IN THE SUPREME COURT OF THE STATE OF NEVADA

HG STAFFING, LLC, and MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT

Petitioners-Defendants,

vs.

SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK, THE HONORABLE LYNNE K. SIMONS, DISTRICT COURT JUDGE,

Respondents,

and

EDDY MARTEL (also known as MARTEL-RORIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS and WHITNEY VAUGHAN,

Real Parties in Interest - Plaintiffs.

Supreme Court No.:

District Court No.: CV16-01264

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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I. NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioner HG Staffing, LLC, is wholly owned by Petitioner MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort. Petitioner MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort has no parent corporation. No publicly held company owns 10% or more of any stock associated with these entities.

2. The following are the law firms, whose partners or associates have appeared for Petitioner, or are expected to appear in this case:

a) Cohen|Johnson|Parker|Edwards, formerly Cohen-Johnson, LLC
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RULES

IV. ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant to Nev. R. App. P. 17(a)(1) as this case does not involve a case category that is presumptively assigned to the Nevada Court of Appeals under Nev. R. App. P. 17(b).

This matter is also presumptively retained by the Nevada Supreme Court pursuant to Nev. R. App. P. 17(a)(14) as this case involves issues of first impression as to whether wage claims brought under NRS 608.016, 608.018, 608.020, 608.040, 608.050 and/or 608.140 must be dismissed when Plaintiffs failed to exhaust the administrative remedies mandated by NRS Chapter 607, which is a question of statewide public importance.

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V. RELIEF SOUGHT

Defendants-Petitioners HG Staffing, LLC, and MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort, by and through their counsel of record, petition this Court, pursuant to NRS 34.140 – 34.310, NRS 34.320 – 34.350, and Nev. R. App. P. 21, for a writ of mandamus and/or prohibition to mandate the district court to grant Defendants' motion to dismiss Plaintiffs' First, Third and Fourth Claims of Relief for the failure to exhaust the administrative remedies required by NRS Chapter 607.

VI. STATEMENT OF ISSUES

1. Whether the district court wrongly refused to grant Defendants' motion to dismiss Plaintiffs' First, Third and Fourth Claims of Relief, asserting wage claims under NRS 608.016, 608.018, 608.020, 608.040, 608.050 and/or 608.140, for failing to exhaust the administrative remedies mandated by NRS Chapter 607.

VII. INTRODUCTION

Plaintiffs Eddy Martel ("Martel"), Mary Anne Capilla ("Capilla"), Janice Jackson-Williams (Williams) and Whitney Vaughan ("Vaughan") (collectively, "Plaintiffs"), have conceded that they failed to exhaust the administrative remedies statutorily mandated by NRS Chapter 607 before bringing their complaint alleging wage claims under NRS 608.016 – 608.140. As the Labor

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Commissioner has original jurisdiction to hear such claims, those claims were not justiciable before the district court. The district court was obligated to grant Defendant GSR's motion to dismiss Plaintiffs' First, Third and Fourth Claims of Relief, alleging claims under NRS 608.016 – 608.140, for failing to exhaust the administrative remedies under the clear authority of NRS Chapter 607. The district court manifestly abused its discretion by refusing to dismiss these unexhausted claims that were not justiciable in the district court. This Court should therefore grant Defendant GSR's petition for a writ of mandamus and/or prohibition and mandate that the district court grant Defendants' motion to dismiss Plaintiffs' First, Third and Fourth Claims of Relief.

VIII. STATEMENT OF FACTS

After Plaintiffs' original complaint was properly dismissed for failing to state a claim, Plaintiffs Martel, Capilla, Williams, and Vaughn filed a First Amended Complaint on January 29, 2019 (Amended Complaint). *See* Appendix to Petition for Writ of Mandamus and/or Prohibition ("APP"), 1-155, v. 1. The First, Third and Fourth Claims of Relief, in Plaintiffs' Amended Complaint, asserted wage claims under NRS 608.016, 608.018, 608.020, 608.040, 608.050 and/or 608.140 against Defendants HG Staffing, LLC, and MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort (collectively Defendants and/or GSR). APP 1 - 27, v. 1.

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GSR moved to dismiss Plaintiffs' Amended Complaint. APP 156 - 180, v. 1. After the motion was fully briefed (APP 156 -777, v. 1 – 4), the district court dismissed the all of the claims of Capilla and Vaughan, all but one (1) month of Martel's claims, and all but eighteen (18) months of Williams' claims as being barred by the applicable statute of limitations. APP 781 - 794, v. 4. The district court, however, denied GSR's motion to dismiss the First, Third and Fourth Claims of Relief for failure to exhaust the administrative remedies mandated by NRS Chapter 607. APP 781 -794, v. 4. Dismissal of these claims was also required because the failure to exhaust the administrative remedies with the Labor Commissioner renders such wage claims non-justiciable. On June 28, 2019, GSR filed a notice of entry of the district court's order. APP 778 – 795, v. 4. This Petition timely followed.

IX. POINTS AND AUTHORITIES SUPPORTING WRIT

In *International Game Tech., Inc. v. Second Judicial Dist. Court of Nevada*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006), this Court held a "writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion, and is appropriate when the district court manifestly abuses its discretion by improperly refusing to dismiss an action." "A writ of prohibition is the counterpart to a writ of mandamus and is

available when a district court acts without or in excess of its jurisdiction." *Id.* This Court exercises "its discretion to consider such writ petitions when the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule or when an important issue of law needs clarification and this court's review would serve considerations of public policy or sound judicial economy and administration." *Id.*

In *International Game*, this Court held that a writ of mandamus should be granted when the district court improperly refuses to dismiss claims after plaintiff failed to exhaust the required administrative remedies. *Id.* at 142-62, 127 P.3d 1096-1108. This Court reasoned that "extraordinary relief is warranted" because the "district court manifestly abused its discretion in refusing to dismiss" the unexhausted claims and because such petitions for extraordinary relief "raise important issues of law in need of clarification, involving significant public policy concerns, of which this court's review would promote sound judicial economy." *Id.*; *see also City of Henderson v. Kilgore*, 122 Nev. 331, 336–37, 131 P.3d 11, 14–15 (2006) (holding that a writ of mandamus should be granted when plaintiff "has failed to exhaust his or her administrative remedies" because the "matter is not justiciable in the district court").

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A. Dismissal of Plaintiff's First, Third and Fourth Claims for Relief Is Mandatory because Plaintiff Failed to Exhaust Administrative Remedies with the Labor Commissioner as Required by NRS Chapter 607.

With the exception of Plaintiffs' minimum wage claim under the Nevada Constitution, Plaintiffs were required to first file and pursue their state law wage claims with the Nevada Labor Commissioner before seeking relief in the district court. In *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571–72, 170 P.3d 989, 993–94 (2007), this Court held that "a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable." The Court reasoned that "the exhaustion doctrine gives administrative agencies an opportunity to correct mistakes and conserves judicial resources, so its purpose is valuable; requiring exhaustion of administrative remedies often resolves disputes without the need for judicial involvement." *Id.* at 571–72, 170 P.3d at 993–94. In *State Department of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013), this Court held "the exhaustion doctrine applies" when the agency "statutorily maintains original jurisdiction" over the claims asserted. *See also Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. Cty. of Clark*, 120 Nev. 948, 959, 102 P.3d 578, 586 (2004) (holding the exhaustion doctrine applies "when an administrative agency has original jurisdiction").

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Likewise, in *Campbell v. Regents of Univ. of California*, 106 P.3d 976, 982 (Cal. 2005), the California Supreme Court held that "the rule of exhaustion of administrative remedies" applies "where an administrative remedy is provided by statute, [and therefore] relief must be sought from the administrative body and this remedy exhausted before the courts will act." The court continued that the "rule is not a matter of judicial discretion, but is a fundamental rule of procedure binding upon all courts." *Id*. The court reasoned that exhaustion is required because "(1) it serves the salutary function of mitigating damages; (2) it recognizes the quasi-judicial tribunal's expertise; and (3) it promotes judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case." *Id*. at 983. The Court concluded when a statute provides an administrative remedy, "the Legislature's silence [as to exhaustion] makes the common law exhaustion rule applicable here and requires employees to exhaust their internal administrative remedies prior to filing a lawsuit." *Id*. at 987.

The Labor Commissioner clearly has original jurisdiction to resolve Plaintiffs' claims asserted under NRS 608.016 - 608.140. NRS 608.180 expressly provides that the "Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced." In *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 961, 194 P.3d 96, 102 (2008), this Court

held that the "Legislature has entrusted the labor laws' enforcement to the Labor Commissioner, unless otherwise specified." This Court continued that "the Labor Commissioner is charged with knowing and enforcing the labor laws" and "these responsibilities acknowledge a special expertise as to those law." *Id*. at 963, 194 P.3d at 104. This Court found that "[i]mplicit in the Labor Commissioner's obligation to know and enforce the labor laws is the duty to hear and resolve labor law complaints" and therefore "the Labor Commissioner's duty to hear and resolve enforcement complaints is not discretionary," but provides "access to an adequate administrative enforcement mechanism," for claims under NRS 608.005 to 608.195. *Id*. at 963–64, 194 P.3d at 104. This Court reasoned by using the Labor Commissioner's enforcement mechanism, "the Labor Commissioner's expertise is optimized, and the parties then have an opportunity to petition the district court for judicial review and, ultimately, appeal to this court." *Id*. at 964, 194 P.3d at 104.

NRS Chapter 607's enforcement mechanism is essential to resolving wage claims under NRS Chapter 608. The Labor Commissioner is charged with the duty to "enforce all labor laws of the State of Nevada" and "[m]ay adopt regulations to carry out" that mandate. *See* NRS 607.160. The Labor Commissioner has a duty to hear and resolve administrative complaints with respect to the enforcement of wage claims under NRS Chapter 608. *See* NRS

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607.160(6), 607.205, 607.207; NAC 607.200. In conducting those hearings, the Labor Commissioner can issue subpoenas and take testimony. *See* NRS 607.210. The Labor Commissioner has adopted comprehensive regulations with respect to the procedures for bringing, hearing, and resolving such wage claims. *See* NAC 607.075 – 607.525. Pursuant to NRS 607.215, after the Labor Commissioner "issue[s] a written decision, setting forth findings of fact and conclusions of law developed at the hearing," and "[u]pon a petition for judicial review, the court may order trial de novo." This "trial de novo" represents the implied "private cause of action for unpaid wages" recognized by this Court in *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499, 504 (Nev. 2017), but may only be pursued after the employee exhausts the required administrative remedies.

Accordingly, exhaustion is required because: (1) the Labor Commissioner has statutorily mandated original jurisdiction to rule on Plaintiffs' wage claims which may have been asserted under NRS Chapter 608.005 to 608.195; (2) NRS Chapter 607 has proscribed a specific administrative scheme to remedy those claims, which has been implemented through comprehensive regulations adopted by the Labor Commissioner; (3) the Labor Commissioner's expertise would undoubtedly aid in resolving such claims; (4) NRS 607.215 mandates exhaustion before the district court may "order a trial de novo;" and (5) exhaustion would

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conserves judicial resources by resolving disputes without the need for judicial involvement. Plaintiffs, however, failed to allege that they have pursued their administrative remedies with the Labor Commissioner and do not dispute that such remedies have not been administratively pursued. Plaintiffs' failure to exhaust renders the controversy nonjusticiable, and therefore the district court improperly refused to dismiss Plaintiffs' First, Third and Fourth Claims for relief.

The district court wrongly refused to grant GSR's motion to dismiss based on its flawed ruling that "Plaintiffs were not required to exhaust administrative remedies before proceeding to district court' because "the Labor Commissioner does not have exclusive jurisdiction over statutory claims." APP 791, v. 4, Order Granting, in Part, and Denying In Part, Motion to Dismiss ("Order") at 11:13-16. The district court is apparently under the mistaken impression that the original jurisdiction which mandates exhaustion is synonymous with exclusive jurisdiction. While exclusive jurisdiction precludes any private right of action whatsoever (*see Allstate*, 123 Nev. at 573, 170 P.3d at 995), an agency need not be endowed with exclusive jurisdiction, but need only be vested with original jurisdiction, to mandate exhaustion before a private right of action may be pursued. *See Masco Builder*, 312 P.3d at 478 (holding "the exhaustion doctrine applies" when the agency "statutorily maintains original jurisdiction" over the claims asserted").

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In *Brown v. Pitchess*, 531 P.2d 772, 774 (Cal. 1975), the California Supreme Court explained that "the phrase 'original jurisdiction' means the power to entertain cases in the first instance" and "does not mean exclusive jurisdiction." As this Court has held that the Labor Commissioner has original jurisdiction to adjudicate all claims brought under NRS 608.005 to 608.195 in the first instance, and that the "exhaustion doctrine applies" when the agency "statutorily maintains original jurisdiction," then Plaintiffs failure to exhaust their administrative remedies before the Labor Commissioner is fatal to any claim they may assert under NRS 608.005 to 608.195.

B. Legislative Mandated Administrative Remedies Must Still Be Exhausted Even When this Court Has Implied a Private Right of Action.

The district court apparently misconstrued this Court's decision in *Neville* to reason that because this Court recognized an implied right of action to pursue unpaid wages, then administrative remedies expressly provide by the legislature need not be exhausted prior to seeking judicial relief. APP 791, v. 4, Order at 11:7-16. The issue of exhaustion of administrative, however, was not even mention by this Court in *Neville*. This Court, in *Neville,* however, did reaffirm the holding in *Baldonado*, which provides: "'The Nevada Labor Commissioner, who is entrusted with the responsibility of enforcing Nevada's labor laws, generally must administratively hear and decide complaints that arise under those

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laws.'" *See Neville*, 406 P.3d at 502 quoting *Baldonado*, 124 Nev. at 954, 194 P.3d at 98. While this Court did recognize an implied private right of action in *Neville*, the Court did not address the perquisites required before filing such an action.

Courts have uniformly held that even when a statute implies a private right of action, exhaustion of administrative remedies is required when an administrative remedy is provided by the statute.[1] In *Stein v. Forest Pres. Dist. of*

[1] *See Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 142 (3d Cir. 2017) (explaining that even though a statute "can be read to support an implied private cause of action," the "exhaustion of administrative remedies may be required in the first instance"); *Allen v. W. Airlines, Inc*., 168 Cal. Rptr. 86, 88 (Cal. App. 1980) ("implying a private cause of action for back pay" under the California age discrimination statute, but holding that such an action could only be brought "after exhausting administrative remedies"); *Trujillo v. Santa Clara Cty*., 775 F.2d 1359, 1362 (9th Cir. 1985) (explaining that even when California courts have "implied a private cause of action," the complainant must still have "exhausted his administrative remedies"); *Maxwell v. New York Univ*., 407 F. App'x 524, 526 n.1 (2d Cir. 2010) (refusing to consider whether the Military Selective Service Act "implies a private right of action" because the "failure to exhaust his administrative remedies preclude[d] suit in federal court"); *McCarthy v. Bark Peking*, 676 F.2d 42, 46–47 (2d Cir.1982) (affirming grant of summary judgment in favor of defendant based on plaintiff's "fail[ure] to exhaust his administrative remedies," even if an "implied private right of action . . . existed" because "it could be invoked only after the filing of a timely [administrative] complaint"), judgment vacated on other grounds and case remanded, 459 U.S. 1166 (1983), 716 F.2d 130, 132 (2d Cir.1983) (prior judgment on exhaustion left "undisturbed"); *Segalman v. S.W. Airlines Co.*, Case No. 2:11-CV-01800-MCE-CKD, 2016 WL 146196, at *3 (E.D. Cal. Jan. 13, 2016) (dismissing claims for "fail[ing] to plead exhaustion of administrative remedies" because "even if [statute] provided a private right of action, Plaintiff has again failed to plead exhaustion of administrative remedies"); *Chaney v. Wal-mart Stores Inc*., Case No. CIV-15-592-R, 2015 WL 6692108, at *10 (W. D. Okla. Nov. 3, 2015)

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Cook Cty., Ill., 829 F. Supp. 251, 255 (N.D. Ill. 1993), the court found an implied private cause of action for violation of the Cook County Civil Service Act. The court, however, held that the county employee was still required to "exhaust his administrative remedies." *Id*. at 256. The court reasoned that the "failure to exhaust administrative remedies prior to filing a lawsuit can bar that action." *Id*.

Similarly, in *Schroeder v. Texas Iron Works, Inc*., the Texas Supreme Court held that where a statute "establishes a comprehensive administrative review system," sets the "time for bringing a civil action" after agency review is

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(holding that "even assuming there was a private cause of action [mandated by statute], Plaintiff's claim would nevertheless fail for failure to exhaust his administrative remedies"); *Wagher v. Guy's Foods, Inc*., 885 P.2d 1197, 1202, 1205 (Kan. 1994) (holding that even though an employee had an implied cause of action against the employer, "she was precluded from filing it until the administrative remedies were exhausted"); *Miller v. Union Pac. R. Co.*, 539 F. Supp. 134, 137 (D. Neb. 1982) (explaining that "even assuming that a private right of action may be implied, undoubtedly the question would arise whether plaintiff would first be required to exhaust his administrative remedies"); *Stiles v. Delta Airlines, Inc*., 29 Fed. R. Serv. 2d 573, 1980 WL 347 (N.D. Ga. 1980) (holding that even if a private right of action could be implied "under Executive Order No. 11246, the court would still deny relief on the ground that the plaintiff has not first exhausted available administrative remedies" because the "Secretary of Labor and the OFCCP are authorized to initiate enforcement actions against federal contractors upon receipt of a complaint of discrimination from the alleged victim"); *Wagner v. Sheltz*, 471 F. Supp. 903, 910–11 (D. Conn. 1979) (even "assuming Arguendo the existence of [an implied] cause of action," plaintiffs claim failed "because of the plaintiff's failure to exhaust her administrative remedies" when the State had "recently enacted an elaborate administrative scheme for handling disputes like the present one" and therefore plaintiff's unexhausted claims run afoul of the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

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sought, provides for "trial de novo" upon seeking judicial review, and "***does <u>not</u> provide for an <u>unconditional</u> private right of action***" then the "exhaustion of administrative remedies is a mandatory prerequisite to filing a civil action alleging a violation" of the statute. 813 S.W.2d 483, 485-88. (Tex. 1991) (emphasis added), overruled on other grounds by *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010). The court reasoned that even though the statute did not expressly require exhaustion of administrative remedies, construing the "statute as a whole . . . the legislative intent is apparent" because the statute's "references to civil action clearly contemplate and require administrative action." *Schroeder*, 813 S.W.2d at 487-88.

Likewise, even though this Court found an implied private right of action for wage claims under NRS Chapter 608, this Court has also indisputably held that the Labor Commissioner has original jurisdiction to "hear and resolve labor law complaints," the Legislature has provided the Labor Commissioner with an "adequate administrative enforcement mechanism" to resolve such claims, and the Legislature has "require[d] the Labor Commissioner to hear and decide complaints seeking enforcement of the labor laws." *Baldonado*, 124 Nev. at 960-64, 194 P.3d at 102-04. The enforcement mechanism set forth in NRS 607.160 – 607.215, along with the regulations adopted by the Labor Commissioner at NAC 607.075 – 607.525, enable the Labor Commissioner to resolve all of their wage

claims asserted under NRS 608.005 to 608.195. The district court's ruling that Plaintiffs need not exhaust their administrative remedies established by the Legislature before pursuing their implied cause of action therefore "contravene[s] the well-established rule that administrative remedies must be exhausted prior to seeking judicial relief." *First American Title Co. of Nevada v. State*, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975).

C. NRS 607.215 Requires Plaintiffs to Exhaust Their Administrative Remedies Before Plaintiffs May Pursue Wages Claims under NRS 608.005 to 608.195.

Plaintiffs' failure to exhaust their administrative remedies is also at odds with NRS 607.215, which provides that after the Labor Commissioner "issue[s] a written decision, setting forth findings of fact and conclusions of law developed at the hearing," and "[u]pon a petition for judicial review, the district court may order trial de novo." Under the express terms of NRS 607.215, the district court may only order a "trial de novo" after the Labor Commissioner conducts a hearing, issues a written decision, and after filing a petition to judicially review that decision. *See In re Steven Daniel P.*, 129 Nev. 692, 696-97, 309 P.3d 1041, 1044 (2013) (holding that where a statute "includes preconditions" before the "court may" act, this "plain language" mandates that the district court may act "only upon the [lower] court's determination that the requirements of [the statute] have been met"); *see also Texas Workforce Comm'n v. Harris Cty. Appraisal*

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Dist., 488 S.W.3d 843, 852 (Tex. App. 2016), aff'd, 519 S.W.3d 113 (Tex. 2017) (holding that although "administrative decisions are reviewed by trial de novo in district court . . . , the party seeking review must still exhaust its administrative remedies"). If exhaustion were not mandatory, the entire administrative mechanism provided by NRS Chapter 607 would be mere surplus if claimants could bypass those procedures and simply skip to the last step, "trial de novo." *See Rural Telephone Co. v. Pub. Utilities Comm'n*, 398 P.3d 909, 911 (Nev. 2017) (explaining that "statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory").

Plaintiffs have argued, without any supporting legal authority, that the Labor Commissioner and the district courts have concurrent jurisdiction over wage claims under NRS Chapter 608.[2] APP 585- 586, v. 3, Plaitniff's Opositon to Defenant' Motion to Dismiss First Amended Complaint ("Op.") at 7:5 – 9:9.

[2] Even if Plaintiffs' assumption were not entirely mistaken, Plaintiffs still would be required to exhaust their administrative remedies with the Labor Commissioner. In *Miss America Org. v. Mattel, Inc.*, 945 F.2d 536, 540-41 (2d Cir. 1991), the Second Circuit held that the exhaustion doctrine was not limited to cases where the administrative body had exclusive jurisdiction, but was also applicable to cases where courts have "concurrent jurisdiction with an agency." The court reasoned that "the exhaustion doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted," and therefore was not limited "to cases of explicit exclusive jurisdiction." *Id.* Accordingly, even if the district court had concurrent jurisdiction with the Labor Commissioner, which absolutely is not the case, Plaintiffs' claims are still subject to dismissal for failing to exhaust their administrative remedies.

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Plaintiffs' assumption, however, is entirely belied by NRS 607.215, which as set forth above, mandates that the Labor Commissioner issue a final determination before the district court may act. *In Wright v. Woodard*, 518 P.2d 718, 720 (Wash. 1974), the Washington Supreme Court affirmed, *en banc*, that it "is the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene." The court held that where a claimant has an "adequate remedy through administrative channels, provided by statute," and no facts have been advanced which would question the agency's "fairness or impartiality," then the "court erred in entertaining the action" when the claimant has "not denied that no attempt has been made to pursue that remedy." *Id*. The court then dismissed the action for the failure to exhaust administrative remedies because judicial review could only be sought under RCW 82.03.180 which, like NRS 607.215, provides that "judicial review of a decision of the [agency] shall be *de novo*" upon filing a timely petition. *See Wright*, 518 P.2d at 720; compare RCW 82.03.180 with NRS 607.215; *see also Cost Management Servs., Inc. v. City of Lakewood*, 310 P.3d 804, 810-13 (Wash. 2013) (holding *en banc*, that "even if original jurisdiction in a case lies with the [lower] court, exhaustion of administrative remedies is still required" because "the exhaustion requirement is not vitiated by the fact that the [lower] court has original jurisdiction over a claim").

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Contrary to Plaintiffs' assumption, the default rule is ***not*** "concurrent jurisdiction," but instead the well-established default rule mandates exhaustion of administrative remedies that are "provided by statute" before a court may exercise jurisdiction. This general rule has been upheld by this Court, the United States Supreme Court, and courts throughout the country.[3] Plaintiffs have not and

[3] *See Benson v. State Eng'r*, 131 Nev. Adv. Op. 78, 358 P.3d 221, 224 (2015) ("Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies"); *Masco Builder*, 129 Nev. at 779, 312 P.3d at 478 (holding the "exhaustion doctrine applies in this matter because the Department statutorily maintains original jurisdiction" and the "doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies"); *Lopez v. Nevada Dep't of Corr.*, 127 Nev. 1156, 373 P.3d 937 (2011) ("The exhaustion doctrine requires that a person exhaust administrative remedies before proceeding in the district court and failure to do so renders the controversy nonjusticiable); *see also F.C.C. v. Schreiber*, 381 U.S. 279, 296–97 (1965) (affirming the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"); *Blanton v. Canyon Cty.*, 170 P.3d 383, 386 (Idaho 2007) (holding the "doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered"); *City of Billings Police Dep't v. Owen*, 127 P.3d 1044, 1047 (Mont. 2006) (holding the "well-settled principle undergirding the exhaustion doctrine is that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"); *Campbell v. Regents of Univ. of California*, 106 P.3d 976, 982 (Cal. 2005) (holding "the rule of exhaustion of administrative remedies" "is not a matter of judicial discretion, but is a fundamental rule of procedure binding upon all courts" and requires "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act"); *Hoflund v. Airport Golf Club*, 105 P.3d 1079, 1086 (Wyo. 2005) (holding that "the exhaustion of available administrative remedies must occur before judicial relief may be available"); *Trujillo v. Pac. Safety Supply*, 84 P.3d 119, 129 (Or. 2004) (holding the "doctrine of exhaustion applies when a party, without

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cannot dispute that they had an adequate remedy through administrative channels, provided by statute," to pursue their wage claims under NRS 608.005 to 608.195. Plaintiffs have not questioned the Labor Commissioner's "fairness or impartiality." Plaintiffs further have "not denied that no attempt has been made to pursue that remedy." Accordingly, the district court was required to dismiss Plaintiffs' First, Third and Fourth Claims for Relief for failure to exhaust their administrative remedies with the Labor Commissioner.

X. CONCLUSION

Based on the foregoing, this Court should grant Defendants' petition and mandate that the district court grant Defendants' motion to dismiss Plaintiffs'

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conforming to the applicable statutes or rules, seeks judicial determination of a matter that was or should have been submitted to the administrative agency for decision"); *Nebeker v. Utah State Tax Comm'n*, 34 P.3d 180, 184 (Utah 2001) (holding as "a general rule, parties must exhaust applicable administrative remedies as a prerequisite to seeking judicial review"); *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998) (holding "the doctrine of exhaustion of administrative remedies . . . serves as a threshold to judicial review that requires parties in a civil action to pursue available statutory administrative remedies before filing suit in district court"); *Minor v. Cochise Cty.*, 608 P.2d 309, 311 (Ariz. 1980) (holding, *en banc*: "It is a well recognized principle of law that a party must exhaust his administrative remedies before appealing to the courts") *Gzaskow v. Pub. Employees Ret. Bd.*, 403 P.3d 694, 701 (N.M. App. 2017) (holding under "the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed").

First, Third and Fourth Claims of Relief for failing to exhaust the administrative remedies required by NRS Chapter 607.

XI. DECLARATION OF CHRIS DAVIS, ESQ.

Chris Davis, being first duly sworn, upon his oath deposes, under penalty of perjury, and declares:

1. I am an attorney representing Petitioners-Defendants Defendants-Petitioners HG Staffing, LLC, and MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort, in the above entitled matter, and have personal knowledge of the facts herein stated and if called upon could testify as to the matters set forth in this declaration.

2. This affidavit is made pursuant to Nev. R. App. P. 21(a)(5), NRS 34.170, and NRS 34.330.

3. The relief requested in this writ is warranted because there is not a plain, speedy and adequate remedy in the ordinary course of law.

4. The relief requested in this writ is also warranted because the district court was obligated to dismiss Plaintiffs' First, Third and Fourth Claims of Relief for failing to exhaust the administrative remedies under the clear authority of NRS Chapter 607. The district court's failure to follow this mandate demonstrates that this is an important issue of law needs clarification and that this

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Court's review would serve considerations of public policy or sound judicial economy and administration.

5. The relief requested in this writ is also warranted because the district court manifestly abused its discretion by refusing to dismiss claims that were not justiciable in the district court because Plaintiffs failed to exhaust their administrative remedies.

6. I verify and affirm that the concurrently filed Appendix consists of true and correct copies of the relevant district court record establishing the facts surrounding the issues set forth in this Petition.

7. I also verify and affirm that this Petition is made in good faith and not for delay.

Dated this 8th day of July, 2019

CHRIS DAVIS, ESQ.

By: */s/ Chris Davis*
H. Stan Johnson, Esq.
Nevada Bar No. 00265
Chris Davis, Esq.
Nevada Bar No. 06616

Attorneys for Petitioners-Defendants

XII. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Nev. R. App. P. 32(c)(2), including the formatting requirements of Nev. R. App. P.

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32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, font size 14-point, Times New Roman. I also hereby certify that I have read the attached appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, except as otherwise stated, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of July, 2019

CHRIS DAVIS, ESQ.

By: */s/ Chris Davis*
Chris Davis, Esq.
Nevada Bar No. 06616

Attorney for Petitioners-Defendants

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CERTIFICATE OF SERVICE

I certify that on 8th day of July, 2019, I served the **PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION** upon the following parties by placing a true and correct copy thereof in the United States Mail, postage fully prepaid:

The Honorable Lynne K. Simons
Second Judicial District Court Judge
75 Court Street
Reno, NV 89501
Respondent Court

Mark R. Thierman, Esq.
Leah L. Jones, Esq.
THIERMAN| BUCK LAW FIRM
7287 Lakeside Drive
Reno, Nevada 89511
Attorney for Real Party in Interest/Plaintiff

DATED the 8th day of July 2019.

/s/ Sarah Gondek
An employee of
COHEN|JOHNSON|PARKER|EDWARDS