT: So I have to go back and review what else has happened in the record. One of the things that has happened during this last year is that on December 7th the Court granted a motion to allow the statistical sampling as evidence. In other words, that the basis that was suggested to the Court previously may not be -- how can I put this -- a statistical sampling of evidence does not give you that warm and fuzzy feeling that you've gotten right down to the exact numbers and that without any discrepancy you've arrived at what a calculation would be.

But that does not always mean that -- as you are well aware because you argued the motion -- that does not mean that the Court can never rely upon it. In fact, one of the cases which was cited by the plaintiff in connection with the granting of that motion on December 7th and which the Court cited in its order was the Anderson v. Mt. Clemens Pottery Company at 328 U.S. 680, a 1946 case which is still good law on this proposition that the Court may allow statistical sampling and that under the right circumstances the onus may be placed upon a defendant to come up with evidence rather than the plaintiff.

Now, what I'm saying is that the Court is looking at the potential ways to resolve this lawsuit with finality, with justice to both sides as those terms are delineated and defined by our case law. It seems to me that arriving at a statistical accuracy -- I'm sorry, at an absolute accurate number for these things has been made impossible by the defendants. The defendants have failed to keep the records they were supposed to keep under the law in the first instance and they have stymied the Court in trying to get a special master to get down with the records that the defendants have claimed all along are the most accurate and come up with something that's more than a morass of documents but constitutes admissible evidence of the numbers involved. It's not enough to say, look, we've got a whole bunch of time sheets and those are the real evidence, but we can't tell you what the number is based on those. That won't work. And you can't just -- you can't blame the law or blame the other side if you've made it impossible to render an absolute -- absolutely accurate number for what the damages are in this matter.

And I find that I'm having to re-examine the available law and authorities that have been given to the Court by both sides previously, and I find that in a proper case not only can the Court allow the admission of the statistical sampling, which I generally speaking tend to believe is what the 2013 to 2015 calculation brought to the Court in the plaintiff's motion for partial summary judgment, but to the extent or in the event that that is able to be used to arrive at an approximation of the accurate number, as that is discussed and defined in the Anderson v. Mt. Clemens Pottery Company case, that at the very least the onus then would fall to the defendant to show -- to put forward not a bunch of time sheets but evidence in the form of a calculation of what the correct number would be.

I ruled long ago that the liability is proven in this case. I'm satisfied that it has been shown. It is a question of what the appropriate amount of the damages would be. So my question to you is, you contend that your partial summary judgment only extends to the 2013 to 2015 time period and that is because you could not rely on that sampling and make a calculation for the 2007 to 2012 period?

MR. GREENBERG: That is not how I would put it to the Court, Your Honor. I simply have not presented the 2007 to 2013 period for presentation to the Court for partial summary judgment consideration. I was dealing with the 2013 to 2015 period because --

THE COURT: And so that's why I'm curious about why that won't work. And I don't --

MR. GREENBERG: Well, I didn't say it won't work. I think it would work just fine.

THE COURT: Well, I assume there must be a weakness to it or you would have offered that in the first place.

MR. GREENBERG: Your Honor, this case has been so involved. There have been so many steps. We've been trying to digest so much. I'm trying to take small steps here, Your Honor. And just to review in respect to the prior history of the partial summary judgment request for 2013 to 2015, the order that defense counsel was reading from July, she didn't recite to Your Honor that the partial summary judgment was denied without prejudice. And the essence of your opinion, the crux of your view at that time was that you were concerned that the evidentiary presentation being made to the Court really should be supported and subject to

expert testimony and review --

THE COURT: Uh-huh.

MR. GREENBERG: -- rather than simply a summary of the 14,000 payroll periods that was presented at that time. And we proceeded to do so. We had Dr. Clauretie review Charles Bass' work. He furnished a report. Dr. Clauretie was examined and he attested both in his report and in his examination that the spreadsheets that were presented and prepared by Charles Bass from defendants' records were in fact accurate.

And in fact, Mr. Leslie, defendants' expert, also concurred that the spreadsheets, the 14,000 pay period analysis of the QuickBooks records upon which I've presented to the Court for partial summary judgment do accurately do what they purport to do. And this testimony is recited at pages 10 to 11 of the supplement. And I'm reading this to you verbatim: "So my question is, when the A Cab spreadsheet accepts those hours and uses those hours recorded in the payroll records to calculate minimum wages owed at either a constant $7.25 rate or the constant $8.25 rate, using those hours from the payroll records" -- the QuickBooks records and payroll records are synonymous, Your Honor -- "does it do so correctly?" There were all sorts of objections made. Ultimately, Mr. Leslie says, "The math foots through." "And by foot through you are confirming that it is your understanding when the A Cab file uses the hours from the payroll records for that 2013 to 2015 period and calculates amounts at minimum wages they're owed at $7.25 and $8.25 an hour constantly for all pay periods in each scenario, it is doing so correctly?" Again, objections. "Answer: I think the math works."

THE COURT: So that's all well and good, but what I'm curious about is why

is that then -- why does it not work to calculate the 2007 to 2012?

MR. GREENBERG: Your Honor, I think given the circumstances that Your Honor has outlined, the fact that defendants have not maintained the statutory required records -- they haven't produced any substitute to evaluate what the hours of work are. As in Mt. Clemens, to obtain some measure of appropriate justice here, I don't think the Court has any alternative. I fully agree that the 9.21 hours simply should be applied down the line here for every pay period for the earlier time. For the 2013 --

THE COURT: What would be -- what's the evidentiary basis to apply 9.21 hours per shift?

MR. GREENBERG: Well, Your Honor, the evidentiary basis at this point is the fact that Your Honor had directed the special master be tasked with actually finding the true hours. I believe that the true hours would be more than 9.21 and the damages would be larger.

THE COURT: Well, let me rephrase my question. Where do you get the 9.21 hours?

MR. GREENBERG: The 9.21 is the average of all of the shifts for those 14,000 analyzed pay periods.

THE COURT: For the two years?

MR. GREENBERG: For the 3-year period, 2013 through 2015.

THE COURT: Okay.

MR. GREENBERG: And Dr. Clauretie in his report -- I can cite you to the page, I have it on my computer here -- confirms that he examined the spreadsheets as assembled by Mr. Bass and that 9.21 average is calculated correctly based on

the information in the spreadsheets. And again, there is no dispute that the information in those spreadsheets is in fact the same information the defendants gave us. Defendants insist they don't know, but for them to say they don't know or they're not sure or they suspect that it may be inaccurate is not sufficient, Your Honor.

THE COURT: But you're not comfortable for purposes of a motion for summary judgment with applying that 9.21 hours retroactively to cover 2007 through 2012?

MR. GREENBERG: Your Honor, I am more than comfortable in doing so, and what I would say actually is -- what I would ask the Court to do is to simply grant partial summary judgment on that -- actually, summary judgment in full on that basis and simply at that point dissolve any class claims that may exist beyond that for the individual class members to pursue. There is no doubt in my mind that applying --

THE COURT: And that's because of the eight and a quarter claims?

MR. GREENBERG: Well, because we have an issue regarding health insurance at eight and a quarter. And candidly, Your Honor, if I was to bring my clients individually in here who I have talked to extensively and they testified at their depositions, they would say on average their shift length is 11 hours, not 9.21 hours. But nonetheless, as a measure of substantial justice that can be obtained in this case and based as Your Honor was pointing out on essentially a massive statistical sample from 2013 to 2015, we have a 3-year statistical sample of 14,000 pay periods -- well, it's more than 14,000 pay periods, it's over 100,000 shifts actually worked because in a pay period somebody typically works 10 shifts or more. So to

figure that 9.21 is a reasonable average to be applied for the entirety of the class period is more than appropriate.

And in fact, Your Honor, it is our contention that that 9.21, which comes from the recorded time from 2013 to 2015, is actually artificially reduced because we don't in fact believe that defendants recorded all of the time on the trip sheets into the QuickBooks. We believe they did on occasion reduce time that they recorded for certain individuals and that belief, Your Honor, is actually confirmed by their own expert who reviewed 77 or so pay periods. He actually pulled the trip sheets, conducted his own review, and he came up with 9.6 or .61 average shift length during that 2013 to 2015 period for when he actually went through the trip sheets. So the 9.21 that I'm present -- proposing the Court use, based on the QuickBooks records, is if anything too low in terms of the full measure of the class members' true average. But it is an average. It is certainly a floor that would be appropriate to use here based on what is available to the Court. And I would urge the Court to apply it throughout the entire class period.

For the 2013 to 2015 period I was focusing on defendants' admissions. Defendants have testified under oath and admitted that what's in those QuickBook records is accurate. It's accurate as to the hours and it's accurate in terms of what we paid these guys. So therefore they have no basis to object to a calculation using those two pieces of information, the hours worked every pay period and what they paid them every pay period at $7.25 an hour doing the math. And the math foots through, as their expert stated. They had been given the math. They haven't raised any objections to the math.

So I would ask the Court to grant the partial summary judgment for

the 2013 to 2015 period in the form already presented, and in the record I have individual notated amounts. In respect to granting partial summary judgment for the remaining period or summary judgment for the remaining period in entirety at 9.21, Your Honor can make that finding now and I can direct the appropriate table to the Court. There will be a submission of something like 20,000 lines of pay periods showing the calculations and judgment can then be entered accordingly.

THE COURT: And you're confident that you could defend that on appeal?

MR. GREENBERG: I am absolutely confident I can, Your Honor, given the posture of this case and for the reasons that Your Honor has spoken, which is defendants have not maintained the records they were required to by statute. They've also refused to cooperate with the Court's directions in respect to the special master.

THE COURT: Well, that remains to be seen whether they've refused or whether they really can't. If I understand what you're saying, it would -- if the Court grants that motion then it would not be necessary to either, A) incarcerate the defendant, Mr. Nady, until he pays the special master, or B) appoint a receiver to take charge of the company to do -- to make a determination if the defendant company is able to make the payment, and if so to make the payment for the company, or to have a special master as part of his or her duties be given access to the financial records of all three defendants and to determine whether there was an ability to pay the special master. All of that would be unnecessary.

MR. GREENBERG: Unnecessary. Yes, Your Honor. And I think it would be very desirable to render all of that unnecessary in the context of concluding this case. I'm talking about a way for us to get this case to final judgment quite rapidly,

presumably within a week or two. It shouldn't take any longer than that. If Your Honor is inclined to make the ruling I'm outlining, I can have the findings to Your Honor by next week sometime, along with a detailed statement of judgment for everybody. The only thing remaining would be post-judgment matters.

THE COURT: Well, what about, for example, you have a conspiracy claim against Mr. Nady?

MR. GREENBERG: Well, Your Honor, what I would propose is that that claim simply be severed from this case. We enter final judgment against the corporate defendants, and if the company is willing to pay then there's no need to pursue the claim against Mr. Nady personally.

THE COURT: Well, realistically let us suppose that the company would not be willing to pay and you wanted to proceed on that claim. How would you be able to do that, given the remaining time for this case under the five year rule?

MR. GREENBERG: I don't believe that that claim would be governed by the five year rule from the commencement of this action. Mr. Nady's case would be severed. In fact, Your Honor earlier severed the case against Mr. Nady, saying that that would be determined after we make a determination regarding the responsibility of the corporation. Your Honor had earlier entered an order of bifurcation. The case needs --

THE COURT: So does the -- when it's severed, then, or bifurcated or however we put it, does the five year rule cease to run?

MR. GREENBERG: Well, Your Honor, it's five years to trial. If we have summary judgment, if we go to summary judgment within five years that's in lieu of a trial, Your Honor. I mean, there is a disposition here.

THE COURT: Well, sure, but that gives you from -- unless the five year rule is tolled as to Mr. Nady, that would give you between now and, what, October 20th, something like that, to begin a trial on a conspiracy claim.

MR. GREENBERG: Your Honor, we would be prepared to proceed in that fashion if the Court believes that that is necessary --

THE COURT: Well, I'm not saying --

MR. GREENBERG: -- in the event that the judgment is not satisfied.

THE COURT: I'm not saying I believe it. I'm just trying to test the waters here to see how you would envision this thing playing out.

MR. GREENBERG: Well, Your Honor, it is -- I am not telling you I necessarily have every possible authoritative answer to your questions. Your Honor is posing important questions. Your Honor is trying to achieve the ends of justice here on all the issues that are before the Court. I understand that; as I am doing my best to do. What I'm trying to emphasize to the Court is that the circumstances of the corporate defendant as the employer here as a responsible party are not disputed. They were clearly the employer. Mr. Nady's liability is completely derivative and revolves around his relationship with the corporate defendant. If the corporate defendant satisfies the judgment, then there is no claim against Mr. Nady. If the corporate defendant --

THE COURT: Well, then let me ask you this while we're poking around at these various matters. Assuming that the Court went some course other than that, did not grant the motion for partial summary judgment or did not grant it to the extent that you're proposing and still needed to try and see whether the special master could be utilized, would you be asking the Court to have the special master make a determination not only whether the corporation could make the payment but also

whether Mr. Nady personally could make it, or is that off bounds for some reason, out of bounds?

MR. GREENBERG: If Your Honor was to go down that path in terms of inquiring about ability to make the payment, I would say yes, certainly that inquiry should be made in respect to Mr. Nady, given his relationship to the corporation. I think that that is a completely sort of detour from the course of justice here to inquire about whether they have the ability to make the payment. I mean, essentially their latest submission to Your Honor repeats their earlier position, which is that, look, stay this case, it is more just to await the disposition in Dubric and that will narrow the claims and that's where the money should be going with the limited resources we have. We don't have the money. It should go to fund the payments to the class members in Dubric. This is in the interest of everyone, so forth and so on.

If that is in fact correct and that assertion is to be objectively examined, Your Honor should enter final judgment here and if defendants are true to that assertion they will then go to the bankruptcy court, stay both of these proceedings. The bankruptcy court judge will be empowered to take a measure of the assets, to examine the transactions between Mr. Nady as an insider with the corporation, the issues that you're talking about, and if in fact their assertions to the Court today are true, that objectively it is in the best interest of the class for the settlement to proceed as outlined in the Dubric proceedings, the bankruptcy court will do that. What they're trying to do here, Your Honor --

THE COURT: Well, I can't guess at what a bankruptcy court is going to do on a bankruptcy filing that's not been made, so.

MR. GREENBERG: Your Honor, my point isn't that the court, the bankruptcy court would do that. My point is if defendants are truly posturing before the Court the accurate scenario that entering final judgment here and proceeding in this case is not going to make sense, they can't pay the special master, the interest of justice would be served by the stay, by allowing the disposition to proceed in Dubric -- let's assume all of that is true, Your Honor. They will have the opportunity to vet all of that in front of the bankruptcy court.

THE COURT: Well, you keep talking about the bankruptcy court. I can't even, as I interpret the ruling from the supreme court, I can't even take into account what's happening in a similar case in a sister district court, let alone what's going to happen if the defendant chooses -- defendants choose to file in bankruptcy court. I can't speculate as to that.

MR. GREENBERG: I understand, Your Honor. And you're absolutely correct and I don't think you should. And that gets to my original point, which is their assertions that they can't pay the special master are worthless. They're not for the Court's consideration. It's not about examination of their financial circumstances. And if the Court is going to allow this sort of examination, they put in financial statements when we were here before. I mentioned that I have other financial statements that they gave me that were produced under seal and I didn't produce them to Your Honor. Your Honor, if you're going to examine this issue, they should be compelled to waive that objection and let me put these financial statements in the record so Your Honor can consider them as well and get a full picture here, as opposed to the incomplete and inaccurate depiction that they are trying to foist on the Court regarding their financial infirmity.

If they're not going to waive their objection to my introduction of these other financial materials, I don't see why the Court should consider any claims they're making of poverty here in respect to inability to pay the special master. And we discussed the financial submissions they made to Your Honor when we were here before and as I pointed out to the Court, those financial submissions did show that there was equity in the corporation of some significant measure, more than enough to have paid the special master his fee.

But again, this is not what the Court should be inquiring about. The ends of justice require that the law be enforced, as Your Honor has stated repeatedly. This is a constitutional right. It commands vigorous respect and enforcement by the Court. The fact that the defendants claim they do not have at this point the funds to fulfill their statutory obligation to have kept those records -- they wouldn't have to pay the special master, okay, to perform this $180,000 estimate of work if they had done what they were supposed to do under the statutory obligation in the first place, Your Honor. Given that they haven't -- that they don't want to pay for the special master to get to the bottom of this, the default is appropriate. We would proceed to use the averages we have been discussing earlier today and have a judgment fashioned accordingly and that would be the appropriate way to proceed, as Your Honor was talking about in Mt. Clemens as well, the principle that we have to have some measure of appropriate enforcement and relief rendered on these minimum wage rights.

THE COURT: Why would you have to strike an answer and hold them in contempt in order to do that if you have a basis for a summary judgment?

MR. GREENBERG: Well, Your Honor, I'm not saying they're exclusive, but --

THE COURT: And particularly when, as I said, I don't know that I have sufficient information before me to satisfy me that the defendants are capable of paying and choose not to.

MR. GREENBERG: Your Honor, I think there needs to be a presumption that they are refusing to comply with the Court's order.

THE COURT: Why would I do that?

MR. GREENBERG: Your Honor, if I'm a debtor and I owe the casino money on my marker or I owe my mortgage or whatever it is, I pay it. If I don't pay it, a judgment is entered against me. I mean, Your Honor made an order in this case that they were to pay the special master. I had pointed out to you in my submission that under statute the special master is entitled to an execution against the defendants for failing to pay his $41,000. I mean, and that's a specific statutory conferral. As I've also pointed out to Your Honor, the supreme court has been very clear that your inherent powers extend to granting the kind of relief that I'm asking in respect to a default judgment for abusive litigation practices and failure to respect and follow the Court's orders.

So, I mean, Your Honor, the defendants have no incentive to comply with your order regarding the special master. What is the special master going to do? The special master is going to establish the full scope of the liability, Your Honor. Why would they want to have that happen? They have no incentive to have that happen, Your Honor. So --

THE COURT: Remind me of what the financials put before the Court by the defendants are.

MR. GREENBERG: Yes, Your Honor.

THE COURT: Did it deal with the corporate ability to pay?

MR. GREENBERG: What we have from the financial statements that were put before the Court in their submission which came to the Court last week was a statement from 2017 and the first quarter of this year. And what we have is a -- what we have is a balance sheet statement. I'm looking for it here in front of me. It stated that the defendants at the end of 2017 had equity in the business in excess of three hundred thousand, and at the end of the first quarter of 2018 there was still equity of over a hundred thousand dollars in the business, meaning, you know, equity over assets in advance of liabilities.

THE COURT: My question is more to the point of did it purport to tell the Court that the individual defendant was also unable?

MR. GREENBERG: Oh, no. There was no disclosure as to the individual defendant. And, Your Honor, in the materials that as I said were produced under seal, I have some very relevant information I could provide to the Court about that, but again, that's under seal and defendants have not consented to its introduction in the record.

THE COURT: Okay. Ms. Rodriguez.

MS. RODRIGUEZ: Yes, Your Honor. Do you want me to speak to some of this or --

THE COURT: Yeah.

MS. RODRIGUEZ: Well, I go back to how the Court can even grant or consider summary judgment and I want to be clear on that because it seems to me that the Court is considering liability based on a record-keeping statute. And I want to be clear on the record the records have always been maintained. That's what

the special master is reviewing. There's always been trip sheets, there's always been QuickBooks data, there's always been paystubs that have been available to Mr. Greenberg.

THE COURT: And in your view that comports with Nevada's constitutional minimum wage act?

MS. RODRIGUEZ: Absolutely, Your Honor. Every federal agency, every state agency that has ever come into A Cab has found that the preservation of those records is sufficient.

THE COURT: Okay.

MS. RODRIGUEZ: So I don't believe that the liability has necessarily been found just with the Court relying on a violation of a record-keeping statute.

THE COURT: Okay.

MS. RODRIGUEZ: I believe that he still has to prove that there was some underpayment somewhere. I don't think that he's ever done that.

THE COURT: Well, if the Court --

MS. RODRIGUEZ: That's why I moved for dismissal and for summary judgment because I think he has all together failed to prove this case. And that's why it has been sent off to the special master, and he's laughing on the record here about the work of the special master and everything that the special master is doing now at the expense of the defendant. That's what Mr. Greenberg should have been doing for five years is preparing his case with everything that we gave him. Statistical sampling or anything, he's never done it, Your Honor. And now the special master is starting at square one.

THE COURT: Why is the motion for partial summary judgment not dependent

on just that statistical sampling?

MS. RODRIGUEZ: The motion for partial summary judgment is based on the very same spreadsheets. It's not a statistical sampling. We appear to be calling them something different today. They're the same spreadsheets that the Court already found were not sufficient to support a partial summary judgment. That's in the Court's order, that's in the Court's transcript, that those --

THE COURT: That was before the Court also then found that based on the Mt. Clemens that it could do so on an even approximate statistical record.

MS. RODRIGUEZ: Your Honor then after that finding declared in the order appointing the special master that that was not sufficient, that there had to be an actual review of the source documents. So there are some contradictory --

THE COURT: That would be the ideal to the extent there is a conflict there, I will grant you. I would much prefer to have been able to have this case come to a conclusion, win, lose or draw, one way or the other based on a stronger evidentiary basis than a statistical approximation.

MS. RODRIGUEZ: I understand that, Your Honor, and that's making sense to me entirely. But we cannot just now change the label of the Excel spreadsheets and call them a statistical sampling because that's not what they are. They have -- we have the testimony showing that they're unreliable. The Court has already concluded that they're unreliable. And what the Court asked Mr. Greenberg to do was to go back and get expert testimony or opinions to --

THE COURT: Hold on. I didn't say -- or if I did say, I didn't mean to say that they were entirely unreliable. It's that we typically deal with something more finite in these kinds of cases. We have more finite evidence. And absent the

finite evidence, it's much easier to make an argument that there at the very least remains an issue of material fact for a jury.

MS. RODRIGUEZ: But my concern is, Your Honor, then -- that's why I was asking for clarification on what the Court is finding liability on on the record-keeping violation. But number two is, who is supporting the damages in this finding of partial summary judgment? Because by the plaintiff's own submissions to the Court -- and I quoted directly from their oppositions, they say that Mr. Bass, who prepared these spreadsheets, says that "he will not offer testimony on the actual damages, if any, owed to the class members, but only his work preparing that spreadsheet model and how that model operates." And they also say again in their own opposition, "The testimony of Charles Bass concerns not damages but data from A Cab's records and calculations upon that data. A jury, after making a finding about the class members' hours of work, may find that information useful in determining damages."

THE COURT: Uh-huh.

MS. RODRIGUEZ: By their own admissions they're saying --

THE COURT: Sure, but you're still under the old evidentiary standard of what this Court would require and every court would require if you had the capability of arriving at a finite answer.

MS. RODRIGUEZ: But a summary judgment must be based on some type of evidence, and what I am trying to bring to --

THE COURT: And Mt. Clemens says that it can be -- that judgment may be rendered on an approximation through a statistical type of sampling.

MS. RODRIGUEZ: And who is offering that to the Court? Not his experts.

THE COURT: I think the plaintiff.

MS. RODRIGUEZ: His experts say they're not going to testify about that. They say all they --

THE COURT: Well, that's what Bass says. What does Clauretie say?

MS. RODRIGUEZ: Clauretie says I looked at what Bass did and the math looks right to me. The same quotes that he had about my expert --

THE COURT: Is Clauretie not an expert?

MS. RODRIGUEZ: Clauretie is an economist.

THE COURT: Okay.

MS. RODRIGUEZ: What they are wanting to support a summary judgment is an Excel spreadsheet. Clauretie has no authority, no expert qualifications to speak to an Excel spreadsheet and a tool and the calculations, the mathematics, the arithmetic that goes into an Excel spreadsheet. And that's what they hired him to talk about, to say Mr. Bass walked me through his calculations and they look right to me. Yes, Dr. Clauretie is qualified to talk about economics and his area of expertise. He's very qualified in that area. But this is not an economist type of opinion that they're soliciting from Dr. Clauretie. That's why I've asked the Court to --

THE COURT: Why is it not an economist type opinion?

You're going to need to speak to that, too, when I come back to you.

MS. RODRIGUEZ: Well, Your Honor, I have extensively briefed this issue why these two experts do not qualify under the statutes and under our case law. And I can cite to the Court again the case law, but it's been briefed as to why the opinions that they attempt to render are not expert opinions. I pulled things right out of their depositions that say they're not offering opinions, they're not -- all they're

doing is rubber stamping what Mr. Greenberg brought to the Court the first time.

THE COURT: Okay.

MS. RODRIGUEZ: And the Court said you can't do this, you need an expert to do it.

THE COURT: Okay.

MS. RODRIGUEZ: So then there was -- every one of these experts, when I deposed them I said what kind of investigation did you do to acquire your opinions? Did you talk to any of the plaintiffs? Did you look at any of the records? Did you look at any of the data?

THE COURT: Is that required if you're doing an approximation of damages?

MS. RODRIGUEZ: Absolutely. You have to look at data. You have to do some kind of independent research. You have to be helpful to the trier of fact. There's a whole litany, as Your Honor I'm sure is aware, of everything that an expert has to do to qualify. These guys did nothing but speak to Mr. Greenberg, who explained items to Mr. Bass, Mr. Bass explained them to Dr. Clauretie, and there they say voila, we have an expert report. But we're back to relying upon the same original spreadsheets that basically Mr. Greenberg put together.

THE COURT: Do either of you know what the statistical sampling was in the Mt. Clemens case? The Supreme Court, U.S. Supreme Court. I don't recall.

MR. GREENBERG: Your Honor, my recollection is it's discussed in the Court of Appeals opinion. I believe there were several hundred employees there and they took testimony from maybe two dozen to arrive at some inference as to what this off-the-clock unrecorded time amounted to, Your Honor. And that's fairly typical in these kind of cases.

THE COURT: And did it include expert opinions?

MR. GREENBERG: It did not, Your Honor. And in respect to answering this question about expert opinion and testimony, the work done by Charles Bass, Charles Bass is a database computer software technician or an expert. He's certainly qualified in that area. So his job was to take the QuickBooks records as produced by defendants and do the division, you know, the hours for every pay period divided into the gross wages for every pay period, and then tell us does it meet the $7.25 or the $8.25 amount. If it doesn't, tell us what the deficiency was for the pay period. As was discussed with Mr. Scott (sic) at his deposition, as I was reciting the testimony from their expert as well, he performed that job accurately. There is no dispute he performed that job accurately.

THE COURT: Did Mr. Clauretie offer expert opinion?

MR. GREENBERG: He offered an expert opinion in respect to the work of Charles Bass. His expert report indicates he reviewed --

THE COURT: And you're satisfied that's within the expertise of an economist?

MR. GREENBERG: Yes, I am. And also he did offer an opinion on one area, Your Honor, in his report, which is that he examined the -- what we would call distortion that would come from using an average because we had certain what are called cab manager in and out times, which we're not relying in respect to the partial summary judgment, but he compared the cab manager in and out times, which were about 11 hours on average. He compared the actual cab manager in and out times to a uniform average applying the same 11 hours per shift to see if it would greatly diverge in terms of the end results. What he found is that the end results in terms

of damage calculations came out within a few percentage points. And this is discussed at I believe page 30 of his expert report. I have it here on my computer.

THE COURT: Okay.

MR. GREENBERG: So he did offer an expert opinion on something that is a matter of expertise, but the issue of what information is in defendants' records in terms of -- the QuickBooks records, I'm talking, in terms of how many hours did the defendants record these people working every pay period and what did they pay them. That's not an issue of expert opinion. I mean, Mr. Bass -- they took Mr. Bass' deposition as well, Your Honor, he's not an expert on minimum wage. I mean, he doesn't even necessarily know that $7.25 or $8.25 is the required minimum wage or when the minimum wage should be paid. He's not presented as an expert in that area. Nor is Dr. Clauretie for that matter, either. They were only brought to give testimony, a report in this case in respect to their review of defendants' records and that's it, Your Honor. And for that point, as I said, Dr. Clauretie did also offer an opinion regarding the fact that the use of an average would not create any significant distortion of damages, based on the information that was presented to him. He did provide an opinion on that point, Your Honor.

THE COURT: So what's the comparison between this kind of evidence and what they said was sufficient in the Mt. Clemens?

MR. GREENBERG: Your Honor, I would actually submit in respect to the 2013 to 2015 period we're discussing this evidence is far more compelling and precise than what was submitted in Mt. Clemens. In Mt. Clemens essentially you had individuals coming in making statements, testimony as to average approximations of what these time periods were that people were working, and

then a finding being made by a finder of fact based upon accepting, you know, those assertions and weighing the veracity, the strength of such testimonial evidence.

Here we're not relying on testimonial evidence at all, or to the extent we are it's defendants' testimony. Defendants' testimony. Again, it's in the depositions, it's in the record in my supplement. These QuickBooks records accurately set forth the amount of hours each of these guys worked every pay period. And it also contains the amount they were paid every pay period. They were ordered by the Court to produce it. They did produce it pursuant to the Court order. They can't now say it's not accurate or they don't know if they produced the right documents. They're bound by their own records, Your Honor. I mean, I'm relying on defendants' business records, their own testimony, their own authentication as to the accuracy of these materials, the QuickBooks records for the 2013 to 2015 period. That is the basis for the partial summary judgment motion that's been submitted, briefed, supplemented to the Court.

In respect to the broader issue of the average to be drawn from that and applying the judgment throughout the case on that basis, we can discuss that and I can address that further.

THE COURT: Okay.

MR. GREENBERG: But that's somewhat of a secondary issue, a different issue.

THE COURT: All right, thank you.

Ms. Rodriguez.

MS. RODRIGUEZ: Your Honor, I just want to answer the Court's concern

because I did -- about Dr. Clauretie and what he purported to opine about, and throughout his deposition basically all he's saying is he didn't do any independent work. He is just rubber-stamping what Mr. Bass did.

THE COURT: Did he say he was rubber-stamping?

MS. RODRIGUEZ: I would like to read for you from the deposition of Terrence Clauretie, page 36, starting at line 16. I asked him what his assignment was and he said, "My assignment was not to opine on the relevance of the scenarios themselves. For example, he, Bass, made once an area where he assumed that everybody's minimum wage should have been $7.25 an hour. Then he made another calculation that everybody should have -- a minimum wage of $8.25 an hour. My assignment was not to consider the reasonableness of those particular calculations, but were they done mathematically correct. That's about it, were they mathematically correctly done."

THE COURT: Uh-huh.

MS. RODRIGUEZ: That's all he said he basically did.

THE COURT: Okay. And what more would he have to have said or what more of an opinion would be necessary to make that -- the conclusions drawn, the mathematical work done --

MS. RODRIGUEZ: That's not an expert opinion, Your Honor. I mean, that falls way short of an expert opinion.

THE COURT: Okay.

MS. RODRIGUEZ: And he's not qualified. He says he's --

THE COURT: Let's assume for the moment that it does. So what?

MS. RODRIGUEZ: Okay. So if Clauretie --

THE COURT: What's wrong with relying on that?

MS. RODRIGUEZ: If Clauretie is not doing anything but just checking Mr. Bass' math.

THE COURT: Uh-huh.

MS. RODRIGUEZ: And Mr. Greenberg continues to reference Mr. Scott's, Leslie Scott's -- Scott Leslie's approval of the math -- and he kind of brushed over my objections. My objections was that he had already asked the question five times and Mr. Scott (sic) had said all of the problems that were wrong with the math, until he finally said, well, if you add up A and B, does the math add up? And Mr. Scott (sic) finally conceded and said, well, I guess if you do those factors, yeah, I guess that would add up. So there's no expert that is needed to say one plus one is equal to two, but the problem is the underlying sources that go into those particular spreadsheets. So Dr. Clauretie said I didn't look at any of that, I didn't study any of that.

THE COURT: And if the underlying sources include the QuickBooks provided by the defendants --

MS. RODRIGUEZ: Right. I'm getting to that, Your Honor.

THE COURT: Oh, okay.

MS. RODRIGUEZ: Because Dr. Clauretie said I didn't do any evaluation, I didn't look at anything. All I did was check what Mr. Bass did; rubber-stamped it. It looks good to me, I'll --

THE COURT: He said he rubber-stamped it, huh?

MS. RODRIGUEZ: He probably didn't use those words, Your Honor.

THE COURT: Yeah. Okay.

MS. RODRIGUEZ: I'm not going to fib to the Court. I would love to find a question where I said did you basically rubber-stamp it, so I'll do a search when I go back to see if I asked that question.

Mr. Bass, though, if we go back to Mr. Bass, who prepared the Excel spreadsheets, I walked him through twenty different things of what did you do independently to put this spreadsheet together. What sources did you look at, what independent investigation; anything to get him qualified for an expert. The final question after he says, I did not, I did not, I did not, I didn't look at any of that: "So, would it be fair to say that all of the sources, sources of information that you relied upon in formulating your model were provided from Mr. Greenberg?" "Answer: That's fair, yes." And that's basically what he said is that Mr. Greenberg told him how to set up what he wanted, what to plug in. And that's been the problem with the reliability. Mr. Greenberg --

THE COURT: And where did Mr. Greenberg get the information?

MS. RODRIGUEZ: I don't know, Your Honor. That's the million dollar question. And that's --

THE COURT: Okay. So it's not obvious from looking at the document where the -- what statistical source was used?

MS. RODRIGUEZ: That's why -- that's what we argued previously before the Court because we argued there's no way to tell what portions Mr. Greenberg chose to plug into these spreadsheets.

THE COURT: Uh-huh.

MS. RODRIGUEZ: He asserts it's portions of the QuickBooks data that is given by the defendants. Short of going line by line, we don't know what he's using.

And the Court agreed a year ago that this was an issue --

THE COURT: I caution you against returning to that because I've already given the explanation for the degree of accuracy that the Court was intent on having these parties present to a jury on that, and that has proven to be impossible. So the question becomes is that what's required?

MS. RODRIGUEZ: Well --

THE COURT: And as I read the law it apparently is not in all cases.

MS. RODRIGUEZ: I think at the end of the day what we've done, Your Honor, is what we've been fighting all along, is the shifting of the burden to disprove to the defendant.

THE COURT: Okay.

MS. RODRIGUEZ: From the commencement of the case the burden of proof is upon the plaintiffs, and throughout this litigation they've attempted to shift the burden of proof. At the end of the day the Court's reasoning is that now is going to accept the statistical sampling and we as the defendants have to disprove any errors in the sampling as to why it's wrong. So essentially we will end up with shifting the burden of proof, which is what the plaintiffs have advocated all along.

I would assert to the Court that that is unjust and unfair at this point because it's based on the plaintiffs' failure to properly prepare their case over five years. They've had the records. They could have done their statistical sampling even with their own experts. I think the Court even allowed them another opportunity to go out and have the appropriate experts do what they needed to do to say this is why this is valid data. They didn't do that. They failed to do that, Your Honor.

THE COURT: Okay. Let me ask you a question, Mr. Greenberg.

MR. GREENBERG: Yes, Your Honor.

THE COURT: Is the document that contains the information, the numbers, the statistical information which was given to Mr. Bass, does that -- are the sources for that information self-evident from the document? And are they --

MR. GREENBERG: Your Honor, they are identified by Mr. Bass in a sworn declaration which is included with Dr. Clauretie's report. This is in paragraph 3: "The two Excel files provided to me by Leon Greenberg that I summarized" -- because his job was to summarize the information, produce that 14,000 line analysis -- "are named." And he gives the name which was created on October 3rd, modified on that date, and is fourteen thousand -- fourteen million, six hundred thirty-three thousand, zero hundred and thirty-nine bytes in size. He is identifying the particular computer file that I gave him with the exact name, as given to me by the defendants with its date of creation and its exact size. These are the files that they gave me. I gave them to him.

THE COURT: Okay. So you're saying, if I'm understanding, that everything that you gave to the -- that you gave to Mr. Bass or Mr. Clauretie was directly obtained from the defense.

MR. GREENBERG: Yes, it was. And Mr. Bass identifies the two files that he worked with, the QuickBooks files we've been discussing. They were in two Excel files. He identifies them precisely by name, size, date, creation, as given to me by defendants. I turned them over to him. Defendants have not disputed that those are in fact the identification of those files. They haven't disputed that the results, those 14,000 lines that Mr. Bass summarized, contain any information that is not

consistent with the information in those two files they gave me, which again were produced pursuant to the order of this Court. So the evidentiary chain here, the chain of custody if you wish to call it, is in the record. I made it a point to be sure that this was here because I understand the Court needs to be concerned that this is all documented. And I worked very hard to make sure it is in the record, Your Honor.

THE COURT: Okay.

MR. GREENBERG: So this assertion that it's not by defendants just doesn't have any basis.

THE COURT: Ms. Rodriguez, any rejoinder to that?

MS. RODRIGUEZ: Well, just that I hear a key word coming out of Mr. Greenberg's mouth, and that is "summarized." This is not the actual data. He said what Mr. Bass summarized. And that's been the dispute is we don't know what Mr. Bass summarized. So then --

THE COURT: We don't know what he summarized? We don't know what --

MS. RODRIGUEZ: No, Your Honor. We've turned over several data blocks, for lack of a better term, of QuickBooks data. We've turned over, as Your Honor knows, lots of data.

THE COURT: Okay.

MS. RODRIGUEZ: So I don't know what Mr. Bass --

THE COURT: And they were not -- so I assumed that we were talking about a spreadsheet with columns, if you will, of data points that were provided by the defense to the plaintiff. Is that not the case, Mr. Greenberg?

MR. GREENBERG: Your Honor, the summarization -- again, we're talking

this 3-year period, 2013 through 2015, okay. Defendants produced a lot of information --

THE COURT: Uh-huh.

MR. GREENBERG: -- okay, that Mr. Bass did summarize and assemble. For example, a taxi driver in the same period, pay period got paid commissions. He may have gotten paid a bonus. He may have gotten paid some other special reward, okay. So all of those items of payment which are separately identified in defendants' records have to be added together --

THE COURT: Okay.

MR. GREENBERG: -- to determine what his total compensation was for the pay period. This is discussed in Dr. Clauretie's report. There is a long list of every single item in the data that was compiled together to arrive at the total payment received by the --

THE COURT: Compiled by whom?

MR. GREENBERG: By Charles Bass.

THE COURT: Does that involve anything more than adding them up?

MR. GREENBERG: It does not involve anything more than adding them up.

THE COURT: Okay.

MR. GREENBERG: Your Honor, the payroll data also included things such as deductions, child support payments, tax payments. Mr. Bass didn't need to consult or summarize any of that because it's not relevant to the issues in this case. So, yes, there is a great deal of data that we received from defendants that aren't in that 14,000 line summary which, you know, I can show Your Honor the output here if you don't have it in front of you, that shows, you know, week by week again

this calculation, gross wages, hours, deficiency if any at the $7.25 or $8.25 an hour rate, Your Honor. So defendants have not pointed to any error in any of those 14,000 lines. And again, this was --

THE COURT: Or anything which is not identified as to its source?

MR. GREENBERG: Well, the source is all -- the source for everything in that final work by Mr. Bass is those two Excel files we were just discussing which are identified in his declaration by date, size; it's specifically given title by the defendants.

THE COURT: All right. Okay, Ms. Rodriguez.

MS. RODRIGUEZ: Well, our expert did point out some errors by sampling certain ones. And Mr. Greenberg even talked about that earlier to the Court, that Mr. Leslie pulled out certain examples where the numbers did not add up. But I will refresh the Court's recollection that Your Honor looked at those Excel spreadsheets, what he's purporting to explain now. We took a break -- I think it was in that January 2017 where Your Honor went and looked at these things and just decided they didn't make sense. They weren't adding up. And it's not a simple formula as Mr. Greenberg has indicated.

THE COURT: That they didn't even add up? Is that what I indicated?

MS. RODRIGUEZ: That they didn't make sense.

THE COURT: They didn't make sense.

MR. WALL: Your Honor, may I just add, if you'd look at the transcript we had a several day break and then you came back and you said specifically I'm trying to make the numbers work and I can't do it. And you asked Mr. Greenberg, explain the numbers to me so I can figure out how they work, and he wasn't able to do it.

THE COURT: Hmm. Mr. Greenberg.

MR. GREENBERG: Your Honor, again, they're referring to the background of the compilation of the data. This is the spreadsheet. I mean, I guess I could put it on the projector or I could show it to you. This is, you know, 300 pages here of the 14,000 line-by-line.

THE COURT: Do you recall them -- what they're talking about where I took a break and came back and said I can't make it work?

MR. GREENBERG: Yes, because there is in fact -- I referred to the declaration of Mr. Bass where he talks about the origin of the source material in paragraph 3, and then he goes on to explain the calculations that are made in columns B through M or so on this, okay.

THE COURT: Uh-huh.

MR. GREENBERG: And he then explains how he sorted the data and how he then arranged it and the information that he compiled, those various commissions, bonuses, etcetera, to come up with the gross wage amounts. You found the declaration and the detail provided in there to not be sufficiently clear to you at that time and denied the partial summary judgment without prejudice --

THE COURT: Uh-huh.

MR. GREENBERG: -- again offering us the opinion that you thought that this should be subject to further scrutiny, evidentiary review, expert testimony and development, which it was, Your Honor. And Dr. -- the purpose of Dr. Clauretie's report was to go through the methodology used by Charles Bass, furnish a formal report, which was 30 pages, explaining that he examined the end product here, what Charles Bass produced. He examined the source material, the Excel files. He walked through the process with Charles Bass that Charles Bass used to get

from the source data to the end result. He found that it was mathematically correct and made sense.

And their expert, Mr. Scott (sic), ultimately agrees that the numbers add up and that it was done correctly. When defense counsel is saying that Mr. Scott identified errors, he didn't identify any errors in Mr. Bass' work from the source material to the summary. What she's talking about is again this issue of whether the source material itself is accurate because we keep getting back to this insistence by defendants that you can only rely on the trip sheets. And Mr. Scott -- all Mr. Scott did, their expert, was just look at the trip sheets, and he did in fact come up with instances where the trip sheets showed more time recorded. As I was saying, he came up -- he studied 77 pay periods and came up with an average of 9.6, and in those 77 pay periods most of them showed more time worked than in the QuickBooks records, even though defendants testified under oath that the QuickBooks records were accurate in respect to the hours worked. But that's a completely different issue, Your Honor. Defendants should be bound by their representations under oath as to the accuracy of these QuickBooks records. They can't now say they're not accurate. And in terms of the --

THE COURT: I don't perceive them as trying to say that.

MR. GREENBERG: Well, okay, Your Honor. I understand Your Honor is trying very hard -- would you like me to present to you this --

THE COURT: No. You've actually already explained.

MR. GREENBERG: There is no material issue of fact, Your Honor.

THE COURT: Now, let me ask this question, though.

MR. GREENBERG: Yes.

THE COURT: Does this last round of back and forth suggest to you that there is any error or weakness in the Court applying the 9.21 hours per average shift number for -- in other words, to arrive at the damages from 2007 to 2012?

MR. GREENBERG: There is not, Your Honor.

THE COURT: All right.

MR. GREENBERG: I would not hesitate for the Court to do that and I would urge the Court to do so and simply limit the class judgment accordingly. And to the extent that any class member wants to assert that they have a claim for something based on something more than that because they claim their hours of work were more or they claim that they were entitled to the $8.25 an hour rate relating to their health insurance status, that they simply be -- remain free to litigate those issues individually, and we would enter judgment for the class accordingly and can bring this case to final judgment. I had also requested an interim award of $100,000 in class counsel fees if partial summary judgment --

THE COURT: A hundred and thirty-five.

MR. GREENBERG: A hundred and thirty-five, Your Honor, is more attentive than myself.

THE COURT: Well, for costs.

MR. GREENBERG: Well, I have $50,000 in costs in this case, Your Honor, as part of the immediate entry of the order for partial summary judgment. We get to final judgment. There will then of course be a post-judgment request for assessment of attorney's fees that Your Honor will hear --

THE COURT: Okay.

MR. GREENBERG: -- and I will submit documentation on.

THE COURT: All right. It's your motion, but I'll give them the last word.

MS. RODRIGUEZ: Thank you, Your Honor. I think it's clear --

THE COURT: If this whole process strikes you as being somewhat disagreeable, I would echo that comment.

MS. RODRIGUEZ: I wouldn't say that, Your Honor.

THE COURT: I am very used to having cases that go to trial based upon finite information, certainly more finite than what we have available to this point. And the potential for the Court to now award a summary judgment lies in trying to do essential justice and trying to assess what has and is frustrating that purpose.

MS. RODRIGUEZ: Well, I would just indicate to the Court that at the time that this was set for trial the defendants were ready to proceed to trial. And based on the evidence and the preparation of what was before the Court, it would have been appropriate for the Court to strike the experts that plaintiff seeks to rely upon. Without their experts they cannot prove any damages. It's always been our position they cannot prove any liability. They've never proved it for one single driver. And if the Court --

THE COURT: Do you recall the countermotions?

MS. RODRIGUEZ: Pardon me?

THE COURT: Do you recall the countermotions by the plaintiff to --

MS. RODRIGUEZ: There were 25 omnibus --

THE COURT: -- to strike the defendants' experts or a portion of their testimony? I don't recall exactly which.

MS. RODRIGUEZ: I don't know that they took a shot at the expert.

THE COURT: What all of that motion work showed me was that this was

going to be nothing more than a giant battle of experts, not even on their testimony, which we often have.

MS. RODRIGUEZ: But the problem has been that the Court didn't hear that motion in January when it was set or -- and has skipped over that.

THE COURT: Do you think it would have become more clear to me by hearing oral argument?

MS. RODRIGUEZ: Has it become more clear to you? I'm sorry?

THE COURT: No. I say do you think it would have been become more clear to me that the purposes of the trial would be frustrated if it boiled down to the kind of not just battle of the experts but battle over which experts could even testify and which were --

MS. RODRIGUEZ: It's not so much that, Your Honor. What I'm complaining about is the order in which the Court is addressing these issues because the defendants' motion was on calendar, was briefed, was set for hearing --

THE COURT: Uh-huh.

MS. RODRIGUEZ: -- and was not heard.

THE COURT: Uh-huh.

MS. RODRIGUEZ: It was skipped over. So now we are --

THE COURT: Well, it wasn't exactly skipped over. Do you recall what the Court said at the time?

MS. RODRIGUEZ: I do, Your Honor. Bad choice of word on my part.

THE COURT: And that was why I went to Plan B with a special master.

MS. RODRIGUEZ: But now we're here on summary judgment relying on those same expert reports which we are now naming as statistical samplings, which

they are not. It's still unreliable data that should not be relied upon for summary judgment and that's my frustration.

THE COURT: You're speaking of the data submitted by your clients.

MS. RODRIGUEZ: But it's not the data.

THE COURT: It's not?

MS. RODRIGUEZ: It's a summary prepared by an expert, Mr. Bass, and Mr. Bass is not qualified to be an expert. And he --

THE COURT: Now, I'm going to ask one more time then. My understanding, Mr. Greenberg, is that you submitted the information from the defendants to Mr. Bass and that he simply did a mathematical calculation using the various numbers that were contained in those files from the defense.

MR. GREENBERG: Two pieces of information, Your Honor, for each person. The total amount they were paid every pay period; total amount of hours recorded working per pay period. Those were the two essential pieces of information. Everything else is just division. You divide the hours into the wages. It either met the $7.25 or it didn't, Your Honor. If it didn't, you know the deficiency. It's a very simple formula. Getting the information together because it's voluminous --

THE COURT: Uh-huh.

MR. GREENBERG: -- you know, we're talking, as I said, 14,000 pay periods for this 3-year period, you're dealing with a large database of information, two large Excel files, many, many lines. More than 14,000 lines of Excel information because each item of payment or deduction is a separate line, a separate entry for a pay period. So one person's pay period in the original data has maybe 20 lines with different entries in them, some are deductions, some are additions. Mr. Bass took

all of those --

THE COURT: And it's your contention that no expert or expertise, if you will, or the sort that requires an expert opinion was either required or used in order to assemble that and come up with the final numbers?

MR. GREENBERG: I would agree, Your Honor. This is not a question of opinion, for example, where a medical expert will opine on the best way to treat a certain condition based upon the prevalent belief in the medical community or the field of experts who deal with that particular medical condition. This is not a question of expert opinion in that context. This is a question simply of adding up numbers. I mean, Your Honor, if this was -- if these were ledger sheets as opposed to presumably a million lines of Excel data, a clerk would sit down with a calculator. You understand, I mean, you know, you and I are old enough and perhaps defense counsel as well to remember the old green ledger sheets and how people did accounting in the old days, and in litigation matters they would have people come in with summaries that were compiled by hand.

THE COURT: Guys with slide rules in a pocket protector.

MR. GREENBERG: Yes, Your Honor. And it would be the same thing, Your Honor, except of course here we are dealing with a computer software, Excel, which Mr. Bass used.

THE COURT: Yeah.

MR. GREENBERG: And again, the details in his declaration, the purpose of Dr. Clauretie's examination of his work was to verify that it was correct. It was the work -- the end product was produced to defendants. Defendants gave us the source material. They've had every opportunity to examine the end product,

to compare it to the source material, to identify any errors in the end product, to identify any inconsistencies in the end product from the source material. They have identified none, Your Honor.

THE COURT: Okay. All right, go ahead, Ms. Rodriguez.

MS. RODRIGUEZ: Your Honor, as Mr. Greenberg was speaking, I can remember him arguing to the Discovery Commissioner in his motions to compel the cab manager data because he argued to the Discovery Commissioner that the cab manager data was the only data that he needed to determine the hours for these cab drivers, the actual hours worked or even a statistical sampling of the hours. We turned over all that data. You'll see that in those Excel spreadsheets or in Mr. Bass' testimony or in Mr. Bass' affidavits he never even looked at the cab manager data. So now Mr. Greenberg is arguing to the Court we're just using this QuickBooks data and that's all you need to grant summary judgment. So I would reiterate to the Court that those are conflicting statements and that's a critical piece that is missing to base summary judgment on. By his own arguments cab manager data is one of the pieces that was never even considered in the calculation of the hours.

Your Honor's other question about the 9.21 hours, if the Court is inclined to grant that across the board, I'm not even sure where that comes from if no one has ever looked at the cab manager data. The other agencies that have come in, like the Department of Labor that came in and did an audit, they reached a different number after going through four years of spreadsheets.

THE COURT: The two million dollar number?

MS. RODRIGUEZ: Is it a million dollar number?

THE COURT: Two million.

MS. RODRIGUEZ: No, I'm talking about the number of -- the average hours.

THE COURT: Oh, okay.

MS. RODRIGUEZ: Right. Because I think the Court's question was did he feel comfortable relying upon a 9.21 average.

THE COURT: Uh-huh. Right.

MS. RODRIGUEZ: Again, I don't know whose data we're relying upon to support that because neither Clauretie or Bass --

THE COURT: Well, that's a good point. That's a good point. Let's ask.

MS. RODRIGUEZ: And the DOL has come up with a different figure. I believe their number was closer to 8.5. And let me just add one thing about the hours, Your Honor. If you're going to use averages for hours, those hours fluctuate not only from year to year, obviously from driver to driver. There are a lot of drivers that merely work part-time as opposed to full time. And they also greatly fluctuate by the time of year. As you can imagine, there are very slow periods in the industry and then there's peak periods in the spring. So I do not believe that that's an appropriate representation, then, to apply for summary judgment. Again, 9.21 across the board for, what are we talking, like six years or so?

THE COURT: 2007 to 2012.

MS. RODRIGUEZ: 2007 to 2012?

THE COURT: Yeah.

MS. RODRIGUEZ: Five -- four years.

THE COURT: Wouldn't business have been better before Uber?

MS. RODRIGUEZ: Well, for everyone else but Mr. Nady. Mr. Nady is the only -- A Cab is the only one who remained a restricted company until the end of

2011 -- 2012?

MR. NADY: When we were unrestricted?

MS. RODRIGUEZ: Yes.

MR. NADY: Last year.

MS. RODRIGUEZ: Sorry. No, not 2017.

MR. NADY: The year before last.

MS. RODRIGUEZ: 2016. I'm sorry, Your Honor; too many years flying.

THE COURT: Okay.

MS. RODRIGUEZ: But about the same time that Uber came into the industry was exactly when Mr. Nady had his restrictions lifted. Otherwise he was restricted to only serving residential areas, so he didn't get to serve the lucrative areas and he's had the unfortunate luck that pretty much the same month that the Taxicab Authority lifted his restrictions allowing him to service the airport and the Strip and the more lucrative areas after ten years of being in business is the same time that the Uber and Lyft people came into town, so.

THE COURT: Yeah. What about that -- what is the source again for 9.21?

MR. GREENBERG: The source is the QuickBooks records, Your Honor, which they again have testified under oath were contained for every pay period, the actual hours worked for the pay period by the drivers.

THE COURT: So that number was used to calculate the 174,000 for the 2013 to 2015?

MR. GREENBERG: Yes, it was, Your Honor.

THE COURT: Okay.

MR. GREENBERG: And let me explain. There was discussion of the cab

manager information. The cab manager information is used for one purpose, which is to know the number of shifts the driver worked because the QuickBooks records do not tell us how many shifts the driver worked. It only tells us he worked 65 hours, 83 hours, whatever it is in the pay period.

THE COURT: Uh-huh.

MR. GREENBERG: It doesn't tell us how many shifts.

THE COURT: Okay.

MR. GREENBERG: So for us to know how many shifts they worked, we need to look at the cab manager record which shows the driver driving a cab on a particular day. The cab manager records also have in and out times, which average around 11 hours in length between in and out, but there can be a dispute as to whether they were actually working that entire 11 hours. They could have been on a break. We're not getting into that, Your Honor.

THE COURT: Understood.

MR. GREENBERG: We're not referring to the cab manager records for any other purpose than just to show that the driver worked a shift on a particular date, Your Honor.

THE COURT: Okay.

All right, anything else, Ms. Rodriguez?

MS. RODRIGUEZ: No, Your Honor.

THE COURT: I suppose I start and end with the notation that we are dealing with important rights, important because the people of Nevada have said so by virtue of inserting what would otherwise be a statutory provision into the Constitution of the State of Nevada. I have great respect for constitutions and constitutional law.

I believe that they form the basic backbone of the laws and government enumerated therein, both for the United States of America and for the State of Nevada. If the people of this state have said that there is a minimum wage act which entitles employees to be paid, you know, a certain amount, I believe it's incumbent upon the Court to make sure that at the end of the day justice is done, even though the justice that is done may turn out to be of a somewhat imprecise nature.

I'm satisfied that the rationale of the Mt. Clemens case not only provides ample authority or justification, but provides an avenue for this Court to attempt to do essential justice to the parties. In a case in which the attempt to go the usual route has been frustrated, Ms. Rodriguez has argued that the Court cannot keep pointing to what the Court claims is the failure to maintain appropriate records. It seems to me that throughout the years that this case has been going on that this Court has bent over backwards in an attempt to be fair not only to the drivers who have this constitutional right to lay claim to certain monies, but to a defendant who is just operating a business and who gets met with these kinds of claims and who must then try and put up a defense as best they can. This Court has attempted to be fair to both sides.

It is my determination that rather than provide any further risk to the plaintiffs by requiring the sort of specificity, accuracy and what to lawyers is more pure evidence as a basis for any decision, that the Court accept approximation as countenanced by Mt. Clemens and a host of other cases. Whether or not you put it on the basis that it can then shift the burden of proof to a defendant or you simply say the motion has been put, notwithstanding the arguments of the defense, the Court finds that no real basis has been put forward to put this into a triable issue

within the context of approximation-type evidence, statistical evidence which may be subject to more -- or less precision than finite numbers contained in reports, testified to by experts and receiving the gold star approval by a court.

I am not saying that I think that the evidence put forward by the plaintiffs here is lacking or that it is inadmissible or that the Court cannot do essential and fair justice between the parties by accepting it. I am satisfied that essential justice is being done here. It's less than what the plaintiffs wanted and claimed that they were legally entitled to and more than what the defense would say has been proven.

In light of the frustration at attempting to provide the means for more articulate, finite evidence that we would all like to be able to depend on more, the Court finds that it is best to grant the motion for summary judgment, partial motion for summary judgment in that it certainly does not grant all of the relief requested by the plaintiffs, but it grants that it goes a long way towards satisfying the bulk of the claims of these plaintiffs, of the plaintiff class.

The alternatives open to the Court involve -- some of the alternatives open to the Court involve using this Court's power to really lean on one side either by appointing a receiver or by appointing a separate special master that would be locally based who would have the first duties of being given all of the financial records of all defendants and determining whether or not these defendants truly were -- are in a position that they cannot pay for a special master functioning. Or of course more bizarre results, holding the defendant in contempt and placing Mr. Nady in custody on a civil case, particularly unattractive to this Court, or anything else.

I don't find that there is another reasonable way to do essential justice in this case. And so, reluctantly, I grant the plaintiffs' motion for partial summary judgment to the extent that not only is the time period of 2013 to 2015 granted, but using the rationale and the evidence propounded by the plaintiffs, which they in turn claim is based on the evidence propounded by the defendants, to grant the same summary judgment for the period of 2007 through 2012. My understanding is that that amounts to 174,000 and -- I don't have the precise amount. Do you have it?

MR. GREENBERG: Your Honor, for the 2013 to 2015 period it is itemized in precise amounts to identified individuals. It does total approximately 174,000. It is in the record. What I would --

THE COURT: You don't know the precise amount?

MR. GREENBERG: Well, it is actually discussed in the motion submission. The precise amount is $174,839.

THE COURT: That is the amount?

MR. GREENBERG: Well, excuse me, I -- Yes, Your Honor, that is the amount that's actually requested. That's at least $10 an hour -- at least $10 owed to each of these individuals. If it's below $10, we're treating it as de minimis and not bothering the Court with entry of a judgment.

THE COURT: And additionally in the amount of -- was the $804,000 figure precise?

MR. GREENBERG: Your Honor, I believe you can certainly recite it and I would submit an order for Your Honor's approval. What I would like to do is to submit the actual -- and I believe the Court should have entered in the record the actual --

THE COURT: Calculations.

MR. GREENBERG: -- pay periods and calculations for each individual with the documentation. As I inserted in the record about 400 pages with those 14,000 payroll periods analyzed --

THE COURT: Yeah.

MR. GREENBERG: -- I would submit that in conjunction with a final order that Your Honor would then approve, and there would be an appendix listing the judgment amounts for each individual.

THE COURT: All right. Now, as to interim fees, I don't -- am I incorrect, is there any kind of evidence before the Court, any recitation, any numbers that would show me even exactly how that was calculated? I know that you have indicated there's about 50,000 in costs --

MR. GREENBERG: Yes.

THE COURT: -- and that I believe you argued that the hours for counsel was calculated at something like $85 an hour.

MR. GREENBERG: Well, Your Honor, I am looking at the submission I gave the Court on November 2nd and I did submit a declaration. This is at page 9 of that submission. This is the memorandum. At that time I had stated that I personally expended over 850 hours and $35,000 at that time in costs on this litigation.

THE COURT: So the fee amount is how much and based on what hourly rate?

MR. GREENBERG: Well, Your Honor, if --

THE COURT: It is more complicated than that, isn't it?

MR. GREENBERG: If I was to be compensated for 500 hours, okay, of work,

not 850 hours but 500 hours of work at $200 an hour, Your Honor, I believe that's $100,000.

THE COURT: I'll tell you what. I think that we had better have that be the subject of a separate motion.

MR. GREENBERG: That is Your Honor's determination. I mean, my point to Your Honor is that the --

THE COURT: I'm not saying I don't know whether interim fees should be awarded because at this point I believe they should. But I have to have a coherent at least, basis, a number, a calculation.

MR. GREENBERG: Well, Your Honor, I did submit, again, a declaration in support of the fee request. It was at -- it was attached as an exhibit to the memorandum filed on November 2nd. It begins at paragraph 13. It says, "I have reviewed the contemporaneous attorney time records maintained. I have over 850 hours expended on the prosecution of this case; $27,200 for expert witness and technical consultant costs; $6,200 for --

THE COURT: Can you just give me the total for the fees and the hours that were used for that?

MR. GREENBERG: Well, the fee request is $35,200.

THE COURT: Okay.

MR. GREENBERG: And this is itemized in paragraph 13 of my declaration --

THE COURT: All right.

MR. GREENBERG: -- that was submitted on November 2nd. I had simply asked for a round award of $100,000 in interim fees based on the fact that I had -- that at this time I had expended over 850 hours. My time expenditures, I just

checked my office the other day, are over 1,100 hours personally. Ms. Sniegocki, who is my associate, has expended over 500 hours on this case. I understand defendants --

THE COURT: Do you know what your costs are to date?

MR. GREENBERG: My costs are the $35,200 -- well, they're more than the $35,200, but we have the itemization as of November 2nd of $35,200. Those are the costs.

THE COURT: For costs?

MR. GREENBERG: For costs. Expert -- $27,200 for expert witness costs and --

THE COURT: So you're asking for $70,400?

MR. GREENBERG: I'm asking for -- I had requested $135,000 in total, Your Honor --

THE COURT: All right.

MR. GREENBERG: -- just as a round number for costs and interim class counsel fees.

THE COURT: Yeah.

MR. GREENBERG: If Your Honor wishes to approach it differently, that's fine. I was trying to just make this sort of simple and very minimal, Your Honor. Can I include an interim award in the order that I will present to Your Honor?

THE COURT: Yes. Yes.

MR. GREENBERG: For the $135,000?

THE COURT: Yes.

MR. GREENBERG: Okay.

THE COURT: I am satisfied that the -- now, this is based upon the -- a provision in the minimum wage act itself?

MR. GREENBERG: Well, the minimum wage act empowers the Court to award any relief that it is empowered to act to award in any civil action of an equitable injunctive damages type nature. In respect to the award of interim counsel fees, again, this is discussed at pages 9 and 10 and this has been approved of by the United States Supreme Court. I quote this case, Texas State Teachers v. Garland, 489 U.S. 782. That's from 1989; another decision I cited from the D.C. Circuit. I mean, this is -- the Nevada Supreme Court has never addressed this issue.

THE COURT: Okay.

MR. GREENBERG: I want to be candid with the Court. But the judicial doctrine that in these cases where there is some measure of success for a class prior to entry of final judgment justifies an award of interim fees is well recognized, Your Honor. There's no contrary view of that. So I think Your Honor is well within your discretion to grant the award as I have requested as part of the immediate judgment that will be entered. We will be before your court on a post-judgment motion for a full fee award, at which time I will submit a detailed itemization of all of the hours, justification for a lodestar fee in hourly rate. That will of course be presented to defendants, who will have an opportunity to dispute the actual calculation of all fees to be awarded.

THE COURT: All right, here's what we're going to do on that. I'm going to review the authority that you gave me in your motion and I will make the determination of whether and in what amount interim fees will be awarded.

MR. GREENBERG: I trust --

THE COURT: So I make no ruling from the bench on that today.

MR. GREENBERG: I trust Your Honor will issue a minute order --

THE COURT: Yes.

MR. GREENBERG: -- this week or soon on that.

THE COURT: Yes.

MR. GREENBERG: Okay, because I would like to obviously submit the final order to Your Honor in accordance with the other rulings you've made today so we can have a final judgment entered appropriately.

THE COURT: Uh-huh. Okay.

MR. GREENBERG: And again, it is my understanding that the directions you're giving us today is to fashion an order that will constitute a final judgment in this case pursuant to your rulings today.

THE COURT: Oh, thank you. That -- we need to make something more finite then. You're saying that the Court could then simply dissolve the class and allow those former class members who wish to to go forward on their own for any higher amounts?

MR. GREENBERG: Your Honor, the judgment is going to be fashioned in individual amounts for each individual class member pursuant to the approach --

THE COURT: Okay.

MR. GREENBERG: -- Your Honor has discussed with us here today. That approach is partially documented already in the record on the 2013 to 2015 period where we have the 14,000 pay periods and we also have a compilation of amounts to each of about 350 people, you know, that are found from those 14,000 pay periods that were analyzed. We will do the same thing for the other time period.

There will be individual judgments entered in individual amounts for each class member pursuant to that approach, Your Honor, and that will be incorporated as an appendix to the order Your Honor will sign. It will constitute a final judgment of the Court. To the extent that any class member asserts they are owed amounts under the minimum wage act or under 608.040, there were 608.040 claims that were made, penalty claims in this case.

THE COURT: Uh-huh.

MR. GREENBERG: I believe it would be more efficient to simply allow those claims to be dismissed without prejudice and if any class member wishes to pursue those claims or pursue a claim that they are entitled to compensation in excess of what the Court has determined here today, they will be --

THE COURT: And this would --

MR. GREENBERG: -- they would be free to do so.

THE COURT: And this would be a final judgment as to all defendants?

MR. GREENBERG: It would be a final judgment as to all defendants and as to the class and as to the class representatives, Your Honor.

THE COURT: What happens to, for example, the conspiracy claim?

MR. GREENBERG: Your Honor, that would be dismissed without prejudice.

THE COURT: Okay.

MR. GREENBERG: If some individual wishes to assert that they were -- argued in respect to that -- when you're talking about the conspiracy claim --

THE COURT: Yeah.

MR. GREENBERG: -- let me withdraw -- let me backtrack a little bit because there's really -- there's an alter ego claim, there's a question of misuse of the

corporate form --

THE COURT: Yeah.

MR. GREENBERG: -- which I guess is what you're referring to as the conspiracy claim. As I stated, Your Honor, that claim, the claims against Mr. Nady personally --

THE COURT: Uh-huh.

MR. GREENBERG: -- have previously been severed in this case.

THE COURT: Yeah.

MR. GREENBERG: So we enter final judgment in the form I'm proposing, that is a final judgment in this case in respect to the corporate defendants.

THE COURT: Okay.

MR. GREENBERG: Mr. Nady is not subject to that judgment and there would be no need for the claims against Mr. Nady to proceed. The Court could issue a stay of those claims pending entry of the final judgment and we'll see whether the final judgment is satisfied, if this is worked out between the parties. I think that would be an appropriate approach and we'll take it from there, Your Honor. If for some reason the final judgment is not satisfied, this isn't worked out, then the claims against Mr. Nady will have to proceed separately with separate evidentiary considerations and separate issues to be pursued, but that's a separate case, Your Honor.

THE COURT: Okay.

MR. WALL: Severing claims doesn't make it a separate case, Your Honor, and that would not be a final judgment under any interpretation under Nevada law that I've been familiar with in my practice.

THE COURT: The part about the claims against Mr. Nady, or are you talking about the whole thing?

MR. WALL: I'm talking about the whole thing. A final judgment is a judgment that resolves all claims against all parties that were asserted. Severing claims is just a matter of the method by which claims are decided. It doesn't change the matter of whether or not you've got a final judgment. If you bifurcate the case, you don't get a final judgment until you've done the second half of the bifurcated case. You don't get multiple final judgments in Nevada. That's absolutely clear. Lee v. GNLV would be the case to look up for that.

THE COURT: Impressive.

MR. GREENBERG: Your Honor, in the Valdez v. Cox case, which was before Your Honor --

THE COURT: Oh, wow.

MR. GREENBERG: Your Honor may remember this, actually. I appealed Your Honor's order because I disagreed with a certain portion of it. And Your Honor had complied with my request for severance in that case and I had waited until the claims against the last remaining defendants were resolved and then I tried to appeal Your Honor's order in respect to the prior severed case --

THE COURT: Uh-huh.

MR. GREENBERG: -- and the supreme court said I was untimely. They said that once the severance was effected by the district court in respect to that party that was a final judgment and I had allowed my time to lapse. So I learned my lesson there quite painfully in that case, Your Honor, and that is of course contrary to the outcome that was just hypothesized by Mr. Wall.

MR. WALL: There's a difference between severing cases and making two cases out of them when you've have cases that are consolidated and then you sever them.

THE COURT: Uh-huh.

MR. WALL: Then once they're consolidated they're one case and when they're severed they're separate cases. Here we've bifurcated. That's a completely different thing. You can't make one case and sever it into two cases. So we have bifurcated here the issues that have been resolved, and although the mistake that Mr. Greenberg made in that case is unfortunate, it doesn't justify the argument he's made in this case as to finality.

THE COURT: All right. Well, how do you propose that the Court resolve this dispute?

MR. GREENBERG: Your Honor, I will proceed as I think it's best for the class. I would ask that the Court enter the final judgment, sever -- the order that I will present to the Court will enter final judgment in accordance with what we've discussed.

THE COURT: Well, okay, but --

MR. GREENBERG: And we'll sever the claims against Mr. Nady and I would propose that the Court also stay those claims for a period of time pending resolution of the judgment. If the judgment is satisfied --

THE COURT: What I'm suggesting is I will need to see some authority from both sides on the issue of whether or not there can be a final judgment at this juncture in this case. That's the dispute, right?

MR. GREENBERG: Well, Your Honor, Mr. Wall is saying you can't enter a

final judgment. I mean, presumably he wouldn't take that position if we dismiss the claims against Mr. Nady.

MR. WALL: I didn't say you couldn't enter a final judgment. I said the judgment that he described wouldn't be -- in my opinion would not be a final judgment.

THE COURT: Because it's only against some of the parties and not all of them. Okay.

MR. WALL: You would have to do something to finalize, to make that judgment final so that all claims against all parties in the action are resolved.

THE COURT: So if he was willing to dismiss any other claims --

MR. WALL: Yes.

THE COURT: -- then it could be a final judgment.

MR. GREENBERG: I understand that is the construction the defendants would prefer because that would mean my alternatives would be to get a final judgment against A Cab, which I need, or I have to then dismiss the claims against Mr. Nady. But again, Your Honor, Your Honor has the power to -- I mean, there's also leave it to Rule 54. Your Honor is probably familiar with this where an immediate appeal may be entered where summary judgment is granted against some but not all parties. District court has the power to certify a final judgment and then the supreme court will hear an appeal. It's the same type of thing that I'm proposing here with the severance of the claim against Mr. Nady as occurred in the Valdez case, as I was relating to Your Honor. So, Your Honor, we -- look. Your Honor, we can submit the authorities on this --

THE COURT: Yeah.

MR. GREENBERG: -- in connection with the proposed order, okay.

THE COURT: Yep. All right, let's do that. You give me your authorities with the proposed order and then defendants will have 10 days to submit any countervailing authorities.

MS. RODRIGUEZ: Your Honor, what is the finding that pertains to the 2007 to 2012? Because it's my understanding the Court is entering summary judgment on that period as well.

THE COURT: That's correct.

MS. RODRIGUEZ: And it's based on 9.21 average hours?

THE COURT: Yes. It's based on the argument put forward by the plaintiffs' counsel that that number is accurate, and so that you wind up with not only resolving the 2013 to 2015 claim, but also the 2007 to 2012.

MS. RODRIGUEZ: And do we know what that number is?

THE COURT: $804,000 was the calculation that was just argued in the briefing, but --

MR. GREENBERG: That is the approximate number based on the calculations that I've run. I have to get them done precisely. We are not going to -- Your Honor, we're not going to request judgment in amounts of less than $10 for any individual because that would seem unduly burdensome and unnecessary.

THE COURT: Okay.

MR. GREENBERG: But we're going to specify amounts in total, which would be that eight hundred or so thousand -- eight hundred thousand number you mentioned for that period. But they're going to be itemized by individual, supported by introduction into the record of the Court --

THE COURT: Of the evidence.

MR. GREENBERG: -- of the payroll records as we've discussed that have been analyzed and so forth, Your Honor.

MS. RODRIGUEZ: I didn't hear that number earlier.

THE COURT: Oh.

MS. RODRIGUEZ: That's why -- I heard the Court indicating 174,000. So it's eight hundred -- approximately eight hundred and four thousand, but we're going to have Mr. Bass do further calculations to come up with a figure, is that what I'm hearing?

MR. GREENBERG: There are no further calculations. The model was already constructed. They have the spreadsheet, Your Honor. It's just a question of putting in that 9.21 hours. The model, the Excel file is discussed in Dr. Clauretie's report. I mean, he verified that it works correctly and that you can do this and that you can do it accurately. You can put in that average of -- or a different average if one wished and get the resulting approximation in compliance with --

THE COURT: With the briefing that you're going to include with your proposed judgment, will you put your calculation basis on the other amount, the 2007 to 2012?

MR. GREENBERG: Absolutely, Your Honor.

THE COURT: And the defendants will have --

MR. GREENBERG: I will -- I mean, there's going to be a several hundred page submission that I'm going to want to get in the record here of those pay periods --

THE COURT: Okay.

MR. GREENBERG: -- and the compilation, as was done already in the record on the other 3-year, the 2013 to 2015 period. I believe that should be in the record of the case.

THE COURT: And then the defendants may have 10 days to submit any countervailing authorities or argument if you say that it's improper.

MS. RODRIGUEZ: Well, that's why I was asking because what I heard him say was that the calculations had to be performed. So I was asking who's going to prepare these, is it Mr. Greenberg or is it Mr. Bass? Because, again, if the Court is relying upon these to grant summary judgment --

THE COURT: Uh-huh.

MS. RODRIGUEZ: -- then he needs to attach some kind of declaration or affidavit or something. If he's doing it himself, if he says it's already done, I'm just plugging in the numbers, then we need to know that that's Mr. Greenberg's figures that are going to be submitted to the Court.

THE COURT: So in your submission you will provide the methodology for that calculation.

MR. GREENBERG: Yes, I will, Your Honor.

THE COURT: And the --

MR. GREENBERG: And defendants have the spreadsheet I am referring to and they will be able to duplicate everything I do because they can put in that number, they can see the data that's being processed and the calculations being made. So they will have a full opportunity to review that and be sure the math is done correctly and so forth.

THE COURT: All right. Anything else?