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Dec 15 2016 08:14 a.m.
Docket Number: 70096
Elizabeth A. Brown
Clerk of Supreme Court
District Court Case No: A-15-728134-C

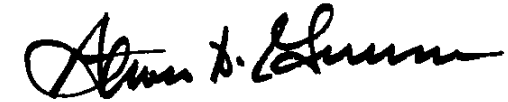
VS.

Defendant-Real Party in Interest

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CLERK OF THE COURT

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ATTORNEYS FOR PLAINTIFF

DISTRICT COURT

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY NEVADA

MICHAEL GROTE, an Individual, on
behalf of himself and all persons similarly
situated;

Plaintiffs,

vs.

THE GREATEST SKYCAPS, INC. a/k/a
and d/b/a TGS AVIATION SERVICES; a
corporation; NICK CILLA; an individual;
STEVE BURDICK; an individual;
EMPLOYEE(S)/AGENT(S) DOES 1-10;
AND ROE CORPORATIONS 11-20,
INCLUSIVE,

Defendants.

Case No.: A-14-703051-C-J
Dept.: XXVI

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS PURSUANT TO
NRCP 12(b)(5).**

Hearing Time: 9:30 am
Hearing Date: 1/15/2015

Defendants' Motion to Dismiss Pursuant to Rule 12(b)5 came before the Court on January 15, 2015 for hearing at 9:30 am. Present for Plaintiff was Christian Gabroy, Esq. and Ivy Hensel, Esq. of Gabroy Law Offices. Present for Defendants was Naomi Arin, Esq. After having heard oral arguments and having read Defendant's Motion to Dismiss Pursuant to NRCP 12(b)(5), Plaintiffs' Opposition to Defendant's Motion to Dismiss Pursuant to NRCP 12(b)(5), Plaintiffs' Supplement to Plaintiffs' Opposition to Defendant's Motion to Dismiss Pursuant to NRCP 12(b)(5), and Defendant's Reply to

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Plaintiff's Opposition to Defendant's Motion to Dismiss Pursuant to NRCP 12(b)(5),
having reviewed the pleadings, supporting documents, due notice having been given
and good cause appearing, this Honorable Court finds, orders, and adjudicates as
follows:

1. It is hereby ORDERED Defendant's Motion to Dismiss Pursuant to NRCP
12(b)(5) as to claims related to NRS 608 is DENIED without prejudice ~~and~~
~~the Court finds a private right of action exists to maintain these claims.~~
2. It is hereby ORDERED Defendant's Motion to Dismiss Pursuant to NRCP
12(b)(5) as to claims related to the Fair Labor Standards Act is DENIED
without prejudice.
3. It is hereby ORDERED Defendant's Motion to Dismiss Pursuant to NRCP
12(b)(5) as to all claims against individual Defendants Steve Burdick and Nick
Cilla is DENIED without prejudice.

IT IS SO ORDERED.

Dated this 26th day of January 2015.

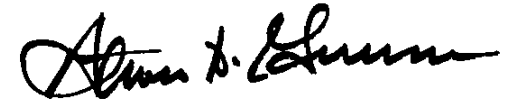

DISTRICT COURT JUDGE

Submitted by,

GABROY LAW OFFICES

By 
CHRISTIAN GABROY, ESQ.
IVY HENSEL, ESQ.

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17 *ATTORNEYS FOR PLAINTIFFS*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 KATHLEEN KULESZA, individually and
21 on behalf of a class of all similarly
22 situated persons,

23 Plaintiffs,

24 vs.

25 LAS VEGAS RACQUET BALL CLUB,
26 INC. a/k/a and d/b/a LAS VEGAS
27 ATHLETIC CLUBS, a Nevada
28 Corporation; SMITH-PALLUCK
29 ASSOCIATES CORP., a Nevada
30 Corporation, a/k/a and d/b/a LAS
31 VEGAS ATHLETIC CLUBS;
32 EMPLOYEE(S)/AGENT(S) DOES 1-10;
33 and ROE CORPORATIONS 11-20,
34 inclusive,

35 Defendants.

Case No.: A-14-710719-C
Dept.: XXXI

**ORDER DENYING IN PART
AND GRANTING IN
PART DEFENDANTS' MOTION
TO DISMISS**

Hearing Date: 03/05/2015
Hearing Time: 9:00 am

Defendants' Motion to Dismiss came before the Court on March 5, 2015 for

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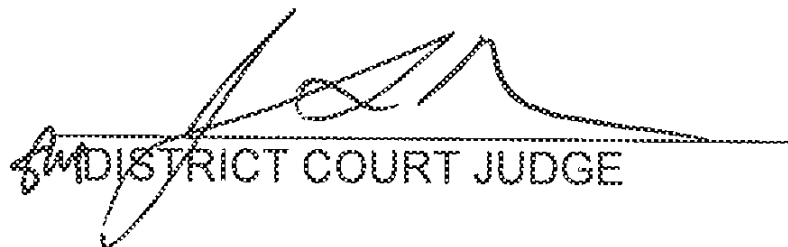
1 hearing at 9:00 am. Present for Plaintiffs was Christian Gabroy, Esq. and Ivy Hensel,
2 Esq. of Gabroy Law Offices. Present for Defendants was Montgomery Paek, Esq. of
3 Littler Mendelson, P.C.

4 After having heard oral arguments and having reviewed Defendants' Motion to
5 Dismiss, Plaintiffs' Opposition to Defendants' Motion to Dismiss, and Defendants'
6 Reply in Support of Motion to Dismiss, the pleadings, supporting documents, due
7 notice having been given and good cause appearing, this Court finds, orders, and
8 adjudicates as follows:
9

- 10 1. It is hereby ORDERED Defendants' Motion to Dismiss as to Plaintiffs' Count I
11 alleging Violation of Nevada Revised Statute 608.016 is DENIED without
12 prejudice.
13 2. It is hereby ORDERED Defendants' Motion to Dismiss as to Plaintiffs' Count II
14 alleging Breach of Contract and Breach of Covenant of Good Faith and Fair
15 Dealing is DENIED without prejudice.
16 3. It is hereby ORDERED Defendants' Motion to Dismiss as to Plaintiffs' Count III
17 alleging Conversion is GRANTED with prejudice.
18

19 IT IS SO ORDERED.

20 Dated this 19th day of March 2015.
21

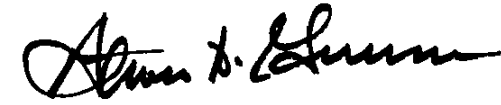
22
23 
24 DISTRICT COURT JUDGE
25
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27
28

Submitted by:
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

TARISSA LAURIN and GILBERT
MCFARLIN on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

SITEL OPERATING CORPORATION; and
DOES 1 through 50, inclusive,

Defendant(s).

Case No.: A-16-736053-C

Dept. No.: XXX

**[PROPOSED] ORDER DENYING
DEFENDANT'S MOTION TO DISMISS**

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1 The above-referenced matter came on for hearing before Judge Jerry A. Wiese II, on
2 Tuesday, September 16, 2016, with regard to Defendant's Motion to Dismiss the Plaintiffs'
3 Complaint. Although the Court had reviewed the briefs prior to hearing oral argument, the
4 Court needed additional time to research the cases referred to by counsel, and consequently,
5 indicated that a Minute Order would issue from chambers. The Court issued its minute
6 Order on September 16, 2016 and submitted a Notice of Entry of Order Re: Defendants'
7 Motion to Dismiss on October 24, 2016.

8 Having now reviewed all papers and pleadings on file, the relevant cases, and after
9 hearing oral argument, the Court issues the following Order:

10 This case stems from a Complaint in which the Plaintiffs, call-center employees,
11 sued their employer for alleged non-compliance with Nevada Wage Statutes, including
12 failure to pay for overtime, minimum wage, failure to pay wages due and owed, failure to
13 compensate for all hours worked, and for breach of contract. Defendant, Sitel, filed a
14 Motion to Dismiss, based on various grounds. Defendant argues that Counts I, III, and IV,
15 should be dismissed because there is no private right of action exists to bring the claims.
16 Defendant argues that Counts II and V should be dismissed as they are inadequately pled,
17 and that if the Court does not believe that the Wage Statute claims should otherwise be
18 dismissed, that the applicable statute of limitations has expired.

19 Both sides cited to the case of *Baldonado v. Wynn Las Vegas, LLC*, 24 Nev. 951,
20 194 P.3d 96 (2008), in support of their arguments. In that case, the dealers at the Wynn
21 brought an action alleging that the modified policy requiring them to share tips with people
22 in lower-level management positions, violated state labor laws. The District Court ruled
23 against the dealers, and the dealers appealed. The Supreme Court affirmed, and in part held
24 that the dealers had no private right of action to enforce the Nevada Labor Statutes. The
25 Supreme Court stated the following:

26 [W]e conclude the following. First, the Nevada Labor
27 Commissioner, who is entrusted with the responsibility of
28 enforcing Nevada's labor laws, generally must administratively
hear and decide complaints that arise under those laws.

1 Accordingly, we will imply no private cause of action to enforce
2 NRS 608.160, or the other labor statutes at issue here . . .Id., at
3 954.

4 The Court in *Baldonado* further indicated the following:

5 In Nevada, the Legislature has entrusted the labor laws
6 enforcement to the Labor Commissioner, unless otherwise
7 specified. With respect to NRS 608.160, the Legislature has
8 expressly ordered the Labor Commissioner to enforce that
9 statute; NRS 608.180 provides that [t]he Labor Commissioner
10 or his representative shall cause the provisions of NRS 608.005
11 to 608.195, inclusive, to be enforced. . . . As other courts have
12 recognized, when an administrative official is expressly charged
13 with enforcing a section of laws, a private cause of action
14 generally cannot be implied. *Baldonado* at pg. 961, citing to
15 *Matoff v. Brinker Restaurant Corp.*, 439 F.Supp.2d 035, 1037
16 (C.D.Cal.2006).

17 The Court concluded that the labor statutes require the Labor Commissioner to hear and
18 decide complaints seeking enforcement of the labor laws. If a party is dissatisfied with the
19 Labor Commissioner s decision, it may be challenged by way of a district court petition for
20 judicial review, and the district court may hold a trial de novo thereupon. *Baldonado* at pg. 962-
21 963, citing to NRS 607.215(3).

22 The Plaintiffs contend that the *Baldonado* court expressly limited its holding to a private
23 cause of action for tips, and distinguished a private cause of action for wages arising under NRS
24 Chapter 608. The Plaintiffs cite to footnote 33 in the *Baldonado* decision, which states in
25 pertinent part the following:

26 ...In contrast, two other statutes in NRS Chapter 608,
27 otherwise enforceable by the Labor Commissioner, expressly
28 recognize a civil enforcement action to recoup unpaid wages:
NRS 608.140 (civil actions by employees to recoup unpaid
wages) and NRS 608.150 (civil actions by the district attorney
to recoup unpaid wages from general contractors). The
existence of express civil remedies within the statutory
framework of a given set of laws indicates that the Legislature
will expressly provide for private civil remedies when it intends
that such remedies exist; thus, if the legislature fails to
expressly provide a private remedy, no such remedy should be
implied. *Baldonado* at n.33.

1 In that same footnote, the Nevada Supreme Court indicates that a private cause of action to
2 recover unpaid wages is entirely consistent with the express authority under NRS 608.140
3 to bring private actions for wages unpaid and due. Thus, *U.S. Design* does not mean that a
4 private cause of action necessarily exists here. *Baldonado* at n. 33. The Court's citation to
5 the case of *U.S. Design & Const Corp. v. International Broth. Of Elec. Workers*, 118 Nev.
6 458, 50 P.3d 170 (2002), is interesting because in that case, the Nevada Supreme Court
7 concluded that the while the plain language of NRS 608.150 grants a right of enforcement
8 to the district attorney, it does not preclude or explicitly exclude a private right of
9 enforcement. *U.S. Design* at 462. The Court went on to clearly hold that NRS 608.150
10 grants a private right of action to workers and their representatives. *U.S. Design* at 462.

11 Although the Court referenced the *U.S. Design* case in the *Baldonado* decision (at least
12 in footnote 33), and did not overrule the *U.S. Design* case, the decisions seem to be somewhat at
13 odds with one another. In both cases the Nevada Supreme Court indicates its objective is to give
14 effect to the legislature's intent, but in *Baldonado* the Court found that if the statute does not
15 specifically provide for a private right of action, the claim must be submitted to the Labor
16 Commissioner, and in *U.S. Design*, the Court found that even though NRS 608.150 indicates
17 that the district attorney may bring a claim, such language apparently provides for and
18 authorizes a private right of action. Perhaps, since NRS 608.150 discusses the possibility of an
19 action being brought by the district attorney against a contractor, the Court concluded that
20 whether it was the district attorney or a worker, it was still a private right of action.

21 This Court finds that the present case is more similar to the *U.S. Design* case, since
22 NRS 608.140 discusses an employee bringing a suit for wages earned and due according to
23 the terms of his or her employment. As the Nevada Supreme Court indicated in *U.S.*
24 *Design*, as well as in the *Baldonado* footnote, NRS 608.140 indicates the Legislature's
25 intent to provide for a private right of action, for workers to bring suit to recover wages
26 earned and due.

27 With regard to the Defendant's argument that Plaintiffs claims are not plead
28 correctly, this Court notes that Nevada is a notice pleading state, and the Court finds that

the allegations contained in the Complaint are sufficient to put the Defendant on notice of the claims asserted by the Plaintiffs. With regard to the Defendant's argument that the Plaintiffs' claim for breach of contract should be dismissed because employees in Nevada are at will, and Plaintiffs' have not established that a contrary agreement was in effect, this Court again relies upon the language of *Baldonado*, which indicates that employers may unilaterally modify the terms of an at will employment arrangement in prospective fashion; the employees' continued employment constitutes sufficient consideration for the modification. In the present case, however, the allegation is not that there was a modification to the employment, with which the Plaintiffs were dissatisfied. Instead, it was the lack of payment for work which the employer required, apparently from the time that the Plaintiffs were hired.

Although this may be a distinction without meaning, when considering a Motion to Dismiss, the Court must view the evidence in the light most favorable to the nonmoving party, and may dismiss the case only if under no set of circumstances would the Plaintiffs be able to prevail. The Court finds that the Defendant has failed to meet its burden of proof in this regard, and consequently, the Court cannot dismiss the Plaintiffs' Complaint as to the breach of contract claim.

With regard to the Defendant's argument that the statute of limitations expired prior to the filing of the present lawsuit, the Court agrees with the Plaintiffs that the Defendant's argument is really an attempt to limit the Plaintiffs damages to a two-year period. Such a determination need not be made at this stage of the litigation. The Court is not convinced as to the applicable statutes of limitations, and will require additional briefing if the parties deem it necessary as the litigation continues. At this time, the Defendant's Motion to

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1 Dismiss will be denied in this regard, and the issue of what damages are recoverable will be
2 addressed in the future.

3 Based upon the foregoing, and good cause appearing, the Court finds and concludes that
4 Defendant's Motion to Dismiss must be DENIED without prejudice.

5
6 **IT IS SO ORDERED**

7
8 **HONORABLE JERRY A. WIESE II**

9 **EB**

10 Submitted By:

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