IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge, Respondents, and LAKSIRI PERERA, Individually and on behalf of others similarly situated, Real Party in Interest.	**Case No.:** _____ District Court Case No. A-14-707425-C

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

VOLUME 7 OF 7

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c) a true and correct copy of the foregoing **PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION VOLUMES 1 THROUGH 7** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 10th day of September, 2015, to the following:

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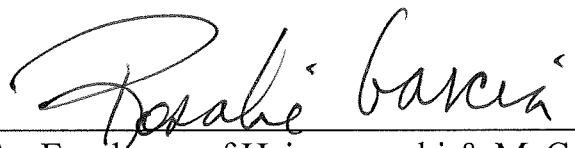
And a true and correct copy of the foregoing **PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION VOLUMES 1 THROUGH 7** was served via first class, postage-paid U.S. Mail on this 10th day of September, 2015, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
Las Vegas, NV 89101



An Employee of Hejmanowski & McCrea LLC

APPENDIX 12

APPENDIX 12

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, Individually and on behalf of others similarly situated, Plaintiff, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: XIV PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THIS COURT'S JUNE 16, 2015 DECISION AND ORDER Date of Hearing: Aug. 5, 2015 Time of Hearing: 9:00 a.m.

Plaintiff, by and through their attorney, Leon Greenberg Professional Corporation, submits this memorandum of points and authorities in response to defendant's motion for reconsideration of this Court's June 16, 2015 Decision and Order.

MEMORANDUM OF POINTS AND AUTHORITIES

DEFENDANT PROVIDES NO PROPER BASIS FOR RECONSIDERATION

Defendant's unhappiness with the Court's June 16, 2015 Decision and Order is not a basis for the Court to reconsider that Order. Nor is a recent decision by another trial court judge (Judge Kishner of this Court) disagreeing with the June 16, 2015 Decision and Order provide a basis for reconsideration. Defendant provides no new evidence or arguments it did not or could not have previously presented to the Court. Defendant's motion is fundamentally improper and made simply to consume plaintiffs' counsel's time and show that defendants will "fight

hard" to obstruct the progress of this litigation.

ARGUMENT

Although no basis is furnished by defendants for the Court to even consider reviewing its Decision and Order of June 16, 2015, plaintiffs respond to defendant's assertions.

I. NEVADA'S RECORD KEEPING STATUTE IS IRRELEVANT

Defendant, citing the two year employee payroll record keeping requirement of NRS 608.115(3), insist that a two year statute of limitations must be imposed in this case because an employer following 608.115(3) will not have four years worth of employee payroll records. That is untrue. While employers may only be *mandated* under NRS 608.115(3) to keep employee records for two years there is no statute *prohibiting* them from keeping them for much longer periods. Defendants also fail to advise the Court that the Fair Labor Standards Act requires that they keep payroll records for a three year period. *See,* 29 U.S.C. § 211 and 29 C.F.R. § 516.5.

As *Yellow Cab* makes clear the force of the Nevada Constitution displaces all contrary statutory or other considerations (except obviously other constitutional concerns). Defendants' assertions that the statute of limitations in this case should be two years because a Nevada statute only requires them to keep payroll records for two years is unsupported and without merit. While defendants, and other Nevada employers, may be disadvantaged by their failure to maintain employee records, such considerations are irrelevant. The statute of limitations otherwise applicable to the plaintiffs' claims arising under Nevada's Constitution is not subject to modification in response to such hypothetical disadvantages that certain Nevada employers may face. Nor does imposing such a statute of limitations violate the "due process" rights of the defendant (an assertion that they do not explain, much less provide any citation in support of).

II. THERE IS NO SEPARATE "TAXI DRIVER" STATUTE OF LIMITATIONS CREATED BY THE COURT'S DECISION

All Nevada employees enjoy the minimum wage protections of Nevada's Constitution, not just taxi drivers. Indeed, that principle is the foundation of the *Thomas v. Yellow Cab* decision. The idea the Court's June 16, 2015 Order and Decision will somehow provide inconsistent statutes of limitations, and minimum wage rights, for Nevada employees is wholly specious. All Nevada employees, not just taxi drivers, possess a four year statute of limitations for any claims they seek to bring for minimum wages under Nevada's Constitution.

III. PLAINTIFFS HAVE NO REMEDY WHATSOEVER UNDER NRS 608.260, MUCH LESS AN "ADEQUATE REMEDY"

Defendant distorts the language of Nevada's Constitution which confers an "adequate remedy" right upon the plaintiffs to somehow mean the "remedy" provided for in NRS 608.260. Yet the relevant language from NRS 608.260 states it is applicable only:

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

Plaintiffs possess no rights under NRS 608.250 or any regulations issued by the Labor Commissioner. Accordingly, NRS 608.260, which by its express language only provides a remedy for rights conferred by NRS 608.250 or the Labor Commissioner's regulations issued thereunder, is inapplicable to the plaintiffs' claims. Nor could such a remedy be "adequate" as the "right" asserted is one that is from the constitution, not from NRS 608.250 or any other statute. Accordingly, as the Court correctly ruled, the proper statute of limitations for a "remedy" of a violation of that "right" is four years, as per NRS 11.220.

IV. THE COURT HAS ALREADY PROPERLY CONSIDERED THE OTHER DECISIONS ON THIS ISSUE

A. The new decision provided by defendants is incorrect and provides no new analysis or authority.

The *Franklin* decision simply adopts, without substantive explanation or

citation to any proper authority, defendants' arguments. It ignores the express language of NRS 608.260 stating it only applies to claims arising under NRS 608.250 or regulations issued under that statute. It converts NRS 608.260 into a statute of limitations for "all" claims for "minimum wages" of whatever nature even though language of NRS 608.250 clearly does not allow that application. Indeed, Judge Jones of the federal district court, in the recent in *Sheffer v. US Airways, Inc.*, 2015 WL 345192 (D. Nev. 2015, 15-CV-204, 6/1/15), discussed *infra*, expressly recognized the same. Similarly, with all due respect to Judge Kishner, the finding in *Franklin* that a two year statute of limitations is mandated by the two year mandatory record keeping requirement of NRS 608.115 as a matter of "sound public policy" is improper. *Franklin* cites no support for that conclusion and while Judge Kishner may believe that would be a good policy, such policy decisions are not properly made by this Court.

B. The other decisions defendant relies upon do not support their claims and their holdings were properly considered and rejected by this Court.

Judge Jones of the federal district court, in *Sheffer v. US Airways, Inc.*, 2015 WL 345192 (D. Nev. 2015, 15-CV-204, 6/1/15) also agrees that NRS 608.260 cannot govern the statute of limitations for Nevada constitutional minimum wage claims:

> NRS 608.260 creates a private right of action to enforce the minimum wages administratively set by the Labor Commissioner under NRS 608.250, and the limitations period for such a claim is two years. *See* Nev.Rev.Stat. § 608.260. Plaintiff has brought no claim under NRS 608.250, but under Section 16 [of Nevada's Constitution]. Indeed, Section 16 supersedes NRS 608.250 as to any inconsistency, and the specific minimum wages provided by Section 16 are inconsistent with NRS 608.250's grant of power to the Labor Commissioner to establish the minimum wage. *See, Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518, 520–22 (Nev.2014).

Judge Jones, based upon the inapplicability of NRS 608.260 to Nevada constitutional minimum wage claims, found the default three year statute of limitations applied to all claims arising under a statute, NRS 11.190(3)(a), applies to such claims. He does not discuss why the four year NRS 11.220 "catch all" statute

of limitations is not applicable to constitutional claims and that point was not raised to him in *Sheffer*.

2. Four of the decisions relied upon by defendants reach summary conclusions or did not even purport to resolve the merits of the statute of limitations issue.

Defendants urge the Court to incorrectly assume that *Rivera v. Peri & Sons*, 735 F3d 892 (9th Cir. 2013) affirmed a district court finding, on the merits, that NRS 608.260 provides the statute of limitations for minimum wage claims arising under Nevada's Constitution. That is untrue, as the defendant in *Rivera* simply asserted that to be so and the plaintiffs never contested that assertion and waived their right to present any contrary argument to the Ninth Circuit:

> "Peri & Sons clearly argued to the district court that the two-year statute of limitations applies to the farmworkers' state constitutional claims. Instead of arguing in favor of a four-year statute of limitations, the farmworkers merely contended that the issue should not be resolved on a motion to dismiss, a contention we have already rejected. The farmworkers' failure to raise the argument below constitutes a waiver." 735 F.3d at 902.

It should also be observed that the District Court Judge in *Rivera* was Judge Jones who, in *Sheffer*, discussed *supra*, has now expressly held that a two year statute of limitations does not, and cannot, apply to minimum wage claims arising under Nevada's Constitution.

The decision in *McDonagh v. Harrahs's Las Vegas, Inc.*, 2014 U.S. Dist Lexis 82290 (13-CV-1744, 6/17/14), as in *Rivera*, never reached the issue of whether the four year "catch all" statute of limitations of NRS 11.220 applies to a Nevada Constitutional minimum wage claim. Rather, without discussion, it rejected the argument that the six year written contract statute of limitations of NRS 11.190(1)(b) applied to such claims and, without considering the relevancy of the constitutional nature of those claims, found the two year statute of limitations of NRS 608.260 to control. Similarly, the decisions in *Tyus v. Wendy's of Las Vegas* (Ex. "5" of the moving papers) and *Golden v. Sun Cab, Inc,*. (Ex. "7" of the moving papers) provide no guidance.

Tyus incorrectly attributes *Rivera* as having made an actual determination of the merits of applying NRS 608.260 when it did nothing of the sort (it simply adopted such unopposed assertions and then found on appeal all contrary arguments had been waived). While *Tyus* does acknowledge that plaintiff had argued for application of the four year statute of limitations specified by NRS 11.220, it rests its decision on a finding that there was no "implied repeal" of NRS 608.260. In doing so it ignored what was aptly understood by Judge Jones in *Sheffer*: that NRS 608.260 is irrelevant to claims being made under Nevada's Constitution and not under NRS 608.250. The decision in *Golden* **is not actually a decision but only a tentative ruling by Judge Ellsworth** who has yet to make any final decision.

3. The one detailed decision relied upon by defendants, *Williams*, makes illogical and contradictory findings and the Nevada Supreme Court has directed an answer to a mandamus petition seeking its reversal.

Williams v. Claim Jumper Acquisition Co. (Ex. "6" moving papers) holds that a *legislative* structure, NRS 608.260, converts a claim under Nevada's Constitution into a claim under NRS 608.250, with all of the attendant limitations the legislature has placed on such claims:

> Accordingly, a claim alleging that an employee has been illegally paid less than the effective minimum wage rate [specified by Nevada's Constitution] is a claim that alleges a violation of the rates established by the Labor Commissioner, not a claim that alleges a violation of the rates set forth in the Minimum Wage Amendment. Thus, the Plaintiffs' claim in this case, although styled as a violation of Article IV, Section 16, actually appears to allege a violation arising under NRS 608.260. Such a claim is governed by the two-year statutory period set forth in NRS 608.260. *Williams*, p. 10., ¶ 15.

This holding rests upon two clearly erroneous findings: (1) That a claim for unpaid minimum wages under Nevada's Constitution "alleges a violation of the rates established by the Labor Commissioner" and (2) That such a claim for a "violation of the rates established by the Labor Commissioner" is within the purview of NRS 608.260.

The two year statute of limitations imposed by NRS 608.260 only applies to wage rates set by the Labor Commissioner **"pursuant to the provisions of NRS**

608.250." The wage rate (the Nevada Constitutional minimum hourly wage amount) that *Williams* found was "established by the Labor Commissioner" was not so "established" pursuant to NRS 608.250.[1] Indeed, as the *Williams* decision acknowledges, the "wage rates" it finds were "established" by the Nevada Labor Commissioner were so established "pursuant" to the express dictates of Nevada's Constitution and not NRS 608.250.[2]

The deviations from sound logic taken by *Williams* are manifest, as it makes clear in paragraphs ¶ 11-12:

> On its face, the Minimum Wage Amendment does not merely establish a straightforward uniform minimum wage rate to be paid to every employee in Nevada at all times. Rather, the Minimum Wage Amendment sets a specific floor and then expressly requires the Governor (through the state Labor Commissioner) to adjust the rate periodically as follows:
>
> > These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State

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[1] NRS 608.250(1) states: "Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest." It directs the Labor Commissioner to make minimum wage determinations "in accordance with federal law." It does not authorize the Labor Commissioner to make minium wage determinations on any other basis, much less based upon Nevada's Constitution.

[2] *See*, ¶ 12 of *Williams*, l. 11-15: "In other words, the 'cause-in-fact' of any such claim [for minimum wages imposed by Nevada's Constitution] is not that the employee has not been paid the particular dollar amount set forth in the Minimum Wage Amendment, but that he has not been paid the wage rate set forth in the periodic bulletins issued by the Labor Commissioner **pursuant to the Minimum Wage Amendment.**" (Emphasis provided).

> agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1.
>
> Thus, the effective minimum wage rate in Nevada is not merely what is stated in Article XV section 16, but rather is expressly defined as a wage rate set by the Labor Commissioner based partially upon data from the U.S. Department of Labor.

The foregoing section of *Williams* contains two remarkable, and completely erroneous, conclusions that have no support in the excerpted text of Nevada's Constitution: (1) That the Nevada's Constitution "requires the Governor (through the state Labor Commissioner)" to "adjust" the minimum wage rate and (2) that the minimum hourly wage required by the Nevada Constitution "is expressly defined as a wage rate set by the Labor Commissioner."

Nowhere does the Nevada Constitution mention the Labor Commissioner. *Williams* offers no explanation of how the minimum wage required by the Nevada Constitution can be "expressly defined" as one "set" by a person (the Labor Commissioner) who is never mentioned in the Constitution. Nor does the Nevada Constitution direct that the Governor or the Labor Commissioner "adjust" the minimum wage rate. It commands the Governor or "the State agency designated by the Governor" to "**publish** a bulletin by April 1 of each year **announcing** the adjusted rates."

The "adjusted rates" that the Governor or their designee must "publish" and "announce" are specified in the Constitution. They are not "defined" or "set" by the Governor, the Labor Commissioner, or any state official. *Williams'* finding that the Nevada Constitution does not "establish a straightforward uniform minimum wage rate" but "sets a specific floor and then expressly requires the Governor (through the state Labor Commissioner) to adjust the rate periodically" is without any basis. Such holding ignores the Nevada Constitution's language and reads into the Nevada Constitution non-existent text and completely absent meanings.

The hourly minimum wage rate established by the Nevada Constitution is, contrary to *Williams's* finding, completely "straightforward." It is an exact wage

rate created by referencing the Consumer Price Index and a maximum yearly increase of 3% and that automatically becomes effective on July 1st of every year as a matter of law without any action by any state official. The Governor (either personally or through his designee) is charged with the non-discretionary duty of "publishing" that rate and has no control over that rate and wholly lacks any ability to "set" or change that rate. If the Governor neglected his Constitutional obligation to publish such rate it would still be the supreme law of Nevada and easily ascertainable by any interested party or Court.

Williams's holding is logically impossible. It determines that the minimum wage "rate" set by the Labor Commissioner is "pursuant to the Minimum Wage Amendment" which means it cannot be a rate set "pursuant to NRS 608.250" and within the scope of NRS 608.260. Yet it inexplicably also holds that such "rate" is, contrary to its own finding about its origins, within the scope of NRS 608.260. *Williams* makes no attempt to reconcile these incompatible findings and such findings are irreconcilable.

The Nevada Supreme Court also took the highly unusual step in *Williams* of directing an answer to the plaintiff's petition for a writ of mandamus and assigning it to the court's *en banc* track where it is currently awaiting the assignment of a date for oral argument. The vast majority of petitions to the Nevada Supreme Court are dismissed outright, without any answer directed, but of those to which an answer is directed more are granted than denied.[3] Such circumstances must, at a minimum, cast strong doubt on the correctness of the decision in *Williams* and requires this

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[3] In the year ending 2014, the Nevada Supreme Court statistics, available at its website, indicates 257 original proceeding petitions were denied outright without an answer and 56 such petitions were subject to consideration upon a directed answer (over 82% of all petitions were disposed of without an answer being required). Of those petitions resolved after an answer, 35 (62.5%) were granted in whole or in part. These statistics are for all original petition proceedings, not just writs of mandamus.

Court to be sure it independently scrutinizes the statute of limitations issue.

CONCLUSION

Wherefore, for all the foregoing reasons, the defendant's motion should be denied in its entirety.

Dated: July 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 20, 2015, she served the within:

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THIS COURT'S JUNE 16, 2015 DECISION AND ORDER.

by court electronic service:

TO:
Malani Kotchka
HEJMANOWSKI & MCCREA LLC
520 S. 4th St., Suite 320
Las Vegas, NV 89101

/s/ Sydney Saucier
Sydney Saucier

APPENDIX 13

APPENDIX 13

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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA,

Plaintiff,

v.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: VII

DEFENDANT'S FIRST SUPPLEMENT TO REPLY TO PLAINTIFF'S RESPONSE AND SUPPLEMENT TO HIS RESPONSE TO DEFENDANT'S MOTION TO DISMISS

AND

OPPOSITION TO PLAINTIFF'S COUNTER-MOTION TO AMEND COMPLAINT AND CONDUCT DISCOVERY UNDER NRCP RULE 56(f)

Date of Hearing: 03/12/15
Time of Hearing: 9:00 a.m.

Defendant Western Cab Company hereby submits its First Supplement to advise the Court of a newly issued decision by Judge Bare in Department 32 holding that a two-year statute of limitations applies to claims for unpaid minimum wages under Nevada's Constitution. Contrary to Judge Williams' decision of February 23, 2015, Judge Bare's decision of March 5, 2015, held that the two-year statute of limitations in NRS 608.260 "was the applicable statute of limitations relevant to actions by employees to recover the difference between the minimum wage and the amount paid." Exhibit 14.

To date, Judge Tao, Judge Ellsworth and Judge Bare have held that the two-year statute of limitations applies. Only Judge Williams has held that a four-year statute of limitations applies.

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
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CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, the undersigned hereby certifies that a true and correct copy of **DEFENDANT'S FIRST SUPPLEMENT TO REPLY TO PLAINTIFF'S RESPONSE AND SUPPLEMENT TO HIS RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S COUNTER-MOTION TO AMEND COMPLAINT AND CONDUCT DISCOVERY UNDER NRCP RULE 56(f)** was electronically served via the Eighth Judicial District Court's ECF System on this 9th day of March, 2015, to the following:

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Attorney for Plaintiff

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EXHIBIT 14

EXHIBIT 14

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Attorneys for Defendant
TERRIBLE HERBST, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

DEBORAH PERRY, an individual, on behalf of herself and all similarly-situated individuals,

Plaintiff,

vs.

TERRIBLE HERBST, INC., a Nevada corporation, d/b/a TERRIBLE HERBST; and DOES 1 through 100, inclusive,

Defendant.

Case No. A-14-704428-C

Dept. No. XXXII

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO NRCP 12(C) WITH RESPECT TO ALL CLAIMS FOR DAMAGES OUTSIDE THE TWO-YEAR STATUTE OF LIMITATIONS AND ALL CLAIMS BY PLAINTIFF PERRY AND DENYING PLAINTIFFS' COUNTERMOTION FOR SUMMARY JUDGEMNT

On September 26, 2014, Defendant TERRIBLE HERBST, INC.'S ("Terrible Herbst" or "Defendant"), filed its Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and All Claims by Plaintiff Perry. In response, on October 13, 2014, Plaintiffs filed their Opposition to Defendant's Motion For Judgment On The Pleadings Re Claims Prior To Two Years Before Filing and Plaintiffs' Countermotion For Partial Summary Judgment Re Limitation Of The Action. On December 16, 2014, at 10:30 a.m. the Court heard oral arguments on the competing motions and determined that the two year statute of limitation in NRS 608.260 was the applicable statute of limitations.

After colloquy regarding whether there was a discovery allowance applicable to each party individually, the Court continued the matter and allowed supplemental briefing. On January 9, 2015, Plaintiffs filed their supplemental briefing. Defendant responded on January 23, 2015 and Plaintiffs replied on January 30, 2015. The Court heard oral arguments regarding the supplemental briefing on February 10, 2015, and based on the pleadings and papers filed therein, the Court maintained its prior decision that the two year statute of limitation in NRS 608.260 was the applicable statute of limitations relevant to actions by employees to recover the difference between the minimum wage and the amount paid.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and All Claims by Plaintiff Perry is GRANTED.

IT IS FURTHER ORDERED that all claims for back pay outside the two-year statute of limitations, including the sole claim asserted by Plaintiff Deborah Perry, in Plaintiffs' First Amended Class Action Complaint, are DISMISSED.

IT IS FURTHER ORDERED that Plaintiffs' Countermotion For Partial Summary Judgment Re Limitation Of The Action is DENIED.

DATED this 3 day of Mar, 2015.

HON. ROB 'BARE
DISTRICT COURT JUDGE

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Respectfully submitted by:

By: _____
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APPENDIX 14

APPENDIX 14

From: Teri Williams
Sent: Tuesday, March 31, 2015 8:20 AM
To: Teri Williams
Subject: Immediate Release: Nevada minimum wage and daily overtime rates remain unchanged for 2015

State of Nevada Department of Business & Industry
Bruce Breslow, Director
901 S. Stewart Street, Suite 100
Carson City, Nevada 89701
Phone (775) 684-2996 | Fax (702) 684-2998

For Immediate Release: March 31, 2015
Contact: Rosalind Hooper, (775) 687-4850

Nevada's minimum wage and daily overtime rates remain unchanged for 2015

Carson City, NV — The Office of the Labor Commissioner today released the annual bulletins for Nevada's minimum wage and daily overtime requirements that will take effect July 1, 2015. The 2006 Minimum Wage Amendment to the Nevada Constitution requires the minimum wage to be recalculated and adjusted each year based on increases in the federal minimum wage, or, if greater, by the cumulative increase in the cost of living.

The rates will remain unchanged from the previous year. The minimum wage for employees who receive qualified health benefits from their employers will remain at $7.25 per hour; the minimum wage for employees who do not receive health benefits will remain at $8.25 per hour.

The rate for daily overtime will also remain the same. Employees who receive qualified health benefits from their employer and earn less than $10.875 per hour, and employees earning less than $12.375 per hour who do not receive qualified health benefits must be paid overtime whenever they work more than 8 hours in a 24-hour period. Nevada is one of a few states with a daily overtime requirement in addition to the requirement to pay overtime for more than 40 hours in a workweek. Employees that are exempt from overtime under Nevada state law are not subject to these requirements.

Additional information regarding the minimum wage and daily overtime rates is available from the Office of the Labor Commissioner at: (702) 486-2650 in Las Vegas or (775) 687-4850 in Carson City. The Annual Bulletins containing the rates are available online from the Office of the Labor Commissioner's website at www.laborcommissioner.com or in hard copy form by request to the Office of the Labor Commissioner.

About the Office of the Labor Commissioner

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

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APPENDIX 15

APPENDIX 15

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DISTRICT COURT

CLARK COUNTY, NEVADA

Barbara Gilmour, individually and on Behalf of all others similarly situated Plaintiff, vs. DESERT CAB, INC., Defendant.	Case No.: A-12-668502-C Dept. No.: III

ORDER GRANTING IN PART AND STAYING IN PART DEFENDANT, DESERT CAB, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST "CLAIMS" FOR RELIEF AND/OR MOTION TO STRIKE PLAINTIFF'S FIRST CLAIM FOR RELIEF AND/OR PRAYER FOR PUNITIVE DAMAGES AND PRAYER FOR INJUNCTIVE AND EQUITABLE RELIEF AND DENYING PLAINTIFF'S BARBARA GILMOUR'S COUNTERMOTION FOR DISCOVERY UNDER N.R.C.P. 56(f)

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ATTORNEYS AT LAW
630 SOUTH 4TH STREET
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Defendant, DESERT CAB, INC.'s Motion to Dismiss Plaintiff, BARBARA GILMOUR's, individually and on behalf of all other similarly situated (collectively, the "Plaintiff") First "Claims" for Relief pursuant to Nevada Rule of Civil Procedure ("N.R.C.P.") 12(b)(5), and/or Defendant's Motion to Strike Plaintiff, 's First Claim for Relief and/or Prayer for Punitive Damages and Prayer Injunctive and Equitable Relief Pursuant to N.R.C.P. 12(f), and Plaintiff's Countermotion for Discovery Under N.R.C.P. 56(f) having come regularly for hearing on Wednesday, July 22, 2015, at 09:00 a.m., in Department III of the above-entitled Court, the Honorable Douglas W. Herndon presiding, LEON GREENBERG, ESQ., having appeared on behalf of Plaintiff and JEFFERY A. BENDAVID, ESQ., of MORAN BRANDON BENDAVID MORAN, having appeared on behalf of Defendant.

The Court having considered the pleadings and papers filed herein, the arguments of counsel, and all other evidence presented **HEREBY GRANTS IN PART AND STAYS IN PART** Defendant's Motion to Dismiss Plaintiff, BARBARA GILMOUR's, individually and on behalf of all other similarly situated (collectively, the "Plaintiff") First "Claims" for Relief pursuant to Nevada Rule of Civil Procedure ("N.R.C.P.") 12(b)(5), and/or Defendant's Motion to Strike Plaintiff, 's First Claim for Relief and/or Prayer for Punitive Damages and Prayer Injunctive and Equitable Relief Pursuant to N.R.C.P. 12(f), HEREBY DENIES Plaintiff's Countermotion for Discovery Under N.R.C.P. 56(f), and **FINDS, CONCLUDES, AND ORDERS** as follows:

THE COURT FINDS that the Nevada Supreme Court's decision in *Thomas v. Yellow Cab Corp.*, 130 Nev. Adv. 52, 327 P.3d 518 (2014), did not implicitly repeal NRS 608.260.

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THE COURT FURTHER FINDS that NRS 608.260 is an "available" and "appropriate" remedy available to an "employee" to rectify an alleged violation of Nevada's Minimum Wage Amendment.

THE COURT THEREFORE CONCLUDES that Plaintiff's First Claim for Relief is subject to the two (2) year statute of limitation expressly provided in NRS 608.260 since NRS 608.260 is an "available" and "appropriate" remedy available to Plaintiff to rectify Defendant's alleged violation of Nevada's Minimum Wage Amendment.

THE COURT HEREBY ORDERS that Plaintiff's First Claim for Relief is dismissed with prejudice but only to the extent Plaintiff's claim for unpaid minimum wage is barred by the applicable two (2) year statute of limitation provided in NRS 608.260.

THE COURT FURTHER FINDS that to the extent any allegations in Plaintiff's First Claim for Relief are intended to be construed, or could be construed, as a claim for Conversion, the Plaintiff has failed to state a claim for relief for Conversion under Nevada law upon which relief may be granted.

THE COURT HEREBY ORDERS Plaintiff's allegations, to the extent they are intended to be construed, or could be construed, as involving Defendant's alleged Conversion of Plaintiff's personal property are dismissed with prejudice and struck from Plaintiff's First and Second Claims for Relief since Plaintiff has failed to state a claim for Conversion upon which relief may be granted.

THE COURT FURTHER FINDS that the issue of whether Plaintiff's prayer for injunctive/equitable relief should be struck from Plaintiff's First Amended Complaint is an issue better suited for consideration at the time Plaintiff seeks to certify her class of similarly situated individuals.

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THE COURT THEREFORE ORDERS that Defendant's Motion to Strike Plaintiff's Prayer for Injunctive Relief is stayed until such time as Plaintiff moves to certify her class of similarly situated individuals.

THE COURT FURTHER FINDS that NRS 42.005 provides that a plaintiff only may obtain an award of exemplary and punitive damages in an action for the breach of an obligation not arising from a contract.

THE COURT FURTHER FINDS that *Sprouse v. Wentz*, 105 Nev. 597, 603, 181 P.2d 1136, 1139 (1989), requires that an award of exemplary or punitive damages pursuant to NRS 42.005 must be based upon a cause of action sounding in tort and not based on a contract theory.

THE COURT FURTHER FINDS that Plaintiff's claims are based on Defendant's alleged failure to pay Plaintiff Nevada's minimum wage while working as employees of Defendant and/or at the time of each Plaintiff's resignation, termination, or discharge.

THE COURT FURTHER FINDS that none of Plaintiff's claims as alleged in Plaintiff's First Amended Complaint sound in tort.

THE COURT THEREFORE ORDERS that Plaintiff's prayer for punitive damages is hereby struck from Plaintiff's First Amended Complaint.

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THE COURT FURTHER ORDERS that since the Court has Granted Defendant's Motion to Strike Defendant's Prayer for Punitive Damages, Plaintiff's Countermotion for Discovery Under N.R.C.P. 56(f) is denied as moot.

IT IS SO ORDERED this 18 day of August, 2015.

DISTRICT COURT JUDGE

Submitted by:

KAMER ZUCKER ABBOTT

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Attorneys for Defendant

Approved as to form By:

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APPENDIX 16

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JIM GIBBONS
GOVERNOR

One Hundred One North Carson Street
Carson City, Nevada 89701
Office (775) 684-5670
Fax No. (775) 684-5683

Office of the Governor

March 28, 2007

Michael Tanchek
Labor Commissioner
675 Fairview Drive, Suite
Carson City, Nevada 89701-5474

RE: Agency Designation

Dear Mr. Tanchek,

Pursuant to the Nevada Constitution Article 15, Section 16, I hereby designate the Department of Business and Industry, Office of Labor Commission as the agency designated to determine any adjustments to the minimum wage and to publish a bulletin by April 1 of each year announcing the adjusted minimum wage rates, which shall take effect the following July 1.

Sincerely,

JIM GIBBONS
Governor

JAG/kc

RECEIVED
MAR 29 2007
NEVADA
LABOR COMMISSIONER-CC

APPENDIX 17

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RULES TO BE OBSERVED BY EMPLOYERS

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PLEASE NOTE: Every person, firm, association or corporation, or any agent, servant, employee or officer of any such firm, association or corporation, violating any of these provisions is guilty of a misdemeanor.

The legislature hereby finds and declares that the health and welfare of workers and the employment of persons in private enterprises in this state are of concern to the state and the health and welfare of persons required to earn their livings by their own endeavors require certain safeguards as to hours of service, working conditions and compensation therefor.

1. Discharge of employee: Immediate payment. Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately.

2. Quitting employee: Whenever an employee resigns or quits his employment, the wages and compensation earned and unpaid at the time of his resignation or quitting must be paid no later than the day on which he would have regularly been paid or 7 days after he resigns or quits, whichever is earlier.

3. An employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour. No period of less than 30 minutes interrupts a continuous period of work.

4. Every employer shall authorize and permit covered employees to take rest periods, which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. Authorized rest periods shall be counted as hours worked, for which there shall be no deduction from wages.

5. Effective July 1, 2007 each employer shall pay a wage to each employee of not less than $5.30 per hour worked if the employer provides health benefits, or $6.33 per hour if the employer does not provide health benefits. Offering health benefits means making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section.

6. A part of wages or compensation may, if mutually agreed upon by an employee and employer in the contract of employment, consist of meals. In no case shall the value of the meals consumed by such employee be computed or valued at more than 35 cents for each breakfast actually consumed, 45 cents for each lunch actually consumed, and 70 cents for each dinner actually consumed.

7. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate prescribed pursuant to the Constitution of the State of Nevada: (a) More than 40 hours in any scheduled week of work; or (b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to the Constitution, works more than 40 hours in any scheduled week of work.

The above provisions do not apply to: (a) Employees who are not covered by the minimum wage provisions of the Constitution (b) Outside buyers; (c) Salesmen earning commissions in a retail business if their regular rate is more than 1 1/2 times the minimum wage, and more than one-half their compensation comes from commissions; (d) Employees who are employed in bona fide executive, administrative or professional capacities; (e) Employees covered by collective bargaining agreements which provide otherwise for overtime; (f) Drivers, drivers' helpers, loaders and mechanics for motor carriers subject to the Motor Carrier Act of 1935, as amended; (g) Employees of a railroad; (h) Employees of a carrier by air; (i) Drivers or drivers' helpers making local deliveries and paid on a trip-rate basis or other delivery payment plan; (j) Drivers of taxicabs or limousines; (k) Agricultural employees; (l) Employees of business enterprises having a gross sales volume of less than $250,000 per year; (m) Any salesman or mechanic primarily engaged in selling or servicing automobiles, trucks or farm equipment; and (n) A mechanic or workman for any hours to which the provisions of subsection 3 or 4 of NRS 338.020 apply.

8. Every employer shall establish and maintain records of wages for the benefit of his employees, showing for each pay period the following information for each employee: (a) Gross wage or salary; (b) Deductions; (c) Net cash wage or salary; (d) Total hours employed in the pay period by noting the number of hours per day; (e) Date of payment.

9. Wages must be paid semimonthly or more often.

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11. It is unlawful for any person to take all or part of any tips or gratuities bestowed upon his employees. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

12. An employer may not require an employee to rebate, refund or return any part of his or her wage, salary or compensation. Also, an employer may not withhold or deduct any portion of such wages unless it is for the benefit of, and authorized by written order of the employee. Further, it is unlawful for any employer who has the legal authority to decrease the wage, salary or compensation of an employee to implement such a decrease unless:

(a) Not less than 7 days before the employee performs any work at the decreased wage, salary or compensation, the employer provides the employee with written notice of the decrease; or

(b) The employer complies with the requirements relating to the decrease that are imposed on the employer pursuant to the provisions of any collective bargaining agreement or any contract between the employer and the employee.

13. All uniforms or accessories distinctive as to style, color or material shall be furnished, without cost, to employees by their employer. If a uniform or accessory requires a special cleaning process, and cannot be easily laundered by an employee, such employee's employer shall clean such uniform or accessory without cost to such employee.

For additional information or exceptions, contact the Nevada State Labor Commissioner: Carson City 775-687-4850 or Las Vegas 702-486-2650
TOLL FREE: 1-800-992-0900 Ext. 4850 Internet: www.LaborCommissioner.com

JIM GIBBONS	MICHAEL TANCHEK	MENDY ELLIOTT
Governor	Nevada Labor Commissioner	Director
State of Nevada		Nevada Department of Business & Industry

REVISED JUNE 25, 2007

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5. Effective July 1, 2008 each employer shall pay a wage to each employee of not less than $5.85 per hour worked if the employer provides health benefits, or $6.85 per hour if the employer does not provide health benefits. Offering health benefits means making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section.

6. A part of wages or compensation may, if mutually agreed upon by an employee and employer in the contract of employment, consist of meals. In no case shall the value of the meals consumed by such employee be computed or valued at more than 35 cents for each breakfast actually consumed, 45 cents for each lunch actually consumed, and 70 cents for each dinner actually consumed.

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JIM GIBBONS
Governor
State of Nevada

MICHAEL TANCHEK
Nevada Labor Commissioner

MENDY ELLIOTT
Director
Nevada Department of Business & Industry

REVISED 6-03-2008

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JIM GIBBONS	MICHAEL TANCHEK	DIANNE CORNWALL
Governor	Nevada Labor Commissioner	Director
State of Nevada		Nevada Department of Business & Industry

REVISED 6-11-2009

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5. Effective July 1, 2010 each employer shall pay a wage to each employee of not less than $7.25 per hour worked if the employer provides health benefits, or $8.25 per hour if the employer does not provide health benefits. Offering health benefits means making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. Tips or gratuities received by employees shall not be credited as being any part of or offset against the minimum wage rates.

6. A part of wages or compensation may, if mutually agreed upon by an employee and employer in the contract of employment, consist of meals. In no case shall the value of the meals consumed by such employee be computed or valued at more than 35 cents for each breakfast actually consumed, 45 cents for each lunch actually consumed, and 70 cents for each dinner actually consumed.

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JIM GIBBONS	MICHAEL TANCHEK	DIANNE CORNWALL
Governor	Nevada Labor Commissioner	Director
State of Nevada		Nevada Department of Business & Industry

REVISED 7-1-2010

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The legislature hereby finds and declares that the health and welfare of workers and the employment of persons in private enterprises in this state are of concern to the state and the health and welfare of persons required to earn their livings by their own endeavors require certain safeguards as to hours of service, working conditions and compensation therefor.

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REVISED 11-7-2011

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REVISED 11-13-2012

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REVISED 5-2-2014

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge, Respondents, and LAKSIRI PERERA, Individually and on behalf of others similarly situated, Real Party in Interest.	**Case No.:** _____ District Court Case No. A-14-707425-C

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

VOLUME 6 OF 7

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Western Cab Company

APPENDIX #	DOCUMENT DESCRIPTION	PAGES
11	Western Cab's 8/19/15 Reply in Support of Motion for Reconsideration	381-432

APPENDIX 11

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Attorneys for Defendant
Western Cab Company

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, individually and on behalf of others similarly situated, Plaintiffs, v. WESTERN CAB COMPANY, Defendant.	**Case No.: A-14-707425-C** **Dept.: VII** **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF PORTION OF THIS COURT'S JUNE 16, 2015 DECISION AND ORDER** **Date of Hearing: 08/27/15** **Time of Hearing: 9:00 a.m.**

I. RECONSIDERATION IS NECESSARY GIVEN THE SIGNIFICANCE AND CONSTITUTIONAL DIMENSION OF THE FREQUENTLY RECURRING QUESTION RAISED

At issue is what statute of limitations applies to a claim for back wages under the Minimum Wage Amendment, Nevada Const. Art. XV, Sec. 16, where the employee was previously excluded by NRS 608.250(2) from receiving minimum wage set by the Nevada Labor Commissioner. In the wake of the Supreme Court's decision in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), courts sitting in Nevada have inconsistently applied two, three and four year statutes of limitations to claims for back wages under such circumstances, *e.g.*: (1) two years under NRS 608.260, titled "Action by employee to recover difference between minimum wage and

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amount paid; limitation of action;" (2) three years under NRS 11.190(3)(a), governing actions on claims created by statute; or (3) four years under the catchall NRS 11.220, titled "Action for relief not otherwise provided for."[1]

This issue is obviously frequently occurring and of great significance to employers and employees. It should be determined only after the parties have been accorded full opportunity to present all arguments and authorities on the issue. Nothing in EDCR 2.24 ("Rehearing of motions") curtails or prohibits the Court's exercise of its discretion to reconsider matters, particularly ones as unsettled and important as this, and the parties' presentation and the Court's consideration of all relevant portions of NRS and NAC Chapters 608 and relevant case law is clearly justified under the circumstances.

II. THE COURT IS OBLIGED BY NEVADA LAW TO PRESERVE NRS 608.260'S TWO-YEAR LIMITATION AS IT DOES NOT OFFEND ANY PROVISION OF THE NEVADA CONSTITUTION'S MINIMUM WAGE AMENDMENT

Under a subsection of NRS Chapter 608 titled "Minimum Wage," NRS 608.250 provides:

> **NRS 608.250 Establishment by Labor Commissioner; exceptions; penalty.**
> 1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest.
> 2. The provisions of subsection 1 do not apply to:

[1] The majority of courts split between two years and four years. Only one case, *Sheffer v. US Airways, Inc.*, 2015 WL 3458192 (D. Nev. 2015), applied the three-year statute to a Minimum Wage Amendment claim. There, the plaintiff urged application of the six year limitation provided by NRS 11.190(1)(b) for actions on written contracts and obligations while the defendant argued for application of NRS 608.260's two-year statute. The Court rejected both positions and settled on the three-year statute governing actions based on a statutory right as the "most obvious candidate." *Id.*, at *3 (continuing: "Section 16 is not strictly a 'statute,' but the Court believes the Nevada Supreme Court would treat it as one for purposes of the limitations period.").

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> (a) Casual babysitters.
>
> (b) Domestic service employees who reside in the household where they work.
>
> (c) Outside salespersons whose earnings are based on commissions.
>
> (d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 days of agricultural labor in any calendar quarter of the preceding calendar year.
>
> (e) Taxicab and limousine drivers.
>
> (f) Persons with severe disabilities whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.
>
> 3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

The Constitutional Minimum Wage Amendment, titled "Payment of minimum compensation to employees," as interpreted by *Thomas*, effected the elimination of the exclusion of certain Nevada workers from the minimum wage, e.g., taxicab drivers, but did not eliminate subsections (1) and (3) of the statute – hence, the Nevada Labor Commissioner still establishes the minimum wage in conformity with the Minimum Wage Amendment and still enforces claims on behalf of employees who have not been paid the applicable minimum wage. *See* Exhibit 10, p. 2, Office of the Labor Commissioner's 7/1/14 Biennial Report to the Governor and the Legislature Pursuant to NRS 607.080, July 1, 2014, defining as part of the "Function and Purpose of the Office," the "Minimum Wage Calculation" as follows:

> Pursuant to Article 15, Section 16(A) of the Nevada Constitution, the Governor or the State agency designated by the Governor must calculate the State minimum wage annually and publish a bulletin announcing the adjusted rates, if any, by April 1 of each year. The new rates, if any, go into effect the following July 1.

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> The Office of the Labor Commissioner is the agency designated by the Governor to make the minimum wage calculation each year and publish the bulletin announcing the rates. This is a duty this office takes very seriously as we understand the impact the determination of minimum wage has on the Nevada economy.
>
> In 2014, the minimum wage rates for the State of Nevada did not increase from the year before. Presently, minimum wage in Nevada is $7.25 for workers offered qualified health insurance and $8.25 for workers without employer-provided health insurance.

Then, NRS 608.260 provides a two-year statute of limitations for recovery of back wages, stating:

> **Action by employee to recover difference between minimum wage and amount paid; limitation of action.** If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action.

Thomas interpreted the Minimum Wage Amendment as eliminating the exceptions of certain workers under NRS 608.250(2). 327 P.3d at 522. But, other than thereby adding to the breadth of Nevada workers covered by the minimum wage, *Thomas* did not invalidate any other part of NRS 608.250 or even address NRS 608, including either its two-year statute of limitations (NRS 608.260) or its two-year employer record-keeping obligation (NRS 608.115 and NAC 608.140)).[2]

Thomas should not be construed as requiring the invalidation of other portions of NRS

[2] Thus, as noted in Western Cab's Motion, *Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 954 (2014), observes as to the operation of *Thomas*: "Only an 'employee' is entitled to minimum wages under NRS 608. NRS 608.250, ***superseded in part by constitutional amendment as recognized in Thomas....***" (Emphasis added.)

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Chapter 608. In fact, under both its inherent authority and statutory direction, the judicial branch is obliged by the severabilty doctrine to uphold the constitutionality of the remainder of NRS Chapter 608, as those statutes are not repugnant to the Minimum Wage Amendment. For example, NRS 0.020, added in 1975, confirms the Legislature's intent that Nevada courts not invalidate any portions of statutes that are not constitutionally offensive:

> **Severability**
>
> 1. If any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, ***such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, and to this end the provisions of NRS are declared to be severable.***
>
> 2. The inclusion of an express declaration of severability in the enactment of any provision of NRS or the inclusion of any such provision in NRS, does not enhance the severability of the provision so treated or detract from the severability of any other provision of NRS.

(Emphasis added.) The Nevada Supreme Court has long embraced the so-called "severance doctrine" as part of its inherent authority. Thus, *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 515, 217 P.3d 546, 555-56 (2009), affirms that only the unconstitutional portions of the Indoor Air Act statutory scheme be stricken, explaining:

> Under the severance doctrine, ***it is 'the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.'*** *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001) (quotation omitted.) This court has adopted a two-part test for severability: ***a statute is only severable if the remaining portion of the statute, standing alone, can be given legal effect, and if the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed.*** *County of Clark v. City of Las Vegas*, 92 Nev. 323, 335-37, 550 P.2d 779, 788 (1976).

(Emphasis added.) More than a century earlier, the Nevada Supreme Court explained precisely the doctrine in *State ex rel. Attorney General v. Harris*, 19 Nev. 222, 8 P. 462, 463 (1885):

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> *An unconstitutional provision will not invalidate an entire enactment of the legislature, unless the obnoxious portion is so inseparably connected with the others that it cannot be presumed the legislature would have passed the one without the other.* 'It is true,' said the supreme court in California, in *Lathrop v. Mills*, 19 Cal. 530, 'that *the constitution merely inderdicts acts which oppose its provisions, and that if any act there be found a provision which is constitutional, that provision may be carried out*, provided the excepted provision is entirely disconnected from the vicious portions of the act, and the legislature is presumed to intend that, notwithstanding the invalidity of the other parts of the act, still this particular section shall stand. The saving of the particular provision, even when not upon its face unconstitutional, in such instances is therefore a matter of legislative intent. In order to sustain the excepted clause, we must intend that the legislature, knowing that the other provisions of the statute would fail, still willed that this particular section should stand as the law of the land.'

(Emphasis added.)

Subsection (2) of NRS 608.250 is the only part of the statute that is unconstitutional. The rest of the statute must be preserved to the extent possible. *United States v. Beko*, 88 Nev. 76, 88, 493 P.2d 1324, 1331 (1972) (court had authority to sever unconstitutional exemption in tax statute if severance did not invalidate entire statute); *Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 645, 600 P.2d 1189, 1192 (1979) (citing both NRS 0.020 and the courts' inherent authority to determine "whether the remainder" of a statutory scheme under attack as unconstitutional could "stand independently and whether the Legislature would have intended it to do so."). *Desert Chrysler* concluded that severability saved significant portions of the statutory scheme:

> In this case it is clear that the legislation is separable and that the Legislature would have intended severance. The remaining sections of Chapter 295 define unfair business practices and provide for civil penalties when these laws are violated.... Such legislation is divisible from that which imposes a licensing function on the district court. Furthermore, since it was the intent of the Legislature to enact a law that regulated motor vehicle franchises, *it must*

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> *be presumed that the Legislature would have intended that the remaining portion of the act be severable from the invalid provisions.*

95 Nev. at 645-46, 600 P.2d at 1192 (emphasis added).

The application of the severability doctrine to statutes and parts of statutes is a fundamental part of basic law of the United States. *See Loeb v. Trustees of Columbia Township*, 179 U.S. 472, 489-90 (1900) ("As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. ***One part may stand, while another will fall,*** unless the two are so connected, or dependent on each other in subject-matter, meaning, or purpose, that the good cannot remain without the bad." (emphasis added)); *Cash America International v. Bennett*, 35 S.W.3d 12, 22 (Tex. 2000) ("When a part of a statutory scheme is unconstitutional, ***a court should sever out the unconstitutional aspects and save the balance of the scheme*** if 'other provisions or applications of the statute... can be given effect without the invalid provision or application.'" (emphasis added)); *Commissioner v. Lawyer Discipline v. Benton*, 980 S.W.2d 425, 551 (Tex. 1998) ("The ***unconstitutionality of one part of a statute does not require us to invalidate the entire statute*** unless the unconstitutional provision is not separable from the remainder." (emphasis added)); *Bach v. County of St. Clair*, 576 N.E.2d 1236, 1241 (Ill. App. 1995) ("[T]he ***invalidity of that one section does not mandate invalidation of all of Chapter 42.*** The ***invalidity of one part of a statute does not affect the validity of the remainder*** unless it is clear that the legislature would not have enacted the law without the invalid portion." (emphasis added)).

In this case, *Thomas* did not require or even suggest any reason why the statute of limitations in NRS 608.260 would be constitutionally repugnant to the Minimum Wage Amendment and fall with NRS 608.250(2). Under well-settled Nevada law, the two-year statute of

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limitations should be enforced as it stands.

III. THE MINIMUM WAGE AMENDMENT AND NRS 608.260'S TWO-YEAR LIMITATION ARE RATIONALLY HARMONIOUS

The Minimum Wage Amendment, Art. XV, Sec. 16(B), does not provide specific remedies or limitations for action, but specifically embraces a plaintiff's entitlement "to all remedies available under the law or in equity appropriate to remedy any violation" of the Amendment, stating in pertinent part:

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

(Emphasis added.) NRS Chapter 608 is titled "Compensation, Wages and Hours" and subsections 608.250 -.290 are grouped under the title "Minimum Wage." Within the Minimum Wage grouping, NRS 608.260 specifically addresses remedies for the recovery of minimum wages, limited by two-years within which to bring such a suit, stating in pertinent part:

> If any employer pays any employee a lesser amount than the minimum wage..., ***the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage....***

(Emphasis added.) These provisions are not inconsistent or incompatible, but complementary and harmonious one with the other. In fact, the Constitutional Amendment's words "***all remedies available under the law*** or in equity ***appropriate to remedy any violation of this section***" are reasonably read to anticipate or rely on plaintiff's ability to commence lawsuits for back wages under NRS 608.260. (Emphasis added.) Thus, the Nevada Supreme Court has long and uniformly concluded that statutes must be construed "if reasonably possible, so as to be in ***harmony with the***

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constitution." (Emphasis added.) *Thomas, supra*, 327 P.3d at 521, *citing State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982). In addition, the Nevada Supreme Court has also long concluded that "[if] the constitutional provision is ambiguous, we look to the history, public policy, and reason for the provision," concluding that "***the interpretation of a ... constitutional provision will be harmonized with other statutes.***" (Emphasis added.) *Landreth v. Malik*, 127 Nev. Adv. Op. 16, 251 P.3d 163, 166 (2011), *citing We the People v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) ("[W]hen possible, ***the interpretation of a*** statute or ***constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results***" (emphasis added)).

As a natural result of these longstanding precepts, Nevada acknowledges a "***presumption... against implied repeal unless*** the enactment conflicts with existing law to the extent that ***both cannot logically coexist.***" (Emphasis added.) *Thomas, supra*, 327 P.3d at 521, *citing Western Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165 (1946). To avoid invalidation of statutes "***every favorable presumption and intendment" must be employed in favor of the statute's constitutionality.***" (Emphasis added.) *Glusman, supra*, 98 Nev. at 419-20, 651 P.2d at 644; and *id.*, further explains:

> We have long recognized, as a general principle, that ***statutes should be construed, if reasonably possible, so as to be in harmony with the constitution.*** *Copeland v. Woodbury*, 17 Nev. 337, 30 P. 1006 (1883); cited with approval in *Milchem Inc. v. District Court*, 84 Nev. 541, 445 P.2d 148 (1968). In the face of attack, ***every favorable presumption and intendment will be brought to bear in support of constitutionality.*** As previously held, ***'[a]n act of the legislature is presumed to be constitutional and should be so declared unless it appears to be clearly in contravention of constitutional principles.'*** *State ex rel. Tidvall v. Eighth Judicial District Court*, 91 Nev. 520, 526, 539 P.2d 456, 460 (1975).

(Emphasis added.) In considering statutory challenges, the "***statutes are presumed to be valid,*** and

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the burden is on the challenger to make a ***clear showing of their unconstitutionality.***" *Paschall v. State*, 116 Nev. 911, 914, 8 P.3d 851, 852-53 (2000) (emphasis added). As a result, "it is axiomatic that '[w]here the language of a statute is plain and unambiguous, and its meaning is clear and unmistakable, ***there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.***'" (Emphasis added.) *Id.*; *see also Sheriff, Clark County v. Luqman*, 101 Nev. 149, 155, 697 P.2d 107, 111 (1985) ("Where the intention of the legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute to effectuate, rather than to nullify, its manifest purpose.").

NRS 608.260's two-year limitation for back wages is not addressed, supplanted or replaced by any portion of Art. XV, Sec. 16, but is completely harmonious and reconcilable with the Minimum Wage Amendment's instruction that "[a]n employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief." As in *Glusman*, none of plaintiffs' constitutional rights are impaired by enforcement of the two-year time limit of the statute, but rather enforced under it. 98 Nev. at 423, 651 P.2d at 646.

This conclusion is further supported by NRS 608.115's direction that employers maintain records of wages for a 2-year period. The Minimum Wage Amendment is also consistent with NAC 608.140, added by the Labor Commissioner to the Administrative Code effective August 25, 2004 –before the first vote on the Constitutional Amendment -- and reaffirming NRS 608.115's duties, stating:

> **Provision of records of wages to employee.** (NRS 607.160, 608.115) Within 10 days after a request by an employee, an employer shall provide ***the records of wages required to be kept by the employer pursuant to NRS***

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> *608.115* to the employee, including, but not limited to, an employee that is paid by salary, piece rate or any other wage rate.

(Emphasis added.) *See* Exhibit 16. Record retention provisions of other employment or fair wage statutory schemes have been considered significant evidence of what statute of limitations should be applied. For example, *Jones v. Tracy School District*, 611 P.2d 441, 443-44 (Cal. 1980), concludes that a two-year records retention requirement had real meaning – to prevent the prosecution of claims where records and witnesses were no longer available -- with regard to the statutory scheme's two-year limitation for recovery of back wages:

> The section, read as a whole, demonstrates a legislative intent to limit back pay recovery to two years. ***It is significant that subdivision (d) requires all employers to keep records of wages and job classifications for only two years.*** As explained below, ***this requirement discloses a legislative intent to limit recovery of back wages in the manner sought by respondent.***
>
> ***The relationship between the two-year record-keeping requirement of subdivision (d) and the limitations period set forth in subdivision (h) becomes apparent when these provisions are viewed in the light of the important purpose served by the statute of limitations, namely, 'to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available.'*** (Addison v. State of California (1978) 21 Cal.3d 313, 317, 146 Cal.Rptr. 224, 226, 578 P.2d 941, 942-43; People v. Universal Film Exchanges (195) 34 Cal.2d 649, 659, 213 P.2d 697.) By reason of the operation of subdivision (d), documentary evidence may be lacking to support or defend against claims of discrimination occurring more than two years before the initiation of an action for back wages, while less stale claims, in all probability, will be well documented. ***Surely the Legislature would not have imposed only a two-year record retention requirement had it intended to permit unlimited recovery in wage discrimination cases.*** Thus, in order to harmonize the various provisions of section 1197.5, ***we read the two-year limit of subdivision (h) as both a filing requirement and a limitation upon recovery.***

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(Emphasis added.) Based on the same logic, *Barajas v. Bermudez*, 43 F.3d 1251, 1260 (9th Cir. 1994), reverses the district court's application of a one-year statute of limitations to claims under the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") where there was a three-year document retention requirement, which the Ninth Circuit deemed appropriate to afford protection to both workers and employers:

> One important component of the AWPA statutory scheme is disclosure. As the House Report on the AWPA bill emphasized, 'the duty to provide truthful information shall be a duty which runs throughout the period beginning with recruitment and extending until the point that the records required to be maintained need no longer be maintained.' H.R. Rep. No. 97-885, 9th Cong. 2d Sess. 16.... The statute carries forward this purpose.... These provisions not only require that employers provide comprehensive information to workers, concerning the terms of their employment, but also that they 'make, keep and preserve records *for three years*...' pertaining to hours worked, piecework units earned, wages, pay period earnings, specific sums withheld, and net pay for each worker. ***The three-year record retention requirement would be eviscerated were the private right of action...limited by a one-year statute of limitations*** (the one-year limit, of course, would apply not only to aggrieved workers but also to employers seeking to exercise their AWPA right to obtain employment data on workers who previously had worked for other contractors....)

(Emphasis supplied.) To harmonize the three-year record retention statute with the claims limitation, the Ninth Circuit borrowed the state's three-year limitation for actions on oral contracts: "[W]e would decline to borrow the one-year limitations period ... in light of the three-year record retention requirements of the AWPA and its remedial and humanitarian purposes." *Id.*

Section B of the Minimum Wage Amendment confirms the existing right of employees to sue to recover back wages but does not contain a statute of limitations. By the Supreme Court's decision in *Thomas*, taxicab drivers were removed from the exception to minimum wage and therefore are within the group of employees covered by the Constitution and NRS 608. Under such

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circumstances, it is unfair, irrational, unreasonable and beyond the logical intent of both the Legislature and the Nevada electorate to conclude that an employee's claim for back wages under the Minimum Wage Amendment would be subject to the State's longer catch-all statute of limitations – for "Action[s] for relief not otherwise provided for" -- as opposed to the specific two-year limitation stated in NRS Chapter 608, governing "Compensation, Wages and Hours" and consistently providing a two-year limitations for employee claims and employer's record retention. There is no support in the Minimum Wage Amendment, NRS Chapter 608, NAC Chapter 608, or any Nevada Supreme Court decision to read the limitations period of NRS 608.260 out of Nevada law and instead use the catch-all – "for relief not otherwise provided for" -- statute of limitations. The Court should reconsider its decision and conclude, as the Supreme Court in *Glusman*, 98 Nev. at 423, 651 P.2d at 646, that the "statue here challenged is constitutional on its face" and that, as in *Jones*, *supra*, and *Barajas*, *supra*, the limitations for actions and record-keeping are rationally related and must be read together.[3]

IV. IMPLIED REPEAL OF STATUTES IS STRONGLY DISFAVORED AND READING NRS 608.260 AND NRS 608.115(3) IN HARMONY WITH THE MINIMUM WAGE AMENDMENT PRESERVES THE TWO-YEAR STATUTE OF LIMITATIONS

Under Nevada law, the conclusion that a statute has been impliedly repealed is "heavily disfavored." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001) (this Court "will not consider a statute to be repealed by implication unless there is ***no other reasonable construction*** of the two statutes" (emphasis added)); *Presson v. Presson*, 38 Nev. 208, 208, 147 P. 108, 1082 (1915) (implied repeal is disfavored); *Western Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165 (1946) (*quoting Ronnow v. City of Las Vegas*, 57 Nev. 332, 85 P.2d

[3] The Labor Commissioner voluntarily adopted a 24-month limitation on accepting wage claims. NAC 607.105. Moreover, Mr. Greenberg agrees that his second claim for relief is governed by a two-year statute of limitations. Exhibit 13. *See also* Exhibit 14 where the Court limited discovery regarding the class to two years.

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133, 147 (1937) ("*Where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute...*" (emphasis added)). "The fact that a statute is enacted after another statute, but is subsequently amended without mention of the first statute, may weigh against a finding of legislative intent to repeal by implication." *Washington, supra; see also, Thomas* dissent, 327 P.3d at 522, *citing In re Advisory Op. to the Governor*, 132 So.2d 163, 169 (Fla. 1961) ("Implied repeals of statutes by later constitutional provisions [are] not favored and... in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary.").

The Minimum Wage Amendment makes no specific reference to NRS 608.260, but preserves an employee's "right to bring an action against his or her employer...." There is no indication that when Nevada voters considered the Constitutional Minimum Wage Amendment, they were informed that they might be deemed to have repealed or amended NRS 608.260's two-year time limit for initiating a court case or NRS 608.115(3)'s requirement that employers maintain wage records for two years. *See Lucas v. Bell Trans*, 2009 WL 2424557, at *8 (D. Nev. 2009), concluding that there was no conflict sufficient to read NRS 608.250 out of the Constitutional Amendment as opposed to reconciling it:

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

Of course, as *Thomas, supra*, concluded that as to NRS 608.250(2)'s exceptions for casual babysitters, certain domestic servants, commissioned salespersons, and others, the intent of the

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Minimum Wage Amendment was clear:

> The Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups: '"employee" means any person who is employed [by an individual or entity that may employ individuals or enter into contracts of employment] but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days.' Nev. Const. art. 15, §16(C). Following the *expression unius* canon, the text necessarily implies that all employees not exempted by the Amendment, including taxicab drivers, must be paid the minimum wage set out in the Amendment. The Amendment's broad definition of employee and very specific exemptions necessarily and directly conflict with the legislative exception for taxicab drivers established by NRS 608.250(2)(e). Therefore, the two are 'irreconcilably repugnant,' ... such that 'both cannot stand.' ... and the statute is impliedly repealed by the constitutional amendment.

The same result is not required, or even suggested, by the Minimum Wage Amendment as to NRS 608.260's time limit for actions. *Thomas*'s analysis of Constitutional superiority over a conflicting legislative enactment is inapplicable here as there is no conflict.

V. THE FEDERAL COURTS HAVE GENERALLY PRESERVED THE TWO-YEAR STATUTE CONTAINED IN NRS 608.260

The U.S. District Courts for Nevada have generally applied the two-year limitations to claims under the Minimum Wage Amendment.[4] *See Hanks v. Brtad Restaurant Group,* LLC, 2015 WL 4562755, at *7 (D. Nev. 2015), Exhibit 15, *citing Thomas*, *supra*, and *Terry, supra* ("[T]he two-year statute of limitations period found in section 608.260 does not necessarily and directly conflict with the Minimum Wage Amendment, making the two laws irreconcilably repugnant. Rather, the statutory provision can be construed in harmony with the constitution because the

[4] *See*, fn. 1, *supra*, discussing *Sheffer*, 2015 WL 3458192, in which U.S. District Judge Jones applied the three-year statute of limitations, NRS 11.190(3)(a), predicting that the Nevada Supreme Court would treat claims under the Minimum Wage Act as statutory.

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constitution is silent as to the appropriate limitations period. Therefore, the Court finds that the Minimum Wage Amendment's silence does not impliedly repeal the two-year statute of limitations found in section 608.260 and that the two-year limitations period applies to minimum wage claims brought under the amendment."); *Tyus v. Wendy's of Las Vegas, Inc.*, 2015 WL 1137734, at *3 (D. Nev. 2015), Exhibit 5, ("[A]lthough the Minimum Wage Amendment is silent on a limitations period, the Court finds that this silence does not impliedly repeal the two-year statute of limitations period found in NRS 608.260. Accordingly, the Court dismisses with prejudice all wage claims accruing more than two years before Plaintiffs filed suit."); *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 n. 7 (9th Cir. 2013), Exhibit 3, *cert. den.*, 134 S.Ct. 2819 (2014) (affirming application of the 2-year statute); *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874, at *4 (D. Nev. 2014), Exhibit 4, (applying the 2-year statute); and *Golden v. Sun Cab*, Case No. A678109 (Exhibit 7, at p. 3: "Since the nature of the action here is the same as the nature of the action described in NRS 608.260, the two year limitation period should apply").

Since July 1, 2015, when Western Cab filed its motion for reconsideration, two additional Eighth Judicial District Courts have ruled on the issue, with Department 3, District Judge Herndon, ruling in *Desert Cab, Inc. v. Barbara Gilmore*, Case No. A-12-668502-C, that the two-year statute applied (Exhibit 11, Minute Order), and with Department 28, District Judge Israel, ruling that the four-year statute applied (Exhibit 12, Order).

VI. CONCLUSION

As a question of obvious Constitutional magnitude affecting many Nevadans, this issue should be resolved only after the parties have had full opportunity to present all arguments on the issue. Nothing in EDCR 2.24 ("Rehearing of motions") curtails or prohibits the Court's exercise of its discretion to reconsider matters, particularly ones of such significance, reoccurrence and persistent diversion among the State's Courts as this, and the parties' presentation and the Court's

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consideration of all relevant portions of the Minimum Wage Act and NRS and NAC Chapters 608 and the cases interpreting them is clearly justified under these circumstances.

Public trust and confidence in legislative and judicial branches of government is not served by the confusion raised by inconsistent or irreconcilable treatments of NRS 608.260 and the Minimum Wage Amendment. Nor would it be served by treating different categories of workers defined as "employees" differently. As demonstrated by the authorities cited above, the connection between the duty to maintain records and the right to recover back wages based on those records is rationally connected and the statute of limitations for both should be consistent. Moreover, the Supreme Court's striking of the exclusion of certain employees from the benefit of minimum wages in *Thomas* did not invalidate the rest of NRS Chapter 608. The Court should reconsider its decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, the undersigned hereby certifies that a true and correct copy of **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF PORTION OF THIS COURT'S JUNE 16, 2015 DECISION AND ORDER** was electronically served via the Eighth Judicial District Court's ECF System on this 19th day of August, 2015, to the following:

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EXHIBIT 10

EXHIBIT 10

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Biennial Report to the Governor and the Legislature Pursuant to NRS 607.080
July 1, 2014

MISSION

The Office of the Labor Commissioner is the principal labor and industrial relations regulatory agency for the State of Nevada. As such, it is the mission of this office to enforce all labor and industrial relations laws of the State of Nevada not otherwise assigned to another entity to ensure the fair and lawful conduct of business in the State of Nevada.

The Office of the Labor Commissioner envisions a labor force in which all employees are compensated for all work performed and where all employers are aware of and comply with labor laws, ultimately resulting in an economic benefit for the State of Nevada.

GOALS

As an agency, it is our goal to help the public resolve labor-related problems in an efficient, professional, and effective manner. This includes educating employers and employees regarding their rights and responsibilities under the law in an effort to promote the growth of business in Nevada. Additionally, it includes taking enforcement action, when necessary, to ensure that Nevada's workers are treated fairly and compensated for all time worked.

STATUTORY AND REGULATORY AUTHORITY

NRS 607 – Office of the Labor Commissioner
NRS 608 – Compensation, Wages and Hours
NRS 609 – Employment of Minors
NRS 610 – Apprenticeship
NRS 611 – Private Employment Agencies
NRS 613 – Employment Practices*
NRS 614 – Organized Labor and Labor Disputes
NRS 338 – Public Works

NAC 607 – Rules of Practice
NAC 608 – Compensation, Wages and Hours
NAC 609 – Employment of Minors
NAC 610 – Apprenticeship
NAC 611 – Private Employment Agencies
NAC 613 – Employment Practices
NAC 338 – Public Works

**NRS 613.040-613.070 and NRS 613.310-613.435 are not enforced by the Labor Commissioner.*

FUNCTION AND PURPOSE OF THE OFFICE

While the Office of the Labor Commissioner is the principal labor and industrial relations regulatory agency for the State of Nevada, we do not have jurisdiction over all employment matters. The Office of the Labor Commissioner primarily handles wage and hour matters in private employment and on public works projects. Matters related to discrimination, unemployment, worker's compensation, etc. are handled by other government entities.

The Office of the Labor Commissioner investigates complaints for the non-payment of wages, minimum wage, overtime, and prevailing wage on public works projects. Additionally, the office monitors youth employment practices, apprenticeship programs, and private employment agencies operating in the State of Nevada.

Employment Practices

The Office of the Labor Commissioner ensures that certain safeguards and enforcement mechanisms exist in the workplace with regard to hours of service and working conditions. However, the Labor Commissioner does not have authority over employment practices related to political affiliation or employment discrimination; those duties are vested in other entities.

Minimum Wage Calculation

Pursuant to Article 15, Section 16(A) of the Nevada Constitution, the Governor or the State agency designated by the Governor must calculate the State minimum wage annually and publish a bulletin announcing the adjusted rates, if any, by April 1 of each year. The new rates, if any, go into effect the following July 1.

The Office of the Labor Commissioner is the agency designated by the Governor to make the minimum wage calculation each year and publish the bulletin announcing the rates. This is a duty this office takes very seriously as we understand the impact the determination of minimum wage has on the Nevada economy.

In 2014, the minimum wage rates for the State of Nevada did not increase from the year before. Presently, minimum wage in Nevada is $7.25 for workers offered qualified health insurance and $8.25 for workers without employer-provided health insurance.

Wage Claim Disputes

Resolution of wage disputes between employers and employees is the primary service provided by the Office of the Labor Commissioner. These disputes often relate to claims that an employee was not paid for all time worked, was not paid the appropriate overtime or was not paid timely.

Due to the significant financial impact unpaid wages can have on Nevada workforce and their families, this office strives to resolve all claims as quickly as possible. To that end, it is our goal to complete 90% of all wage claim investigations within 90 days of opening the claim. An investigation is considered completed when money due to the worker is received, the wage claim is dismissed or a final order has been issued.

In 2012 and 2013, the Office of the Labor Commissioner recovered over $4.5 million in wages and penalties for Nevada workers. To date, approximately 850 wage claims have been filed with over $650,000 in wages and penalties recovered in 2014.

Public Works Enforcement and Administration

The Office of the Labor Commissioner oversees the enforcement and administration of public works in Nevada. This includes the survey and determination of the minimum prevailing rate to be paid for each of the 36 job classifications recognized by Nevada law; the assignment of identifying numbers for public works projects and management of project files; and the adjudication of disputes between workers, contractors, and public bodies sponsoring or financing a public works project.

The Office of the Labor Commissioner issued public works project numbers for over 1,200 projects statewide in 2012 and 2013. The amount of these awarded projects totaled over $2.25 billion. Thus far in 2014, the Office of the Labor Commissioner has issued public works project numbers for 431 projects statewide, totaling $1.27 billion.

The Office of the Labor Commissioner's annual survey for 612 wage rate (36 classifications in 17 counties) resulted in approximately 3,500 individual rates being generated. For the first time in 2013, our office accepted these surveys electronically. This resulted in greater participation by contractors statewide. The Office of the Labor Commissioner expects the same for 2014.

Additionally, the Office of the Labor Commissioner oversaw 224 public works complaints in 2013. The resolution of those claims resulted in the recovery of over $1,000,000 for Nevada workers employed on public works projects. To date, 42 public works complaints have been filed with our office in 2014. The total number of complaints is down from prior years due in large part to efforts by our office to educate contractors and public bodies about Nevada's public works law.

Apprenticeship

Apprenticeship, often referred to as the "original 4-year degree," is a system of supervised training leading to certification in a trade, occupation or craft. It combines on-the-job training with classroom-related instruction. There are currently 91 approved apprenticeship programs and 2,714 registered apprentices in the State of Nevada.

With oversight by the Office of the Labor Commissioner, apprenticeship in Nevada is administered by the State Apprenticeship Council. The State Apprenticeship Council is comprised of seven members appointed by the Labor Commissioner, who serves are the State Director of Apprenticeship. Members of the State Apprenticeship Council represent the general public, labor, and management. The State Apprenticeship Council meets quarterly in February, May, August and November.

Any and all matters decided by the Council involving a registered apprentice or apprenticeship program, union or non-union, is subject to review and appeal by the Labor Commissioner. Unless appealed, all decisions rendered by the Labor Commissioner are binding and final.

Private Employment Agencies

The Office of the Labor Commissioner provides licensing and regulatory oversight of all private employment agencies in the State of Nevada. A private employment agency as defined by the Nevada Revised Statutes (NRS) is any person who, for a fee, commission or charge furnishes information to a person seeking employment enabling or tending to enable the person to seek employment; furnishes information to a person seeking employees enabling or tending to enable the person to obtain employees; or maintains a record of persons seeking employment or employees.

In 2013, all application materials to apply for a private employment agency license or to renew a previously issued private employment agency license were made available, for the first time, on the Office of the Labor Commissioner website. A total of 109 private employment agency licenses were issued or renewed in 2013. For 2014, a total of 103 private employment agency licenses were issued or renewed. This number includes 8 new agencies licensed and 16 agencies that closed or failed to renew.

Employment of Minors

The Office of the Labor Commissioner enforces the child labor laws outlined in NRS 609, including providing for the safety of minors in the workplace and ensuring that minors only work certain jobs, certain hours, and at certain ages.

OFFICE OF THE LABOR COMMISSIONER STAFF

The Office of the Labor Commissioner maintains offices in Carson City and Las Vegas with a staff of 19 individuals statewide. This is the same number of staff members the office had in 1991.

Executive Staff

Labor Commissioner

The Labor Commissioner serves as the administrator and primary hearing officer for the Office of the Labor Commissioner. Pursuant to NRS 607.030, the Labor Commissioner devotes his/her entire time and attention to these duties and the business of this office.

In his role as administrator, the Labor Commissioner oversees the day-to-day management and operation of the Carson City and Las Vegas offices. This includes hiring, training, supervising and evaluating administrative and investigative staff; representing the Office of the Labor Commissioner before the State Legislature and Legislative Committees; researching and, if necessary, revising applicable statutes and regulations; and educating Nevada employers and employees on Nevada's labor laws through outreach. Additionally, the Labor Commissioner oversees the preparation and administration of the agency's biennial budget.

In his role as hearing officer, the Labor Commissioner conducts administrative hearings on complaints of alleged violations of NRS 608 and/or NRS 338 in Northern Nevada (all counties except Clark, Esmeralda, Lincoln and Nye). Additionally, the Labor Commissioner serves as hearing officer over complex matters within the jurisdiction of the Las Vegas office.

In addition to his duties as administrator and primary hearing officer, the Labor Commissioner also serves as State Director of Apprenticeship with oversight of the Nevada State Apprenticeship Council.

The Labor Commissioner is based out of the Carson City office.

Deputy Labor Commissioner

The Deputy Labor Commissioner acts under the direction of the Labor Commissioner and assists in the performance of the Labor Commissioner's duties. Pursuant to NRS 607.030, the Deputy Labor Commissioner devotes his/her entire time and attention to these duties and the business of this office.

The Deputy Labor Commissioner acts as supervisor for the administrative staff of the Las Vegas office. Except in complex matters in which the Labor Commissioner serves as hearing officer, the Deputy Labor Commissioner serves as hearing officer for matters arising within the jurisdiction of the Las Vegas office.

Chief Assistant to the Labor Commissioner

The Chief Assistant to the Labor Commissioner serves as the Executive Assistant to the Labor Commissioner with both programmatic and administrative responsibilities as directed by the Labor Commissioner. Specific responsibilities include, but are not limited to: drafting and editing correspondence; managing the Commissioner's calendar, including scheduling travel and speaking engagements; drafting legal pleadings and orders of the Labor Commissioner; serving as Custodian of Records for the Office of the Labor Commissioner; and assisting with general administrative functions including payroll, personnel, budget, and agency finances.

The Chief Assistant to the Labor Commissioner is based out of the Carson City office.

Administrative Staff

Administrative Assistants

The Office of the Labor Commissioner employs an administrative staff of eight individuals statewide, including Administrative Assistant IVs, Administrative Assistant IIIs, and Administrative Assistant IIs.

The administrative staff primarily provides assistance to the public by answering questions and concerns pertaining to Nevada wage and hour laws by telephone, email, and in person. For matters not within the jurisdiction of the Labor Commissioner, administrative staff directs the public to other state and federal government agencies. Administrative staff also assists members of the public with filing wage claims, general employment complaints, and requests for personnel and wage records.

In addition to the duties referenced above, administrative staff members assist investigative staff with preparing case files, researching business information, and preparing letters to claimants and/or respondents. Further, the Administrative Assistant IVs are responsible for the administration of the Apprenticeship and Private Employment Agency programs.

Investigative Staff

Compliance/Audit Investigators

The Office of the Labor Commissioner employs an investigative staff of eight individuals statewide.

Investigators review wage claims to determine the issues and applicable statutes to make a determination as to whether there has been a violation of Nevada wage and hour laws. Investigators are required to exercise independent judgment in determining what actions to take during an investigation and must utilize available search techniques in the investigation of a claim. Investigators are often called upon to explain the claim process and answer questions regarding relevant provisions of Nevada wage and hour law.

The investigative process begins with an initial review of the wage claim to ensure that the claim falls within the jurisdiction of the Office of the Labor Commissioner. Next, the employer is notified that a claim has been filed alleging a violation of Nevada. Many times investigators are able to resolve the claim at this initial stage. If not, the employer must submit a response to the claim. Upon receipt of the employer's response and any relevant documentation, the investigative process begins. During the investigative process, investigators often meet with both parties to negotiate a settlement of the claim. If the parties cannot reach a settlement and the investigator believes the claim is sustainable, a formal written determination will issue. If an objection to the determination is filed, the investigation may move to the formal hearing process in which the matter is present to a hearing officer (usually the Labor Commissioner or Deputy Labor Commissioner). A Final Order of the Labor Commissioner may issue either as a result of the hearing or where no objection to the determination is submitted.

EXHIBIT 11

EXHIBIT 11

REGISTER OF ACTIONS

CASE NO. A-12-668502-C

Barbara Gilmore, Plaintiff(s) vs. Desert Cab, Inc., Defendant(s)	§	Case Type:	Other Civil Filing
	§	Subtype:	Other Civil Matters
	§	Date Filed:	09/17/2012
	§	Location:	Department 3
	§	Cross-Reference Case Number:	A668502
	§	Supreme Court No.:	62905

PARTY INFORMATION

Defendant	Desert Cab, Inc.	Lead Attorneys Jeffrey A. Bendavid *Retained* 7023848424(W)
Plaintiff	Gilmore, Barbara	Leon M. Greenberg *Retained* 7023836085(W)

EVENTS & ORDERS OF THE COURT

07/22/2015 | All Pending Motions (9:00 AM) (Judicial Officer Herndon, Douglas W.)

Minutes
07/22/2015 9:00 AM
- DEFENDANT, DESERT CAB, INC.'S MOTION TO DISMISS PLAINTIFF, BARBARA GILMOUR'S FIRST "CLAIMS" FOR RELIEF AND/OR MOTION TO STRIKE PLAINTIFF'S FIRST CLAIM FOR RELIEF AND-OR PRAYER FOR PUNITIVE DAMAGES AND PRAYER FOR INJUNCTIVE AND EQUITABLE RELIEF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND COUNTER-MOTION FOR DISCOVERY UNDER NRCP RULE 56(F) Mr. Bendavid argued in support of his motion with regards to conversion and punitive damage. With respect to the counter-motion, Mr. Bendavid stated plaintiff conceded and they have no evidence. Further arguments regarding discovery and injunctive relief. Mr. Bendavid argued plaintiff has no standing; plaintiff was a former employee and does not have a right to sue for future wages, cannot seek injunctive relief and plaintiff failed to address statute of limitations in their arguments. Further arguments regarding Nevada minimum wage rate addressed in defendant s reply. Arguments regarding conversion. Mr. Greenberg argued in opposition of defendant s argument regarding the two year statute of limitations with respect to unpaid minimum wages and referenced rulings that held that the statute is inapplicable to minimum wage claims brought directly under Nevada s Constitution. Further arguments. Court stated its findings and ORDERED, it will not strike anything related to the injunctive or equitable relief request, that request is STAYED; in regard to punitive damages, request to strike GRANTED; as to the conversion claim , it is not an appropriate part of the request and request to strike, GRANTED; as to the statute of limitations, Court stated the statute that applies is 2 years. Mr. Bendavid to prepare the order.

Parties Present
Return to Register of Actions

EXHIBIT 12

EXHIBIT 12

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CLERK OF THE COURT

NOTC
LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
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(702) 385-1827(fax)
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

PLEASE TAKE NOTICE that the attached order was entered and filed on August 4, 2015.

Dated: Clark County, Nevada
August 4, 2015

Leon Greenberg Professional Corporation

By: /s/ *Leon Greenberg*
Leon Greenberg, Esq.
Nevada Bar No.: 8094
2965 South Jones Boulevard - Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that on August 4, 2015, she served the within:

NOTICE OF ENTRY OF ORDER

by court electronic service to:

TO:

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

/s/ Sydney Saucier

Sydney Saucier

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CLERK OF THE COURT

ORDR
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. A-12-661726

DEPT. NO. XXVIII

Hearing Date: July 21, 2015
Hearing Time: 9:00 a.m.

ORDER DENYING DEFENDANTS' MOTION FOR A DECLARATORY ORDER TO LIMIT THE STATUTE OF LIMITATIONS PURSUANT TO NRS 608.260

Defendants filed their Motion for a Declaratory Order to Limit the Statute of Limitations Pursuant to NRS 608.260 on June 17, 2015. Plaintiffs' Response in Opposition to Defendants' motion was filed on July 6, 2015. Defendants thereafter filed their Reply to Plaintiffs' Response in Opposition to Defendants' motion on July 16, 2015.

7/31/15

This matter, having come before the Court for hearing on July 21, 2015, with appearances by Leon Greenberg, Esq., and Dana Sniegocki, Esq. on behalf of all plaintiffs, and Tamer B. Botros, Esq., on behalf of all defendants, and following the arguments of such counsel, and after due consideration of the parties' respective briefs, and all pleadings and papers on file herein, and good cause appearing, therefore

IT IS HEREBY ORDERED:

Defendants' Motion for a Declaratory Order to Limit the Statute of Limitations Pursuant to NRS 608.260 is **DENIED**. Since the Nevada Supreme Court's June 26, 2014 decision in the appeal of this case found that Article 15, Section 16 of the Nevada Constitution conferred upon the plaintiffs a right to a minimum hourly wage, as set forth in that section, it would not make sense to rely on NRS 608.260 as the applicable statute of limitations for claims under Article 15, Section 16 of the Nevada Constitution. NRS 608.260 sets forth the statute of limitations to bring a claim for unpaid minimum wage owed pursuant to NRS 608.250 and the regulations of the Labor Commissioner issued under NRS 608.250. A claim for a violation of Article 15, Section 16 of the Nevada Constitution, which is the claim brought in this case by the plaintiffs, is neither a claim for unpaid minimum wages under NRS 608.250 nor a claim for a violation of the minimum wage prescribed by regulation of the Labor Commissioner pursuant to NRS 608.250. The minimum wage, under the Nevada Constitution, is set according to the terms of the Constitution, and not by the Nevada Labor Commissioner. Accordingly, the statute of limitations referenced in NRS 608.260 does not apply to claims for unpaid minimum wages under Nevada's Constitution.

The more appropriate course is to apply Nevada's "catch all" statute of limitations found in NRS 11.220 which provides for a four year statute of limitations for actions for

relief not otherwise provided for. The Court finds the application of NRS 11.220's four year statute of limitations to claims for violations of the Nevada Constitution to be appropriate even where other claims are asserted by the plaintiffs (in this case, claims for 30 day waiting penalties under NRS 608.020, NRS 608.030 and NRS 608.040) are governed by the two (2) year statute of limitations period.

Accordingly, Defendants' Motion for a Declaratory Order to Limit the Statute of Limitations Pursuant to NRS 608.260 is hereby **DENIED** in its entirety and the court will apply the limitations period set forth in NRS 11.220 to plaintiffs' claims under Article 15, Section 16 of the Nevada Constitution.

IT IS SO ORDERED.

Dated this 31 day of July, 2015.

Hon. Ronald J. Israel
District Court Judge

Submitted:

By: _____
Leon Greenberg, Esq.
Dana Sniegocki, Esq.
LEON GREENBERG PROF. CORP.
2965 s. Jones Blvd., Ste. E-4
Las Vegas, NV 89146
Attorneys for Plaintiffs

Approved as to form and content:

By: Not Approved
Marc C. Gordon, Esq.
Tamer B. Botros, Esq.
YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.
5225 W. Post Road
Las Vegas, NV 89118
Attorneys for Defendants

EXHIBIT 13

EXHIBIT 13

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS,

Plaintiff,

vs.

NEVADA YELLOW CAB CORP,

Defendant.

CASE NO. A661726

DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

TUESDAY, JULY 21, 2015

TRANSCRIPT OF PROCEEDINGS

DEFENDANTS' MOTION FOR DECLARATORY ORDER TO LIMIT THE STATUTE OF LIMITATIONS PURSUANT TO NRS 608.260

APPEARANCES:

For the Plaintiff: LEON GREENBERG, ESQ.
DANA SNIEGOCKI, ESQ.

For the Defendant: TAMER B. BOTROS, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

TUESDAY, JULY 21, 2015 AT 9:31 A.M.

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

THE COURT: Good morning. Counsel, state your appearance for the record.

MR. GREENBERG: Leon Greenberg and Dana Sniegocki for plaintiffs, Your Honor.

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

THE COURT: Good morning. This is Defendant's, excuse me, motion. Basically I would imagine it should be characterized as summary judgment or partial summary judgment as to the statute of limitations, declaratory order is what you put. But anyway, I think since this is a question of law, it certainly is appropriate, ripe, whatever, for decision. I think the plaintiffs agree to that.

Do you have anything to add? I've read all this.

MR. BOTROS: Just briefly, Your Honor. In the first –

THE COURT: I know that courts have gone three different ways.

MR. BOTROS: Well, that wasn't what I was going to mention, but I wanted to add just something briefly that wasn't mentioned in our reply. And that is in the first amended complaint, plaintiffs allege claims regarding NRS 608.040 as well as 020 and 030 regarding individuals who are discharged from my clients or resigned and basically the duties my clients owe in terms of paying them when they are discharged or terminated from employment. That would bolster our argument, Your Honor, that NRS 608.260 applies in this matter with the respect that the statute of limitations being two years as opposed to what plaintiff's argue with respect of

four years.

And I'll go ahead and submit that, Your Honor.

THE COURT: Thank you.

MR. GREENBERG: Your Honor, in respect to the claims made in the case under 608.040 that Defendants' counsel was mentioning, those are clearly statutory penalty claims. We do not dispute that those would be governed by two years' statute of limitations. The dispute between the parties here is what is the actual period for these minimum wage claims that arise under Nevada's Constitution.

Your Honor has the briefings. What I would just point out to the Court, it is mentioned briefly in the papers, is that this matter is scheduled for en banc review on a writ petition. Argument has been directed but not yet scheduled by the Supreme Court. This was seeking writ on that *Williams* decision which held it was a two-year statute of limitations. The Supreme Court elected to take a close look at that obviously by granting that writ petition for hearing.

THE COURT: You guys want to stay this? It is up there.

MR. GREENBERG: Well, Your Honor, I wouldn't want to stay the case in its entirety. I'm just saying that make a decision on this particular point. I don't know if it's necessarily important to the progress of this case. There is a statute of limitations tolling issue that plaintiffs would put before the Court irrespective of whether it's a two- or four-year statute of limitations that's operative here, but that's a different issue, Your Honor. I'm just giving Your Honor sort of a fuller picture that the –

THE COURT: Right, right.

MR. GREENBERG: -- Court may not have of what's going on here. That's all, Your Honor.

EXHIBIT 14

EXHIBIT 14

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

MELAKU TESEMA, MINALE M. ABEBE, METASEBIA MMILLION, and ACMETHA GEBERSECASA, Individually and on behalf of others similarly situated,

Plaintiffs,

vs.

LUCKY CAB CO. and LUCKY TRANSPORTATION, INC.,

Defendants.

CASE NO. A-12-660700-C

DEPT. NO. XX

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

WEDNESDAY, MARCH 4, 2015

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

APPEARANCES:

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

For the Defendants: MARIO P. LOVATO, ESQ.

RECORDED BY: SUSAN DOLORFINO, COURT RECORDER/TRANSCRIBER

THE COURT: Well, two years might give us enough information as to whether we've got a class.

MR. GREENBERG: It certainly will for that -- that time period, Your Honor. If -- if, I mean, a class will be designated presumably in respect to people employed during a particular time period. If the statute only is two years then you can't certify a class earlier, of course, Your Honor. I just don't know if the Court wants to sort of jump into this issue right now. I understand that. Perhaps we would just defer it for --

THE COURT: Well, it was the first thing that struck me in looking at this is you wanted documents and information from 2007 to 2014 and that seemed like an awful long time.

MR. GREENBERG: Well, Your Honor, there's also an issue here as to whether there should be a toll of the statute of limitations based upon a violation of the notice provision of the constitution. The constitution actually states that the employer has to give written notice to the employee. And it also says that in the event there's a violation of the requirements of the constitution, the employee has a right to all remedies at law or in equity that are available in the courts in the State of Nevada. So that would provide a foundation, at least, to make the claim that they are estopped --

THE COURT: Can we decide that at a later point?

MR. GREENBERG: I think that might be a --

THE COURT: Just do two years now?

MR. GREENBERG: That might be a good idea, Your Honor. I'm not -- I'm not disagreeing with that.

THE COURT: I understand you're not conceding it, but let's just do two years for the time now.

MR. GREENBERG: Well then, what I would suggest Your Honor do is simply a -- you can simply strike the references from July 1st, 2007 or -- and, and we can -- we can make that to be April 1st, 2010 since this case was commenced in April of 2012.

MR. LOVATO: I believe it was April 24th if I'm right of 2010.

MR. GREENBERG: April 20 -- We can say April 24th.

THE COURT: April 24th, 2012.

MR. GREENBERG: 2010 would be the appropriate production date because the case was commenced in April 20, 2012.

THE COURT: For two years from April, 2010?

MR. GREENBERG: Two thousand -- No, the case was commenced on April 24th, 2012, so we go back two years from the commencement date --

THE COURT: Oh, Okay. I see what you're --

MR. GREENBERG: -- for the relevant class period at this limited stage that we're discussing, Your Honor, so --

THE COURT: Okay.

MR. GREENBERG: So, we would no longer refer to the July 1st, 2007 date. We would --

THE COURT: Well, that would make sense.

MR. GREENBERG: Yes, Your Honor.

THE COURT: Then the question is to what extent --- now the Defendants objected but didn't offer any suggestions as to how the discovery should be permitted. You objected to the discovery saying that they don't need it.

EXHIBIT 15

EXHIBIT 15

2015 WL 4562755
Only the Westlaw citation is currently available.
United States District Court,
D. Nevada.

Erin HANKS, et al., Plaintiffs,
v.
BRIAD RESTAURANT GROUP, L.L.C., Defendant.

No. 2:14–cv–00786–GMN–PAL. | Signed July 27, 2015.

Attorneys and Law Firms

Bradley Scott Schrager, Daniel Bravo, Don Springmeyer, Wolf, Rifkin, Shapiro, Schulman and Rabkin, LLP, Las Vegas, NV, for Plaintiffs.

Robert Baker, Las Vegas, NV, pro se.

Montgomery Y. Paek, Jackson Lewis P.C., Rick D. Roskelley, Kathryn Blakey, Roger L. Grandgenett, Littler Mendelson, PC, Las Vegas, NV, for Defendant.

ORDER

GLORIA M. NAVARRO, Chief Judge.

*1 Pending before the Court is the Motion to Compel (ECF No. 42) filed by Defendant Briad Restaurant Group, L.L.C. ("Defendant"). Named Plaintiffs Erin Hanks, Deatra Enari, Jeffrey Anderson, Toby Earl, Shyheem Smith, Robert Baker, James Skadowski, and Michelle Pickthall (collectively, "Plaintiffs") filed a Response (ECF No. 47), and Defendant filed a Reply (ECF No. 64).

Also pending before the Court is the Motion for Partial Judgment on the Pleadings (ECF No. 74) filed by Defendant. Plaintiffs filed a Response (ECF No. 76), and Defendant filed a Reply (ECF No. 77).

For the reasons discussed below, both Defendant's Motion to Compel and Defendant's Motion for Partial Judgment on the Pleadings are **GRANTED.**

I. *BACKGROUND*

This case arises out of alleged violations of an amendment to the Nevada Constitution setting certain minimum wage requirements for employers (the "Minimum Wage Amendment"). Plaintiffs are employees of the restaurant chain TGI Friday's, and work at several of the chain's various locations throughout Nevada. (Am. Compl. ¶ 1, ECF No. 6). Plaintiffs allege that this action "is a result of [Defendant's] failure to pay Plaintiffs and other similarly-situated employees who are members of the Class the lawful minimum wage, because [Defendant] improperly claimed eligibility to compensate employees at a reduced minimum wage rate under Nev. Const. art. XV, § 16."(*Id.* ¶ 2).[1]

Plaintiffs filed the instant action in this Court on May 19, 2014 on behalf of themselves and a purported class of Defendant's current and former employees. *See* (Compl., ECF No. 1). Shortly thereafter, on May 23, 2014, Plaintiffs filed an Amended Complaint, alleging three claims for relief: (1) violation of Nev. Const. art. XV, § 16; (2) violation of Nev. Const. art. XV, § 16 and NAC 608.102; and (3) violation of Nev. Const. art. XV, § 16 and NAC 608 .104. (Am. Compl. ¶¶ 72–83, ECF No. 6). On February 24, 2015, this Court entered an Order (ECF No. 68) dismissing counts two and three and allowing the case to proceed on count one. In the February 24, 2015 Order, the Court also denied without prejudice a motion for class certification filed by Plaintiffs for lack of evidentiary support and declined to issue an advisory opinion at Plaintiffs' request determining the applicable limitations period in this case. (Feb. 24, 2015 Order 14:1–11, ECF No. 68).

Defendant subsequently filed the present pending Motion to Compel, seeking to compel four of the eight named plaintiffs (collectively, the "Arbitration Plaintiffs")[2] to arbitrate their claims pursuant to a four-page Employment At–Will and Arbitration Agreement ("Arbitration Agreement") signed by each of the Arbitration Plaintiffs. (Mot. to Compel 1:21–2:5, ECF No. 42). Defendant then filed the present pending Motion for Partial Judgment on the Pleadings seeking to limit Plaintiffs' claims to a two-year statute of limitations period and exclude punitive damages. (Mot. for Judgment 2:1–3:3, ECF No. 74).

II. *LEGAL STANDARDS*

A. Motion to Compel Arbitration

*2 Section 2 of the Federal Arbitration Act ("FAA")

provides that:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."*Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). Courts shall place arbitration agreements "upon the same footing as other contracts."*Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

Under the FAA, parties to an arbitration agreement may seek an order from the Court to compel arbitration. 9 U.S.C. § 4. The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."*Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). Thus, the Court's "role under the Act is ... limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue."*Lee v. Intelius, Inc.*, 737 F.3d 1254, 1261 (9th Cir.2013) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000) (internal quotations omitted)). If a district court decides that an arbitration agreement is valid and enforceable, then it should either stay or dismiss the claims subject to arbitration.*Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1276–77 (9th Cir.2006).

Similarly, Nevada law also recognizes that "strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation ."*D.R. Horton v. Green*, 120 Nev. 549, 96 P.3d 1159, 1162 (Nev.2002). Nevada has adopted the Uniform Arbitration Act (the "UAA").*See generally*Nev.Rev.Stat. § 38.206–.248. Under the UAA, "the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds there is no enforceable agreement to arbitrate."Nev.Rev.Stat. § 38.221(1)(b). Arbitration agreements are "valid, enforceable and irrevocable except as otherwise provided in NRS 597.995 or upon a ground that exists at law or in equity for the revocation of a contract."Nev.Rev.Stat. § 38.219. Accordingly, like the FAA, the Court's role under the UAA is limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. *See*Nev.Rev.Stat. § 38.221(1)(b) ("[T]he court *shall* proceed summarily to decide the issue and order the parties to arbitrate unless it finds there is no enforceable agreement to arbitrate.") (emphasis added).

B. Motion for Judgment on the Pleadings

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

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."*Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted)."A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Id.*

III. *DISCUSSION*

A. Motion to Compel Arbitration

In its Motion to Compel, Defendant asserts that the Arbitration Plaintiffs have all signed a valid Arbitration Agreement requiring them to arbitrate their claims. (Mot. to Compel 1:21–2:5, ECF No. 42). The Arbitration Agreement states:

> 1. Any claim, controversy or dispute (hereafter "claim") that I have against the Briad Restaurant Group, LLC, or the Briad Restaurant Group, LLC has against me, arising from or relating to my employment or the termination of my employment with the Briad

> Restaurant Group, LLC (its owners, directors, officers, managers, employees, agents, franchisors or, any company owned by or affiliated with the Briad Restaurant Group, LLC), shall be settled by binding arbitration in accordance with the rules of the American Arbitration Association under its National Rules for the Resolution of Employment Disputes and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof....
>
> 2. I accept and consent to binding arbitration as an alternative to civil litigation and agree to forego a trial by jury with respect to all claims covered by this Agreement.
>
> 3. The claims covered by this Agreement include, but are not limited to:
>
> • claims for wages or other compensation (including but not limited to claims for salary, bonuses, severance pay, and vacation pay);
>
> ...
>
> • claims for employee benefits including health care benefits ...;
>
> ...
>
> I understand that I am also giving up my right to bring any claim covered by this arbitration agreement as a class action or representative action.

See (Enari Arbitration Agreement § II, ECF No. 42–1); (Skadowski Arbitration Agreement § II, ECF No. 42–3); (Pickthall Arbitration Agreement § II, ECF No. 42–4); *see also* (Earl Arbitration Agreement § II, ECF No. 42–2) (containing identical quoted language except for a more detailed acknowledgment of the signer's agreement to renounce any right to bring or join a class action covered by the agreement).

*4 Under the plain language of the Arbitration Agreement signed by the Arbitration Plaintiffs, those plaintiffs may only bring claims relating to their employment against Defendant through arbitration. Accordingly, the two issues to be resolved at this time are (1) whether the Arbitration Agreement is valid and (2) whether the Arbitration Agreement encompasses the dispute at issue. *See Intelius, Inc.*, 737 F.3d at 1261; Nev.Rev.Stat. § 38.221(1)(b).

Plaintiffs, however, do not argue that the Arbitration Agreement does not encompass the claims raised in their purported class action, nor do they assert that the Arbitration Agreement is invalid based upon any grounds for the revocation of a contract. Instead, Plaintiffs' only argument against applying the Arbitration Agreement to the Arbitration Plaintiffs' claims is that the Arbitration Agreement is "void for illegality" as applied in this case because the Minimum Wage Amendment "expressly prohibits the waiver of its provision by an individual employee in an agreement with an employer ."(Resp. to Mot. to Compel 4:25–27, ECF No. 47). Specifically, the Minimum Wage Amendment states both that "[t]he provisions of this section may not be waived by agreement between an individual employee and an employer" and that "[a]n employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section."Nev. Const. art. XV, § 16(B). Plaintiffs argue that reading these two phrases together necessitates a finding that the claims granted to employees under the Minimum Wage Amendment cannot be compelled into arbitration by an agreement between an employer and its employees. (Resp. to Mot. to Compel 4:25–8:1, ECF No. 47). This argument fails for two reasons.

First, the Minimum Wage Amendment's prohibition on an employee waiving their rights by agreement does not prohibit the employee and employer from agreeing on the forum that will adjudicate the rights provided under the amendment. The Supreme Court of Nevada has long recognized that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."*D.R. Horton, Inc.*, 96 P.3d at 1164 (quoting *Kindred v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 116 Nev. 405, 996 P.2d 903, 909 (Nev.2000)). The Minimum Wage Amendment's prohibition is against waiving "provisions of this section" such as the substantive right to a minimum wage as detailed in the amendment. No provision of the Minimum Wage Amendment, however, requires claims to be brought in a court of law. The Minimum Wage Amendment merely states that "[a]n employee claiming a violation of this section *may* bring an action in the courts of this State."Nev. Const. art. XV, § 16(B) (emphasis added). It provides that Nevada state courts will enforce an employee's rights, but it does not limit the forum exclusively to those courts.

*5 This reading of the Minimum Wage Amendment is further supported by analogous cases involving interpretations of other laws such as the Fair Labor Standards Act (the "FLSA") or Title VII of the Civil Rights Act of 1964 ("Title VII"). For example, the FLSA prohibits a private agreement from altering an employee's right to a minimum wage and overtime. *See Barrentine v.*

Arkansas—Best Freight Sys., 450 U.S. 728, 740, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate."). However, every one of the court of appeals that has considered whether the FLSA establishes a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually has concluded that arbitration agreements are enforceable in FLSA cases. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319–20 (9th Cir.1996); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir.2013); *Caley v. Gulf Stream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir.2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.2002)). Likewise, after the Supreme Court's decision in *Gilmer*,[3] the circuit courts and the Supreme Court of Nevada have all held that the provision of a right to a jury trial in the 1991 amendment to Title VII "presents no bar to compulsory arbitration."*E.E.O .C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 750 (9th Cir.2003); *see, e.g., Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 205 (2d Cir.1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 11 (1st Cir.1999); *see also Kindred*, 996 P.2d at 907 ("[T]he language of Title VII does not expressly preclude arbitration."). Accordingly, the Minimum Wage Amendment's prohibition on waiving the substantive rights granted within it does not prohibit the enforcement of those rights through arbitration.

Second, even if the language of the Minimum Wage Amendment expressly prohibited compulsory arbitration for claims arising from it, that prohibition would be preempted by FAA and, as a result, would be invalid. "Pursuant to the Supremacy Clause of the United States Constitution, 'the FAA preempts contrary state law.' " *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 932 (9th Cir.2013) (quoting *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1158 (9th Cir.2013)). Thus, "[i]n enacting the FAA, Congress 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " *Id.* (quoting *Southland Corp.*, 465 U.S. at 10). As a result, courts are "prohibited from applying any state statute that invalidates an arbitration agreement [or] 'prohibits outright the arbitration of a particular type of claim' " *Id.*(quoting *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, ——, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011)) (citation omitted).

*6 Plaintiffs argue that the Minimum Wage Amendment prohibits outright the arbitration of any of the claims arising under it. If that were true, it would directly conflict with the FAA and Congress's declared national policy favoring arbitration. Therefore, even if Plaintiffs' interpretation of the Minimum Wage Amendment were correct, that portion of the amendment is preempted by the FAA. *See Concepcion*, 131 S.Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."). Accordingly, the Court finds that the Arbitration Agreement is valid and encompasses the Arbitration Plaintiffs' claims against Defendant under the Minimum Wage Amendment. Each of the Arbitration Plaintiffs are dismissed from this suit and ordered to arbitrate their claims against Defendant in accordance with their respective versions of the Arbitration Agreement.[4]

B. Motion for Partial Judgment on the Pleadings

In its Motion for Partial Judgment on the Pleadings, Defendant asserts that Plaintiffs' claims "extend beyond the applicable statute of limitations and, additionally, seek [punitive] damages which are unavailable to parties alleging violations of Nevada's minimum wage."(Mot. for Judgment 2:3–6, ECF No. 74). More specifically, Defendant asserts that because the Minimum Wage Amendment fails to provide any limitations period for claims arising under it, Nevada Revised Statute § 608.260—which limits minimum wage claims to two years—provides the applicable statute of limitation in this case. (*Id.* 4:15–5:19); *see*Nev.Rev.Stat. 608.260. Additionally, Defendant asserts that because the Minimum Wage Amendment does not explicitly provide punitive damages and, unless otherwise provided for by law, punitive damages are only available for tort claims in Nevada, punitive damages are unavailable to Plaintiffs for their claims premised on violations of the Minimum Wage Amendment. (Mot. for Judgment 10:14–13:22, ECF No. 74).

1. Section 608.260's two-year limitations period applies to claims arising under the Minimum Wage Amendment.

Prior to the passage of the Minimum Wage Amendment, Nevada's minimum wage law was set by statute. *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 519–20 (2014), *reh'g denied* (Sept. 24, 2014); *see*Nev.Rev.Stat. §§ 608.250–.290. Under the earlier statutory scheme, an employee's claims against an employer to recover the difference between the amount paid to the employee and the amount of the minimum wage was limited to two years. *See*Nev.Rev.Stat. § 608.260. The Minimum Wage

Amendment, however, does not explicitly provide a limitations period for claims arising under it. *See* Nev. Const. art. XV, § 16.

In *Thomas v. Nevada Yellow Cab Corp.*, the Supreme Court of Nevada explained that the Nevada Constitution controls over any conflicting statutory provisions and that a statute will be construed to be in harmony with the constitution, if reasonably possible. 327 P.3d at 521. Therefore, "when a statute 'is irreconcilably repugnant' to a constitutional amendment, the statute is deemed to have been impliedly repealed by the amendment." *Id.* However, "[t]he presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist." *Id.*

*7 Here, the two-year statute of limitations period found in section 608.260 does not necessarily and directly conflict with the Minimum Wage Amendment, making the two laws irreconcilably repugnant. Rather, the statutory provision can be construed in harmony with the constitution because the constitution is silent as to the appropriate limitations period. Therefore, the Court finds that the Minimum Wage Amendment's silence does not impliedly repeal the two-year statute of limitations found in section 608.260 and that the two-year limitations period applies to minimum wage claims brought under the amendment. *See id.* at 522 (finding that because the Minimum Wage Amendment contained enumerated exceptions that did not include taxicab drivers, it superseded the taxicab driver exception found in section 608.250(2)); *see also Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 955 (Nev.2014), *reh'g denied* (Jan. 22, 2015) ("[T]he Minimum Wage Amendment supplants that of our statutory minimum wage laws *to some extent*....") (emphasis added); Nev. Att'y Gen. Op. No.2005-04 at 15-21 (March 2, 2005) (explaining that the extent of the Minimum Wage Amendment's preemption of the statutory framework for minimum wage claims "depends on the extent of the conflict" and advising that some provisions that do not directly conflict, such as the civil and criminal enforcement provisions, would only be "modified" by the amendment).

This finding is in accord with several courts in the District of Nevada that have already addressed this question and found that the two-year limitations period in section 608.260 applied to claims arising under the Minimum Wage Amendment. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir.2013) *cert. denied*, —— U.S. ——, 134 S.Ct. 2819, 189 L.Ed.2d 785 (2014) (affirming the district court's application of the two-year limitations period in section 608.260 for failing to properly raise the issue on appeal); *see also Tyus v. Wendy's of Las Vegas, Inc.*, No. 214-CV-00729-GMN-VCF, 2015 WL 1137734, at *2-3 (D.Nev. Mar.13, 2015); *McDonagh v. Harrah's Las Vegas, Inc.*, No. 2:13-cv-01744-JCM-CWH, 2014 WL 2742874, at *4 (D.Nev. June 17, 2014). *But see Sheffer v. U.S. Airways, Inc.*, No. 3:15-CV-00204-RCJ, 2015 WL 3458192, at *2-3 (D.Nev. June 1, 2015) (finding without addressing the prior cases applying the limitation period in section 608.260, including an order written by the same judge, that the general three-year limitations period for statutory causes of action in Nevada Revised Statute § 11.190(3)(a) applied to claims brought under the Minimum Wage Amendment). Likewise, a majority of the decisions by state trial courts have also held section 608.260's two-year limitations period to be appropriate for claims arising under the Minimum Wage Amendment. *See (Golden v. Sun Cab Inc.*, Ex. A to Mot. for Judgment, ECF No. 74-1); (*Perry v. Terrible Herbst, Inc.*, Ex. B to Mot. for Judgment, ECF No. 74-2); (*Williams v. Claim Jumper Acquisition Co., LLC*, Ex. C to Mot. for Judgment, ECF No. 74-3). *But see Diaz et al. v. MDC Restaurants*, A-14-701633 (Feb. 3, 2015) (finding that section 608.260 does not apply to claims brought under the Minimum Wage Amendment). Therefore, the majority of state and federal courts addressing the issue have agreed with this Court's decision and applied the two-year limitations period in section 608.260 to claims arising under the Minimum Wage Amendment. Accordingly, because this Court finds that the limitations period in section 608.260 applies to Plaintiffs' claims, all wage claims accruing more than two years before Plaintiffs filed suit are dismissed with prejudice.

2. Punitive damages are not available for claims arising under the Minimum Wage Amendment.

*8 Plaintiffs' sole surviving claim is for unpaid minimum wages under the Minimum Wage Amendment. *See* (Feb. 24, 2015 Order, ECF No. 68) (dismissing all claims except for violations of the Minimum Wage Amendment). Defendant urges the Court to find that Nevada courts would adopt one or both of the rationales articulated by the California Court of Appeals in *Brewer v. Premier Golf Properties* for finding that punitive damages are unavailable to plaintiffs claiming violations of minimum wage laws. 168 Cal.App.4th 1243, 86 Cal.Rptr.3d 225 (Cal.Ct.App.2008).[5] In *Brewer*, the court held first that the California Labor Code's minimum wage requirements are new rights created by statute that did not exist under common law; therefore, under the "new right-exclusive remedy" rule, claims premised on violations of the statutory rights are limited to only those remedies expressly provided under the statute—which did not include punitive damages. *See id.* at 232-34. The court

went on to find that notwithstanding the "new right-exclusive remedy" rule, punitive damages would still be unavailable to the plaintiff "because punitive damages are ordinarily limited to actions 'for the breach of an obligation not arising from contract,' and [plaintiff]'s claims for unpaid wages and unprovided meal/rest breaks arise from rights based on her employment contract." *Id.* at 235 (citing Cal. Civ.Code § 3294).

The Court finds that both of the rationales for denying punitive damages in *Brewer* are equally applicable to claims arising under Nevada's Minimum Wage Amendment. Like California, Nevada courts have long subscribed to the rule that "[w]here a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other."*State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 225 (1879); *see also Builders Ass'n of N. Nevada v. City of Reno*, 105 Nev. 368, 776 P.2d 1234, 1235 (Nev.1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."). The right to receive a minimum wage arises from legislative mandate and did not exist under common law. *See Brewer*, 86 Cal.Rptr.3d at 232 ("Labor Code statutes regulating pay stubs (§ 226) and minimum wages (§ 1197.1) create new rights and obligations not previously existing in the common law."); *cf. MGM Grand Hotel–Reno, Inc. v. Insley*, 102 Nev. 513, 728 P.2d 821, 824 (Nev.1986) (noting that the "obligation to pay compensation benefits and the right to receive them exists as a matter of statute independent of any right established by contract," and that such liability is "created" by statute). Accordingly, the remedies available for violating minimum wage laws are limited to those expressly provided by statute and constitutional amendment.

The Minimum Wage Amendment states: "An employee claiming violation of this section ... shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief."Nev. Const. art. XV, § 16(B).[6] However, there is no provision for punitive damages or any other type of damages aimed at punishing an employer for noncompliance. *See Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 846 P.2d 303, 304–05 (Nev.1993) ("Punitive damages are not awarded as a matter of right to an injured litigant, but are awarded in addition to compensatory damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct ."). Instead, the Minimum Wage Amendment's language explicitly provides only for damages "appropriate to remedy any violation." Nev. Const. art. XV, § 16(B). Therefore, because damages for violations of the Minimum Wage Amendment are limited to those expressly provided by the amendment and there is no provision in the amendment for punitive damages, Plaintiffs cannot recover punitive damages for their claims.[7]

*9 Additionally, even if the "new right-exclusive remedy" rule did not apply, punitive damages would still be unavailable for Plaintiffs' claims. Nevada law permits the awarding of punitive damages for tort claims where the defendant "has been guilty of oppression, fraud or malice,"*see*Nev.Rev.Stat. § 42.005, or where such damages are explicitly provided by statute. *See, e.g.*,Nev.Rev.Stat. § 42.010 ("In an action for the breach of an obligation, where the defendant caused an injury by the operation of a motor vehicle ... after willfully consuming or using alcohol or another substance, knowing that the defendant would thereafter operate the motor vehicle, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant."). However, "the award of punitive damages cannot be based upon a cause of action sounding solely in contract."*Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 134 P.3d 698, 703 (Nev.2006); *see also*Nev.Rev.Stat. § 42.005 ("[I]n an action for the breach of an obligation *not arising from contract*,... the plaintiff ... may recover damages for the sake of example and by way of punishing the defendant.") (emphasis added).

Though Plaintiffs' minimum wage claims arise from Defendant's alleged failure to pay a statutory obligation, "when a statute imposes additional obligations on an underlying contractual relationship, a breach of the statutory obligation is a breach of contract that will not support tort damages beyond those contained in the statute."*See Brewer*, 86 Cal.Rptr.3d at 235; *see also Camino Properties, LLC v. Ins. Co. of the W.*, No. 2:13–CV–02262–APG, 2015 WL 2225945, at *3 (D.Nev. May 12, 2015) ("ICW cannot be right that liabilities arising from a contract, where the contract is required by statute, is a 'liability by statute.' ...Even though insurance contracts exist because a statute requires drivers to buy them, claims for breaches of the insurance policy are governed by the six-year limitations period for contracts."); *cf. Descutner v. Newmont USA Ltd.*, No. 3:12–CV–00371–RCJ, 2012 WL 5387703, at *2 (D.Nev. Nov.1, 2012) (stating that the Nevada statute concerning overtime wages, section 608.140, "does not imply a private right of action to sue under the labor code, but only to sue in contract"). Therefore, because claims for violations of the Minimum Wage Amendment arise from an underlying contractual employer-employee

relationship, such claims do not entitle a plaintiff to punitive damages. Accordingly, Plaintiffs cannot seek punitive damages based solely on a claim for violations of the Minimum Wage Amendment, and their claims for punitive damages are dismissed.

IV. *CONCLUSION*

IT IS HEREBY ORDERED that Defendant's Motion to Compel (ECF No. 42) is **GRANTED.**Plaintiffs Deatra Enari, Toby Earl, James Skadowski, and Michelle Pickthall are dismissed from this action and ordered to arbitrate their claims in accordance with their respective versions of the Arbitration Agreement.

*10 **IT IS FURTHER ORDERED** that Defendant's Motion for Partial Judgment on the Pleadings (ECF No. 74) is **GRANTED.**Plaintiffs' punitive damages request and all wage claims accruing more than two years before Plaintiffs filed suit are dismissed with prejudice.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment as to Plaintiff Deatra Enari (ECF No. 78) is **DENIED as moot.**

IT IS FURTHER ORDERED that Defendant's Motion to Disqualify (ECF No. 80) and Plaintiffs' Motion to Certify Class (ECF No. 81) are **DENIED without prejudice.**The parties may refile their respective motions after adjusting them to reflect the status of the present action following this Order.

All Citations

Slip Copy, 2015 WL 4562755

Footnotes

1 The Nevada Constitution provides in pertinent part:
> Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living.

Nev. Const. art. XV, § 16.

2 The Arbitration Plaintiffs are Deatra Enari, Toby Earl, James Skadowski, and Michelle Pickthall.

3 In *Gilmer,* the Supreme Court held that compulsory arbitration clauses could be enforced in claims arising under the ADEA even though that statute explicitly provides a right to jury trials. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26–29, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

4 Defendant has filed a Motion for Summary Judgment as to Plaintiff Deatra Enari (ECF No. 78), requesting summary judgment solely on her claims against it. Because Ms. Enari is a member of the Arbitration Plaintiffs whose claims have now been dismissed from this action, Defendant's Motion for Summary Judgment as to Plaintiff Deatra Enari is **DENIED as moot.**

Additionally, the parties have recently filed a Motion to Disqualify (ECF No. 80) and a Motion to Certify Class (ECF No. 81). In the Motion to Disqualify, Defendant seeks to disqualify all of the Plaintiffs as inadequate class representatives, (Mot. to Disqualify 1:21–26, ECF No. 80), and in the Motion to Certify Class, Plaintiffs seek to certify a class in this action which includes all of the Plaintiffs as class representatives. (Mot. to Certify 3:9–5:27, ECF No. 81). Because half of the individuals sought be certified or disqualified as class representatives have now been dismissed from this action, the Motion to Disqualify and Motion to Certify Class are **DENIED without prejudice** so that the parties may, if appropriate, refile these motions reflecting their dismissals.

5 "Where Nevada law is lacking, its courts have looked to the law of other jurisdictions, particularly California, for guidance."*Elchacker v. Paul Revere Life Ins. Co.,* 354 F.3d 1142, 1145 (9th Cir.2004).

6 In addition to the compensatory damages, the Minimum Wage Amendment also provides: "An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs."Nev. Const. art. XV, § 16(B).

7 The Court notes, however, that under the old statutory minimum wage scheme, "the Labor Commissioner may impose against [an employer] an administrative penalty of not more than $5,000 for each violation."Nev.Rev.Stat. § 608.290.2. Accordingly, because there is no provision of the Minimum Wage Amendment addressing the application of penalties or fines for violations, the Labor Commissioner may impose an administrative penalty of up to $5,000 for violators of the Minimum Wage Amendment. *See supra* Part III .B.1. The ability of the Labor Commissioner to impose such a penalty alleviates Plaintiffs' concern that punitive damages are necessary for minimum wage claims in order to discourage employers from willfully violating the Minimum Wage Amendment. *See* (Resp. to Mot. for Judgment n. 3, ECF No. 76).

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EXHIBIT 16

EXHIBIT 16

STATE OF NEVADA
Department of Business & Industry

Office of the Labor Commissioner

- 555 Washington Avenue Suite 4100, Las Vegas, NV 89101; or
- 675 Fairview Drive Suite 226, Carson City, NV 89701

REQUEST FOR RECORDS OF WAGES

The undersigned employee has requested, in writing, that a copy of their wage/payroll records be provided to them.

Employee Name:_____

Mailing Address:_____

City, State, Zip:_____

Phone #:_____ Message Phone #:_____

☐ Daily Time Records ☐ Itemized List of deductions

Company Name:_____

Mailing Address:_____

City, State, Zip:_____

Person to Contact:_____ Phone #:_____

Starting Date Requested:_____ Ending Date Requested:_____

In accordance with Nevada Revised Statutes 608.115(2), I authorize the Nevada State Labor Commissioner to make a demand upon my former employer to secure my records of wages.

_____

Signature Date

appealable 'judgments' disposing of entire claims")[1]; *RePass v. Vreeland*, 357 F.2d 801, 805 (3d Cir. 1966) ("it is clear that summary judgment cannot be invoked to dispose of [something less than a] claim"); *Westinghouse Electric Corp. v. Fidelity and Deposit Co.*, 63 B.R. 18, 23 (E.D.Pa. 1986) ("Partial summary judgment may not be invoked to dispose of only part of a single claim"). However, in this case, the question raised by the Plaintiffs' Motion is one that will likely recur at various points during this litigation (for example, when certifying and defining the class, during discovery, or when deciding how the jury is to be instructed on the damages that it can award) and therefore it needs to be resolved at some point during this litigation. Moreover, the question is purely one of law whose resolution does not appear to depend on any particular facts or evidence that might be uncovered during discovery, and therefore its answer is unlikely to change during the course of this litigation. Therefore, even if the instant Motion is not procedurally proper in all respects under NRCP 56 and would not result in the entry of a final judgment for any party, it raises a question that will guide the parties during this litigation and therefore for reasons of efficiency and judicial economy the Court deems it prudent to address the legal question presented by the parties, even if doing so results in an Order by this Court that may technically be somewhat premature in that it would ordinarily have been brought at a later point in the litigation.

(4) The question at hand is whether the two-year limitations period of NRS 608.260 applies to a claim alleging a violation of Article XV, section 16 of the Nevada Constitution. The Minimum Wage Amendment (Article XV, section 16) was adopted in 2006 with an effective date of November 28, 2006, and reads in its entirety as follows:

[1] Where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this Court in applying the Nevada Rules, *E.g., Executive Management Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 53 (2002). NRCP 56 is identical to FRCP 56.

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

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

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An

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

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

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

(5) NRS 608.260 reads as follows:

NRS 608.260 Action by employee to recover difference between minimum wage and amount paid; limitation of action. If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action.

(6) NRS 608.250 states as follows:

NRS 608.250 Establishment by Labor Commissioner; exceptions; penalty.

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

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

(a) Casual babysitters.

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(b) Domestic service employees who reside in the household where they work.
(c) Outside salespersons whose earnings are based on commissions.
(d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 days of agricultural labor in any calendar quarter of the preceding calendar year.
(e) Taxicab and limousine drivers.
(f) Persons with severe disabilities whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.
3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

(7) By this Motion, the Plaintiffs argue that the two-year limitations period of NRS 608.260 does not apply on its face to claims brought under the Minimum Wage Amendment because the Plaintiffs' Constitutional claim does not allege that they were paid a wage less than that "prescribed by regulation of the Labor Commissioner." The Plaintiffs also contend that, even if NRS 608.260 were construed to apply to Constitutional claims rather than violations of regulations, NRS 608.260 has been "impliedly repealed" by the enactment of the Minimum Wage Amendment because the Labor Commissioner's power to perform the duties set forth in NRS 608.250 no longer exist by operation of the Minimum Wage Amendment. The Plaintiffs cite *Thomas v. Yellow Cab Corp.*, 327 P.3d 518 (Nev. 2014) for the proposition that NRS 608.250 has been repealed by the Minimum Wage Amendment. Because NRS 608.250 is a major portion of NRS 608.260, the Plaintiffs contend that NRS 608.260 has been repealed as well. In *Thomas v. Yellow Cab Corp.*, 327 P.3d 518 (Nev. 2014), the Nevada Supreme Court held that the Minimum Wage Amendment operated to impliedly repeal the portions of NRS 608.250 that created any statutory "exclusions" among the class of "employees" expressly eligible to receive the minimum wage under the Minimum Wage Amendment. The Court held that a statute could not operate to carve out an exclusion to a class expressly defined in the Nevada Constitution, because "a

constitutional amendment, adopted subsequent to the enactment of the statute relied on by counsel for petitioner, is controlling over the statute that addresses the same issue. Statutes are construed to accord with constitutions, not vice versa." *Id.* at 521 (internal citations omitted). Thus, when a statute and a Constitutional provision are "irreconcilably repugnant" such that "both cannot stand," the Constitutional provision must be read to have "impliedly repealed" the statute. *Id.* (citations omitted). From this, the Plaintiffs argue that the entirety of NRS 608.250 and 608.260 have been "impliedly repealed" by the Minimum Wage Amendment. Specifically, the Plaintiffs argue that the duties of the Labor Commissioner set forth in NRS 608.250 have been entirely abolished by the Minimum Wage Amendment and therefore the entire scheme set forth in NRS 608.250 and 608.260 no longer exists.

(8) Two federal courts have concluded that the two-year limitations period of NRS 608.260 applies to claims alleging a violation of the Minimum Wage Amendment. *E.g., Rivera v. Peri & Sons*, 735 F.3d 892 (9th Cir. 2013); *McDonough v. Harrah's Las Vegas*, 2014 WL 2742874 (D.Nev. June 17, 2014). However, federal court decisions on questions of state law, while persuasive if their reasoning is sound, are not binding either on this Court or upon the Nevada Supreme Court.

(9) Prior to the enactment of the Minimum Wage Amendment in 2006, any claim alleging a violation of Nevada's minimum wage laws or regulations would have been subject to a limitations period of two years under NRS 608.260. There is no indication anywhere on the face of the Minimum Wage Amendment that it was intended to change this scheme. For this reason, federal courts have concluded that claims arising under the Minimum Wage Amendment were intended to be governed by the two-year limitations period that previously governed such claims under NRS 608.260. However, the reasoning employed by those federal courts strikes this Court as somewhat superficial because it is also true that, prior to 2006, the minimum wage in Nevada was established by way of regulation issued by the state Labor Commissioner pursuant to standards set forth in NRS 608.250, and any claim based upon a failure by

an employer to pay the minimum wage when required to do so would have been based upon a violation of NRS 608.260 and those regulations. In contrast, in this case the Plaintiffs attempt to frame their claim as a "Constitutional tort" based directly upon a violation of a provision of the Nevada Constitution, rather than as a claim brought under NRS 608.260 alleging a violation of a regulation issued by the Labor Commissioner. If the Plaintiffs' claim is indeed a true Constitutional tort rather than a claim based upon a violation of NRS 608.260, then at least arguably the two-year limitations period of NRS 608.260 would not apply to such a Constitutional tort.

(10) A cause of action can be based directly upon a violation of a provision of a state Constitution or the U.S. Constitution if the plaintiff can demonstrate that a constitutional violation was a "cause-in-fact" of the injuries and the resulting damages, and the injuries were a "reasonably foreseeable consequence" of the actor's act or omission. *E.g., Smith v. City of Oak Hill*, 2014 WL 4627947 (11th Cir. September 17, 2014); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). The "cause-in-fact" must arise from an action that violates a specific constitutional provision. *E.g., Strehlke v. Grosse Pointe Public Schools System*, 2014 WL 4603482 (E.D.Mich. September 15, 2014) (not "every governmental decision with which one disagrees [is] a constitutional tort").

(11) But in this case, it is not clear that the Plaintiffs' claim is such a thing. On its face, the Minimum Wage Amendment does not merely establish a straightforward uniform minimum wage rate to be paid to every employee in Nevada at all times. Rather, the Minimum Wage Amendment sets a specific floor and then expressly requires the Governor (through the state Labor Commissioner) to adjust the rate periodically as follows:

> These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All

> Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1.

(12) Thus, the effective minimum wage rate in Nevada is not merely what is stated in Article XV section 16, but rather is expressly defined as a wage rate set by the Labor Commissioner based partially upon data from the U.S. Department of Labor. It follows that any employee who claims to have been illegally paid less than the then-existing minimum wage is not necessarily alleging a Constitutional tort, but rather is alleging a violation of the wage rates established in the bulletin issued by the state Labor Commissioner in effect on the date of the alleged violation. In other words, the "cause-in-fact" of any such claim is not that the employee has not been paid the particular dollar amount set forth in the Minimum Wage Amendment, but that he has not been paid the wage rate set forth in the periodic bulletins issued by the Labor Commissioner pursuant to the Minimum Wage Amendment. Thus, the legal standard that the Plaintiffs allege was violated is the wage rate established by the Labor Commissioner, not Article XV section 16 itself. Although that wage rate is established pursuant to the methodology articulated in the Minimum Wage Amendment, the Minimum Wage Amendment does not itself define what that exact rate is at any given moment in time. Therefore, any claim that an employee has been illegally paid less than the effective minimum wage rate actually alleges a violation of wage rates established by state regulation rather than alleging a direct violation of Article XV section 16 of the Nevada Constitution. Consequently, although styled as a "Constitutional tort," the Plaintiffs' claim actually appears to be one alleging a violation arising under NRS 608.260.

(13) The Court notes that the Minimum Wage Amendment does, by its plain terms, impose duties directly upon private employers doing business in Nevada. Thus, the Plaintiffs' claim could plausibly be interpreted as a "Constitutional tort" based upon

an alleged violation of the duties imposed upon employers by the Minimum Wage Amendment to pay the minimally required wage rate. But those minimally required wage rates are nonetheless set by the Labor Commissioner, not by the Minimum Wage Amendment itself. Thus, even if the Plaintiffs' claim were construed in this manner as a "Constitutional-tort" arising from the failure of an employer to pay the minimum wage as required by Article XV section 16, the genesis or "cause-in-fact" of the claim is that the employer did not pay the wage rates set by the Labor Commissioner.

(14) For purposes of the present Motion the Court need not definitively determine which interpretation is correct, because, under either interpretation, the Minimum Wage Amendment is not "irreconcilably repugnant" with the regulatory and statutory scheme set forth in NRS 608.250 and 608.260 (excepting that the exclusions of NRS 608.250(2) have been repealed). The Minimum Wage Amendment does not supplant or abolish the duties of the state Labor Commissioner in establishing the current minimum wage rate, but rather still requires the Labor Commissioner to issue regulations establishing minimum wage rates, albeit changing how those duties are performed. The state Labor Commissioner still sets the effective minimum wage rate in Nevada via periodic regulation, and he still does so based upon data from the federal government, and he still cannot violate federal law in doing so. Therefore, on its face, NRS 608.250 and 608.260 are not irreconcilable with the Minimum Wage Amendment, but rather are quite obviously intended to be complementary (with the exception noted in *Thomas*).

(15) Accordingly, a claim alleging that an employee has been illegally paid less than the effective minimum wage rate is a claim that alleges a violation of the rates established by the Labor Commissioner, not a claim that alleges a violation of the rates set forth in the Minimum Wage Amendment. Thus, the Plaintiffs' claim in this case, although styled as a violation of Article XV section 16, actually appears to allege a violation arising under NRS 608.260. Such a claim is governed by the two-year statutory period set forth in NRS 608.260.

(16) It is so ORDERED.

DATED: September 22, 2014

JEROME T. TAO
DISTRICT COURT JUDGE

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

EXHIBIT 7

EXHIBIT 7

REGISTER OF ACTIONS

CASE No. A-13-678109-C

Neal Golden, Plaintiff(s) vs. Sun Cab Inc, Defendant(s)

Case Type: Other Civil Filing
Subtype: Other Civil Matters
Date Filed: 03/11/2013
Location: Department 5
Cross-Reference Case Number: A678109

PARTY INFORMATION

Defendant	Sun Cab Inc *Doing Business As* Nellis Cab Co	Lead Attorneys Rick D. Roskelley *Retained* 7028628800(W)
Plaintiff	Golden, Neal	Leon Greenberg *Retained* 7023836085(W)
Plaintiff	Hassan, Abaikarim	Leon Greenberg *Retained* 7023836085(W)

EVENTS & ORDERS OF THE COURT

12/05/2014 | All Pending Motions (9:00 AM) (Judicial Officer Ellsworth, Carolyn)
All Pending Motions: 12/5/14

Minutes
12/05/2014 9:00 AM
- DEFT'S MOTION FOR PARTIAL SUMMARY JUDGMENT & MOTION TO DISMISS... PLTF'S OPPOSITION AND COUNTERMOTION FOR DISCOVERY AS PER NRCP RULE 56(f)... PLTF'S COMPLAINT UNDER NRCP RULE 12 Prior to hearing, counsel provided with tentative ruling as follows: This is a class action lawsuit brought by cabdrivers of Deft. for failure to pay the minimum wage. The matter had been stayed for a lengthy period of time pending the Supreme Court s decision on the question of whether the exception for taxicab drivers to the minimum wage requirement, which is contained in NRS 608.250(2), applies to deprive taxicab drivers of the minimum wage in the face of Article 15, Section 16 of the Nevada Constitution which was an amendment to the constitution by way of initiative petition and ratification. The Supreme Court has now decided that matter in Thomas v. Yellow Cab Corp., 130 Nev. Adv. Op. 52 (June 26, 2014)and held that the Constitutional Amendment does indeed supplant the exceptions listed in NRS 608.250(2). This leaves Deft. with two further arguments: (1) that the two year limit on filing an action under NRS 608.260 to recover the difference between the wage paid and the amount of the minimum wage bars the first claim for relief by Deft. Golden (and all others so similarly situated) who was not employed within two years of the filing of the suit; and (2)that Plf s third claim for waiting-time penalties under NRS 608.040 must be dismissed because Plf s did not bring a cause of action for Attorneys fees under NRS 608.140, or because the section does not apply where an employee is paid upon separation, but subsequently disputes the amount paid. The Statute of Limitations Argument: Article 15, Section 16(B) provides in relevant part: The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement . An employee claiming violation of this section may bring an action against his or her employer in the

courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. NRS 608.260 provides in pertinent part: If any employer pays any employee a less amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action. (emphasis added) Thus, the Constitutional Amendment is more expansive than NRS 608.260. While NRS 608.260 provides for a limited remedy of recovery of the difference in the wage paid, the Constitution provides for all remedies available in law or in equity appropriate to remedy any violation, including, but not limited to, recovery of back pay, damages and injunctive relief. Additionally, the minimum wage is no longer prescribed by regulation of the Labor Commissioner, but rather by the very terms of the Nevada Constitution which prescribe how the wage shall be determined. Previously, under NRS 608.250, the Labor Commissioner was presumably free to decline a match of the federal minimum wage if she determined that those increases are contrary to the public interest. In opposition to Deft s statute of limitations argument, Plf s argue that there is no statute of limitations for an action to enforce the Constitutional Provision because no limitation is set forth in the section and subsection B prohibits a waiver of the minimum wage requirement by an individual employee, so that should be interpreted to be a bar to any limitation. Alternatively, Plf s argue that applying a statute of limitations would be inequitable; that Deft should be equitably estopped from invoking the statute of limitations because they failed to advise Plf s of their minimum wage rights as required by the Nevada Constitution , or that the statute should be equitably tolled until the date of the decision in Thomas v. Yellow Cab, Supra. Finally, Plf s argue that if there is a limitation on the time to bring an action under the Constitutional amendment, it is either a 6, 4 or 3 year limitation period. The Court finds Plf s first argument (i.e. that there is no period of limitations for an action claiming a violation of Article 15, Section 16) and second argument (i.e. that the provision within subsection B of Section 16 prohibiting a waiver of the minimum wage requirements by agreement between and individual employee and an employer amount to a prohibition against any period of limitation) unpersuasive. NRS 11.010 provides that Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. Article 15, Section 16 contemplates a civil action, but does not prescribe a limitation on the action, and so a statutory limitation period must apply. The anti-contractual waiver provision does not amount to an exception to NRS 11.010. A statute of limitations applies to all civil actions, legal and equitable, and if the cause of action is not particularly specified elsewhere in a statute, it is included in the catchall statute, NRS 11.220 providing for a 4 year period. Deft. argues that a two year period has been prescribed by NRS 608.260 and cites to two federal cases for the proposition that the two year statute of limitations in NRS 608.260 was not implicitly repealed by Nevada s Constitutional amendment. Specifically, Deft. cites to Rivera v. Perl & Sons Farms, Inc., 735 F.3d 892 (9th Cir. 2013) and McDonagh v. Harrah s Las Vegas, Inc. 2014 WL 2742674, 2014 U.S. Dist. LEXIS 82290 (D. Nev. June 17, 2014). Actually, River v. Perl & Sons did not so hold. Instead, the court held that because the appellant farmworkers failed to raise the argument in the lower court it was deemed waived. While the court in McDonagh v. Harrah, Supra, did make a finding that the constitutional provision was not intended to change this two-year statute of limitations, it did so without any analysis beyond noting that the provision was silent on whether it changed the two-year statute. Plf s have also argued that other limitation periods

should apply NRS 11.190(1)(b) because compensation was paid pursuant to a written agreement; NRS 11.190(2)(c) because if there was not a written agreement, there was an unwritten contract; and NRS 11.220 because there is no other period provided; NRS 11.190(3)(a) because it is an action for a liability created by statute; or NRS 11.190(3)(c) because it is an action for the taking of personal property. The Nevada Supreme Court has determined that the term action as used in NRS 11.190 refers to the nature or subject matter of the claim and not to what the pleader says it is, and it is the nature or subject matter of the claim that will determine what limitation period applies. Hartford Insurance Group v. Statewide Appliances, Inc., 87 Nev. 195, 484 P.2d 569 (1971). In the Hartford Insurance case, the insurance company, as the subrogee of its insured, filed an action for breach of express and implied warranties which were extended by the Deft, upon the sale of a water heater which subsequently exploded causing damage to the insured s home. The insurance carrier argued that NRS 11.190(2)(c) applied [an action upon a contract, obligation or liability not founded upon an instrument in writing]. The court, focusing on the nature of the action found that NRS 11.190(3)(c) [an action for injuring personal property] applied because the Plif. sought recovery for injuries to personal property which NRS 11.190(3)(c) specifically governs. In Blotzke v. Christmas Tree, Inc. 88 Nev. 449, 499 P.2d 647 (1972), Plif. sued his employers for personal injuries alleging that they had not provided a safe place to work. The court s focus was the Plif s attempt to assert a contract claim with a longer statute of limitations. The court, finding that the action sounded in tort rather than contract, applied the shorter limitation period which barred the claim. State Farm v. Wharton, 88 Nev. 183, 495 P.2d 359 (1972) involved an automobile accident and State Farm sued as subrogee of its insured, thereby stepping into the shoes of its insured. The carrier insisted that since it paid the insured under its insurance contract, a 6 year statute of limitations should apply. Again, the nature of the action was for personal injuries presumably caused by the wrongful act or neglect of the adverse, so that the 6 year limitation period would not apply. Thus, the Court is to look to the real purpose of the cause of action in determining the applicable provision of the limitation statute. Here, it is clear that the purpose of the first cause of action is to collect the difference between the wages paid and the minimum wage required, assuming that the former was less than the latter. The Constitutional provision does not set forth a limitation period and the two year period set in NRS 608.260 is not irreconcilable with the Constitutional provision. Thomas v. Nevada Yellow Cab Corp., Supra, did not implicitly repeal the entire statutory framework of NRS Chapter 608 concerning minimum wage (i.e NRS 608.250 through 608.290. Since the nature of the action here is the same as the nature of the action described in NRS 608.260, the two year limitation period should apply. Tolling of the period: Plif s argue that even if the two year limitation period applies, it should be tolled because Deft. failed to advise Plif s of their minimum wage rights. Specifically, Plif s cite to Article 15, Section (16)(A) which requires an employer to provide written notification of rate adjustments to each of its employees. Firstly, this provision does not require an employer to notify employees of their right to a minimum wage. Thus, Plif s may not rest on this argument alone to toll the statute, but it may be a factor when considering whether the doctrine of equitable tolling should be applied to the 2 year limitation period found in Nevada s wage and hour statutes. Equitable tolling is defined as [t]he doctrine that the statute of limitations will not bar a claim if the Plif. , despite diligent efforts, did not discover the injury until after the limitations period had expired City of North Las Vegas v. State Local Government Employee-Management Relations Bd., 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011) quoting Black s Law Dictionary 618 (9th ed. 2009). The doctrine has been adopted in Nevada in discrimination claims addressed to the Nevada Equal Rights Commission under Chapter 613 because procedural technicalities that would bar claims of discrimination will be looked upon with disfavor. Copeland v. Desert Inn Hotel,

99 Nev. 823, 826, 673 P.2d 490, 492 (1983). Nonetheless, even in the situations where equitable tolling may be considered, certain factors should be analyzed when determining whether the doctrine will apply. Among these are the claimant s diligence, knowledge of the relevant facts, reliance on misleading authoritative agency statements and/or misleading employer conduct, and any prejudice to the employer. Id. Nevada has also applied equitable tolling to time limits for filing claims for the refund of tax overpayments, See State Dept. of Taxation v. Masco Builder Cabinet Group, 127 Nev. Adv. Op. 67, 265 P.3d 666 (2011), but emphasized that Even when the claim s untimeliness is due to a procedural technicality, application of the doctrine is appropriate only when the danger of prejudice to the Deft. is absent and the interests of justice so require. Id. quoting Seino v. Employers Ins. Co of Nevada, 121 Nev. 146, 152, 111 P.3d 1107, 1112 (2005). Masco told the Tax Department s auditor that it was requesting a refund, stated its basis for said request, and this was communicated by the auditor in writing to his supervisors in the Tax Department. The only flaw was that Masco had not sent its own refund request letter to the Tax Department. The court in applying the doctrine of equitable tolling, considered this a mere procedural technicality. Similarly, in Copeland v. Desert Inn Hotel, Supra, the claimant did not file a Charge of Discrimination with NERC although she did go to the Commission offices and tell the relevant facts to a NERC representative who promised to get back to her. The Copeland court found these facts, asserted in a declaration by the Plff. , were sufficient to preclude summary judgment in light of the doctrine. Here, Plff. Golden has submitted a declaration stating that in August of 2010, he filed a written claim with the Labor Commissioner asserting that he had not been paid the minimum wage. It appears that thereafter, he never followed up on his claim, but that is not entirely clear from the declaration. He does admit that the Labor Commissioner never advised him that he did not have a valid claim for violation of the minimum wage provision. Clearly, the Labor Commissioner was aware of the Constitutional Amendment. See NAC 608.100 added to NAC by the Labor Commissioner by R055-07 in 2007. The civil action herein was filed on March 11, 2013-- 32 months later, but there is no explanation as to why it was not filed earlier or how and when Golden apparently became aware of his right to file a civil action. Golden s affidavit does demonstrate that he was aware of his right to a minimum wage that was apparently the basis of his complaint to the Labor Commissioner. Because Golden has acknowledged in his declaration that he knew of the of his minimum wage rights, the Nevada cases involving tolling under the delayed discovery rule are inapposite. Plff s have requested that they be permitted to conduct discovery on issues concerning the factors bearing upon equitable tolling and have submitted a declaration of counsel. The Court would like Plff. s counsel to elaborate further in oral argument as to what he believes may be revealed in discovery that would support an equitable tolling argument. The Equitable Estoppel argument: Plff s argue that Deft s should be equitably estopped from asserting a statute of limitations but provide no clear analysis of why equitable estoppel should apply. Equitable estoppel works to prevent someone from asserting legal rights that in equity and good conscience should not be available due to that person s conduct. The four elements of equitable estoppel are; (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. In re Harrison Living Trust, 121 Nev. 217, 223, 112 P.3d 1058, 1062 (2005). The Plff s have made no arguments that demonstrate equitable estoppel applies here. Counsel may wish to address this in oral argument. The Third Cause of Action pursuant to NRS 608.040: Plff. s third cause of action claims that they are entitled to the statutory penalty for a late payment of wages owed an employee at the time the employee resigns or quits his employment. NRS

608.040 which provides: If an employer fails to pay: (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or (b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less. NRS 608.180 charges the Labor Commissioner with enforcement of NRS 608.005 through 608.195. Deft s argue that Plif s have no private right of action to collect the penalty provided for under the statute. Whether a private cause of action can be implied is a question of legislative intent. Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 958, 194 P.3d 96, 100 (2008) Baldonado addressed NRS 608.160 and held that the statute contained no express provision for a private action and that there was no evidence that the legislature intended to create one where there is an adequate administrative process in place via the Labor Commissioner. Like NRS 608.160, NRS 608.040 does not contain an express provision for private action. Plif s argue that NRS 608.140 allows for assessment of attorney fees in a private cause of action so that this is an indication that the legislature intended to a private cause of action for the collection of the penalties provided for in NRS 608.040. While NRS 608.140 does indeed provide for the recovery of attorney s fees in a suit for wages under a contract of employment (i.e. according to the terms of his or her employment) it does so in connection with a common law cause of action for the recovery of wages (i.e. Breach of contract). NRS 608.160 merely creates an exception from the American Rule, and allows for an award of attorney s fees by a court in a common law action for breach of contract involving wages in an employment contract. NRS 608.040 is not similar to 608.140 in this way. There is no indication that the legislature intended to create a private right of action for the collection of the late payment penalties which is all Plif. seek in their third claim from relief. (The Court was unable to read the federal unpublished opinions which were cited but not attached as exhibits, because only LEXIS cites were provided and the Court only has access to Westlaw. Therefore, the arguments regarding the necessity of pleading a cause of action under NRS 608.140 in order to obtain the penalties under 608.040 are unclear to the Court.) Thus, Deft s Motion for Judgment on the pleading as to that claim should be GRANTED. Arguments by counsel. Colloquy between Court and counsel regarding equitably tolling. Further arguments by Mr. Greenberg. COURT advised is will allow Discovery on the issue of statute of limitations should be equitably tolled. Mr. Paek objected as he believes there will be prejudice to his client as they don't have records. Further arguments by counsel. COURT stated findings and ORDERED, Discovery is opened for the limited purpose regarding statute of limitations being equitably tolled. Further arguments by counsel. Court advised counsel used Lexis Nexus while siting their positions, but Court only has access to Westlaw. Court directed counsel to submit courtesy copies of the Federal cases so Court can look at legislative intent, and will take this issue, for 3rd claim of relief under advisement. COURT ORDERED, Motion for Partial Summary Judgment is DENIED WITHOUT PREJUDICE and counsel can renew motion at the close of discovery, and countermotion is GRANTED as to equitable tolling.

Parties Present
Return to Register of Actions

EXHIBIT 8

EXHIBIT 8

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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

MDC RESTAURANTS, LLC, a Nevada limited liability company; LACUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company; and DOES I through 100, inclusive,

Defendants.

Case No: A701633
Dept. No.: XVI

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Date of Hearing: December 4, 2014
Time of Hearing: 9:00 a.m.

On October 1, 2014, Defendants filed their Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations. On October 20, 2014, Plaintiffs filed their Opposition to Defendants' Motion and a Countermotion for Partial Summary Judgment Re: Limitation of the Action. On December 4, 2014, the Court held a hearing on the competing motions on the applicable statute of limitations.

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After a review and consideration of the record, the points and authorities on file herein, and the oral arguments of counsel, the Court finds the following facts and states the following conclusions of law:[1]

FINDINGS OF FACT

The District Court FINDS as follows:

1. The civil claims and remedies for violations of minimum wage laws under NRS 608.260 and article XV, section 16 of the Nevada Constitution differ significantly in both character and nature.

2. Pursuant to NRS 608.260, an employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the minimum wage amount. Thus, under the Nevada statutory scheme, the employee is solely limited to back pay, i.e., the difference between the amount paid and the amount of the minimum wage. *See* NRS 608.260.

3. In contrast, article XV, section 16(B) of the Nevada Constitution provides that "[a]n employee claiming a violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of the section and shall be entitled to all of the remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action under this section shall be awarded his or her attorney fees and costs." Nev. Const. art. XV, § 16(B).

4. The claims for relief and remedies afforded to Nevada employees under the Nevada Constitutional Amendment are expanded and not merely limited to back pay.

5. By its very nature, the Nevada Constitutional Amendment grants Nevada employees expansive rights, relief and legal remedies available in law or in equity. *Id.* In addition, the Nevada Constitutional Amendment expands employee rights even further, providing for an entitlement to attorney fees and costs should an employee prevail in the prosecution of his or her action. *Id.*

6. It is of paramount importance to distinguish the limited remedy of back pay available to

[1] If any finding herein is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so.

Nevada employees under NRS 608.260 versus the Constitutional rights, claims, and remedies available to Nevada employees under the Nevada Constitutional Amendment, which could include, but are not limited to, back pay, damages, and injunctive relief.

7. Pursuant to the language of NRS 608.260, the two-year limitations period applies only to claims for back pay. *See* NRS 608.260. Consequently, this statutory limitation does not affect or apply to the constitutionally mandated claims, rights, and remedies afforded to claimants under the Constitutional Amendment.

8. It is also important to note that the Nevada Constitutional Amendment is much more expansive in the rights, claims, relief, and remedies available to claimants. As a result, it would be problematic to apply a two year statute of limitations to a claim for back pay and a different limitations period for claims for damages and/or injunctive relief not covered by the statute (NRS 608.260).

9. Clearly, the implication of the expansive Nevada Constitutional Amendment effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260.

10. Lastly, with respect to the applicable statute of limitations period, this determination is based largely on the allegations and claims for relief asserted in Plaintiffs' Complaint. A review of Plaintiffs' Amended Complaint clearly indicates that Plaintiffs' action is primarily based on Defendants' alleged violations of Nev. Const. art. XV, 16. Furthermore, Plaintiffs Prayer For Relief is not limited to an award of back pay; rather, Plaintiffs request declaratory relief, unpaid wages, damages, interest, attorneys' fees and costs, and other relief necessary and just in law and in equity.

11. Therefore, the Court finds that in this action, the most plausible applicable limitations provision shall be the four-year catch-all limitations period for civil actions pursuant to NRS 11.220.

CONCLUSIONS OF LAW

Based upon these Findings of Fact, the District Court CONCLUDES AND ORDERS as follows:

1. In this action, for alleged violations of article XV, section 16 of the Nevada Constitution, the applicable limitations provision shall be the four-year catch-all limitations period for civil actions pursuant to NRS 11.220.

2. Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations is DENIED.

3. Plaintiffs' Countermotion for Summary Judgment Re: Limitation of the Action is GRANTED.

IT IS SO ORDERED this 19th day of February, 2015.

DISTRICT COURT JUDGE

Submitted by:

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EXHIBIT 9

EXHIBIT 9

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

I. PROCEDURAL BACKGROUND AND SUMMARY OF ARGUMENTS RAISED

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

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

[1] On June 4, 2015 a Notice of Dismissal without prejudice was filed on behalf of Defendant SN Investment Properties LLC and thus they are not a party to the action.
[2] On May 18, 2015 Plaintiffs filed a Motion for Leave to File Amended Complaint on Order Shortening Time. The Order on that Motion is set forth separately. The Court's ruling on the instant Motion to Dismiss is based on the First Amended Complaint filed in February, 2015 and is not reflective of any attempted changes Plaintiff sought in their Motion for Leave to Amend that was filed after the hearing in the present matter but prior to the instant decision.

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

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

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

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

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

fictitious Plaintiffs asserting claims against Defendant as required by N.R.C.P.17(a);
2. Plaintiffs, JANE DOE DANCER II, III, VI, VIII, and IX through XI, must be struck from Plaintiffs' First Amended Complaint as redundant pursuant to N.R.C.P. 12(f);
3. Plaintiffs' First Cause of Action must be dismissed pursuant to N.R.C.P. 12(b)(5) to the extent Plaintiffs' claims for unpaid minimum wages are barred by the applicable two (2) year statute of limitations;
4. Plaintiffs' Second and Third Causes of Action must be dismissed pursuant to N.R.C.P. 12(b)(5) to the extent Plaintiffs' claims for unpaid minimum wages are barred by the applicable two (2) year statute of limitations;
5. Plaintiffs' Fourth Cause of Action must be dismissed pursuant to N.R.C.P. 12(b)(5) since Plaintiffs are not entitled to an equitable remedy under Nevada law;
6. Plaintiffs' Fourth Cause of Action must be dismissed pursuant to N.R.C.P. 1 2(b)(5) since Plaintiffs have failed to assert any factual allegations demonstrating the necessary elements required for a claim of unjust enrichment;
7. Plaintiffs' First Cause of Action must struck as redundant pursuant to N.R.C.P. 12(f);
8. Plaintiffs' prayers for relief asserted as part of Plaintiffs' Fourth Cause of Action must be struck as immaterial pursuant to N.R.C.P. 12(f); and
9. Plaintiffs' prayer for exemplary and punitive damages must be struck since Plaintiffs have not asserted any claims sounding in tort upon which punitive damages may be awarded and Plaintiffs have not otherwise asserted any factual allegations demonstrating that Defendant's conduct was fraudulent, oppressive, or conducted with malice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil

action to recover the difference between the amount paid to the employee and the amount of the minimum wage.[6]

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

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

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

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

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

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

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

Thomas at 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

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

Dated this 25th day of June, 2015.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

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

CERTIFICATE OF SERVICE

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

Ryan Anderson, Esq.
MORRIS ANDERSON

Jeffery Bendavid, Esq.
MORAN BRANDON BENDAVID MORAN

Gregory Kamer, Esq.
KAMER ZUCKER ABBOTT

Gail M. Grigas for
TRACY CORDOBA
JUDICIAL EXECUTIVE ASSISTANT

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge, Respondents, and LAKSIRI PERERA, Individually and on behalf of others similarly situated, Real Party in Interest.	**Case No.:** _____ District Court Case No. A-14-707425-C

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

VOLUME 5 OF 7

Malani L. Kotchka
Nevada Bar No. 283
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520 South Fourth Street, Suite 320
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Attorneys for Petitioner
Western Cab Company

APPENDIX #	DOCUMENT DESCRIPTION	PAGES
10	Western Cab's 7/1/15 Motion for Reconsideration of Portion of this Court's June 16, 2015 Decision and Order	276-380

APPENDIX 10

APPENDIX 10

MRCN
MALANI L. KOTCHKA
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Attorneys for Defendant
Western Cab Company

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, individually and on behalf of others similarly situated, Plaintiffs, v. WESTERN CAB COMPANY, Defendant.	**Case No.: A-14-707425-C** **Dept.: ~~V~~ VII** **MOTION FOR RECONSIDERATION OF PORTION OF THIS COURT'S JUNE 16, 2015 DECISION AND ORDER** **Date of Hearing:** **Time of Hearing:**

Pursuant to EDCR 2.24, defendant Western Cab Company ("Western Cab") moves this Court to reconsider the portion of its June 16, 2015 Decision and Order in regard to the

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applicable statute of limitations. This motion is based on the Memorandum of Points and Authorities and exhibits attached hereto and incorporated herein.

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
Malani L. Kotchka
Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, NV 89101

Attorneys for Defendant

NOTICE OF HEARING

TO: Plaintiff Laksiri Perera and his attorney of record, Leon Greenberg.

PLEASE TAKE NOTICE that the hearing on **MOTION FOR RECONSIDERATION OF PORTION OF THIS COURT'S JUNE 16, 2015 DECISION AND ORDER** will be brought before Department ~~V~~ VII of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, on the 5 day of August, 2015, at 9:00am a.m./p.m.

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
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MEMORANDUM OF POINTS AND AUTHORITIES

I. This Court's June 16, 2015 Decision and Order Regarding the Applicable Statute of Limitations

In this Court's June 16, 2015 Decision and Order, this Court held, "Thus, an action brought to enforce an employee's right to minimum wage established by the Minimum Wage Amendment is wholly different than an action brought to recover a minimum wage as prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250." Decision and Order, p. 8. This Court further held:

> The Minimum Wage Amendment provides the exclusive private right of action for taxicab drivers to enforce Nevada's minimum wage law. Accordingly, the limitation on a taxicab driver's right to enforce the minimum wage law is defined by the limitations on the Minimum Wage Amendment itself. Although the Minimum Wage Amendment does not provide a claims limitation period for an employee claiming violation of the Amendment, Nevada Revised Statute 11.220 provides that "[a]n action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued." NRS 11.220. So without specific statutory prescription stating otherwise, claims for violations of the provisions of the Minimum Wage Amendment must be brought within four years of the cause of action having accrued. Therefore, Mr. Perera's action to enforce Nevada's minimum wage law pursuant to the Minimum Wage Amendment is subject to the four-year claims limitation period provided under NRS 11.220.

Decision and Order, pp. 9-10.

EDCR 2.24 provides that a motion for rehearing or reconsideration must be filed within "10 days after service of written notice of the order . . . ." *Winston Products Company, Inc. v. Deboer*, 122 Nev. 517, 134 P.3d 726, 731 (2006). Western Cab requests that this Court reconsider the portion of its December 16, 2015 Decision and Order concerning the applicable statute of limitations on alleged violations of the Minimum Wage Amendment.

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II. Records of Wages

NRS 608.115 provides as follows:

> 1. Every employer shall establish and maintain records of wages for the benefit of his or her employees, showing for each pay period the following information for each employee:
>
> (a) Gross wage or salary other than compensation in the form of:
>
> (1) Services; or
>
> (2) Food, housing or clothing.
>
> (b) Deductions.
>
> (c) Net cash wage or salary.
>
> (d) Total hours employed in the pay period by noting the number of hours per day.
>
> (e) Date of payment.
>
> 2. The information required by this section must be furnished to each employee within 10 days after the employee submits a request.
>
> 3. Records of wages must be maintained for a 2-year period following the entry of information in the record.
>
> (Added to NRS by 1975 by 1975, 508; A 1979, 1488; 1983; 250; 1985, 579)

According to Nevada law, records of wages must be maintained for a two-year period following the entry of information in the record. If an employer complies with the two-year retention of records of wages requirement pursuant to NRS 608.115, which is the only state law on the subject, the employer will not be able to provide records of wages for four years pursuant to a four-year statute of limitations applied to the Minimum Wage Amendment. Such an employer will also be unable to comply with a discovery obligation to produce wage records for four years. This Court should reconsider the applicable statute of limitations.

III. Employees Other Than Taxicab Drivers

The essence of this Court's ruling on the statute of limitations for the Minimum Wage Amendment is that the Amendment provides "the exclusive private right of action for taxicab drivers to enforce Nevada's minimum wage law." Decision and Order, p. 9. However, when

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addressing a statute of limitations for the Minimum Wage Amendment, this Court should consider the impact on all industries and all employees subject to the Minimum Wage Amendment. There cannot be one statute of limitations for taxicab drivers and another statute of limitations for other employees under the Minimum Wage Amendment.

In *Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 953-54, (2014), the Nevada Supreme Court applied many of the provisions of NRS Chapter 608 in determining that exotic dancers were employees even though they were categorized as independent contractors. Thus, they were not paid the minimum wage they were entitled to under applicable law. In *Sapphire*, the Court specifically said, "Only an 'employee' is entitled to minimum wages under NRS Chapter 608. NRS 608.250, *superseded in part by constitutional amendment as recognized* in *Thomas v. Nev., Yellow Cab Corp.*, 130 Nev. _____, 327 P.3d 518 (2014)." 336 P.3d at 954. Thus, NRS 608.250 was **only** superseded in part by the Minimum Wage Amendment. The two-year statute of limitations provided in NRS 608.260 is an available remedy to rectify Western Cab's alleged violation of the Minimum Wage Amendment. A two-year statute of limitations complies with the wage record keeping requirement under Nevada law. A four-year statute of limitations does not.

There is no direct conflict between the Minimum Wage Amendment and the two-year statute of limitations. In *Sapphire*, the Nevada Supreme Court recognized the continued viability of causes of action raised under NRS 608.250 and 608.260. Since the voters did not demonstrate any intent to modify the statute of limitations for alleged violations of the minimum wage, allowing Perera the same time period to allege constitutional violations of the minimum wage as he had to allege statutory violations of the minimum wage meets a goal of harmonizing the two.

NRS 11.010 provides that if a different limitation is prescribed by statute, the statute controls. Action as used in NRS 11.190 "refers to the nature or subject matter of the claim and

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not to what the pleader says it is." *Hartford Insurance Group v. Statewide Appliances, Inc.*, 87 Nev. 195, 484 P.2d 569 (1971). *See Blotzke v. Christmas Tree, Inc.*, 88 Nev. 449, 499 P.2d 647 (1972) (personal injury action by employee against employer barred by two-year statute of limitations); *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 327, 130 P.3d 1280, 1286-87 (2006) (two-year state statute of limitations of NRS 11.190 for a statutory penalty applied to federal law violation even though federal statute had a four-year statute of limitations). Here, Perera is seeking alleged unpaid minimum wage. Whether a claim is titled as one pursuant to the Minimum Wage Amendment or NRS Chapter 608, Perera should bring his claim within the time period already provided for claims that allege a failure to pay the minimum wage, i.e. two years.[1]

The two-year statute of limitations provided in NRS 608.260 deals directly with the allegation of non-payment of Nevada's minimum wage whereas NRS 11.220 is only a general catch-all statute of limitations for those claims not otherwise specifically addressed by statute. The various statutes of limitations exist because they provide a necessary remedial constraint on a plaintiff's ability to bring stale claims. This constraint is explicitly tied to due process considerations. The four-year statute of limitations conflicts with the state record keeping requirement of NRS 608.115 and as such, unfairly prejudices employers' due process rights. To require an employer to maintain records for longer periods than set forth in the statute, is inconsistent with the statutory record retention requirement. For these reasons, this Court should reconsider its decision on the statute of limitations.

IV. Other Court Decisions On This Issue

A number of federal and state courts have addressed the issue of the Minimum Wage Amendment and the statute of limitations. Recently, in a mandamus proceeding before the

[1] Employees of subcontractors have only 2 years to pursue recovery of wages from a principal contractor if the principal contractor is located in Nevada. NRS 11.209(1)(a).

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Nevada Supreme Court, *Williams v. Claim Jumper Acquisition Company, LLC*, the Nevada Supreme Court expressed concern that the different orders on this issue were not presented to or considered by the district court. Exhibit 1. Therefore, Western Cab respectfully requests that this Court consider all of the orders on this issue to date which are attached hereto and incorporated herein as Exhibits 2 through 9.

In Exhibit 2, *Riviera v. Peri & Sons Farms, Inc.*, 805 F. Supp. 2d 1042, 1046 (D. Nev. 2011), Judge Jones found that Nevada has a two-year statute of limitations and Section 16 (the Minimum Wage Amendment) is silent on the limitation period for minimum wage actions. Therefore, the court would not imply a repeal of NRS 608.260's two-year limitation period. *Id.* In *Riviera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013), Exhibit 3, the Ninth Circuit held, "The district court properly dismissed the state constitutional claims to the extent they accrued more than two years before the farm workers filed suit."

Judge Mahan decided in *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874, at *4 (D. Nev. June 17, 2014), Exhibit 4, that:

> While article 15, section 16 of the Nevada constitution does create a new two-tiered minimum wage in the state, the section is silent on whether it changes the two-year statute of limitations in the Nevada Revised Statutes. Therefore, the court finds that the constitutional provision was not intended to change this two-year statute of limitations.
>
> Accordingly, plaintiffs are only entitled to a two-year statute of limitations for the fourth cause of action, failure to pay minimum wage in violation of the Nevada constitution.

Finally, in *Tyus v. Wendy's of Las Vegas, Inc.*, 2015 WL 1137734, at *2-3 (D. Nev. March 13, 2015), Exhibit 5, Judge Navarro held that the *Thomas* decision did not impliedly repeal NRS 608.260. Judge Navarro held, "Therefore, although the Minimum Wage Amendment is silent on a limitations period, the Court finds that this silence does not impliedly repeal the two-year statute of limitations period found in NRS 608.260. Accordingly, the Court

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dismisses with prejudice all wage claims accruing more than two years before Plaintiffs filed suit." *Id.*

In addition to this Court's decision, there are four other state court decisions on this issue. In Exhibit 6, *Williams v. Claim Jumper Acquisition Company, LLC*, Judge Tao decided on September 22, 2014 that the two-year statute of limitations applied to the Minimum Wage Amendment. Judge Tao also rejected the argument that *Thomas* impliedly repealed NRS 608.260. Exhibit 5, p. 6. Judge Tao found that prior to the enactment of the Minimum Wage Amendment in 2006, any claim alleging a violation of Nevada's minimum wage laws or regulations would have been subject to a limitations period of two years under NRS 608.260. The court said there was no indication anywhere on the face of the Minimum Wage Amendment that it was intended to change that scheme. Exhibit 5, pp. 7-8. Judge Tao said:

> Thus, the effective minimum wage rate in Nevada is not merely what is stated in Article XV, section 16, but rather is expressly defined as a wage rate set by the Labor Commissioner based partially upon data from the U.S. Department of Labor . . . . Thus, the legal standard that the Plaintiffs allege was violated is the wage rate established by the Labor Commissioner, not Article XV, section 16 itself. Although that wage rate is established pursuant to the methodology articulated in the Minimum Wage Amendment, the Minimum Wage Amendment does not itself define what that exact rate is at any given moment in time. Therefore, any claim that an employee has been illegally paid less than the effective minimum wage rate actually alleges a violation of wage rates established by state regulation rather than alleging a direct violation of Article XV, section 16 of the Nevada Constitution.

Exhibit 5, p. 9.

In Exhibit 7, *Golden v. Sun Cab, Inc.*, Judge Ellsworth similarly found that the two-year statute of limitations in NRS 608.260 should apply. The court found, "Since the nature of the action here is the same as the nature of the action described in NRS 608.260, the two year limitation period should apply." Exhibit 7, p. 3.

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In Exhibit 8, *Diaz v. MDC Restaurants, LLC*, Judge Williams found that the four-year statute of limitations applied because the Nevada Constitutional Amendment effectively supplanted, superseded or repealed the two-year limitations period. Exhibit 8, p. 3. The court did not address the Nevada statutory two-year wage record retention requirement.

Finally, in *Franklin v. Russell Road Food and Beverage, LLC*, Exhibit 9, Judge Kishner found on June 25, 2015, that the two-year statute of limitations in NRS 608.260 applied to the Minimum Wage Amendment. The court held that a specific statute of limitations providing for non-payment of Nevada's minimum wage controlled over NRS 11.220 which only provided a general "catch-all" statute of limitations. Judge Kishner was also troubled by applying a four-year statute of limitations when Nevada law required wage records to be kept for only two years. Western Cab respectfully requests that this Court reconsider its June 16, 2015 Decision and Order on the statute of limitations in light of all of these decisions.

V. Conclusion

Employers in Nevada are required to keep and maintain wage records for only two years. NRS 608.115. If there is a four-year statute of limitations for the recovery of minimum wage pursuant to the Minimum Wage Amendment, that requirement will violate the due process of Nevada employers who maintain wage records for only the required two years.

Moreover, in deciding a statute of limitations for the Minimum Wage Amendment, this Court needs to consider all employers and all employees in Nevada who are entitled to minimum wage, not just taxicab drivers. The Nevada Supreme Court has never enforced different statutes of limitations depending upon the private industry in which an employee works.

There is no direct conflict between the Minimum Wage Amendment and the two-year statute of limitations. Since voters did not demonstrate any intent to modify the statute of limitations for alleged violations of the minimum wage, allowing Perera the same time period to

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allege a constitutional violation of the minimum wage as he has to allege statutory violations of the minimum wage meets a goal of harmonizing the two.

The Nevada Supreme Court in *Sapphire* specifically held that NRS 608.250 was superseded only in part by the Minimum Wage Amendment. NRS 608.260 applies to Perera.

Action as used in NRS 11.190 refers to the nature or subject matter of the claim and not to what the pleader says it is. Here, Perera is seeking alleged unpaid minimum wage. Whether a claim is titled as one pursuant to the Minimum Wage Amendment or NRS 608, Perera should bring his claim within the time period already provided for claims for failure to pay the minimum wage, i.e. two years.

The two-year statute of limitations provided in NRS 608.260 deals directly and specifically with the allegation of non-payment of Nevada's minimum wage whereas NRS 11.220 is only a general catch-all statute of limitations for those claims not otherwise specifically addressed by statute.

Finally, all four federal courts and three out of five state courts who have considered the issue have determined that a two-year statute of limitations applies, rather than a four-year statute of limitations. Only Judge Williams in the *Diaz* case and this Court in this case have found that the four-year catch-all statute of limitations applies. Since oral argument was held in this case, Judge Navarro and Judge Kishner have joined the courts who have held that a two-year statute of limitations applies. Therefore, Western Cab respectfully requests that this court reconsider its June 16, 2015 Decision and Order on the statute of limitations in light of

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these arguments and find that Perera's claim for minimum wage is subject to a two-year statute of limitations.

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
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EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA WILLIAMS, AN INDIVIDUAL; AMBER KLINE, AN INDIVIDUAL; LAWRENCE PARSONS, AN INDIVIDUAL; HANNAH SAFFORD, AN INDIVIDUAL; AND DYLAN LEACH, AN INDIVIDUAL, ALL ON BEHALF OF THEMSELVES AND ALL SIMILARLY-SITUATED INDIVIDUALS,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JEROME T. TAO, DISTRICT JUDGE,
Respondents,
and
CLAIM JUMPER ACQUISITION COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Real Party in Interest.

No. 66629

FILED

APR 10 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING MOTIONS

Petitioners and real party in interest have each filed a request asking that this court take judicial notice of decisions entered in separate cases that deal with issues related to those raised in the instant writ petition. This court will not generally take judicial notice of records in another and different case. However, an exception to this rule may be made where there is a "close relationship" between the cases. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981); *see also In re Amerco Derivative Litigation*, 127 Nev. Adv. Op. No. 17, 252 P.3d 681, 699 n.9 (2011). The parties here do not demonstrate that there exists a "close

relationship" between the instant case and the cases in which the subject orders were entered such that judicial notice of those orders is warranted. Further, because the orders were entered after the docketing of this writ petition, it does not appear that the subject orders were presented to or considered by the district court. *See Carson Ready Mix v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476-77, 635 P.2d 276, 277 (1981) (this court may only consider matters appearing in the record). Accordingly, the motions are denied. The clerk shall detach the orders attached to the requests filed on March 4, 2015, and March 17, 2015, and return them unfiled.

It is so ORDERED.

_____, C.J.

cc: Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Jackson Lewis P.C.

EXHIBIT 2

EXHIBIT 2

805 F.Supp.2d 1042
(Cite as: 805 F.Supp.2d 1042)

United States District Court,
D. Nevada.
Victor Rivera RIVERA et al., Plaintiffs,
v.
PERI & SONS FARMS, INC., Defendant.

No. 3:11–cv–00118–RCJ–VPC.
July 27, 2011.

Background: Lawfully admitted immigrant workers brought putative class action against their employer, alleging claims for **minimum** wage violations under the Fair Labor Standards Act (FLSA), breach of contract, state wage and hour law violations, and **minimum** wage violations under state law. Workers moved for leave to amend, and employer moved to dismiss the complaint, and for a protective order to stay discovery until its motion to dismiss was determined.

Holdings: The District Court, Robert C. Jones, J., held that:
(1) workers failed to state a claim for violation of the FLSA's **minimum** wage provision on a kick-back theory;
(2) workers failed to state a breach of contract claim; and
(3) workers failed to state a claim for violation of Nevada wage and hour laws.

Motion to amend granted, motion to dismiss granted, and motion for protective order denied.

West Headnotes

[1] Labor and Employment 231H ⚿2380(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) **Minimum** Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2378 Pleading
231Hk2380 Complaint, Petition, or Declaration
231Hk2380(1) k. In general. Most Cited Cases

Lawfully admitted immigrant workers did not allege that, after 50% of the work contract period was finished, their employer had still not paid reimbursable expenses, and that when those expenses were deducted from the wages paid theretofore, the effective wage rate for the first half of the work contract period was below the **minimum** wage, as required to state a claim for violation of the FLSA's **minimum** wage provision on a kick-back theory. Fair Labor Standards Act of 1938, § 6(a), 29 U.S.C.A. § 206(a); 20 C.F.R. § 655.122(h)(1); 29 C.F.R. § 531.35.

[2] Labor and Employment 231H ⚿2323

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) **Minimum** Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2321 Time and Mode of Payment
231Hk2323 k. Deductions from wages in general. Most Cited Cases

Implementing regulation of the FLSA prohibiting kick-backs that effectively reduce a wage below the **minimum** wage does not itself treat as a kick-back the failure to make reimbursement for guest worker's inbound travel and subsistence, but only for the

805 F.Supp.2d 1042
(Cite as: 805 F.Supp.2d 1042)

self-provision of "tools of the trade" by the employee and other such direct benefits to the employer. 29 C.F.R. § 531.35; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[3] Labor and Employment 231H ⚿2380(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2378 Pleading
231Hk2380 Complaint, Petition, or Declaration
231Hk2380(1) k. In general. Most Cited Cases

Lawfully admitted immigrant workers did not allege specific breaches of terms of the Department of Labor for H–2A clearance orders (DOLCO), as required to state a breach of contract claim against their employer, based on employer's alleged failure to pay them required wages.

[4] Aliens, Immigration, and Citizenship 24 ⚿133

24 Aliens, Immigration, and Citizenship
24II Status, Rights, Privileges, Duties, and Disabilities
24k132 Right to Actions by or Against Aliens
24k133 k. In general. Most Cited Cases

Labor and Employment 231H ⚿2362

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2362 k. Nature and form of remedy. Most Cited Cases

The terms of the Department of Labor for H–2A clearance orders (DOLCO) may be privately enforced by employees against employers who agree to them.

[5] Labor and Employment 231H ⚿2403

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2401 Costs and Attorney Fees
231Hk2403 k. Attorney fees in general. Most Cited Cases

Lawfully admitted immigrant workers did not allege that they made a written demand to their employer for an amount not exceeding the amount awarded by the court at least five days before filing suit, as required to recover reasonable attorney fees for workers' successful claim against employer for alleged violation of Nevada wage and hour laws. West's NRSA 608.140.

*1043 Mark R. Thierman, Thierman Law Firm, Jeremy J. Nork, Holland & Hart LLP, Reno, NV, Caryn C. Lederer, Christopher J. Wilmes, Jose J. Behar, Matthew J. Piers, Hughes Socol Piers Resnick & Dym, Ltd., Chicago, IL, for Plaintiffs.

Gregory A. Eurich, Joseph Neguse, Holland & Hart LLP, Denver, CO, Jeremy J. Nork, Holland & Hart LLP, Reno, NV, for Defendant.

ORDER

ROBERT C. JONES, District Judge.

This proposed class action arises out of alleged labor violations by a farm with respect to migrant workers from Mexico. Pending before the Court are a Motion to Dismiss (ECF No. 27), a Motion for Leave

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(Cite as: 805 F.Supp.2d 1042)

to File Second Amended Complaint (ECF No. 34), and Motion for Protective Order (ECF No. 36). For the reasons given herein, the Court grants the motion to amend, grants the motion to dismiss as against the Second Amended Complaint ("SAC"), with leave to amend in part, and denies the motion for protective order.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs and putative class members are Mexican citizens lawfully admitted to *1044 the United States who worked for Defendant Peri & Sons Farms, Inc. ("Peri") in Yerington, Nevada for various periods of time since February 16, 2005. (*See* Second Am. Compl. ¶¶ 1–2, 7, May 16, 2011, ECF No. 34–1). Plaintiffs came to the United States to work pursuant to H2–A guestworker visas issued pursuant to 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(a)(1) and 20 C.F.R. § 655. (*Id.* ¶¶ 9–10).

When an employer applies to the Department of Labor for H–2A clearance orders ("DOLCO"), it must certify that it has complied (or will comply) with certain requirements under Title 20 of the Code of Federal Regulations, and Defendant made such certifications in this case. (*See id.* ¶ 12). Those requirements include: (1) that workers will be paid wages at or above the adverse effect rate ("AER") [FN1], *see* 20 C.F.R. § 655.122(*l*); (2) that the employer will comply with all federal and state employment laws and regulations, *see id.* § 655.135(e) and § 653.501(d)(2)(xii); (3) that the employer will provide required tools, equipment, and supplies necessary to the work free of charge, *see id.* § 655.122(f); (4) that the employer will pay for transportation from the worker's home to the place of employment and subsistence en route, *see id.* § 655.122(h)(1); and (5) that the employer will pay for transportation back to the worker's home and subsistence en route if he completes the contract period, *see id.* § 655.122(h)(2). (*See* Second Am. Compl. ¶ 10). Plaintiffs allege that the DOLCOs function as privately enforceable employment contracts between Plaintiffs and Defendant, with the Title 20 requirements as terms. (*See id.* ¶ 14).

> FN1. The AER is calculated by the Department of Labor to reflect the lowest wage a guest worker can be paid without depressing the wages of similarly employed U.S. workers. *See* 20 C.F.R. § 655.200(c). The AER for agricultural employment in Nevada is "the prevailing wage rate[ ] in the area of intended employment." *Id.* § 655.207(a)-(b). The prevailing wage rate is determined by the Administrator of the local Wage and Hour Division of the Employment Standards Administration of the Department of Labor, *see* 29 C.F.R. § 1.2(c), who makes the calculation according to predetermined standards, *see id.* § 1.2(a). It is not clear where these rates are published, and Plaintiff does not identify where the prevailing wage rates it provides are published, but the allegation that the wages paid were below the rates cited is sufficient for the purposes of a motion to dismiss.

Plaintiffs allege that each time they traveled from Mexico to Yerington, Defendant required them to pay for hiring or recruitment fees of between $100 and $500, bus fare, Mexican passports, H–2A visa applications, lodging near the U.S. Consulate in Hermosillo, Mexico, and I–94 forms at the U.S.—Mexico border, for a total cost of over $400. (*See id.* ¶¶ 15–18). They also allege that Defendant never reimbursed them for their return travel to Mexico, costing over $100 for each return trip. (*Id.* ¶ 26). They also allege that the work required the use of protective gloves that Defendant did not provide, and that they were forced to pay $10 per week or more for their own gloves. (*See id.* ¶ 20). Plaintiffs argue that all these expenses were incurred primarily for Defendant's benefit, and that Defendant never reimbursed them. (*See id.* ¶ 21).

Plaintiffs also allege that Defendant paid them as

little as $6.50 per hour, and that the AER has never fallen below $8.36 since February 16, 2006. (*See id.* ¶ 22). At some times, Defendant paid Plaintiffs at a piece rate rather than an hourly rate, and in addition to not properly counting all pieces (onions) picked, that piece rate often did not equal the AER. (*Id.* ¶ 23). Plaintiffs also argue that they were paid less than the federal and state minimum wages during the first week they worked, because even though they were nominally *1045 paid at a rate above the federal and state minimum wages, if one subtracts the expenses Plaintiffs incurred in anticipation of employment from their first week's pay, the resulting wage rate is below the federal and state minimum wages. (*See id.* ¶ 25). Plaintiffs also allege they were not paid for each hour worked, although they do not plead any facts in support. (*See id.* ¶ 25).

Plaintiffs filed the Complaint in this Court on February 16, 2011 and filed the First Amended Complaint ("FAC") on March 7, 2011. Defendant moved to dismiss on April 13, 2011, which motion was timely due to a stipulated extension to respond. The parties stipulated that Plaintiffs could respond to the motion to dismiss through May 16, 2011, and on that date Plaintiffs filed both their response and the present motion for leave to amend the FAC to address concerns in the motion to dismiss. The SAC lists four claims: (1) Minimum Wage Violations Under § 206(a) of the Fair Labor Standards Act ("FLSA"); (2) Breach of Contract (the DOLCOs); (3) State Wage and Hour Law Violations Under Nevada Revised Statutes ("NRS") Sections 608.040, 608.050, 608.140, 608.250, and 608.260; and (4) Minimum Wage Violations Under Article 15, Section 16 of the Nevada Constitution ("Section 16"). The first claim is brought as a collective action under FLSA, and the second through fourth claims are brought as class actions under Rule 23(b)(2) and (3). (*See id.* ¶¶ 27–28).[FN2] In the interest of efficiency, the Court will grant the motion for leave to amend and will examine the motion to dismiss as against the SAC. Finally, Defendant has moved for a protective order to stay discovery until the present motion to dismiss is determined. That motion is denied as moot.

FN2. The Court will not at this time consider whether the Rule 23 claims are preempted by the FLSA collective action claim. *See Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 760–62 (9th Cir.2010) (holding that the FLSA's § 16(b) opt-in provision did not prevent supplemental jurisdiction over a predominating Rule 23 class action pursuant to California labor laws, but that supplemental jurisdiction was within the district court's discretion). The Court notes, however, that under Rule 23(a)(4) Plaintiffs will have a difficult time showing adequate representation of potentially thousands of foreign migrant workers under an opt-out procedure.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d

896, 898 (9th Cir.1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See* *1046*Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citation omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.2001).

III. ANALYSIS

Defendant argues that both the federal and state wage claims are barred by the applicable statutes of limitations. *See* 29 U.S.C. § 255(a); Nev.Rev.Stat. § 608.260. The two-year federal statute of limitations bars only those claims that accrued before February 16, 2009. The state also has a two-year statute of limitations, and Section 16 is silent on the limitation period for minimum wage actions, so the Court will not imply a repeal of section 608.260's two-year limitation period. *See Washington v. State*, 117 Nev. 735, 30 P.3d 1134, 1137 (2001). The Court will therefore dismiss all federal and state wage claims accruing before February 16, 2009, without leave to amend.

A. Minimum Wage Violations Under § 206(a) of the FLSA

[1] Plaintiffs do not properly allege a traditional failure to pay the federal minimum wage. They allege they were paid as little as $6.50 per hour. But they allege they began working for Defendant in February 2005, and the federal minimum wage has variously been $5.15, $5.85, $6.55, and $7.25 over this time period. The allegations are therefore consistent with liability for failing to pay the nominal minimum wage, but they do not make liability plausible.

Still, there is another theory of liability available. Specifically, Plaintiffs' federal and state minimum wage claims appear to rely on the theory that although Defendant paid Plaintiffs at or above the nominal federal and state minimum wages, when improperly unreimbursed job-related expenses are deducted, the effective wages paid were below the federal or state minimum wages. The Ninth Circuit has recognized with approval the Department of Labor's interpretation of the FLSA to prevent what it characterizes as "kick-backs" that effectively reduce a wage below the minimum wage:

> Whether in cash or other facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the *1047 employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash.

See Gordon v. City of Oakland, 627 F.3d 1092, 1095 (9th Cir.2010) (quoting 29 C.F.R. § 531.35). In *Gordon*, the court rejected the kick-back claim because the employee's reimbursement to the employer for training costs was analogous to an unpaid loan where the employee failed to complete an agreed term of service. *See id.* at 1095–96 (citing *Heder v. City of Two Rivers, Wis.*, 295 F.3d 777 (7th Cir.2002)). Here, there is no indication that Plaintiffs failed to complete their required terms of service such that failure to make certain reimbursements would be proper. Rather, the allegation is that the employees "kicked back" the value of the transportation costs, work gloves, and other fees that the employer was required by law to provide. Because Defendant was required by law to pay for these expenses but required Plaintiffs to pay for them, Defendant received a benefit from Plaintiffs potentially resulting in an illegally low wage rate.

Defendant correctly responds, however, that the applicable H–2A regulations only require payment of reasonable inbound travel and subsistence expenses, not any immigration expenses, and that the expenses need not be paid until 50% of the contract period is over. *See* 20 C.F.R. § 655.122(h)(1). Defendant notes that Plaintiffs have not alleged that Defendant failed to reimburse the workers for their inbound travel and subsistence, but have simply argued that because the expenses were not paid immediately upon arrival (which the regulation does not require) the first week was effectively worked at below the minimum wage. The Court rejects this argument. The "kick-back" theory is valid, but to properly invoke it in the present case Plaintiffs would have to allege that after 50% of the work contract period was finished, Defendant had still not paid reimbursable expenses, and that when those expenses were deducted from the wages paid theretofore, the effective wage rate for the first half of the work contract period was below the minimum wage. Plaintiffs have not pled such facts. The Court will therefore dismiss this claim, with leave to amend.

Plaintiffs argue that under *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir.2002), the kick-back theory is properly invoked whenever an employer fails to make the reimbursements during the first week of work. *See id.* at 1237 (citing 29 C.F.R. § 531.35). The Court respectfully disagrees with this interpretation of the regulations. Section 531.35 applies to workers generally, but it is a well accepted principle of statutory construction that "the specific controls the general," *see, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007), and the regulations applicable specifically to H–2A guest workers require reimbursement only within the first half of the contract period, *see* 20 C.F.R. § 655.122(h)(1). Although the *Arriaga* court correctly noted that employers must comply with cumulative employment regulations that do not directly conflict, *see id.* at 1235 (citing *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519, 70 S.Ct. 755, 94 L.Ed. 1017 (1950)), this does not mean that the requirements of 655.122(h)(1) are incorporated into section 531.35's definition of kick-backs. Section 655.122(h)(1) specifically gives employers of H–2A workers half of the contract period to make the inbound travel and subsistence reimbursements it requires. Only kick-backs as defined under section 531.35 that are incurred before or during the first week of work are counted against the first week's pay for the purposes of a minimum wage claim. The failure to reimburse inbound travel and subsistence during the first week is simply not a "kick-back" under*1048 section 531.35, because under section 655.122(h)(1) no reimbursement is due at that stage for H–2A workers, and section 531.35 does not itself include such requirements under its definition of kick-backs. It makes little sense to treat as a kick-back the failure to pay a reimbursement that is not yet due.

[2] Section 531.35 does not itself treat as a kick-back the failure to make reimbursement for inbound travel and subsistence, but only for the self-provision of "tools of the trade" by the employee

and other such direct benefits to the employer. *Castellanos–Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 400–01 (5th Cir.2010) (en banc). Although *Castellanos–Contreras* concerned H–2B workers, for whom inbound transportation and subsistence is not specifically required, the Fifth Circuit found that section 531.35 did not itself require these kinds of reimbursements because inbound travel and subsistence are simply not "tools of the trade" that primarily benefit the employer. Plaintiffs do more than read sections 531.35 and 655.122(h)(1) as cumulative requirements; they attempt to read section 531.35 as *incorporating* the travel and subsistence reimbursement requirements of section 655.122(h)(1) into section 531.35's definition of kick-backs. Although such a result is a theoretical possibility, the argument must rely on more than the basic doctrine of cumulative requirements. It must rely either on a statutory interpretation that the travel and subsistence here falls under section 531.35's definition of a kick-back (in which case there is no need to invoke section 655.122(h)(1) at all), or it must rely on a statutory construction under which section 655.122(h)(1) is incorporated by section 531.35. Section 531.35 incorporates section 531.32(c), which in turn incorporates 29 C.F.R. § 778.217. *See Wass v. NPC Int'l, Inc.*, 688 F.Supp.2d 1282, 1286 (D.Kan.2010). But travel expenses under section 778.217(b)(3) and (b)(5) include only travel expenses incurred "over the road" *while* working for the employer, as well as the expenses incurred when an employer reassigns a worker to a new town after work has begun in another town. The travel expenses incurred for a worker to move to a town to begin work in the first instance, as here, are not covered. Therefore, the failure to pay the kinds of expenses at issue here are simply not "kickbacks" under section 531.35 itself. For example, an employer is not generally expected to pay inbound travel costs for a construction worker to get from Ohio to Nevada to work on a project. If a worker from Ohio desires to work in Nevada, he has to pay his own way to the state, and any reimbursement for that travel would be a gratuity. And section 531.35 does not otherwise incorporate 655.122(h)(1), directly or indirectly.

The Court believes the Eleventh Circuit incorrectly applied the doctrine of cumulative requirements not simply to pile requirements atop one another, but rather to incorporate provisions of one requirement into those of another in a way that the doctrine does not require and that ordinary principles of statutory construction and interpretation do not support under these circumstances. *See Arriaga*, 305 F.3d at 1235–36 ("If the FLSA mandates that employers reimburse certain expenses at an earlier time than the H–2A regulations, requiring employers to do so would satisfy both statutes."). The above-quoted statement assumes something that the *Arriaga* court failed to examine, i.e., that inbound travel and subsistence falls under section 531.35's definition of kick-backs directly, or that section 531.35 directly or indirectly incorporates section 655.122(h)(1). The only court of appeals actually to address the first question has answered "no," *see Castellanos–Contreras*, 622 F.3d at 400–01, and is it clear that *1049 section 531.35 does not directly or indirectly incorporate section 655.122(h)(1).

B. Breach of Contract

[3][4] The terms of DOLCO may be privately enforced by employees against employers who agree to them. *See Frederick Cnty. Fruit Growers Ass'n, Inc. v. Martin*, 968 F.2d 1265, 1268 (D.C.Cir.1992). Under this claim, Plaintiffs mainly reiterate the wage claims. It is possible that Defendant breached specific terms of the DOLCO, but Plaintiffs must pled such facts. Defendant argues that the DOLCO in this case do not contemplate reimbursement for travel during the first week of employment, but only within the first half of the contract period, as required under the CFR. Defendant also argues that the DOLCO do not require any reimbursement for outbound travel at all. However, even after amendment, these determinations will require an examination of the DOLCO themselves. The Court will therefore dismiss the breach of contract claim, with leave to amend to plead specific breaches

of the DOLCO.

C. State Wage and Hour Law Violations Under Section 16 of Article 15 of the Nevada Constitution and NRS Sections 608.040, 608.050, 608.140, 608.250, and 608.260

[5] First, section 608.040 provides "waiting penalties" for employers who fail to pay all wages due to employees who resign, quit, or are discharged. Assuming for the sake of argument that this statute applies to employees who leave a job amicably, the remedy should be available in this case if Plaintiffs can show they were owed wages they were never paid.

Second, section 608.050 appears to provide a similar, and perhaps redundant, remedy to employees who are involuntarily discharged.

Third, section 608.140 provides for reasonable attorney's fees for a successful wage plaintiff where the plaintiff makes a written demand to the employer for an amount not exceeding the amount awarded by the court at least five days before filing suit. Plaintiffs make no allegation that they made such demands, and the Court will therefore dismiss the section 608.140 claim, with leave to amend.

Fourth, section 608.250 empowers the Labor Commissioner to set a minimum hourly wage. Nevada's current minimum wage is $8.25. The Nevada Administrative Code notes that the minimum wage is $6.15 per hour, *see* Nev. Admin. Code § 608.100(1)(b),[FN3] but notes that the Labor Commissioner may increase the rates for inflation in accordance with Section 16 of Article 15 of the Nevada Constitution, *see id.* at § 608.100(2). Section 16 provides for $6.15 per hour and notes:

> FN3. Assuming Plaintiffs were not offered qualified health insurance.

> These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated *1050 agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin.

Nev. Const. art. 15, § 16(A). In other words, the NAC simply implements Section 16. The Section 16 claim is therefore redundant with (or supersedes) the section 608.250 claim. An aggrieved employee may bring a private action under Section 16 for back pay, damages, reinstatement, injunctive relief, and other legal and equitable remedies and may be awarded reasonable attorney's fees and costs if successful. *See id.* § 16(B). As with the federal minimum wage claims, Plaintiffs do not clearly allege that they were ever paid nominally at a rate below the state minimum wage. However, they appear to allege the same "kick-back" theory under state law. The Nevada Supreme Court does not appear to have considered the kick-back theory, but the Court believes that it would adopt it. The federal and state minimum wage laws exist for the same purpose: to ensure a minimum compensation for each hour worked. When an employee is required to provide a benefit to an employer as a condition of

employment, the hourly compensation is effectively reduced. Still, the Court will dismiss, with leave to amend, for the same reason it dismisses the federal wage claims with leave to amend: Plaintiffs have simply not pled facts making a minimum wage violation plausible.

Finally, section 608.260 provides for a civil action. This section has become redundant with (or has been superseded by) Section 16.

CONCLUSION

IT IS HEREBY ORDERED that the Motion for Leave to File Second Amended Complaint (ECF No. 34) is GRANTED.

IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 27) is GRANTED as against the Second Amended Complaint, with leave to amend as to the breach of contract claims generally and as to the federal and state wage claims insofar as the latter arose on or after February 16, 2009.

IT IS FURTHER ORDERED that the Motion for Protective Order (ECF No. 36) is DENIED.

IT IS SO ORDERED.

D.Nev.,2011.
Rivera v. Peri & Sons Farms, Inc.
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EXHIBIT 3

EXHIBIT 3

735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017
(Cite as: 735 F.3d 892)

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United States Court of Appeals,
Ninth Circuit.
Victor Rivera RIVERA; Ernesto Sebastian Castillo Rios; Vicente Cornejo Lugo; Jesus Garcia Mata; Luis Angel Garcia Mata; Gaudencio Garcia Rios; Simon Garcia Rios; Vicente Cornejo Cruz; Emilio Montoya Morales; Jorge Luis Aguilar Solano; Domingo Ramos Rios; Artemio Rincon Cruz; Sergio Rios Ramos; Pedro Rivera Camacho; Regulo Rincon Cruz; Aureliano Montes Montes; Manuel Rivera Rivera; Martin Flores Bravo; Virgilio Marquez Lara; Jose Balderas Guerrero; Gerardo Rios Ramos, Plaintiffs–Appellants,
v.
PERI & SONSFARMS, INC., Defendant–Appellee.

No. 11–17365.
Argued and Submitted June 14, 2013.
Filed Nov. 13, 2013.

Background: Lawfully admitted immigrant farmworkers brought putative class action against their employer, alleging claims for minimum wage violations under the Fair Labor Standards Act (FLSA), breach of contract, state wage and hour law violations, and minimum wage violations under state law. The United States District Court for the District of Nevada, Robert Clive Jones, Chief District Judge, 805 F.Supp.2d 1042, dismissed action. Plaintiffs appealed.

Holdings: The Court of Appeals, O'Scannlain, Circuit Judge, held that:
(1) more general Fair Labor Standards Act (FLSA) regulations promulgated by Department of Labor (DOL), rather than specific regulations governing the H–2A program for American agricultural employers to hire aliens for temporary labor, controlled whether and when employers had to reimburse employees for inbound travel and immigration expenses;
(2) employer had to reimburse immigrant workers during the first week of work for inbound travel and immigration expenses to the extent that such expenses lowered their compensation below the minimum wage;
(3) farmworkers stated viable claim that employer breached employment contracts by failing to adhere to terms of job order;
(4) claims of farmworkers under Nevada wage-and-hour laws were viable;
(5) farmworkers waived their right to challenge district court's ruling that they were not entitled to recover attorneys' fees;
(6) farmworkers waived issue of whether catch-all four-year statute of limitations applied to their state constitutional claims; and
(7) district court erred in applying two-year statute of limitations FLSA willful violation claim at pleading stage.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Labor and Employment 231H ⚿2324

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2321 Time and Mode of Payment
231Hk2324 k. Board, lodging or other facilities furnished. Most Cited Cases

Labor and Employment 231H ⚿2338

735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017
(Cite as: 735 F.3d 892)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)5 Administrative Powers and Proceedings
231Hk2338 k. Rules and regulations. Most Cited Cases

Labor and Employment 231H ⚷2726

231H Labor and Employment
231HXVI Agricultural Labor
231Hk2725 Regulatory Agencies and Officers
231Hk2726 k. In general. Most Cited Cases

The more general Fair Labor Standards Act (FLSA) regulations promulgated by Department of Labor (DOL), rather than specific regulations governing the H–2A program for American agricultural employers to hire aliens for temporary labor, controlled whether and when employers had to reimburse employees for inbound travel and immigration expenses; DOL regulation clarified "that the FLSA applies independently of the H–2A requirements and imposes obligations on employers regarding payment of wages" and DOL's interpretation was reasonable. 20 C.F.R. § 655.122(h)(1); 29 C.F.R. § 531.36.

[2] Labor and Employment 231H ⚷2324

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2321 Time and Mode of Payment
231Hk2324 k. Board, lodging or other facilities furnished. Most Cited Cases

American agricultural employer that hired aliens for temporary labor under H–2A program had to reimburse its employees during the first week of work for inbound travel and immigration expenses to the extent that such expenses lowered their compensation below the minimum wage. Fair Labor Standards Act of 1938, § 6(a), 29 U.S.C.A. § 206(a); 20 C.F.R. § 655.122(h)(1), (p); 29 C.F.R. § 531.35.

[3] Labor and Employment 231H ⚷2303

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2303 k. Minimum wages. Most Cited Cases

Labor and Employment 231H ⚷2323

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2321 Time and Mode of Payment
231Hk2323 k. Deductions from wages in general. Most Cited Cases

Employers generally may not issue paychecks at the minimum wage rate and then require employees to give some of the money back. 29 U.S.C.A. § 206(a)(1); 29 C.F.R. § 531.35.

[4] Administrative Law and Procedure 15A ⚷413

735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017
(Cite as: 735 F.3d 892)

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak412 Construction
15Ak413 k. Administrative construction. Most Cited Cases

When regulations are ambiguous, a court is required to defer to an agency's reasonable interpretations of those regulations.

[5] Administrative Law and Procedure 15A ⚿413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak412 Construction
15Ak413 k. Administrative construction. Most Cited Cases

Deference to an agency's interpretation of a regulation is not appropriate if the agency's interpretation is nothing more than a convenient litigating position or a post hoc rationalization for its actions rather than a fair and considered judgment on the matter in question; however, a change in an agency's interpretation does not present a separate ground for disregarding the agency's present interpretation unless the change leads to "unfair surprise."

[6] Labor and Employment 231H ⚿197

231H Labor and Employment
231HIV Compensation and Benefits
231HIV(A) In General
231Hk197 k. Travel. Most Cited Cases

Labor and Employment 231H ⚿200

231H Labor and Employment
231HIV Compensation and Benefits
231HIV(A) In General
231Hk200 k. Clothing. Most Cited Cases

Labor and Employment 231H ⚿2324

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2321 Time and Mode of Payment
231Hk2324 k. Board, lodging or other facilities furnished. Most Cited Cases

Lawfully admitted immigrant farmworkers stated viable claim under Nevada common law that American agricultural employer breached employment contracts by failing to adhere to terms of job order under H–2A program that allowed employer to hire aliens for temporary labor, where there was no separate, written work contract and farmworkers claimed that they had "substantial injuries in the form of lost wages"; purported breaches of contract stemmed not only from FLSA violations but also refusal to reimburse farmworkers for cost of their outbound travel and for cost of gloves necessary to perform the job. 20 C.F.R. § 655.122(h)(2), (p, q).

[7] Contracts 95 ⚿326

95 Contracts
95VI Actions for Breach
95k326 k. Grounds of action. Most Cited Cases

735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017
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Under Nevada law, the plaintiff in a breach of contract action must show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach.

[8] Labor and Employment 231H ⚷2220(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2220 Construction
231Hk2220(1) k. In general. Most Cited Cases

Claims of lawfully admitted immigrant farmworkers under Nevada wage-and-hour laws were viable, where those claims were largely duplicative of their viable claims under FLSA and their viable claims for breach of contract under Nevada law. Fair Labor Standards Act of 1938, § 6(a), 29 U.S.C.A. § 206(a); 20 C.F.R. § 655.122(h)(1), (p); 29 C.F.R. § 531.35; West's NRSA 608.250, 608.260.

[9] Federal Courts 170B ⚷3733

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3733 k. Failure to mention or inadequacy of treatment of error in appellate briefs, Most Cited Cases
(Formerly 170Bk915)

Lawfully admitted immigrant farmworkers waived their right to challenge district court's ruling that they were not entitled to recover attorneys' fees on their claims under Nevada wage-and-hour laws for failure to allege that they had made required demand, where farmworkers did not include any argument about making a demand in their opening brief. West's NRSA 608.140.

[10] Federal Civil Procedure 170A ⚷677

170A Federal Civil Procedure
170AVII Pleadings
170AVII(B) Complaint
170Ak677 k. Anticipating defenses. Most Cited Cases

Federal Civil Procedure 170A ⚷1752.1

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1752 Affirmative Defenses, Raising by Motion to Dismiss
170Ak1752.1 k. In general. Most Cited Cases

Plaintiffs ordinarily need not plead on the subject of an anticipated affirmative defense; however, when an affirmative defense is obvious on the face of a complaint, a defendant can raise that defense in a motion to dismiss. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[11] Federal Courts 170B ⚷3392

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BXVII(D)1 In General
170Bk3392 k. Mode and sufficiency of

735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017
(Cite as: 735 F.3d 892)
presentation in general. Most Cited Cases
(Formerly 170Bk617)

Lawfully admitted immigrant farmworkers waived issue of whether catch-all four-year statute of limitations applied to their state constitutional claims, where employer clearly argued to district court that two-year statute of limitations applied, but farmworkers merely contended that issue should not be resolved on motion to dismiss. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; West's NRSA 11.190(2)(c).

[12] Federal Courts 170B ⚿3392

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BXVII(D)1 In General
170Bk3392 k. Mode and sufficiency of presentation in general. Most Cited Cases
(Formerly 170Bk617)

Complaint by lawfully admitted immigrant farmworkers that clearly alleged that employer's violations of Fair Labor Standards Act (FLSA) were "deliberate, intentional, and willful," argument before district court that they "adequately alleged that Defendant's FLSA violations were willful," and citation to Supreme Court case discussing the three year statute of limitations for willful violations was sufficient to implicate three-year statute of limitations for "a cause of action arising out of a willful violation" and preserve issue for consideration by appellate court. Portal–to–Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

[13] Federal Civil Procedure 170A ⚿633.1

170A Federal Civil Procedure
170AVII Pleadings
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity
170Ak633.1 k. In general. Most Cited Cases

At the pleading stage, a plaintiff need not allege willfulness with specificity. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

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

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

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

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

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

Before: DIARMUID F. O'SCANNLAIN and MILAN D. SMITH, JR., Circuit Judges, and JAMES K. SINGLETON, Senior District Judge.[FN*]

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

*895 OPINION

O'SCANNLAIN, Circuit Judge:

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

I

A

Peri & Sons is a Nevada corporation that produces, harvests, and packages onions.[FN1] The plaintiffs are Victor Rivera Rivera and twenty-three other Mexican citizens ("the farmworkers") admitted to the United States to cultivate, harvest, and process onions on Peri & Sons' farm. Since 2004, Peri & Sons has hired such foreign workers through the H–2A program of the United States Department of Labor (DOL).

FN1. Because this case was dismissed upon a motion under Federal Rule of Civil Procedure 12(b)(6), we assume the truth of factual allegations in the operative complaint. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir.2010); *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.2006).

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

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

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

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

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

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

B

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

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immigration expenses. Second, it *896 claimed that Peri & Sons breached its employment contracts by violating the terms of the job orders submitted to the DOL. Third, it alleged violations of Nevada wage-and-hour laws for failure to pay the minimum wage and failure to pay wages owed under employment contracts. Fourth, it asserted violations of the minimum wage requirement in the Nevada Constitution.

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

II

A

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

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

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

We must evaluate such arguments in light of the DOL's regulatory interpretation. A DOL regulation has clarified "that the FLSA applies independently of the H–2A requirements and imposes obligations on employers regarding payment of wages." 20 C.F.R. § 655.122(h)(1); *accord id.* § 655.122(p)(1) ("[An] employer must make all deductions from the worker's paycheck required by law."). Before issuing its regulation, the DOL had rejected many of the specific arguments raised here by Peri & Sons. *See* Temporary Agricultural Employment of H–2A Aliens in the United States, 75 Fed.Reg. 6884, 6915 (Feb. 12, 2010). Under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we *897 must defer to the DOL's interpretation if: (1) the statutory provision is ambiguous, and (2) the agency's interpretation is reasonable.

The FLSA certainly does not unambiguously exempt H2A employers from its requirements and

related regulations. *See* 29 U.S.C. § 206 (requiring "[e]very employer" to pay the minimum wage to covered employees); *id.* § 213 (providing exemptions not relevant to Peri & Sons). Thus, the FLSA either unambiguously applies the reimbursement requirement to H–2A employers or contains an ambiguity on this point. Assuming without deciding that the statute is ambiguous, the DOL's interpretation is reasonable. Because the DOL's interpretation neither makes it impossible to comply with both provisions nor creates surplusage,[FN2] it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

FN2. The FLSA regulations require reimbursement in the first week to the extent that the expenses reduced an employee's wages below the minimum wage. The H–2A regulations require full reimbursement over a longer period of time. The H–2A regulations, therefore, are not superfluous because an employee paid more than the minimum wage would receive some reimbursement in the first week and some reimbursement later.

B

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

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

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

1

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

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

> (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer;*898 (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

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

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

[4][5] When regulations are ambiguous, we are required to defer to an agency's reasonable interpretations of those regulations. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)). Deference, however, is not appropriate if the agency's "interpretation is nothing more than a convenient litigating position or a post hoc rationalization" for its actions rather than a "fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, —— U.S. ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012) (internal quotation marks and citations omitted). A change in an agency's interpretation does not present a "separate ground for disregarding the [agency's] present interpretation" unless the change leads to "unfair surprise." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007).

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

With regard to immigration and recruitment expenses,[FN3] the preamble incorporated by reference the analysis from a previous field assistance bulletin. *Id.* ("Because of the similar statutory requirements and similar structure of the H–2A and H–2B *899 programs, the same FLSA analysis applies to the H–2A program as was set forth in the Field Assistance Bulletin [2009–2 (Aug. 21, 2009)]."). That analysis stated: "[T]ravel and immigration-related costs necessary for workers hired under the H–2B program are for the primary benefit of their employers, and the employers therefore must reimburse the employees for those costs in the first workweek if the costs reduce the employees' wages below the minimum wage." U.S. Dep't of Labor Wage and Hour Div., Field Assistance Bulletin 2009–2, 9 (Aug. 21, 2009), *available at* http:// www. dol. gov/ whd/ Field Bulletins/FieldAssistanceBulletin2009_2.pdf. It also stated that "under both the visa program regulations and the FLSA, we believe that employers are responsible for paying the fees of any recruiters they retain to recruit foreign workers and provide access to the job opportunity." *Id.* at 12.

FN3. This analysis does not apply to passport fees. *See* 20 C.F.R. § 655.135(j). The farmworkers, however, have voluntarily dismissed their claim for reimbursement of passport fees.

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2

In the face of regulatory ambiguity, the DOL's determination that inbound travel and immigration expenses primarily benefit H–2A employers was reasonable. There is no reason to think that the DOL's determination was not a product of its considered judgment. Although the DOL briefly changed its interpretation at one point in 2008, there is no indication that the change caused any unfair surprise for Peri & Sons.[FN4] Therefore, we defer to the DOL's interpretation. The district court erred in ruling that Peri & Sons was not required to reimburse its employees during the first week of work for inbound travel and immigration expenses to the extent that such expenses lowered their compensation below the minimum wage.

FN4. The withdrawal of the brief-lived 2008 interpretation expressly stated that the 2008 "interpretation may not be relied upon as a statement of agency policy." Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H–2A and H–2B Workers, 74 Fed.Reg. 13,261, 13,262 (Mar. 26, 2009).

III

[6] The farmworkers also argue that, under the common law of Nevada, Peri & Sons breached their employment contracts by failing to adhere to the terms of the job order. The purported breaches of contract stemmed from not only the FLSA violations discussed above but also the refusal to reimburse the farmworkers for the cost of their outbound travel and for the cost of gloves necessary to perform the job. The district court dismissed this claim on the ground that the SAC did not plead the breach with sufficient specificity.

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

[7] Under Nevada law, "the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F.Supp.2d 913, 919–20 (D.Nev.2006) (citing *Richardson v. Jones*, 1 Nev. 405, 408 (1865)). The farmworkers' complaint explained the contracts and damages at issue. It asserted that the underlying contracts were the job "orders described in Paragraphs 12 to 14 of this *900 Complaint." Such is a plausible claim because "[i]n the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract." 20 C.F.R. § 655.122(q). The SAC also claimed that the farmworkers had "substantial injuries in the form of lost wages."

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

contract claim plausibly state a claim.

The district court erred in concluding that the farmworkers had not pled their breach of contract claims with sufficient specificity. Such allegations were sufficient to give Peri & Sons fair notice and to make the farmworkers' breach of contract claims plausible.[FN5]

FN5. Contrary to Peri & Sons' assertion, the farmworkers did not waive their recruiting fees argument by failing to raise it below. The Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss alleged that some of the farmworkers had been required to pay recruiting fees and argued that reimbursement of such fees was required by law.

IV

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

A

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

Peri & Sons claims that the Nevada courts would not interpret state law to follow federal law on this issue. The cases on which Peri & Sons relies, however, merely indicate that the Nevada courts do not interpret state law in accordance with federal law when the relevant statutes contain materially different language. In *Boucher v. Shaw*, 124 Nev. 1164, 196 P.3d 959, 963 n. 27 (2008), the Nevada Supreme Court refused to adopt a test used in the federal courts to determine whether an individual is an "employer." The court so *901 ruled because the Nevada statute defining "employer" did not include any language indicating that officers of corporate employers were included. *See id.* The relevant federal statute, on the other hand, defined "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

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

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State.").

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

B

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

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

V

The district court dismissed all of the farmworkers' wage-and-hour claims to the extent that they accrued before February 16, 2009, applying a two-year statute of limitations.[FN6] The farmworkers first argue that the district court should not have *902 addressed statute of limitations issues on a motion to dismiss because plaintiffs are not required to counter affirmative defenses in their complaints. They also assert that their state constitutional claims are subject to a four-year statute of limitations, and that their FLSA claims are subject to a three-year statute of limitations.[FN7] Peri & Sons contends that it was proper for the district court to consider statutes of limitations issues, that the farmworkers waived arguments about longer periods of limitations, and that we, even if we choose to consider such arguments, should reject them.

FN6. The farmworkers interpret the district court's order as applying a two-year statute of limitations to their breach of contract claims as well. It is not entirely clear whether the district court did so, but to the extent it did, it was in error. Nevada law provides a six-year statute of limitations for breach of contract claims. Nev.Rev.Stat. § 11.190(1)(b).

FN7. The farmworkers have not challenged the district court's application of a two-year statute of limitations to their claims under Nevada statutes. Accordingly, we do not disturb the district court's ruling on that issue.

A

[10] The farmworkers are correct to note that plaintiffs ordinarily need not "plead on the subject of an anticipated affirmative defense." *United States v. McGee*, 993 F.2d 184, 187 (9th Cir.1993). When an affirmative defense is obvious on the face of a complaint, however, a defendant can raise that defense in a motion to dismiss. *See Cedars–Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1128–29 (9th Cir.1999) (citing 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1357 (3d ed. 1998) ("A complaint showing that the governing statute of limitations has run on the plaintiff's claim for

735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017
(Cite as: 735 F.3d 892)

relief is the most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)(6)...."). In this case, the statute of limitations issues are apparent on the face of the complaint. The district court, therefore, was correct to address them.

B

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

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

C

[12] With regard to the FLSA claims, the SAC clearly alleged that Peri & Sons' violations were "deliberate, intentional, and willful." The farmworkers argue that this allegation was sufficient to implicate *903 the three-year statute of limitations in 29 U.S.C. § 255(a) for "a cause of action arising out of a willful violation." Peri & Sons contends that the farmworkers waived this argument by failing to raise it before the district court. *See Costanich*, 627 F.3d at 1110. The farmworkers, however, argued before the district court that they "adequately alleged that Defendant's FLSA violations were willful" and cited a Supreme Court case discussing the threeyear statute of limitations for willful violations. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("Ordinary violations of the FLSA are subject to the general 2–year statute of limitations. To obtain the benefit of the 3–year exception, the Secretary must prove that the employer's conduct was willful....").

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

[13] On appeal, Peri & Sons continues to argue that there is no factual basis for applying the three-year statute of limitations because any violation could not have been willful when the federal courts have disagreed with each other over the legality of such actions. The opinion on which Peri & Sons relies, *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F.Supp.2d 117, 128 (E.D.N.C.2011), however, arose

735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017
(Cite as: 735 F.3d 892)

on summary judgment, not a motion to dismiss. *Id.* at 120. At the pleading stage, a plaintiff need not allege willfulness with specificity. *See* Fed.R.Civ.P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). We conclude that the farmworkers sufficiently alleged willfulness and that the district court erred in applying a two-year statute of limitations at this stage.

VI

For the foregoing reasons, we reverse the district court's dismissal of the farmworkers' FLSA claims to the extent that they accrued within three years of filing, reverse its dismissal of their breach of contract claims, affirm its dismissal of their claims under § 608.140, and reverse its dismissal of their other state statutory and constitutional claims to the extent that they accrued within two years of filing.[FN8] We remand for proceedings not inconsistent with this opinion.

FN8. Because of their success on this appeal, we award costs to the plaintiffs-appellants.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

C.A.9 (Nev.),2013.
Rivera v. Peri & Sons Farms, Inc.
735 F.3d 892, 164 Lab.Cas. P 36,179, 21 Wage & Hour Cas.2d (BNA) 894, 13 Cal. Daily Op. Serv. 12,432, 2013 Daily Journal D.A.R. 15,017

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EXHIBIT 4

EXHIBIT 4

Slip Copy, 2014 WL 2742874 (D.Nev.), 2014 Wage & Hour Cas.2d (BNA) 159,081
(Cite as: 2014 WL 2742874 (D.Nev.))

C

United States District Court,
D. Nevada.
Nicole McDONAGH, et al., Plaintiff(s),
v.
HARRAH'S LAS VEGAS, INC., et al., Defendant(s).

No. 2:13–CV–1744 JCM (CWH).
Signed June 17, 2014.

David R. Markham, Janine R. Menhennet, The Markham Law Firm, San Diego, CA, Joshua D. Buck, Mark R. Thierman, Thierman Law Firm, Reno, NV, for Plaintiff(s).

Rick D. Roskelley, Wendy M. Krincek, Littler Mendelson, PC, Las Vegas, NV, for Defendant(s).

ORDER

JAMES C. MAHAN, District Judge.

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

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

I. Background

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

Plaintiffs filed the instant lawsuit alleging several causes of action: (1) violation of the Fair Labor Standards Act ("FLSA"), (2) breach of employment contract and NRS 608.040, (3) violations of NRS 608.016, 608.030, and 608.140, (4) failure to pay minimum wage in violation of the Nevada constitution, (5) failure to pay overtime wages in violation of NRS 6.08.140 and 608.018, and (6) failure to timely pay all wages due and owing upon termination pursuant to NRS 608.140 and 608.020–.050.

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

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

II. Defendants' Motion to Dismiss

A. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be

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

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

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

B. Discussion

1. Tolling

Plaintiffs allege that for purposes of the statute of limitations, the action should be treated as if it was commenced on April 27, 2010, by the filing of *Daprizio v. Harrah's Las Vegas, Inc.* in the District of Nevada. Plaintiffs' cite to *American Pipe* in reasoning that the statute of limitations should be tolled. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974). Defendants contend that *American Pipe* does not relate to this case and cite to the Ninth Circuit's opinion in *Robbin v. Fluor Corp.* which distinguished *American Pipe* in cases in which class certification has been denied and a new member of the class attempts to re-litigate class certification. 835 F.2d 213, 214 (9th Cir.1987). Plaintiffs respond by referencing another Ninth Circuit opinion in which the court granted tolling in a class action that had previously been properly certified in a prior case. *Catholic Soc. Serv., Inc. v. I.N.S.*, 232 F.3d 1139, 1140 (9th Cir.2000) (en banc). In *Catholic Social Services*, the earlier action had been dismissed due to concerns beyond the merits of the claims or class. *Id.*

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

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

In order to determine whether *American Pipe* relates to the current action, a review of the prior action in *Daprizio* is needed. *Daprizio* was filed in April 2010, and attempted to bring a class action relating to

the same or similar facts as in the present case. *Daprizio v. Harrah's Las Vegas, Inc.*, 2:10–CV–00604–GMN, 2013 WL 5328386 (D.Nev. Sept. 20, 2013). A scheduling order was entered in March, 2012, which provided a deadline of May 31, 2012, to add parties or amend pleadings. *Id.* The scheduling order also placed a deadline of September 28, 2012, for plaintiffs to file a motion for conditional certification or a motion to certify class. *Id.* Daprizio failed to ever file a motion for conditional certification or to certify class. *Id.* In November 2012, Harrah's filed a motion for summary judgment which was granted on September, 20, 2013, for estoppel reasons arising out of an unrelated bankruptcy proceeding Daprizio was involved in. *Id.*

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

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

2. Second Cause of Action–Failure to Plead Facts

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

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

In a motion to dismiss, a court accepts as true all well pled facts contained in the complaint. *Iqbal*, 556 U.S. at 678. In the amended complaint plaintiffs have pled that they were employed by defendants. (Doc. # 20 at p. 4–6). The court finds that plaintiffs, having pled that they were employees, is sufficient to infer the existence of an employment contract.

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

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

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

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

The current landscape regarding whether chapter 608 of the NRS creates private rights of action is anything but clear. However, this court has previously

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

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

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

4. Fourth Cause of Action—Statute of Limitations

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

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

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

5. Extent of the Proposed Class

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

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

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

III. Plaintiffs' Motion for Collective Action Certification

A. Legal Standard

The Fair Labor Standards Act ("FLSA") was created to provide a uniform national policy of guaranteeing compensation for all work or employment covered by the act. *Barrentine v. Arkansas—Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981). The

FLSA grants individual employees broad access to the courts and permits an action to recover minimum wages, overtime compensation, liquidated damages, or injunctive relief. *Id.* at 740. Under the FLSA, an employee may initiate a collective action on behalf of himself or herself and other similarly situated people. 29 U.S.C. § 216(b). Court-supervised notice of pendency of § 216(b) actions "serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffman—La Roche, Inc. v. Sperling*, 493 U.S. 165, 172 (1989).

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

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

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

Therefore, although the standard is low, the motion must "provide substantial allegations, supported by declarations or discovery, that the putative class members were together the victims of a single decision, policy, or plan." *Small*, 2013 WL 3043454 at *1. Plaintiffs must show "a factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice," and "plaintiffs cannot proceed [ ] if the action relates to other specific circumstances personal to the plaintiff rather than any generally applicable policy or practice." *Bonilla v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129, n. 6 (D.Nev.1999).

2. Geographic Scope of Certification

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

B. Discussion

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

1. Sufficiently Similarly Situated

*6 Plaintiffs have made "substantial allegations"

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

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

2. Written Consent

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

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

3. Time Barred

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

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

4. Equitable Tolling of Statute of Limitations

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

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

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

5. Content and Time Limit of Notice

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

Plaintiffs have also requested that the court allow

the notice and consent to be translated into Spanish and mailed out with the English version. Plaintiffs have stated they will bear the costs of translation and mailing. The court will allow translation of the form that the parties find mutually acceptable.

In regard to the window for opt-ins, the court will grant a sixty-day opt-in period, consistent with this district's precedent. *See, e.g., Williams v. Trendwest Resorts, Inc.*, 2:05-cv-0605-RCJ-LRL, 2006 WL 3690686, at *2 (D.Nev.2006). This sixty-day opt-in period shall begin running upon approval by the court of the mutually-acceptable form of notice.

IV. Conclusion

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

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

Accordingly,

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

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

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

D.Nev.,2014.
McDonagh v. Harrah's Las Vegas, Inc.
Slip Copy, 2014 WL 2742874 (D.Nev.), 2014 Wage & Hour Cas.2d (BNA) 159,081

END OF DOCUMENT

EXHIBIT 5

EXHIBIT 5

2015 WL 1137734
Only the Westlaw citation is currently available.
United States District Court,
D. Nevada.

Latonya TYUS, an individual; David Hunsicker, an individual; Linda Davis, an individual; Terron Sharp, an individual; Collins Kwayisi, an individual; Lee Jones, an individual; Raissa Burton, an individual; Jermey McKinney, an individual; and Florence Edjeou, an individual, all on behalf of themselves and all similarly situated individuals, Plaintiffs,
v.
WENDY'S OF LAS VEGAS, INC., an Ohio corporation; Cedar Enterprises, Inc., an Ohio Corporation; and Does 1 through 100, inclusive, Defendants.

No. 2:14–cv–00729–GMN–VCF. | Signed March 13, 2015.

Attorneys and Law Firms

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Kathryn Blakey, Rick D. Roskelley, Roger L. Grandgenett, Littler Mendelson, Montgomery Y. Paek, Jackson Lewis P.C., Las Vegas, NV, for Defendants.

ORDER

GLORIA M. NAVARRO, Chief Judge.

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

I. *BACKGROUND*

This case arises out of violations of Nevada statutes pertaining to minimum wage regulations for employers. Plaintiffs are employees at various locations throughout Clark County, Nevada of the fast food restaurant chain, Wendy's. (Am. Compl. ¶ 1, ECF No. 3). Plaintiffs allege that this action "is a result of [Defendants'] failure to pay Plaintiffs and other similarly-situated employees who are members of the Class the lawful minimum wage, because [Defendants] improperly claim, or have claimed, the right to compensate employees below the upper-tier hourly minimum wage level under Nev. Const. art. XV, § 16." (*Id.* ¶ 2).

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

II. *LEGAL STANDARD*

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

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

*2 The Court, however, is not required to accept as true

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

III. *DISCUSSION*

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

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

The Ninth Circuit and the District of Nevada have both addressed this question. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir.2013); *see also McDonagh v. Harrah's Las Vegas, Inc.*, No. 2:13–cv–01744–JCM–CWH, 2014 WL 2742874 (D. Nev. June 17, 2014). In *Rivera*, the district court held that, although the Minimum Wage Amendment is silent on the limitation period for minimum wage actions, such silence did not imply a repeal of the two-year limitation period of NRS 608.260, and dismissed all wage claims accruing before the two-year limitation period. *Rivera v. Peri & Sons Farms, Inc.*, 805 F.Supp.2d 1042, 1046 (D.Nev.2011). On appeal, the Ninth Circuit held that "[t]he district court properly dismissed the state constitutional claims to the extent they accrued more than two years before the farmworkers filed suit." *Rivera*, 735 F.3d at 902. Moreover, in *McDonagh*, the district court acknowledged that, "[w]hile article 15, section 16 of the Nevada constitution does create a new two-tiered minimum wage in the state, the section is silent on whether it changes the two-year statute of limitations in the Nevada Revised Statutes." 2014 WL 2742874, *4. The court went on to hold that "the constitutional provision was not intended to change this two-year statute of limitations." *Id.*

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

Unlike the statutory provision in *Thomas*, the Court finds that the two-year statute of limitations period found in NRS 608.260 does not necessarily and directly conflict with the Minimum Wage Amendment, which would make it irreconcilably repugnant. Rather, the statutory provision can be construed in harmony with the constitution. Therefore, although the Minimum Wage Amendment is silent on a limitations period, the Court finds that this silence does not impliedly repeal the two-year statute of limitations period found in NRS 608.260. Accordingly, the Court dismisses with prejudice all wage claims accruing more than two years before Plaintiffs filed suit.

IV. *CONCLUSION*

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

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

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EXHIBIT 6

EXHIBIT 6

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DISTRICT COURT

CLARK COUNTY, NEVADA

LISA WILLIAMS, et al., Plaintiffs, v. CLAIM JUMPER ACQUISITION COMPANY, LLC, Defendant.	CASE NO.: A-14-702048 DEPARTMENT NO. XX **ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING LIMITATION OF ACTION**

This matter having come on for hearing on the 10th day of September, 2014; Daniel Bravo, Esq., Bradley S. Schrager, Esq., and Don Springmeyer, Esq., appearing for the Plaintiffs; Elayna J. Touchah, Esq., appearing for the Defendant; and the Court having heard arguments of counsel, and being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion for Partial Summary Judgment brought by the Plaintiffs. This is an individual and proposed class action which seeks relief on behalf of all employees of the Defendant, Claim Jumper Acquisition Company LLC, who have been compensated during their employment at a rate less than the minimum hourly wage allegedly required under Nevada law. The Amended Complaint filed on July 23, 2014, asserts a single cause of action based upon alleged violations of Article XV, section 16 of the Nevada Constitution (commonly called the "Minimum Wage Amendment").

(2) The instant Motion seeks a ruling by the Court regarding the appropriate

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

limitations period that should apply to the Plaintiffs' claim. Specifically, the parties seek clarification regarding whether the two-year limitations period set forth in NRS 608.260 applies to the instant cause of action. The Plaintiffs aver that the limitations period set forth in NRS 608.260 does not apply on its face to the instant claim which is based upon a Constitutional provision enacted after NRS 608.260 was enacted, and even if it can be read as somehow applying to the Plaintiffs' claims, it has been "impliedly repealed" by the enactment of Article XV, section 16. In Opposition, the Defendant avers that this action is governed by the two-year period set forth in NRS 608.260.

(3) The instant Motion is styled as a Motion seeking summary judgment pursuant to NRCP 56. The Defendant's Opposition argues that the instant Motion is not a proper NRCP 56 because it does not actually seek entry of judgment on any claim, but rather seeks something along the lines of an "advisory opinion" on a question of law that does not actually dispose of the claim asserted in the Amended Complaint. The Defendant is technically correct. The Plaintiffs' Motion seeks to know what limitations period governs it claims, a question whose answer would not actually result in the entry of judgment on its claim or any portion of its claim; at best, the answer to that question would only reduce the number of members of the putative class (by excluding members seeking relief solely for injuries that occurred before the expiration of the applicable limitations period) or reduce the amount of damages that the class members might be entitled to recover at trial (by limiting their recoverable damages only to injuries that occurred before the expiration of the applicable limitations period). Normally, a party cannot ask this Court to summarily enter "judgment" pursuant to NRCP 56 on something less than a claim or cause of action. *E.g., Arado v. General Fire Extinguisher Corp.*, 626 F.Supp. 506, 509 (N.D.Ill. 1985) (FRCP 56 "simply does not permit the piecemealing of a single claim or the type of issue-narrowing sought here [because] the Rule authorizes only the granting of

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, Individually and on behalf of others similarly situated,

Real Party in Interest.

Case No.: _____

District Court Case No. A-14-707425-C

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

VOLUME 4 OF 7

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APPENDIX 9

APPENDIX 9

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA,

Plaintiff,

vs.

WESTERN CAB COMPANY,

Defendant.

CASE NO: A14-707425-C

DEPT. VII

BEFORE THE HONORABLE LINDA M. BELL, DISTRICT COURT JUDGE

THURSDAY, MARCH 12, 2015

RECORDER'S TRANSCRIPT OF ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff: LEE GREENBERG, ESQ.
DANA SNIEGOCKI, ESQ.

For the Defendant: MALANI L. KOTCHKA
JOHN MORAN, JR.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Thursday, March 12, 2015 10:17 a.m.

THE COURT: Good morning.

MS. KOTCHKA: Your Honor, Malani Kotchka on behalf of Western Cab, and with me I have John Moran, Jr. --

MR. MORAN: Good morning, Your Honor.

MS. KOTCHKA: -- general counsel for Western Cab. It is a family-owned business, and I have some of the owners of the company also in court with us today.

THE COURT: All right. Yes, you looked like a group, but there were extras behind, so --

MR. GREENBERG: Good morning, Your Honor. Leon Greenberg and Dana Sniegocki for Plaintiffs.

THE COURT: Good morning, Mr. Greenberg.

MS. SNIEGOCKI: Good morning.

THE COURT: All right. This is on for a motion to dismiss, and then there's a countermotion to amend the complaint. Let's go ahead and start with the motion to dismiss.

MS. KOTCHKA: Yes, Your Honor. This is a minimum wage action filed by a Mr. Perera, and Mr. Perera was a former cab driver for Western Cab. I guess the very first issue that we've raised is whether the *Thomas* decision, which eliminated the exemption, the minimum wage exemption for cab companies, whether it applies prospectively from the date that *Thomas* was decided.

And we have quoted to you in our briefs that *Vartelas v. Holder*

case out of the Supreme Court, 132 Supreme Court 1479, in which the United States Supreme Court held that there was a presumption against retroactivity of the law where the application would create a new obligation in respect to transactions already passed.

THE COURT: Let me ask you a question about that. There's a new constitutional rule, like *Gideon*, the one that comes to mind, where the U.S. Supreme Court made a judicial rule that under the United States Constitution, defendants are entitled to have counsel, right?

MS. KOTCHKA: Right.

THE COURT: That's the big one that I can think of. Under those circumstances then, it applies prospectively, but when you're talking about retroactivity, isn't the triggering event here the passage of the Minimum Wage Act?

MS. KOTCHKA: Yes. The Minimum Wage Act was passed --

THE COURT: In 2006, right?

MS. KOTCHKA: -- 2006, yes, but the problem was that the labor commissioner in the State of Nevada believed that the minimum wage exceptions of NRS 608.250 still apply, and you can see that in their regulation, NAC 608.115(2). So all the cab companies were complying with the labor commissioner's regulation up until *Thomas* when for the first time our Nevada Supreme Court found a direct conflict between the exemption and the Minimum Wage Amendment. It's a 4-3 decision, which means that there was at least some debate about whether these exemptions still applied or whether the Minimum Wage Amendment basically overruled them.

I think that after *Thomas*, it became crystal clear that the

Minimum Wage Amendment was now going to apply to cab companies. The exemption they previously had is no longer applicable law, but I think that they had a good faith belief when the labor commissioner of the State of Nevada, who is charged with enforcing wage and hour laws, thought that the exemptions were still in existence.

THE COURT: But I don't think that's the test for deciding whether a statute is retroactive. Or if there's retroactive application or prospective application of the *Thomas* decision, did the Minimum Wage Act in 2006, from that time were the cab companies required to pay the minimum wage or no, but I don't know that they're reasonable or unreasonable to me, is what the test is.

MS. KOTCHKA: Okay. Well, I think that we raised the issue initially because Mr. Greenberg, who represented the Thomas plaintiffs, had raised with the Nevada Supreme Court, he had asked to change some language from present tense to past tense, and he said it was to foreclosure this issue, and the Nevada Supreme Court denied the motion to change the language. And so I think that the cab companies at least believe that that was -- that was an issue and that we could raise that issue.

But we've also alternatively argued that if a statute of limitations is going to be applied and it's not going to be prospective, that this Court should adopt the two-year statute of limitations contained in NRS 608.260. We've done a lot of briefing on this issue. We've brought to your attention the decisions of Judge --

THE COURT: Oh, that reminds me, there were three supplements filed. They were all filed untimely, and they all have to do with other cases in this

jurisdiction that are maybe interesting, but not particularly helpful to me. So I'm going to strike all three of the supplements. There was -- there were two filed by -- I believe by Mr. Greenberg. One of them said it was the third, but I only have two, and then there was one filed by this side. Under 2.20, they were untimely, so I'm just going to strike them all. All right. Go ahead.

MS. KOTCHKA: Okay. Well, anyway, the issue, the two-year statute of limitations issue --

THE COURT: Right.

MS. KOTCHKA: -- has been addressed, and we did represent in our original motion and in our reply brief to the Court the decisions of Judge Tao and Judge Ellsworth --

THE COURT: Right. I mean, all I -- really all that tells me that there's decisions all over the board on this issue, so what I need to know is what your legal argument is on this.

MS. KOTCHKA: Yes.

THE COURT: All right.

MS. KOTCHKA: Okay. Our legal argument on the two-year statute of limitations is that on its face, NRS 608.260 provides for a two-year statute when on a minimum wage claim, and our argument is that that's the statute; that this is a minimum wage claim regardless of whether it's brought under a constitutional provision or a statutory provision, it's still a minimum wage claim. We have a statute on point. It provides a statute of limitations. The Minimum Wage Amendment itself has no statute of limitations in it, so there can't possibly be a conflict between it and a statute like there was in *Thomas* because it's completely blank about the statute of limitations. So it's our

belief that the statute in 260 still applies.

Under the Minimum Wage Amendment, the duty of setting the minimum wage, the actual amount is given to the governor or his designee. In our state that is the labor commissioner. So the labor commissioner still sets the rates for the minimum wage. So the statute that says that a minimum wage action, when you sue for the difference between what you're paid and the minimum you were owed is two years, is the applicable statute to the Minimum Wage Amendment.

And so if we start with the two years, our argument is, we went back and we showed the court that Mr. Perera, who filed the original action, is not owed minimum wage for the time period within that two-year statute. We showed you the wages he actually made without including his tips, and he clearly made $7.25 an hour.

Now, in the opposition, the opposing counsel says, wait a minute, he was due $8.25 an hour because his health insurance premiums would've been higher than ten percent of his gross taxable income. In response to that, we have given Your Honor the labor commissioner claim that Mr. Carrera filed in which he asked the labor commissioner for $8.25 up until March 2011, and after that date, he asked for $7.25. We believe this is because he knew that his gross taxable income was high enough that the premium for his dependent coverage was less than ten percent of his gross taxable income.

And the -- there are two bases. One is the labor commissioner already had this claim, and the labor commissioner said they found no merit to his claim. They told him that the payroll records Western Cab had submitted showed he'd been paid correctly, and they asked him if he had any additional

information, to get back to them by a certain date, and he never responded. So we believe the fact that he chose his remedy, he went to the labor commissioner, who found he didn't have a claim, that that precludes his claim altogether.

But, secondly, on the gross taxable income issue, NAC 608.147(2) provides a gross taxable income includes tips, bonuses or other compensation is required for purposes of federal individual income tax. Then you go to the federal individual income tax section of 26 USC Section 61(a)(1), and that provides an income, includes fees, commissioners, fringe benefits and similar items.

So it's our belief that his declared and undeclared tips and health insurance premiums paid by Western Cab and all fees and tickets paid by vendors has to be included in his gross taxable income, and only he has possession of that. But since he asked for the 7.25 from March 2011 on, we believe that he has conceded that his gross taxable income was high enough to cover his dependent coverage. And in the affidavit he submitted in opposition, he never states what his gross taxable income is, and, of course, he's the only one that would really have that information.

So that, in a nutshell, is why we believe that he doesn't state a claim for relief, and we have asked for both -- we've asked for it to be dismissed, but also, alternatively, for summary judgment.

One other thing raised in the opposition was, they say that the Minimum Wage Amendment required us to notify Mr. Perera of the minimum wage in Nevada. Our response to that is that the Minimum Wage Amendment provides only that an employer shall provide written notification of the rate

adjustments to each of its employees, and the last rate adjustment was in 2010, which would be beyond the statute of limitations, but, regardless, Perera had notice. He knew what the rates were because of his labor commissioner claim, because he first asked for the $8.25 an hour, and then when he began receiving health insurance, he reduced it to $7.25 an hour.

And then I can talk about the class issues, but the class issues depend upon him. If his claim was dismissed, then there's no longer a class representative --

THE COURT: If you could address those, I would appreciate it.

MS. KOTCHKA: Okay. All right.

THE COURT: Yeah. But before you get to that, let me ask you a question about the notice thing, though, because whether he knew or no, isn't there still an obligation to provide notice?

MS. KOTCHKA: The notice is of a rate adjustment.

THE COURT: Right.

MS. KOTCHKA: The last time the rate was adjusted in Nevada was in 2010, which would be beyond the statute of limitations. He didn't bring his action until September 2014.

THE COURT: I feel like we're confusing things a little bit because I'm not sure what the obligation -- and I'm not saying whether their argument is a good argument or no, that what they saying -- so I want to make sure I understand your side of it, what they saying is that there should be tolling because there was a failure to give notice, and I believe there's an annual requirement to provide that notice, so I'm asking, was the notice provided?

MS. KOTCHKA: Well, the notice was provided in the sense that we

have always posted the federal notice, which is 7.25 an hour. We've been posting that for 16 years because we were aware that federal minimum wage applied to us. Up until *Thomas*, we were not aware that the state minimum wage applied.

THE COURT: All right.

MS. KOTCHKA: But the notice requirement is not notice every year. It's notice of a rate adjustment. So, in other words, our rates in Nevada haven't changed since 2010. There would be -- we would not be giving notice, and this year I expect that it's going to be the same. We would not be giving notice to employees unless it changes, unless there's a rate adjustment, meaning a change in the rate.

THE COURT: Okay. All right.

MS. KOTCHKA: Okay?

THE COURT: Now the class issues.

MS. KOTCHKA: Okay. Now, the class issues. Well, first of all, you have to have a class representative, and he's got to have similar claims. Here we're saying Mr. Perera doesn't have a similar claim to anybody else. All of our cab drivers worked different hours, different shifts. They made different amounts of money. They're paid on a commission basis. So none of them are paid the same. If --

THE COURT: Would you just briefly explain to me how that works so I under -- because I think that's probably invertant for me to understand that.

MS. KOTCHKA: Okay. Our cab drivers come in every day and they have a trip sheet, and they write in their own handwriting when they begin and then they write their last trip of the day and in between or all the trips that

they take. And they are paid on a -- they pay a trip charge of a dollar a trip, but then the book or the commissions that are made are split 50 percent. They get to keep 50 percent; the company itself keeps 50 percent.

Then they get paid tips. Nine percent of the book -- pursuant to an agreement we have with the IRS, nine percent of the book is declared as tips. We never see their tip money. That's just a percentage that we can take from the meter and declare as tips. That all goes to the IRS. Tax withholding gets done on all of that. So that's how it works.

And that's how you can track their hours to see if they've been paid minimum wage because you simply take the total commission for the day and you can divide by the hours, and if they make over the $7.25 an hour, if they're provided health insurance benefits and it's less than the ten percent of their gross taxable income or if they don't, they get paid the 8.25 an hour. But you can tell, and you can monitor it, and you can make up the difference, which is what Western Cab has been doing since the *Thomas* decision came out.

In terms of Rule 23, however, Rule 23, a class action, is for cases that can be decided on a single set of facts, the common issues of facts and law. And this particular kind of case is not appropriate for class action because you can't answer one question and use generalized proof to show that they're entitled to relief. And the reason for that is because each driver will be paid a different amount of money and each driver will earn a different hourly wage, which may be far less than the minimum wage or far greater than the minimum wage, and so you can't lump them all together and say, okay, with this, you know, you can decide one issue, and that will decide

whether there's liability across the board because that's not true.

You're going to have many, many cab drivers who are paid way, way beyond minimum wage, and then you may have a handful that are not, but you can't lump them all together, bring them all in as a class. You would be having separate trials for each driver to determine whether they were paid minimum wage and what the difference is if they were not.

So that's the reason why we have asked for the class to be de-certified, is because it's not an appropriate case under either the *Walmart-Dukes* case or the *Shuett-Beazer* case out of Nevada.

THE COURT: Walmart is pretty different from this, though, isn't it? When we're talking about *Walmart*, there were different stores and different supervisors. There wasn't, say, one consistent policy like we're talking about here in terms of how wages were calculated.

MS. KOTCHKA: Yes, there were different policies in different stores in *Walmart*, but here you have different circumstances with each individual driver. And the best example of that was his motion to add in a Mr. Ahmad. We've shown the Court that Mr. Ahmad, he made far more in wages than Mr. Perera, and he's not owed minimum wage under any theory, whether you use 7.25 or the 8.25, and that's an example of how they are not similarly situated. They don't really have anything in common other than the fact that they were a taxicab driver and they worked for Western Cab.

THE COURT: Well, so a cab driver who made commissions over the minimum wage wouldn't be part of the class because they got paid more than minimum wage, but how about somebody who is in -- assuming that what Mr. Perera says is correct, just for this argument, wouldn't other cab drivers who

had commissions less than the minimum wage be in the same position?

MS. KOTCHKA: No. They have to -- they have to -- they wouldn't be in an identical position because you'd have to take their wages --

THE COURT: Well, this is not --

MS. KOTCHKA: -- and their hours --

THE COURT: -- an identical position, though, right? It's the same or similar position.

MS. KOTCHKA: Right, but you still have to be able to ask one question, get one answer, a common answer, that would then apply to both of them, and I don't know what that question -- or that answer would be because you'd have to look at each one of them, and you'd have to look at their total compensation.

THE COURT: Uh-huh.

MS. KOTCHKA: And you'd have to look at their total hours, and you'd have to go through the mathematical computation for each of them. I mean, it can't be common. It's going to be individual by individual. And class actions in the minimum wage and overtime scenario arose with exemption cases where employers took a whole class of people performing the same job and said they were either exempt from overtime or they weren't exempt from overtime, and you could look at that category and you could look at the work they did, and with one fell swoop, you could answer the question, did -- do they fit the criteria for the exemption, do they not?

Those are appropriate cases for class determination because they affect a large number of people, and you have like one question. But as *Walmart v. Dukes* pointed out, if you have to do it on an individual-by-

individual basis and they said in that case to decide on discrimination, you'd have to go supervisor by supervisor, manager by manager, store by store. It's no longer a good vehicle for a class because you have to make that individualized determination, and here you would have to do it with the cab drivers.

THE COURT: But isn't their overtime example, which I am familiar with, isn't that example closer to this than the *Walmart* case? Because in the overtime example, your first question is, is this person entitled to overtime, and here the question is, were these cab drivers entitled to minimum wage and was it 7.25 or 8.25 or whatever. But then, even with the overtime example, you have to go on a case-by-case basis did the person work overtime, right? What hours qualified for overtime.

MS. KOTCHKA: Not if -- not if you said they were all exempt from overtime because they all did certain duties and the employer classified them all as exempt, but that --

THE COURT: Right, but the lawsuit is going to be the employees coming in and saying that they were entitled to overtime. If the employer doesn't prevail, there has to be a calculation on a person-by-person basis of whether they are entitled to the overtime pay. I mean, it just seems like a much closer analogy than when you're talking about discrimination by a bunch of different supervisors all over the country.

MS. KOTCHKA: If -- in those cases, with the exemption cases, usually they don't have that damage component because they usually work a set number of hours a week. Like they work a stipulated overtime, if you know what I mean. If you're classified as exempt and you require them to work 45

hours a week, then you don't have that individual damage determination.

Here there's no dispute after *Thomas* that the cab drivers have to be paid minimum wage. The question is, were they paid minimum wage? And in order to determine whether they were paid minimum wage, you've got to go through that individual class -- you've got to go through each individual case to determine if they were paid minimum wage.

THE COURT: Well, I mean, but I think there's a question before that, and that's -- the question is, should they have been paid for minimum wage from 2006, right?

MS. KOTCHKA: Well, yes, if you've got a statute of limitations, it's going to go back to 2006, but I don't think they're arguing that.

THE COURT: Obviously, there's a statute of limitations issue --

MS. KOTCHKA: Right.

THE COURT: -- but I think that's really the question, is when -- when the minimum wage pay starts.

MS. KOTCHKA: Okay.

THE COURT: Right?

[Defense counsel confer]

MS. KOTCHKA: Yeah, three district courts have ruled --

THE COURT: Well, I know, but, I mean, I'm looking at this file, looking at the facts and the law are in this particular case. So it's interesting, but not too helpful to me because I know -- and I know there's other courts that have decided differently as well, so it doesn't really help me a whole lot. You know, what I'm bound by is what the Nevada Supreme Court said, and then I've got to figure the rest of it out, so -- all right. So is there anything else that

you want to say about the class action case?

MS. KOTCHKA: Huh-uh, no. I think I've made the points.

THE COURT: Okay. Thank you. Mr. Greenberg.

MR. GREENBERG: Your Honor, first of all, in respect to Plaintiff's supplement, I would ask the Court to simply allow the portion of Plaintiff's first supplement that propounds a different amended complaint to add an additional plaintiff, if the Court would be inclined to grant the countermotion. Defendant --

THE COURT: Oh, there wasn't -- the countermotion was --

MR. GREENBERG: There is a counter --

THE COURT: Withstands, yeah.

MR. GREENBERG: Okay. Because --

THE COURT: Just not the part that is a supplement to this motion.

MR. GREENBERG: I understand, Your Honor.

THE COURT: All right.

MR. GREENBERG: And I got the impression that Your Honor really doesn't want counsel to be discussing the decisions made by other judges in this Court, and that's --

THE COURT: Honestly, I just don't -- it's not -- it's not binding authority, and when I have people all over the board making different decisions, it's not very helpful to me.

MR. GREENBERG: Judge Ellsworth, when I saw her a month or so ago, was extremely unhappy with counsel was discussing decisions made by other district judges on an issue.

THE COURT: I mean, I won't -- you know, I'm not going to say I'm

unhappy about it, and, certainly, I don't think the rules preclude it. We have a rule that precludes citation to -- you know, once the Supreme Court Rule 23 precludes citation to specifically unpublish Nevada Supreme Court decisions, so I don't think it's, you know, unethical or not allowed by the rules. I just don't think it's very helpful to me, so --

MR. GREENBERG: I understand Your Honor's position. There's a number of issues that have been discussed by counsel for Defendant that are in the papers. I don't want to take up the Court's time with issues that the Court doesn't feel are important or believed to be addressed by myself. There's this issue of whether the *Thomas* case actually has application to conduct after June of 2014. I can start with that, Your Honor, if the Court --

THE COURT: Go ahead. Why don't you. I would really like to do that.

MR. GREENBERG: Okay. Your Honor --

THE COURT: I called this case last for a reason so that we can take the time that you feel you need to go through this because it is complex.

MR. GREENBERG: Yes. Your Honor, in respect to the issue of the *Thomas* case having application to conduct prior to its publication, in the supplement that I was just referring, the first supplement, there is discussions from the Ninth Circuit Court of Appeals on this issue. They rejected that argument involving a different transportation company, a limousine company, that was raising the exact same issue.

In the *Thomas* case itself, Your Honor, upon remand back to this Court, the Defendant taxi companies in that case brought that argument to Judge Israel, who denied it. I don't have it -- I don't have actually a written order form him. It is on his docket. I'm waiting for him to sign an order on

that.

I think Your Honor understands that when we're dealing with a statutory change in the law where there's a pronouncement as to what the law is going to be and therefore parties are on notice as to the change in the law, it is very different than when we have the situation of *Gideon*, for example, Your Honor, that judicially announced change in the law and judicially made law, which changes how legal relations have to be governed prior to that essentially without notice --

THE COURT: Right.

MR. GREENBERG: -- because no one -- no one would know that that was going to happen. And this is all discussed in great detail in my papers, Your Honor. You know, in respect to this issue of whether Defendants actually had notice of this, before the constitutional amendment was enacted, we had the opinion of Mr. Sandoval, who's now our governor, as attorney general, who opined that this was going to abolish these exemptions. So, clearly, there was official legal notice from the highest law enforcement officer of the state that this was going to happen. The Defendants chose to ignore that advice and said, well, we think the labor commissioner implied otherwise or so forth.

Well, honestly, Your Honor, we don't really -- really they shouldn't be getting to that because the law is clear on its face. And, by the way, Your Honor, I just want to point that if they had concerns about this, knowing that this was coming, they could've come to the court for judicial declaration. They could've brought a class action themselves to have their drivers named as a defendant class, sought to pay any disputed monies into

this Court and sought a final binding resolution to determine what their legal liabilities were, Your Honor. They declined to do that. They declined to do it because they would much rather be here years later potentially facing a liability that may turn out to be much more limited. I think they made a very simple business decision. But let me move on, Your Honor.

Essentially, Defendant's motion asked the Court to make rulings based upon suppositions and allegations that it's asking the Court to accept as fact and then dismiss this case. We have no record here, Your Honor. I mean, this is essentially in a Rule 12 context, both in respect to this question of Mr. Perera, Mr. Ahmad, who's a proposed additional plaintiff in the amended complaint that I'm asking leave to file, as well as in respect to striking these class claims. So we have -- we have no record for the Court to examine.

I have pointed out in my response -- and counsel for the Defendants do address this issue of what the proper rate was. Was it 7.25? Was it 8.25? What do the records they proffer show in respect to the actual rate of compensation of Mr. Perera? Did they comply with the appropriate minimum wage? And this is discussed in my responding papers that there are two real problems with the record presented by Defendants.

First of all, the wage is 8.25, not 7.25, unless the proper health insurance is provided. Defendants know what insurance was made available to Mr. Perera. They know what his earnings were. They haven't bothered to detail this to the Court. They instead raise this argument that, well, Mr. Perera went to the labor commissioner at one time and said, I think I'm entitled to 7.25, so, therefore, he somehow should be bound by that belief he had at that

time or what he communicated to the labor commissioner, even though he has a constitutional right here. I don't see -- they don't cite any support for how that should be binding on this Court in respect to this issue of the appropriate rate, and it --

THE COURT: I agree with you there's a dispute of the facts over the appropriate rate.

MR. GREENBERG: Well, okay. Well, Your Honor, so if there's a dispute of fact over the appropriate rate and then we go and we look at what record the Court has before it, and this is discussed in my papers, Defendant's records, except at a 100 percent on their face is accurate, it's established that Mr. Perera is owed something like $41 or something because if the rate was 8.25, even under Defendant's reconciliation, he was at least for one week paid less than that 8.25 an hour rate.

Now, we also have another disputed issue of fact in respect to the records of the compensation and the hours that are there because he was forced to pay for the gas for the vehicle, which is discussed in his declaration. And while an employer can require an employee to pay certain expenses, he can't do that if it's going to reduce the compensation below the minimum wage threshold.

I mean -- and I think this is sort of self-evident. I mean, the employer could say, well, I'm going to pay you $10 an hour, which is clearly more than the minimum wage, but for every hour you work, you're going to have to give me $3 an hour back or you're going to have to devote -- you're going to have to donate $3 to some charity I have or something like that. I mean, then, in effect, the employee's working for $7 an hour, not $10 an

hour, because a condition of his employment is that he has to pay these other monies.

So it's reducing his rate of pay below the minimum. In the example I gave you, by the way, Your Honor, if it was $10 an hour and a $1 an hour mandatory payment, we wouldn't raise the same issue --

THE COURT: Right.

MR. GREENBERG: -- because it would still be $9 an hour. And this is in the CFR -- in respect to the federal minimum wage is discussed.

In response to this issue, we have this assertion from Defendants that, well, it's okay for us to make them use their tips or -- to pay for gas and that the United States Department of Labor somehow told us this was okay, although if you read carefully the declaration from their manager, it doesn't really say that. It was sort of an assumption that they made in terms of their policy to deal with the fact that they had an audit concluded in 2011 that found that they owed over $200,000 under the federal minimum wage standard.

And I would like to just bring that issue forward in respect to this discussion of the class certification issue or the class action allegation the Defendants are also looking at least to remove from this case, which is that -- I would submit that the Court really isn't even in a position to address that issue. Again, we're under a Rule 12 standard here. Okay? So the question is, do these pleadings on their face provide a sufficient basis that there could be a class certified -- assuming the allegations are true, that there's a large group of individuals, they're covered by the minimum wage requirement, they're not getting paid less than -- they're not getting paid, you know, in

compliance with the minimum wage. They have common circumstances.

The pleadings are sufficient. In fact, Defendants don't even actually address the pleading issue on that. They go to this question of, well, the circumstances in fact are all different. People work different hours. They got to pay different rates of pay. Well, Your Honor, that's extraneous from the pleadings, so it just isn't proper at this point. But to the extent that the Court wants to go peek beyond the pleadings and look sort of further into these issues, as I think Your Honor was pointing out, differences in damages do not prohibit certification, okay, if there are common issues in respect to liability, and there are common issues here, Your Honor.

We were just discussing this issue of what the appropriate minimum wage rate is, for example, Your Honor. They offer health insurance under the same terms to all their employees so that would be a common issue to be determined for all of the employees.

There are other, you know, common issues such as, you know, are these paid -- are the pay records necessarily -- you know, the gas charges that we were discussing, is that, in fact, an issue that is material to calculating compliance with the minimum wages? And also there are claims for equitable relief in this case, Your Honor.

One of the claims that is proposed in the amended complaint, which was filed with Plaintiff's first supplement adding Mr. Ahmad as an additional plaintiff, is this question of erroneous reporting to the IRS, which is that the cab drivers were being listed with the IRS as having income in excess of their true income because they were forced to pay these gasoline charges to maintain their employment, gasoline charges, which as I said, were illegal to

the extent that they reduced their earnings below the minimum wage. So we're asking for equitable relief in respect to some correction of those information reports, Your Honor.

And in terms of the Department of Labor's investigation, I just wanted to explain to the Court that, of course, doesn't determine finally anything in this case at this stage, obviously. But the Department of Labor in making that determination that there was this deficiency of $200,000 or so was crediting Defendants with tips that the drivers received, and they used a standard that's nine percent, I think, was mentioned by Defendants. As the IRS would say, well, we're going to imply a nine percent tip rate based on the commission earnings.

So they used that to reduce the liability under the federal minimum wage standard because the federal minimum wage standard says the employer can pay less than the 7.25 if the worker gets tips. They get a discount basically for the amount of the tips that the worker gets. Nevada law doesn't allow that tip credit, as it is called, Your Honor.

So, in fact, if this case extends back to that time period that the U.S. Department of Labor looked at, it's very clear that a review of that audit will establish violations to a large group of drivers because that tip credit doesn't remove the Nevada liability during that time period. It did alleviate the federal liability because of the way the federal law works in this area is different.

So my point, again, Your Honor, is that there's a lot here to believe that there are issues that would be appropriately subject to certification, but we're not -- we shouldn't be even looking at that at this

point. We really should need a record, Your Honor. I mean, let's get a record before the Court. Plaintiff will move for class certification at the appropriate time when we've had an opportunity to conduct discovery, to find out what the records tell us about these various cab drivers. Are there common circumstances? What are the circumstances?

And as Your Honor was pointing out, for example, if we have certain drivers that clearly based upon agreeably accurate records of their compensation and hours of work could not possibly have been below this minimum wage threshold, well, they're not going to be part of the class. So we would need to define who is part of a class in this case, Your Honor.

I think Your Honor understands all of these issues. The remaining issue that I would like to discuss is just the statute of limitations issue and this question of the equitable tolling. I do want to point out, and this is, I believe, Exhibit A of my response, that the decision of Judge Tao in the *Williams* case on this, which is relied upon by Defendants, has been granted a mandamus petition to the extent of directing an answer. And in the order that's Exhibit A, they expressly directed the parties to address this issue of the District Court re-characterizing the claim broad in that case as being under the statutory scheme.

And this really goes to the heart of my difference with Defendants regarding this supposed two-year statute of limitations, which is, they're relying on this language in 608.260, and 608.260 says, "If an employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the labor commissioner pursuant to the provisions of NRS 608.250." It is an express carve-out limitation saying we're going to

put a two-year statute of limitations on claims arising under 608.250. As Your Honor is aware, if this didn't exist, those 608.250 claims would be a three-year statute of limitations because that is the general statute of limitations in Nevada.

So to re-characterize this as applying to claims that don't arise under 608.250 -- in fact, don't even arise under any statute, but directly under Nevada's Constitution -- does not make any sense, Your Honor. The -- and this is discussed again in my brief, that because these claims arise directly from the Constitution, they have a different character and a different nature, and as constitutional claims, they are appropriately viewed under the catch-all four-year statute of limitations that Nevada applies to, you know, causes of action that are not otherwise provided because this isn't statutory, which would normally be three years.

I do cite the authorities in my brief discussing this. The Nevada Supreme Court, to the extent that it has actually looked at this issue at least in the context of other disputes, has opined, at least in passing, Your Honor, that that would be the correct analysis, that you would apply a four-year not otherwise provided catch-all statute of limitations to a claim emanating directly under Nevada's Constitution. That view is also consistent with all of the authorities I have looked at that arise in other jurisdictions. We had cases from New York, Nebraska, Texas, California.

So I think Your Honor understands our argument there and the reason why we believe the four-year period would be really the only appropriate period to use given the nature of the claims made in this case.

In respect to the argument of the equitable estoppel, again, this

is discussed in our brief. I think Your Honor understands the question of the estoppel and the notice is that the Constitution specifically provides that the employer shall provide written notification of the rate adjustment to each of its employees. This is the actual language in the Constitution when it occurs. The first one occurred in July 2007.

So when it says written notification to each, it would presumably mean that you have to actually give each of them in hand or by mail or with their paycheck a written statement advising them that the minimum wage rate in Nevada has changed. Now, that advisement isn't going to mean anything to someone who's getting paid a lot more than minimum wage because it's not a concern to them, but the reason why that's put in there is to help employees enforce their rights and to give them knowledge that they're entitled to this money.

And if we got to Section B of the Constitution, it provides this extremely broad grant of remedial rights, saying that, "Any employee claiming violation of this section may bring an action against his or her employer in the courts of the state to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including, but not limited to back pay, damage, reinstatement injunctive relief." So, I mean, it couldn't be any broader, and, again, this is discussed in my response papers.

Judge Ellsworth did look at this issue. This is actually her minute order. She's not issued a final order on this. It's actually set forth at Exhibit A of Defendant's reply. At the very end of that minute order, she declined to make a ruling on this issue. She wanted a record to see what she

should consider in terms of the relevant issues bearing upon whether equitable estoppel or equitable tolling of the statute of limitations should be applied under these circumstances.

And I would submit that the Court really needs a record to be able to consider that issue and whether by not -- because the problem is, Your Honor, if the employer had the obligation to give the notice and he doesn't give the notice, what remedy would be appropriate to the employee except a toll, a maintenance -- the continuation of their rights that they were supposed to be told about. I mean, there wouldn't be any other appropriate remedy that would make the employee whole for the damage sustained by the failure to get that notice. What are you going to do? Are you going to order the employer to give the notice three years later and then tell the employee, well, tough luck, you can't make those claims anymore?

I think Your Honor understands that given the structure of the constitutional amendment, the force of law that it should require, is, of course, the supreme law of the state, the remedy I'm asking, the equitable estoppel remedy, would make sense or it should at least be reviewed upon a fuller record before the Court in terms of the relevant factors.

I've gone on quite a bit, Your Honor. I don't want to take up too much time of the Court.

THE COURT: Okay. I think we've touched on everything. Thank you.

MR. GREENBERG: Thank Your Honor.

MS. KOTCHKA: Yes. Okay. At the very beginning, Mr. Greenberg said that we're asking you to accept facts, but we haven't given you a record, but we have given you a record. We've given you actual pay documents

concerning Mr. Perera and Mr. Ahmad. Rule 12 allows you to submit records -- or documents outside the pleadings if you convert it to Rule 56, and when we filed our motion to dismiss, we did cite Rule 56(b) and asked the Court to take a look at it.

When Mr. Greenberg made the argument that on the $8.25 rate, we knew what our insurance was and the wages are, that's true, but that isn't the test for the ten percent. Again, it goes back to gross taxable income, which has been defined by regulation by the labor commissioner, and only Mr. Perera knows that. We think that --

THE COURT: Let me ask you a question about that. If you have to decide as the employer whether somebody gets 7.25 or 8.25 an hour based on the charges for insurance, how do you figure that out?

MS. KOTCHKA: Well, I think you can figure it out by looking at the total, what their total wages are, at least with you.

THE COURT: Right.

MS. KOTCHKA: And if you look at the time period and you just take -- you can take ten percent. I mean, it's going to be far less than what their gross taxable income is, but you could make the determination based on what they make with you as the employer, their wages, their compensation, you could do the ten percent. But don't forget, their gross taxable income, although minimum wage excludes tips, gross taxable income doesn't exclude tips.

THE COURT: Right.

MS. KOTCHKA: So you can consider their tip income and looking at that, and that's one of the reasons that we gave you the tip income in our

documents in Exhibit 9, was to show you that the gross taxable income is going to be much higher than their minimum wage income. So that's how you look at it to determine whether they get the 7.25 or 8.25, but most of our cab drivers make far -- this isn't a big issue because most of them make far over minimum wage. It's a tips classification, and most of the money is made in tips and not in the booking them out.

Now, in federal law, you can consider tips, Mr. Greenberg was correct, but under state law for minimum wage purposes, you have to carve the tips out. And so --

THE COURT: Right.

MS. KOTCHKA: And so we did.

MR. MORAN: But if they're insured, they get the higher rate.

THE COURT: Right.

MS. KOTCHKA: Right. On the differences in damages that he talked about, we submitted Mr. Greenberg's solicitation letter to you. That's Exhibit 10 in the reply.

THE COURT: Uh-huh.

MS. KOTCHKA: And in that very letter that he's writing to our cab drivers, he's telling them that if they make less than between 80 to $90 a day, they may be entitled to minimum wage. We're showing you that Mr. Perera made over that. So by his criteria alone, Mr. Perera met the minimum wage standards.

He made an allegation that they might have to -- that the employer might have to file something with the IRS because we reported the gas as income, and that's just not true. We never showed their payments for

their gas as income, and the entire issue concerning the gas arose out of the federal DOL on it in which we were paying for gas --

THE COURT: I want to make sure because -- I want to make sure that I'm understanding this correctly. What I believe that Mr. Greenberg was saying was not that the payment for gas was reflected as income, but the expectation that the cab drivers would pay for the gas should actually reduce the amounts of their income when looking at whether they're being paid minimum wage.

MS. KOTCHKA: Okay. But he also referred something about to the IRS, but taken just that --

THE COURT: That's what I understood. Is that correct, Mr. Greenberg?

MR. GREENBERG: Your Honor, yes, this is only an issue to the extent that those payments go below the minimum wage, and there was an IRS report above the minimum wage for that period.

THE COURT: Right. Got it.

MR. GREENBERG: Okay.

MS. KOTCHKA: Okay. Anyway, the DOL --

THE COURT: There's a lot of pieces here.

MS. KOTCHKA: Okay. This is where the gas issue arose. At the DOL audit back in 2012, we were paying for gas for all of our employees. The DOL told us you can't consider gas in the minimum wage computation. You don't get a credit for paying for it. If you don't pay for it, it doesn't hurt. You have to look at the paycheck, what they actually get on the paycheck. So as a result of that audit, we changed our practice and we said, okay, drivers, you

pay for gas. We will change the compensation formula. They used to get like 30 percent of the book. We will increase that to 50 percent so that you make more money, so that you could go out and pay for the gas.

And although Mr. Greenberg wants to argue that that's part of their minimum wage, the federal government has already told us it's not. They came back in to do another audit. They looked at the gas issue. They basically went away and said, you're doing everything correctly. So we don't think really that they can raise that issue.

In addition to that, the Minimum Wage Amendment says we can't consider tips, but the Minimum Wage Amendment in Nevada doesn't say you can't use your tip money to pay for gas. So we have declared tips. We have undeclared tips. We have all these fees that the drivers make when they take people to certain vendors and the vendors pay them. So, certainly, all of that can be used to pay for gasoline.

The notice issue again, we do a state posting, you know, where we post our -- on the bulletin board for our drivers, where we post our federal notice that we gave the Court information on.

THE COURT: Right.

MS. KOTCHKA: We also do the state notice. So the rates, the 7.25 and the 8.25, have been up there on the board, you know, for the state minimum wage rates, you know, for years as well. We don't, you know, hand them a piece of paper because we didn't believe until *Thomas* happened that we were required to pay the state minimum wage, but the state minimum wage rates were posted, and I think there's an argument that can be made that that was written records.

This thing on the statute of limitations, Mr. Greenberg argues that the four years applies under the catch-all, but there's an exception to the catch-all that says -- and I'm not sure if it's 11.010, but there's a statute that says that the cause of action begins and it refers to set by statute. And what we're saying is, the catch-all can't even pick up this -- this statute of limitations because we have a statute; we have 260.

And while he argues about all the different remedies and things that are in the Minimum Wage Amendment that are bigger, more than just the minimum wage regulations, that's true, but those remedies apply to the causes of action that the Minimum Wage Amendment created for like discrimination and retaliation. They create those causes of action right in the Minimum Wage Amendment if you're fired because you report a minimum wage violation.

And so, therefore, those other remedies apply to those causes of action. It's the back pay that applies to if you don't pay the minimum wage. That's -- that's really your only remedy for that. And, of course, the equitable relief is, you have to pay it from now on. And we've already given Your Honor in the affidavit of Martha Sarver, her commitment after *Thomas,* that she's been checking the wages to make sure that we are complying with the minimum wage Amendment, so, therefore, equitable relief wouldn't be any good anyway.

He made some argument that, oh, gee, there's all this statute of limitations, it's greater than the minimum wage statute of two years, but that has never been determined by the Court yet. And if the Court wants to borrow a statute of limitations on those causes of action which are an issue here, the Court might borrow, for example, from NRS 613, which is a 180-day

statute of limitations for discrimination on the basis of age, race, national origin, et cetera. So the other -- the other claims that are contained in the Minimum Wage Amendment really have nothing to do with what statute of limitation should be applied in this case, which we still contend should be the two years.

And I think the final thing that we wanted to bring to your attention was, Mr. Greenberg wasn't involved in the DOL wage an hour investigation, so he really has no personal knowledge of it. And, again, on the class action allegations, I still think it's going to be a case by case, person by person. We are requesting not only that you grant our motion, but you deny his motion to amend --

THE COURT: Well, we haven't gotten to that yet, so hang on.

MS. KOTCHKA: Huh? What?

THE COURT: Hang on a second. We're going to get to that in a second.

MS. KOTCHKA: Oh, okay.

THE COURT: I can only do one at a time.

MS. KOTCHKA: Okay.

THE COURT: All right.

MS. KOTCHKA: All right.

THE COURT: So let's go ahead and go to the motion to amend. Mr. Greenberg.

MR. GREENBERG: Your Honor, if the Court was interested, there were a few things that I want to respond to about what Ms. Kotchka said, but if you want me to address just the amendment request --

THE COURT: You know what, if you'll just go to the amendment.

MR. GREENBERG: Okay. Yes, Your Honor. The amendment seeks to add this claim regarding this issue of the gas payment, which I was discussing with Your Honor previously. To the extent they're getting, you know, a payment during a pay period for acts which is reduced by a Y gas payment they have to make and that results in a Z amount, which is an amount that is below the minimum wage, that Z amount should not be getting reported to the IRS as income to them because they never got it. I mean, they were required to get it under the Minimum Wage Amendment, but they never did. So these reports are in error, and they should be corrected because they are exposing our clients to -- the class members here to potentially additional tax liabilities.

The other purpose of the amendment, Your Honor, is also to -- well, there are claims for punitive damages and for other relief based upon this intentional misconduct in respect to that false characterization, I was just mentioning as to the income, and, quite honestly, Your Honor, the origin of this January 2012 policy to make them pay for the gas was instituted in response to the DOL's investigation because it hid from the DOL the violations that were going on, because they no longer appeared on the payroll.

When they took the gas off the top, they could see that the commissions that were going to the drivers were winding up to be less than the minimum wage. When they took gas payments out of the commissions split equation, it made it look like the drivers were getting more money, but, in fact, they weren't.

But, Your Honor, in respect to the amendment, which is what I supposed to be addressing, the other issue is to add Mr. Ahmad as an

additional named plaintiff, punitive representative of the class. We do have a declaration from him affirming as to his willingness to be a representative.

In response to that, Defendants make the same argument they make in respect to Mr. Perera, which is that, well, see, if we have these records here which we insist are correct, although we actually don't for Mr. Ahmad have all of his trip sheets. We only have two sheets, and we have -- we have a bunch of what are told are reconciliations of his hours of work and pay and resulting hourly rates that they claim he received.

That's clearly incompetent, Your Honor, in terms of the factual issue of whether this man does or does not have a claim that would be typical or common to the class. I mean, does this man potentially have -- does he have a right to come in here and make a minimum wage claim or not? We don't have a record to judge that, Your Honor, so, I mean, it really is premature, improper request that the Court make rulings of fact without a record, essentially accepting Defendants' assertions as true. But I would point, actually, that those records also on their face are very questionable.

For example, at Exhibit 9-1, for the first week of 2013, they say Mr. Ahmad made 9.12 an hour. If he made 9.12 an hour and that does not reflect the deductions for the gas, which we've already gone over for Mr. Perera, those deductions for the gas definitely reduced his earnings by at least a dollar to $2 an hour. So right there the Court has in front of it strong indication that Mr. Ahmad does potentially have a claim for minimum wage compensation because he was compensated less than 8.25 an hour as required by the Constitution.

But we're all getting ahead of ourselves. Again, we're not here

to address these merits as to whether the claim is, in fact, established or not. It's completely improper for Defendants to be opposing the amendment on that basis. They don't deny that he worked for them during the relevant time period that he was a taxi driver, so on the pleadings, he presumptively is an appropriate plaintiff. I mean, we'll get to these issues of what the -- you know, what the facts are and whether a disposition as a matter of undisputed fact was appropriate before the Court, but we have no discovery. We have no records. We can't do any of that.

Hopefully, I've addressed the Court's concerns regarding the amendment. As I said, there were some other issues that were discussed by Ms. Kotchka, but I don't need to spend the Court's time on that if the Court --

THE COURT: All right. Thank you.

MR. GREENBERG: Thank you.

THE COURT: Counsel, is there anything else?

MS. KOTCHKA: Yes. Mr. Ahmad, as I said earlier, we have submitted his payroll records. There's no question that even at the higher rate, the $8.25, he's well above that rate. This issue --

THE COURT: Well, I suppose my concern, though, is that the standard should allow an amendment, I can't really do a factual evaluation with respect to allowing them to amend the complaint. I need to focus on affairs of legal basis for denying a request to amend the complaint.

MS. KOTCHKA: Well, they would have to show -- I mean, for the amendment not to be futile, they'd have to show that he's similar to Mr. Perera, and I don't see that they made any showing of that. For him to come in as another class representative, they've got to make a similarity showing,

and there's -- there is none. I mean, they aren't similar.

They didn't work the same time period. Again, they didn't work the same hours. They didn't make the same amount of money. I mean, he hasn't alleged that as part of his complaint. And he also seeks, when he does the amendment on the complaint, to add this gas issue, but that's -- I mean, there's -- there's no basis to add the gas issue.

We have not -- we responded to what the DOL told us to do, and we did the right thing as we pointed out in our affidavit. I don't know how to get that before the Court other than through that vehicle. The drivers, we don't report that the gas is part of the income; we report what they're paid and we report the declared tips.

The drivers themselves go to the IRS and take a deduction for the gas payments they've made, and so I don't know why this IRS issue keeps coming up, but the IRS has been told properly from all sides exactly what's going on. We're not hiding anything. We're not misrepresenting anything on the gas.

So our primary basis on the motion to amend is just that there is no issue with respect to the gas, and the Minimum Wage Amendment certainly doesn't refer to gas in any context, and they're not similar. And if they're not similar, then he can't be added under Rule 15.

THE COURT: Okay. Sir, do you have anything that you want to respond to that?

MR. GREENBERG: Your Honor, as the Court pointed out previously, class members don't need to be identical. There needs to be a common issue and judicial efficiency and resolution of the common issue. We're not

anywhere need that stage in terms of --

If Mr. Ahmad worked in a completely different job -- he was a dispatcher in Defendant's taxi business and not a taxi driver -- then perhaps he wouldn't be a proper plaintiff in this case, but it's uncontested that they both were taxi drivers. They're both making these allegations that they didn't get paid the minimum. Maybe they worked different time periods. Some overlapping, some not. Maybe they -- they were paid different amounts. They worked different hours.

Those are issues -- whether those issues would prevent certification is a different issue. We're not there. The Court has no record to consider that. But in respect to whether they at least punitively could bring a case jointly to say, this happened to us, we want to be representatives of a class, it's a very low threshold, Your Honor. We're not here to determine the facts at this point. The Defendants will have an opportunity to say, well, Mr. Perera or Mr. Ahmad could or couldn't be the proper representatives at a particular time, but we didn't get to these issues. It's way, way down the road, the proper record, Your Honor.

THE COURT: All right.

MR. GREENBERG: Thank you.

THE COURT: Thank you. There are many, many apparent issues going on here, and I want to make sure that I give both sides' arguments due consideration, so I'm going to get a written order out to you shortly.

MS. KOTCHKA: Okay. Thank you.

THE COURT: Thank you.

/ / /

MR. GREENBERG: Thank you, Your Honor.

[Proceedings concluded at 11:20 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Renee Vincent

Renee Vincent, Court Recorder/Transcriber