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**No. SC94464**

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In the

Supreme Court of Missouri

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GATEWAY TAXI MANAGEMENT, INC.

Appellant,

v.

MISSOURI DIVISION OF EMPLOYMENT SECURITY,

Respondent.

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Appeal from the Missouri Labor and Industrial Relations Commission

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# APPELLANT'S SUBSTITUTE REPLY BRIEF

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## ARGUMENT

### I. Laclede's argument that it does not pay "wages" to drivers is properly before the Court, and is supported by both Missouri's unemployment-compensation statutes and case law. (Reply to Respondent's Response to Appellants' Point I)

#### A. Laclede did not waive its argument that it is not an employer that pays "wages" to drivers, either factually or as a matter of Missouri law

The Missouri Division of Employment Security ("Division") first argues that Laclede Cab[1] ("Laclede") "waived" any argument that "wages" were not paid to its drivers. *See*, Respondent's Brief ("Resp. Brief") at 16-18. In addressing this argument an understanding of the procedural context of this case is important as it rejects the Division's argument.

The Division Deputy originally ruled that the drivers were employees. Laclede appealed the deputy's decision to the Appeals Tribunal. Before the Appeals Tribunal, the parties adduced testimony, introduced exhibits and briefed both issues -- whether Laclede paid "wages" to drivers and whether drivers were employees or independent contractors. LF. 37-43. The Appeals Tribunal ruled in Laclede's favor, holding that the

[1] Throughout the testimony before the Division, Appellant was referred to as Laclede. TR. 008. Accordingly, to be consistent with cited testimony, Appellant will similarly refer to Laclede throughout this Brief.

drivers were independent contractors. *Id.* As the prevailing party, Laclede had no right to appeal from that decision, even though the Appeals Tribunal concluded that "the drivers' remuneration…was 'wages' under Section 288.036." LF. 41. Laclede was not aggrieved because the hearing tribunal ultimately found in Laclede's favor. The Division was aggrieved and appealed to the Labor & Industrial Relations Commission ("Commission"). LF. 044-046.

The Division's current argument that Laclede, as a prevailing party, was somehow obligated to raise any challenges to findings of the hearing tribunal in an appeal *by the Division*, or else waive those issues, is simply without merit. Laclede, as a respondent, had no legal obligation to file any brief, much less one that specifically argued the wage issues. Under settled Missouri law, only an "aggrieved party" can appeal. Missouri law:

> requires that a party be "aggrieved" by a final judgment before having any right to appeal. "An aggrieved party is one who suffers from an infringement or denial of legal rights." Further, the judgment at issue "must operate directly and prejudicially on the party's personal or property rights or interests" with immediate effect.

*Lane v. Lensmeyer*, 158 S.W.3d 218, 224 n. 10 (Mo. 2005)(citations omitted); *See also, Kennedy v. Dixon*, 439 S.W.2d 173, 180 (Mo. banc 1969)(plaintiff who had one count dismissed, but nevertheless obtained a judgment was not "aggrieved" and could not appeal); *Brockman v. Regency Fin. Corp.*, 124 S.W.3d 43, 50 (Mo. App. W.D. 2004)(litigant is not aggrieved by error if the litigant ultimately prevails).

Further, the Division's appeal from the hearing tribunal's finding challenged only the independent contractor determination, and did not place the "wage" finding at issue. *See generally*, Suppl. LF. 001-017. Laclede had no basis to appeal, and since the Division did not raise the "wage" issue, Laclede had no reason to address in detail the "wage" finding by the hearing tribunal.

*State ex rel. Sir v. Gateway Taxi Management Co.*, 400 S.W.3d 478 (Mo.App. E.D. 2013), which is cited by the Division is not remotely analogous to this case. There, the Assistant Attorney General stipulated that loss of income was not being sought and amended the complaint to delete that claim. *Id.* at 493. On appeal, the complainant tried to claim that the Commission erred in failing to award such relief. *Id.* Naturally, the court found that improper. No such similar facts exist here.

While Laclede had no legal obligation to file any brief as a respondent, nonetheless, Laclede devoted a page of its brief to the issue of wages. *See*, Suppl. LF. at 025-026. This discussion concluded with: "[t]he taxicab drivers do not receive compensation (i.e. wages) from Laclede for services that the drivers render to the customers." *Id.* Laclede preserved the issue.

Finally, once Laclede was aggrieved by *the Commission*'s ruling, Laclede's "wage" arguments were Point I of its brief before the Missouri Court of Appeals. The Division's wavier argument is without merit.

### B. Laclede does not pay its taxicab drivers "wages" as a matter of Missouri law

The Division correctly points out that, if customers' payments to drivers do not constitute payments by Laclede, the Court need not consider Point II, the issue of whether drivers are employees or independent contractors:

> If the money or fares received by drivers from Laclede's customers is not remuneration 'payable or paid' by Laclede, the drivers are not covered by the Missouri Employment Security Law.

Resp. Brief at 13.

Respondent's arguments ignore its own statement of the issue -- that the remuneration must be payable or paid ***by Laclede***. The evidence in this matter establishes that no such remuneration comes from Laclede. Drivers are paid directly by the taxicab customers. The fares are not shared with Laclede. In fact, Laclede does no accounting of fares received by the driver. Laclede does not know how much a driver makes during their shifts, nor does it care. Drivers can make as much as they can or as little as they choose. Respondent does not contest these facts.

In an effort to get around these undisputed facts, Respondent theorizes that "the business model that Laclede has created requires the drivers to 'pay' what the cab company would otherwise make on fares after paying its drivers normal wages or commissions for the work they are doing…." Resp. Brief at 25. This theory is sheer conjecture. Absolutely no facts are cited to support it. Absolutely no analysis of fares earned by the drivers versus the "pro" charged by Laclede was provided in the

proceedings below. Respondent simply hypothesizes – incorrectly - that this is the case in order to support the argument it seeks to advance. This wholly unsupported argument is improper and should be rejected.

Respondent also erroneously tries to analogize this case to factually dissimilar cases in which the taxi company has a fare-splitting arrangement with the driver – a far different arrangement and a dispositive fact that is not present here.

Respondent cites to *Higgins v. Missouri Division of Employment Security*, 167 S.W.3d 275 (Mo. App. W.D. 2005). Reliance on *Higgins* is misplaced as it is clearly distinguishable. In *Higgins*, Ms. Higgins' taxi companies were structured so that drivers retained fifty percent of the net fares that they generated after subtracting expenses, *and Ms. Higgins received the other fifty percent*. *Id.* at 278. The companies' revenues were based upon and varied depending upon the amount of fares generated by the drivers. This Court focused on the "revenue generated in the businesses *as structured by Higgins*" in deciding that such revenue constituted "wages" because the revenue was "first and foremost revenue of [Ms. Higgins's] cab companies." 167 S.W.3d at 282 (emphasis added). As the Court put it, Ms. Higgins's "cab companies . . . part[ed] with some of that revenue to compensate the drivers." *Id*. at 282.

Trying to fit this case within the holding of *Higgins*, Respondent argues that "all revenue generated in the course of Laclede's taxicab business utilizing its goodwill and tradename belonged, first and foremost, to Laclede." Resp. Brief at 23. This statement belies the facts and the clear differences between how Laclede runs its taxicab business and how Ms. Higgins ran hers. Laclede leases taxicabs to drivers (and operates a dispatch

system to help the drivers obtain fares) in exchange for a flat fee – a fee unrelated to the amount of fares earned. TR. 041-042. Laclede drivers retain *all* fares that they earn and pay a flat fee associated with their leasing of the cab. Unlike *Higgins*, Laclede does not receive or retain any of the fares, and accordingly does not part with a portion of the fares to compensate drivers. Laclede does not even know the amount of those fares since the drivers have no reporting obligations. *See* TR. 058. Unlike *Higgins*, none of the drivers' fares are revenues of Laclede that are paid or shared to compensate drivers. There is simply no basis to conclude that fares "belonged, first and foremost, to Laclede," as the Division argues.

Respondent additionally cites to a few federal cases involving taxicab drivers and revenue rulings regarding insurance agents and lottery sales. Resp. Brief at 20-21. However, similar to *Higgins*, in each such case the company received the fares or commissions and then paid a percentage of those revenues to the individual. Fares and commissions earned were tracked to determine how the money would be allocated between the company and the worker. This critical fact is not present here – Laclede drivers pay a flat fee for use of the cab and Laclede does not receive any portion of their fares.

The Eighth Circuit's opinion in *Air Terminal Cab, Inc. v. United States*, 478 F.2d 575 (8th Cir. 1973), cited by Respondent, is instructive on this issue and actually undercuts the Division's position. *Air Terminal Cab* specifically noted that revenue-sharing by the drivers and the cab company was a critical and dispositive fact. Moreover,

it referenced case law that found that drivers were not employees in the context where drivers rented cabs by paying a flat fee.

> This Circuit has not directly passed on the question of whether a taxicab driver is an employee for federal employment tax purposes. The two leading cases in this area appear to be *Party Cab Company v. United States*, 172 F.2d 87 (CA7 1949) … and *United States v. Fleming*, 293 F.2d 953 (CA5 1961). In *Party Cab* the taxicab drivers worked essentially on a rental basis whereby they paid a fixed fee for the use of a cab and were subject to little control over their daily routine other than fixed working hours. The court held that the drivers were not employees for employment tax purposes. In *Fleming*, the drivers were directed to pickups by radio dispatcher calls, were required to account for their trips by use of trip reports, were subject to discharge, did not pay for their own gas and oil, and were required to split their fares with the company (65% to the company). In finding that the taxicab drivers were employees, the court in *Fleming* relied heavily on the fare-splitting arrangement between the drivers and the company. 293 F.2d at 957.

*Air Terminal Cab*, 478 F.2d at 579. In reaching its decision, the court further noted that "[t]he Internal Revenue Service has also ruled that the receipt or fare sharing arrangement diminishes the likelihood of a true lessor-lessee relationship because of the company's interest in receipt of the maximum amount of income possible in return for

its financial risks." *Id.* at 580. This fact critical to the authority cited by Respondent is wholly absent in this matter.

Further, the Division's "wage" argument is simply incorrect as a matter of Missouri law under R.S.Mo. §§288.036.1 and 288.090.2. The Division argues that, because 288.036.1 defines wages as remuneration "payable or paid for personal services without identifying the payor, it doesn't matter who pays the remuneration or how. *See* Resp. Brief at 18-19. That is not a fair interpretation of *all* the governing statutes.

The Division failed to acknowledge section 288.090.2, and did not mention the canon that *all* provisions of a legislative act "are not to be read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *State ex rel. Evans. v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. banc 2008). As previously noted in Laclede's opening brief, §288.090.2 includes language that:

> Each employer ... shall pay contributions at the average industry rate established for the preceding calendar year ... or two and seven-tenths percent of taxable ***wages paid by it*** ....; and,
>
> Any employing unit ... shall pay contributions equal to one percent of ***wages paid by it*** ....

(R.S.Mo. §288.090.2).

Section 288.090.2 limits an employer's obligation to contribute to the unemployment compensation fund to "wages paid ***by it***." *See* Appellant's Brief ("App. Brief") at 29-35. The Division's approach, relying on section 288.036.1 in isolation,

would effectively write the words "by it" out of R.S.Mo. §288.090.2. Section 288.036.1, defining "wages," can only be harmonized with the directly-related section 288.090.2 if wages are understood as "remuneration, payable or paid, for personal services" *by the employer*, and not by third-parties, e.g. taxicab customers. Further, tax laws are to be strictly construed against the taxing authority. *L&R Dist. Co. v. Missouri Dept. of Revenue*, 648 S.W.2d 91, 95 (Mo. 1983).

The *Higgins* decision concerning "wages" comports with this conclusion because the *Higgins* ruling was expressly based on the Court's conclusion that the fares generated by Ms. Higgins's drivers—fares that were *shared* with her—were revenues of the taxicab company "first and foremost." The same conclusion cannot be drawn here, where Laclede's revenues bear no relation at all to the fares earned by the drivers. Laclede gets paid its flat leasing fee whether the drivers earn fares or not. There is no limit set on the amount of fares the drivers can collect and keep, and no sharing or splitting of fares exists. The fares earned by the drivers are, first and foremost and in all other respects, their own.

Respondent correctly notes that "the issue is whether remuneration was '***payable or*** paid' by Laclede." Resp. Brief at 18. However, Respondent's attempt to put the emphasis on "payable" by Laclede instead of "paid" by Laclede does not aid its position. Whether paid or payable, for unemployment withholding to be applicable the remuneration must still come from Laclede, which it does not. Moreover, whether something is "payable" versus "paid" is simply an issue of timing. *Black's Law Dictionary* defines "payable" as an adjective descriptive "[o]f a sum of money or a

negotiable instrument that *is to be paid*." *Black's Law Dictionary* 1150 (7th ed. 1999)(emphasis added). The issue here is **who** had the obligation, not whether it is current or in the future. If a passenger skips out without paying a fare, that fare does not become payable by Laclede. If payment is by a bad check, the fare is not somehow then payable by Laclede. *See*, TR. 064-065. If a driver does not receive any fares during an entire shift, some level of remuneration is not then "paid or payable" by Laclede. TR. 051. The evidence established that fares earned by the drivers were never "paid" or "payable" by Laclede.

Finally, Respondent overstates the applicability of *Shinuald v. Mound City Yellow Cab Co.*, 666 S.W.2d 846 (Mo. App. E.D. 1984).[2] Respondent offers that "the Eastern District examined the exact same relationship that Laclede has with its drivers and the exact same argument employed by Laclede to this Court." Resp. Brief at 19. This is inaccurate and misleading. In *Shinuald*, the court examined whether drivers were employees under the Workers Compensation laws, which is not the issue here. *Shinuald* relied upon precedent which stated that under the Workers' Compensation Law the uncompensated worker was covered by the act even though "[w]e may readily agree that under the general law the relation of employer and employee did not exist." *Id.* at 773. Thus, *Shinuald* based its decision upon case law and legal standards specific to the Workers'

[2] *Shinuald* was decided using an incorrect standard of review which was overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. 2003).

Compensation Law.

Further, Respondent makes the misleading and unsupported statement that the exact same relationship existed in *Shinuald* as with Laclede. In *Shinuald*, the court makes reference to an "ingenious alternative in ***fixing*** [the drivers'] compensation" that was not defined in the court's opinion. *Id.* at 849. (emphasis added). No such "fixing" of compensation exists here. Laclede drivers are free to earn as much as they can. Attempts to claim equivalency between the parties' relationship and the arguments in this case with *Shinuald* are misplaced.

For these reasons, and those set forth in Laclede's opening brief, the Commission's conclusion that Laclede paid "wages" subject to unemployment contributions was contrary to R.S.Mo. §288.090 and Missouri law. The Commission's Decision should therefore be reversed.

## II. Drivers of Laclede cabs are independent contractors because Laclede does not exercise pervasive control exceeding to any significant degree that imposed by the Vehicle for Hire Code (Reply to Respondent's Response to Appellants' Point II).

### A. Respondent's request that this Court overrule *Travelers Equities Sales, Inc. v. Div. of Emp't Sec*. is improper and unfounded.

Respondent begins its argument in Section II by arguing that this Court should overrule *Travelers Equities Sales, Inc. v. Division of Employment Security*, 927 S.W.2d 912 (Mo. App. W.D. 1996). *Travelers* sensibly holds that that reasonable efforts to

ensure compliance with government regulations do not evidence control unless pervasive control by the employer exceeds to a significant degree the scope of the government imposed control. *Id*. at 918. *See also, K&D Auto Body, Inc. v. Division of Employment Security*, 171 S.W.3d 100, 106 (Mo. App. W.D. 2005). Respondent now argues that this law, which has been existence since 1996, "should be overturned because it is contrary to good public policy."

This argument is entirely new and was not raised by Respondent in its briefing in the Court of Appeals. Rule 83.08 of the Rules of Civil Procedure provides that a party's substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." M.R.C.P. 83.08(b). This new request to overturn case law that supports Appellant's position on public policy grounds violates Rule 83.08 and should be rejected on that basis alone.

The rationale of *Travelers* is sound law which should not be overturned. Where a company, such as Laclede, requires workers to abide by laws and regulations governing its business, it is incorrect and inequitable to assert that this constitutes "control and direction" exercised by the company. Laws and regulations must be followed. Compliance, therefore, should not be interpreted as being "control and direction" exercised by the company. As the court in *Travelers* noted, such an interpretation would bring within employment security law entire industries which historically and logically include many independent contractors. 927 S.W.2d at 918. The logic of this view remains sound.

Further, turning logic on its head, Respondent posits that taxicab businesses will

seek to have governmental bodies created solely to impose "pervasive governmental regulations which will be so controlling over industry employees that they [taxicab businesses] then avoid becoming an employer" under Missouri law. Resp. Brief at 29. This suggestion - private businesses will want and lobby for "pervasive governmental regulation" over their business to avoid "employer" status – is unfounded and quite simply absurd. Absolutely no factual support is cited for this "theory." None exists. Notably, the holding of *Travelers* has existed since 1996. If such abusive misuse of the holding of *Travelers* is a logical result, one would expect evidence of it to exist by now, and to have been offered. It does not and was not.

Respondent additionally argues that compliance with the Vehicle for Hire Code should not be considered in this case premised on the fact that the Metropolitan St. Louis Taxicab Commission ("MTC") is comprised in part of taxicab owners. Resp. Brief at 28-29. The Division *again* engages in unsupported speculation, this time suggesting that the MTC's regulatory system serves as a means for taxi companies to avoid Missouri's employment laws. This again was not an issue raised at the hearing and does not withstand scrutiny.

The MTC is a creation of the legislature and the legislature, not taxicab owners, determined its composition. R.S.Mo. §67.1806.2(1)-(2) requires that the MTC be comprised of nine members appointed by the chief executives of the city and the county, consisting of four representatives of the taxicab industry – <u>including one taxi driver</u> – and five at-large members. Taxicab owners total only three of the nine members and do not comprise a majority of the MTC. Respondent's suggestion that the MTC is

controlled by, and is therefore subject to manipulation for the benefit of, taxicab owners is baseless and offensive to those who serve on the MTC. This Court has not been moved by similar arguments and speculation in the past. *See, United COD v. State of Missouri*, 150 S.W.3d 311, 314 (Mo. 2004).

Finally, the Division also makes a "slippery slope" argument which is unpersuasive. Application of *Travelers* to taxi companies is not likely, for example, to result in an action by McDonald's employees or employers to seek independent contractor status. There is no meaningful comparison between compliance with general food and beverage regulations and adherence to specific and narrowly-tailored taxi industry directives.

### B. Drivers of Laclede cabs are independent contractors because Laclede does not exercise pervasive control exceeding to any significant degree that imposed by the Vehicle for Hire Code

Laclede's position remains that the Court need not determine whether taxicab drivers were employees or independent contractors because, as explained in Point I, the plain language of R.S.Mo. §288.090.2 only requires a company to pay unemployment taxes on wages paid ***by it***, which is not the case here. In the alternative, however, the overwhelming weight of the evidence presented to the Commission established that the drivers were independent contractors, not employees.[3]

[3] Amicus Curiae Briefs filed by: (1) the St. Louis and Convention and Visitors

**i. The evidence established that restrictions imposed on drivers was the result of compliance with government regulations which is not "control" exercised by Laclede.**

The Court can readily decide this issue in Laclede's favor by simply analyzing the scope of control imposed by the Metropolitan Taxicab Commission Vehicle for Hire Code ("VHC") in comparison to the lack of control exercised by Laclede. *See* App. Brief at 11-13, 42-45.

Respondent's claim of a lack of independence for taxicab drivers results not from acts of Laclede, but from the regulatory system established by the State of Missouri. Laclede, and other cab companies, operating in St. Louis are governed by the MTC. The MTC is a quasi-governmental entity organized by the Missouri Legislature. R.S.Mo. §§67.1804-67.1808. The MTC has authority over the provision of licensing, control and regulations of taxicab services within the district. R.S.Mo. §67.1804. Laclede is required to obtain a Certificate of Convenience and Necessity ("CCN") from the MTC, and each driver that operates under Laclede's CCN is also required to be separately licensed by the MTC. TR. 044-046; 050. The MTC only issues licenses for a specific CCN holder. Ex. A-1 at §401A – TR. 171. The VHC is promulgated by the MTC and Laclede is required to comply with it. TR. 043, 045-046.

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Commission; (2) The Taxicab, Limousine and Paratransit Association; and, (3) The Metropolitan St. Louis Taxicab Commission, in the Court of Appeals also make compelling arguments on the issues presented.

While the Division complains that there are "legal impediments preventing drivers from truly acting independently,"[4] to the extent that is true Respondent fails to address that it is the result of the statutory system - a statutory system not of Laclede's doing and with which Laclede is compelled to comply. Using compliance with the statutory system as a means to argue that drivers should be deemed "employees" is improper. *Travelers*, 927 S.W.2d at 918; *K&D Auto Body*, 171 S.W.3d at 106.

As but one simple example, Respondent argues that that drivers are prohibited from owning their own taxicab business. Resp. Brief at 7, 26. While, this statement is not accurate and is not supported -- there is no prohibition from a driver applying to the MTC to obtain their own CCN and operate a taxicab business and no evidence of how many one and two cab CCN holders there are -- it is true that many drivers operate a taxicab under an agreement with a taxicab company which holds the CCN. However, the requirement that a driver must drive under the license of a taxicab company that holds a CCN, is the result of the statutory and regulatory system. The alleged "prohibition" of which the Division complains is not a "prohibition" created or imposed by Laclede.

Similarly, Respondent complains that drivers are not truly independent due to the myriad of restrictions that are imposed upon them. Again, as addressed in Laclede's opening brief, such restrictions are predominantly the result of the VHC. They are not created or imposed by Laclede, and they apply to all taxi drivers, even those who hold

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[4] Resp. Brief at 7.

their own CCN. The repeated reference to restrictions and regulations throughout its brief – which if properly analyzed are based upon the statutory system and the VHC created by the MTC - do not support Respondent's positon, but actually cut against it under the holding of *Travelers* and *K&D Auto Body*.

If the Division is displeased with the statutory system, then the Division should seek a legislative change on that issue. However, Laclede's compliance with that system does not serve as a proper basis to argue that Laclede is somehow engaged in a scheme intended to circumvent Missouri Employment Security Law.

**ii. The overwhelming weight of the evidence establishes that drivers of Laclede cabs were independent contractors.**

To justify its position, Respondent repeatedly argues that Laclede has created a system that effectively prevents drivers from picking up passengers other than those dispatched by Laclede.[5] Resp. Brief at 7, 22, 34-35, 56. This argument is directly counter to the record. Every witness testified consistently that drivers are welcome to pick up any passengers that were not dispatched and are not required to accept any

[5] Respondent contends that drivers "rarely, if ever" received fares outside of Laclede's dispatch system. Resp. Brief at 37. However, this statement lacks competent support. The sole basis cited for this statement is the testimony of driver Parent who worked at Laclede ***for only two weeks***. TR. 022, 035-036. Driver Berry conversely testified he picked up non-dispatched passengers. TR. 106.

dispatched fare. More importantly, deconstructing Respondent's argument, it simply makes no sense. If a driver takes a dispatched fare – Laclede does not receive any part of that fare. The Company still only receives the flat fee "pro" paid by the driver. If a driver takes a fare that he obtained on his own Laclede does not receive any part of that fare either. Again, Laclede only receives its flat fee "pro." Given that Laclede receives the same flat fee regardless of whether the fare is dispatched or obtained by the driver, it simply makes no sense that Laclede would have any preference for one over the other. Laclede's interest is ensuring that drivers are getting fares – from whatever source - so that they continue to drive Laclede cabs and continue to pay the "pro." Respondent's theory that Laclede seeks to preclude a driver's ability to obtain other fares ignores the reality that Laclede has absolutely no incentive to do so, and to the contrary has every incentive to keep its drivers busy and bringing in fares.[6] The overwhelming weight of the evidence demonstrates that Laclede did not exercise control exceeding to any significant degree the control imposed by the VHC.

The Western District Court of Appeals provided a detailed, unbiased analysis of these factors and concluded as a matter of law that drivers were independent contractors. Applying the factors correctly and consistent with the mandate of *Travelers*, this Court should reach the same conclusion as the Western District Court of Appeals. The drivers

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[6] Respondent tacitly concedes this point stating: "[Laclede's] business relies on customers to keep its drivers busy and bringing in fares so that they may pay their daily pro back to Laclede." Resp. Brief at 25.

are independent contractors as a matter of law.

In the event the Court intends to conduct a factor-by-factor analysis, Laclede herein briefly replies to the Division's discussion of certain factors that the Division argues favored employee status or were neutral.

***Factor 1 - Instructions.*** Laclede's control, if any, of the "when, where and how" drivers performed their jobs was minimal and was consistent with enforcing the requirements of the VHC. Testimony established that shift drivers are not required to work during the shift when the cab is available to them, and a driver can work however many hours he chooses or not at all. TR. 90-92, 103-104, 110. Open shift drivers, which is the vast majority of arrangements at Laclede, keep the cab at home and work anytime they want. TR. 068-69, 088. Drivers had sole discretion in determining where to pick up non-dispatched passengers. TR 025-026. Drivers had sole discretion where they drove the cab and drivers could choose any zone in which to drive their cabs. TR 98, 110. Drivers determined their own routes, as long as the driver is compliant with the VHC, which requires drivers to take the most direct route. TR 052. It was within the driver's sole discretion whether to accept or decline a fare. TR 016, 036, 111, 116-117

The fact that vehicles be painted in a particular manner and contain Laclede signage is not appropriate support for a "control" finding in favor of employment because the *VHC* imposed detailed painting and signage rules for the taxis. *Compare* LF. 053 *with* TR. 175 (§501A of the VHC). Further, the Division's argument that drivers were required to give priority to dispatch calls, ignores the consistent and undisputed

testimony of the drivers that they were free to disregard calls received from dispatch. *See* TR. 032-033, 111, 113. As the Western District Court of Appeals aptly stated, "Laclede has minimal control over the 'when' of the drivers' services, almost no control over the 'where' of the services, and, relatively speaking, little control over the 'how' of the services." Op. at 12. This factor weighs in favor of independent contractor status.

***Factor 2 - Training***. The VHC requires that CCN holders develop and implement a training program and procedure manual for licensed cab drivers that are affiliated with that CCN Holder. TR. 048, and TR. 165-Ex. A-1 §211. The one-time training Laclede provides is intended to comply with the VHC. TR. 056-057. Further, the VHC requires that major credit cards be accepted as a method of payment for fares. TR. 049, and TR. 176-Ex. A-1 §501M. It is entirely consistent with the mandates of the VHC that Laclede trained drivers regarding its credit card system – the only system with which Laclede is familiar. There is no basis for the argument that Laclede should have also trained the drivers on some other credit card systems as the Division suggests. This factor favors independent contractor status.

***Factor 4 - Services Rendered Personally***. The VHC permits Laclede to use only properly licensed Laclede drivers. Taxicab driver's licenses issued under the VHC are non-transferable, not only as between taxicab companies, but as between individual drivers. TR. 171-Ex. A-1 §401A. Accordingly, the requirement that services be performed personally "was simply an extension of the Code." *See* LF. 053. The fact that a driver cannot send a substitute is the result of the VHC, not control by Laclede,

and favors an independent-contractor status.

***Factor 6 – Continuing relationship***: The fact that the drivers generally worked full time for Laclede is a direct result of the limitation imposed by the VHC, as referenced above in Factor 4. *See* TR. 171-Ex.A-1 at §401A. This factor weighs in favor of independent-contractor status.

***Factor 7 – Set hours of work***: The evidence was that the drivers could work whatever hours (or no hours) that they chose and allowed them to lose money if they chose not to work which supports independent-contractor status. TR. 090-092, 110. The Division argued before the Commission that this factor is "not applicable." Supp. LF. 009-010. Its current attempts to reverse course and argue that this factor favors employee status are unavailing.

***Factor 8 - Full Time Required***. As set forth in Factor 1, testimony established that shift drivers are not required to work during the shift when the cab is available to them, and a driver can work however many hours he chooses or not at all. TR. 090-092, 110. If a driver made enough fares during the first half of a shift to satisfy his personal income goal, he was free to not take any additional fares during the shift. This factor favors independent contractor status or is neutral.

***Factor 9 – Doing work on employer's premises.*** The Commission found, and the Division argues, that the taxicabs were an extension of Laclede's property and that "[t]hus, the drivers were always working on Gateway's property." LF. 054. The Division's argument and the Commission's ruling is wrong as a matter of Missouri law. This Court made clear in the tow-truck context, even where the tow-truck company

provided tow trucks to drivers, that because "the particular nature of the towing service performed by the drivers . . . obviously must be carried out at locations other than K & D's business premises," this factor is inapplicable. *K & D Auto Body*, 171 S.W.3d at 109. The nature of the taxicab drivers' service here is also "obviously" carried out at locations other than Laclede's business premises. This factor is therefore inapplicable here, too.

***Factor 10 - Order or Sequence Set.*** Laclede drivers are not required to follow a schedule established by the business. The inherent nature of cab driving, rather than Laclede, dictates the order or sequence of the services performed by the drivers. *See, K & D Auto Body*, 171 S.W.3d at 109. After receiving a dispatch from Laclede, each driver has the right to refuse a fare. "This is consistent with independent contractor status, because upon being offered a project, independent contractors are generally free to accept or reject the offer." *Id*. Thus, this factor weighs in favor of independent contractor status.

***Factor 11 – Oral or written reports***: This factor is straightforward given that Laclede required no driver reports. TR. 017, 054-055, 104. The Division's argument that submitting a credit card or voucher for payment processing is "reporting" that favors employee status is weak and is without support in the record.

***Factor 12 - Payment by Hour, Week, Month.*** The evidence unequivocally established that fares charged for providing taxicab services were paid by passengers to the drivers and that Laclede does not provide any guarantee or minimum amount of pay to the driver. Mr. McNutt testified that Laclede does not pay compensation of any type

to the drivers for services rendered. TR. 051. Both drivers testified that other than the charge Laclede imposed for processing credit cards and vouchers and the pro payment, they kept everything they made. TR. 029-030, 109-110. Payment the drivers received consisted entirely of fares paid by customers. This is "payment by the job," which indicates that this factor weighs in favor of an independent contractor relationship.

***Factor 13 – Payment of business or traveling expenses***: Proper analysis of this factor demonstrates the extreme degree to which the drivers personally invest and place themselves at risk for loss, hallmarks of independent-contractor status. The Commission's "neutral" finding was against the overwhelming weight of the evidence. The undisputed evidence in fact shows that drivers paid for the gasoline, carwash expenses, their personal license, physicals, drug-testing, and uniform expenses.[7] An open-shift driver of a Laclede cab who works each week of the year pays more than $25,000 per year to lease the cab. *See* TR. 048; App. Brief at 49 (showing calculation). Drivers testified that gasoline costs could range from $20.00 to $60.00 a day, all of which was paid by the driver. TR. 018, 105. Such gasoline costs would be in excess of $9,000 per year. *See* App. Brief at 50. These expenses cannot reasonably be characterized as *de minimis*. Drivers are effectively funding their own taxis, a huge personal investment that is wholly inconsistent with employee status.

***Factor 14 - Furnishing of Tools and Materials***. Drivers supply their own clothes and gas. The drivers are responsible for cleaning their vehicles at their own expense.

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[7] *See*, TR. 11, 18, 65, 66-67, 105, 115-116.

Those who own their own vehicles are responsible for maintenance on those vehicles. Laclede furnished the vehicles for most of the drivers, but the drivers were required to pay a fee to lease the vehicles. This factor favors of an independent contractor relationship.

***Factor 15 - Significant Investment.*** See analysis of Factor 13.

***Factor 16 - Realization of Profit or Loss***. There should be little dispute that the nature of the pay arrangement between Laclede and the drivers, whereby the driver pays a flat fee to Laclede and keeps all the fares, indicates that a driver can incur a loss. *See*, TR. 51. On any given shift the driver may not earn enough fares to cover that day's pro payment. Conversely, the driver could realize a significant profit on a day in which he picks up more customers. This factor is strongly supportive of an independent contractor relationship.

***Factor 17 – Working for more than one firm at a time***: As the Commission recognized, the VHC "did not allow the drivers to work for more than one cab company at a time." LF. 055, A9. Only the VHC, and not Laclede, prohibits drivers from working for another cab company. Yet the Commission held that this VHC-imposed rule operated in favor of employee status. This conclusion is contrary to the rule that a purported employer's control must *exceed* governmental controls in order to constitute evidence of employee status. *See, K & D Auto Body, Inc.*, 171 S.W.3d at 106.

Not only do the VHC's rules and restrictions generally impose pervasive control that far exceeds any control purportedly imposed by Laclede (*see,* App. Brief at 11-13,

42-45), but the "control" factors analyzed above and by the Western District Court of Appeals demonstrate that the overwhelming weight of the evidence favors independent-contractor status as a matter of law. The Commission's contrary ruling, lacking support from competent or substantial evidence, should be reversed.

### iii. The case law on which the Division relies is distinguishable.

As addressed previously in Laclede's opening brief and herein *supra*, the Missouri cases on which the Division relies, and describes as "similar" to this case, are distinguishable. Laclede's authorities demonstrate that where, as here, a company's revenues have no correlation to the amount of a driver's income—and is in fact so unrelated that the company does not even track how much or how little each driver earns—the incentive for the company to exercise control simply does not exist. The flat fee arrangement that undisputedly exists in this matter is in line with the case law referenced in Appellant's opening brief – authority which compels a finding of independent contractor status. Conversely, Respondent's citations are repeatedly to cases in which the payment received for the individual's services were revenues of the company which necessarily supports a finding that greater control exists – such a situation that is simply not present for drivers of Laclede.

Each of the Division's cases are distinguishable based upon facts and context. In *Higgins*, the taxi company exerted extensive control over how drivers performed their jobs. Higgins' drivers were required to follow four pages of instructions and rules implemented by the owner. 167 S.W.3d at 285-86. In *Higgins*, the company also

shared in the fees obtained by drivers, receiving half of all such fares. *Id*. at 278, 282. Similarly, in *K & D Auto Body, Inc.*, the towing company *furnished free-of-charge* trucks worth $60,000 to $120,000 to drivers and paid them commission of one-third of the fee for each tow job completed. *See* 171 S.W.3d at 103-110. In, *Shinuald*, the VHC had not yet been enacted so control over the drivers was by the company, rather than compliance with governmental regulations. 666 S.W.2d at 848-49. The court's analysis extensively referenced "company requirements," including that drivers be clean-shaven (except for mustaches), wear cab-driver caps, purchase gasoline exclusively at Yellow-Cab pumps, and charge Yellow- Cab-set cab fares. *Id*. *Sir* was decided under the Missouri Human Rights Act, an entirely different context using a far less restrictive definition of employee. 400 S.W.3d at 485. Each of the Division's cases analyzed substantively and factually dissimilar issues.

Respondent cites to one new case - *Alexander v. FedEx Ground Package Sys., Inc*., 765 F.3d 981 (9th Cir. 2014) a class action lawsuit applying California law. However, any reliance on *Alexander* is again misplaced. First and foremost, Respondent glosses over the actual facts of the case. The level of control in Alexander is far different than in this matter. As but a few examples, drivers were assigned packages to deliver in specific territories assigned, and changeable by FedEx (they were not free to reject deliveries as here); unlike here drivers were required to deliver the assigned packages at a specific time period negotiated by FedEx and its customer; unlike here drivers workloads were specifically structured to constrain drivers to ensure they were working between 9.5 and 11 hours every day; Drivers were compensated using a

complex formula derived by FedEx; unlike here FedEx billed the customers and collected the payments (i.e. unlike here payment for the delivery was revenue of FedEx); unlike here drivers were subject to ride-along performance evaluations in which compliance with minor details were reviewed and evaluated (e.g. whether he placed his keys on the pinky finger of his non-writing hand after locking the vehicle). *Id.* at 986-87. Further, the court in *Alexander* applied a California common law "right to control" test for the claims. *Id.* at 988-89, 993. These common law standards under California law and the resulting analysis are inapposite to the present matter. More importantly, *Alexander* did not address the same level of compliance with governmental regulations which is central to this matter. Attempts to analogize this matter to Alexander are unavailing.

In concluding, perhaps the most significant authority, one the Division conspicuously tries to sidestep, is IRS Publication 15-A. As Respondent's Brief correctly notes, "[t]he Division follows Internal Revenue Service (IRS) guidance." Resp. Brief at 32 (citing 8 CSR 10-4.150(1)). IRS Publication 15-A describes virtually the same scenario before the Court:

> ***Example***. Tom Spruce rents a cab from Taft Cab Co. for $150 per day. He pays the cost of maintaining and operating the cab. Tom Spruce keeps all fares that he receives from customers. Although he receives the benefit of Taft's two-way radio communication equipment, dispatcher and advertising, these items benefit both Taft and Tom Spruce.

As the IRS unequivocally states, driver "***Tom Spruce is an independent contractor***." A00074 (IRS Publication 15-A (2012) at 9; Appendix at A074)(emphasis added). The same facts exists here. The same conclusion is appropriate.

Even assuming *arguendo* that this Court were to find that Laclede paid wages to its drivers which would subject it to Missouri Employment Security Law, the overwhelming evidence demonstrates that Laclede did not exercise pervasive control beyond that imposed by government regulations over taxicab drivers. The Commission's Decision that the drivers were employees of Laclede was erroneous as a matter of law. The Commission's Decision should be reversed.

## CONCLUSION

For the foregoing reasons, and those stated in Laclede's opening brief, the Decision issued by the Labor and Industrial Relations Commission should be reversed in its entirety.

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## CERTIFICATE OF COMPLIANCE

### CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for Appellant hereby states:

1) The foregoing brief contains 7,498 words, which is within the applicable limitations set forth in Rule 84.06(b) and the limitations of Local Rule 360; and,

2) Respondent Laclede Cab certifies this electronic version of this brief that is provided has been scanned for viruses under Trend Micro Client/Server Security agent v 5.1, and has been found to be virus-free.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of January, 2015, the foregoing was filed electronically with the Clerk of Court, therefore to be served electronically by operation of the Court's electronic filing system upon the following:

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