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.

EIGHTH 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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

VOLUME IV

COHEN|JOHNSON|PARKER|EDWARDS
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
sjohnson@cohenjohnson.com
375 E. Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400

SUSAN HEANEY HILDEN, ESQ.
Nevada Bar No. 5358
shilden@meruelogroup.com
CHRIS DAVIS, ESQ.
Nevada Bar No. 6616
chris.davis@slslasvegas.com
2500 East Second Street
Reno, Nevada 89595
Telephone: (775) 789-5362

Attorneys for Petitioners-Defendants

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Suite 104 • Las Vegas, Nevada 89119 • (702) 823-3500 • FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Suite 104 • Las Vegas, Nevada 89119 • (702) 823-3500 • FAX: (702) 823-3400

TABLE OF CONTENTS

Lunch 2	Under $30.00	1/25	1/600
Dinner 1	Over $49.99	1/16	1/100
Dinner 2	Under $50.00	1/20	1/600

Reception counts include all Captains in Server-per-guest count.

Reception	Menu cost per guest non-inclusive	Number of Servers per guest by guarantee	Lead Captains per guest by guarantee
Reception 1	$100.00 or more	1/25	1/100
2	$50.00 – 99.99	1/50	1/300
3	$5.00 – 49.99	1/80	1/600
4	$0.00 – 4.99	Server $ 12.00/hour Count per management	1/1000 All Captains signed up receive $15.00/hour
Bag lunches over 500 guests	Standard retail	1/80	1/800
Bar only events		Server $ 12.00/hour	No Captain

* In the event of special reduced prices, gratuity will be based on standard retail prices and, therefore, will be staffed according to retail. Costs not to include liquor. Per meal indicates amount of meals guaranteed by client on Banquet event order.

** Set count for scheduling purposes not to exceed five percent (5%) of guarantee.

Captain seniority by job classification

	Employee Number
Maria Delgado	**54020**
Charity Crouch	**81894**
Rigaberto Reyes	**55876**
Ismael Fernandaz	**83117**
Colter, Bill	**89280**
Duey, Leanne	**89281**

EMPLOYER:

WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT

By: Stanley S. Ng

Its: V.P. of Human Resources

UNION:

CULINARY WORKERS UNION LOCAL 226

By: Kim Kline

Its: Chief Neg.

MEMORANDUM OF AGREEMENT

Banquet Food Servers – Work Rules

THIS AGREEMENT is made and entered into this 19th day of November, 2010, by and between WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT(hereinafter referred to as "Employer") and the CULINARY WORKERS UNION LOCAL 226 (hereinafter referred to as "Union"), and attached to and made a part of the Collective Bargaining Agreement.

1. The Banquet Food Servers Core List will be comprised of up to fifteen (15) employees.

2. Scheduling will be done in order of seniority, first from the Core List, then from the "A" list.

3. Scheduled events for the upcoming week will be posted in the Banquet Office.

4. Core List Banquet Servers must sign up for work on the Server Sign-Up Sheet at sign-ups on Wednesday at 11 a.m.

5. Core List Servers and Captains must be available for a minimum of forty (40) hours per week when business needs warrant.

6. Work will be assigned to those Core List Servers who have not signed up for work five (5) days prior to the function and who do not have at least forty (40) hours per week.

7. All event service charge distributions will be posted in the Banquet Office and at the Red Table within seventy-two (72) hours of the event.

8. Employees must sign in and out, and must notify management immediately of any discrepancies in the posted gratuity sheets.

9. The Company will disclose menu items in the BEO (example: steak, chicken, fish or pretzels).

10. The Company will have a designated stationary sign-up area for each function, which will be located in the Convention Gray Area.

11. Core List Servers and "A" List Servers will be scheduled by seniority. "B" List Servers will be scheduled by rotation.

12. Servers who leave the Core List but wish to continue working will move to the top of the "A" List.

_____ / KK
Initialed

13. Any function that is scheduled within seventy-two (72) hours preceding the function shall be considered a pop-up event. Pop-up events will be scheduled by expedient seniority.

EMPLOYER:

WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT

By: Stanley S. Ugo

Its: V.P. of Human Resources

UNION:

CULINARY WORKERS UNION LOCAL 226

By: Ken Kri

Its: Chief Neg.

MEMORANDUM OF AGREEMENT

Scheduling of Banquet Food Servers

Banquet Food Servers may be required to call a designated number reserved exclusively for banquet scheduling each week to advise the Scheduling Coordinator (or leave a message) of his/her availability for the upcoming workweek.

The Scheduling Coordinator will notify Banquet Food Servers of their upcoming weekly schedule by phone. It is understood that if the Coordinator is unable to reach the Banquet employee personally, and cannot leave a message, the Coordinator may proceed to the next Banquet employee on the list for distributing banquet food function assignments.

The Scheduling Coordinator shall allow a reasonable amount of time for Banquet Food Servers to respond to messages that are left with an individual or on a telephone-answering device.

EMPLOYER:

WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT

By: _____

Its: V.P. of Human Resources

UNION:

CULINARY WORKERS UNION LOCAL 226

By: _____

Its: Chief Neg.

MEMORANDUM OF AGREEMENT

Coffee Service

THIS AGREEMENT is made and entered into this 19th day of November, 2010, by and between WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT (hereinafter referred to as "Employer") and the CULINARY WORKERS UNION LOCAL 226 (hereinafter referred to as "Union"), and attached to and made a part of the Collective Bargaining Agreement.

The parties hereby agree to the following terms:

Coffee Service shall be responsible for the following:

1. All bag lunches for under five hundred (500) people;

2. All working lunches;

3. All roll-in Continental Breakfasts;

4. All roll-in Theme Breaks;

5. All Deli lunches for fewer than sixty (60) people;

6. All roll-in breaks that are not full sit-down service, other than receptions and/or pop-ups, which shall continue to be at management's discretion;

7. Coffee Service Department shall have a Coffee Core List of not more than three (3) people. The Core List must be available for the Coffee Department functions before the Banquet Department, and shall be accessed prior to any other crew for scheduling extras.

8. The Coffee Captains shall receive the same tip as the rest of the crew.

9. Opportunities for promotion to the supervisory position shall be offered within the Department whenever possible.

10. The Company will make available all equipment necessary for personnel to complete assigned duties and tasks.

11. The Coffee Department is responsible for set-up and break-down of Coffee Department functions.

///

Initialed

12. The Coffee Department is responsible for ordering and/or stocking of supplies for all Department functions.

EMPLOYER:

WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT

By: _____

Its: _____

UNION:

CULINARY WORKERS UNION LOCAL 226

By: _____

Its: _____

SIDE LETTER # 1

Slot Techs

After passing a probationary period of three (3) months, all new hires who have past experience of two (2) years or more in the industry (or a similar industry) as a Slot Tech will have the opportunity to take a test for the purpose of determining their skill level. If the employee passes the test, he will become a Slot Tech I when a position becomes available. All new hires with less than two (2) years of experience in the industry (or similar industry) who fail to pass the test must complete a two (2)-year training period as an Apprentice Slot Tech.

After completing two (2) years as a Slot Tech I, the employee will have the opportunity to take a test to determine their skill level. If the employee passes the test, he will be promoted to a Slot Tech II when a position becomes available.

After passing the probationary period, all new hires that have four (4) years of experience or more in the industry as a Slot Tech will have the opportunity to take a test to determine their skill level. If they pass the Slot Tech II test, they will be promoted to a Slot Tech II when a position becomes available. If they fail the Slot Tech II test, they will have the opportunity to take the Slot Tech I test. If they pass the Slot Tech I, they will be promoted to a Slot Tech I when a position becomes available.

Testing: It is understood that within the Slot Tech craft there are many areas of specialization. With the exception of general knowledge, the test should be consistent within the realm of the employee's work experience.

The test shall consist of two (2) parts:

1. Written Test. The Company will keep a database of standard questions from relevant manufacturing manuals. A study guide will be provided to the employee no less than sixty (60) days before the test is given. A committee from the Union will work with management for the purpose of instituting changes in the testing based on industry changes and standards. All testing will be standardized.

2. Practical Test. Basic knowledge, validators and progressive units, slot machines, slot system components and ticket printers.

An employee must achieve a combined score of seventy-five percent (75%) in order to have passes the test.

Testing will be offered to qualified persons when there is a need for additional Slot Techs. Classification seniority dates will be assigned when a bid is awarded. Seniority ranking will be assigned according to classification seniority within the group that has received a passing score on the test. If there is a ten (10)-point difference on a passing score within the test group, the person who has the better score will receive a classification seniority date before the person who has the lesser score, regardless of classification seniority. No additional testing will be given as

Initialed

long as there is a person who has passed the test and has not been awarded a bid within the classification.

Training. The Company will make every effort to provide on-the-job training. Whenever practical, Slot Tech II level employees will assist and help in the training of Slot Tech I employees. Whenever practical, Slot Tech I employees will assist and help in the training of Apprentice Slot Tech employees.

The Company will provide the opportunity for formal training. The Company will pay for classes that are relevant for the enhancement of job duties and advancement in skills as a Slot Tech.

Employees who have superior skills in an area of knowledge will agree to assist in the training of co-workers for up to a two (2)-week period each year. The Company may request an extension of the training period for an additional three (3) weeks if it is shown to be necessary. The forum of training will be determined in discussions between the employee and the Company.

Number of Slot Techs.

Traditional staffing levels of Slot tech II and Slot Tech I positions will be maintained by the Company, unless the Company request a meeting with the Union and can demonstrate a significant change in the business needs to justify the change.

Wages.

New Hire	70%	$10.49
Apprentice	75%	$11.24
One (1) year	85%	$12.74
Slot Tech I	90%	$13.49
One (1) year	95%	$14.24
Slot Tech II	100% of	$14.99

EMPLOYER:

WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT

By: _____

Its: V.P of Human Resources

UNION:

CULINARY WORKERS UNION LOCAL 226

By: _____

Its: Chief Neg.

SIDE LETTER #2

INCENTIVE PLAN FOR "BUYING" ROOMS

1. Overtime will be obtained in the order of the following schedule: (1) in advance; (2) same day; (3) buy back (incentive rooms); and, lastly (4) outside of classification.

2. The incentive plan enables Guest Room Attendants to clean additional rooms during their regular eight (8)-hour shift and to receive incentive pay for each additional room cleaned.

3. This plan would be implemented only when Housekeeping is unable to obtain overtime according to the schedule listed in 1 above.

4. At the time when this Agreement was originally executed, a Guest Room Attendant received incentive pay in the amount of Six Dollars and Thirty Cents (6.30) per room. As the time of signing of this version of the Agreement, a Guest Room Attendant receives incentive pay in the amount of Six Dollars and Eighty-Nine Cents (6.89) per room. The room rate will increase annually by the same formula used to reach the original rate of $6.30.

5. The utilization and/or experience of the incentive plan for "buying" rooms will not result in raising the room cleaning expectations.

Purpose

To obtain enough staff to cover any extra room because of (1) inability to obtain overtime in advance or same day overtime, (2) call-ins, and/or (3) unexpected increase in overnight occupancy.

Benefits to the Employee

1. The incentive plan allows the employee to make extra money without having to (1) stay late; (2) incur additional childcare expenses; or (3) worry about finding alternative transportation home.

2. A GRA may elect to "buy" an extra room to clean during her/his regular eight (8)-hour shift and receive incentive pay for it. Or, the GRA may elect to work same day overtime and complete a room(s) after her/his eight (8)-hour shift and receive regular overtime pay for it. There shall be no pyramiding of "incentive" pay or "buy" rooms and overtime.

Considerations

1. Guest Room Attendants must consistently meet standards in order to "buy" rooms(s). If, at any time, a GRA's performance falls below standards as defined by established room standards and based on room inspections, guest complaints and other evaluative measurements, and progressive discipline with regard to quality of work is being administered,

Initialed

the GRA will not qualify to "buy" rooms until standards are consistently met for one (1) month. **This would not necessarily prevent an employee from signing up for regular overtime, but only from doing additional room(s) within an eight (8)-hour period.*

2. No more than three (3) rooms may be "purchased within an eight (8)-hour shift as a matter of right. Additional rooms may be purchased at the manager's discretion.

Implementation

1. If it is determined that additional same-day help is needed, GRAs will be asked if they wish to "buy" a room(s). This will be done as early as possible after A.M. Room Check (9:30 a.m.).

2. Rooms will be awarded to GRAs on a rotational basis to ensure equitable distribution of same day overtime/incentive pay rooms.

3. If a GRA "buys" a room and cannot complete it during the eight (8)-hour shift and chooses to do it as regular overtime (after the eight (8)-hour shift), she/he may have that option, but must notify her/his supervisor or management.

4. Once the GRA has signed the "Extra Room" form, he/she has agreed to modify his/her work schedule to include the additional rooms. A refusal will count as a turn on the rotational list.

5. If, at DND time, it is determined that we do not need as much additional help as previously thought, the additional room time will be taken away from some GRAs based on rotational lists established.

6. Only after completing sixteen (16) values within his/her (8)-hour shift will a GRA qualify for incentive pay for any additional room cleaned within the same time period.

<u>Internal Procedures</u>

1. Scheduler advises management that additional same day help may be needed.

2. A notice is posted in Housekeeping and/or linen rooms asking if anyone wishes to "buy" a room today if it becomes necessary.

3. A GRA who wishes to "buy" rooms for incentive pay or work overtime for regular overtime pay will complete an "Extra Room" form and return it to his/her supervisor or Housekeeping office prior to 11:00 a.m.

4. After A.M. Room Check, management will determine how many rooms to "sell."

5. Assistant Housekeepers will report the extra room numbers to the scheduler or the Assistant Housekeeping Administrator. See Form – Extra Room List for Incentive Pay/Overtime

S / KK
Initialed

Pay. These should be reported after any rooms have been assigned based on the A.M. Room Check.

6. Extra rooms will be given after 2:00 p.m DND check so that GRAs who have less than sixteen (16) values will get their replacement rooms first and whatever is left will be distributed to those who opted to buy a room. Initially, if there are not enough rooms to distribute to everyone who opted to buy a room, the lowest seniority will not be awarded rooms. Henceforth, a list will be established allowing rooms to be awarded on a rotational basis.

7. Housekeeping Supervisors will notify those who will be buying rooms by returning the "Extra Room" form with room number(s) to the qualified GRAs.

8. To ensure accurate accounting, the GRA activity sheet must indicate the equivalent of sixteen (16) or more values for whoever purchased additional room(s). (Dialing in and out room status.) The Assistant Housekeeper will collect the forms at the end of the shift and verify that the equivalent of sixteen (16) or more values has been cleaned. These papers will be reconciled with the Incentive Pay/Overtime Pay Extra Room List.

9. A list of GRAs qualified to receive incentive pay for that day will be approved by the Director of Housekeeping and submitted to Payroll.

IN WITNESS WHEREOF, there parties hereto, by there duly-designated representatives, have hereunder set their hands this 19th day of November, 2010, in Clark County, Nevada.

EMPLOYER:	UNION:
WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT AND CASINO	CULINARY WORKERS UNION LOCAL 226
By: Stanley S. Ng	By: K. Ki
Its: V.P. of Human Resources	Its: Chief Neg.

SIDE LETTER #3

LAUNDRY DEPARTMENT

It is hereby agreed that Employees of the Laundry who are assigned to the flatwork section shall be rotated daily on an equitable basis.

After lateral transfers, all open grade II or grade III positions should be considered for promotional opportunities. Promotional opportunities should be offered to current employees of the laundry before transfers from other departments or new hires. Promotions will be awarded on qualifications, seniority and work record. The posting shall be for three (3) days.

IN WITNESS WHEREOF, there parties hereto, by there duly-designated representatives, have hereunder set their hands this 19th day of November, 2010, in Clark County, Nevada.

EMPLOYER:	UNION:
WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT AND CASINO	CULINARY WORKERS UNION LOCAL 226
By: _____	By: _____
Its: V.P. of Human Resources	Its: Chief Neg.

SIDE LETTER #4

OVERTIME

Kitchen and Steward

The Employer shall post known overtime dates every ten (10) days. Sign-up sheets will be provided; and only interested qualified employees may sign the sheet.

The sign-up sheet will be available for sign-up until five (5) days prior to the date the overtime is needed.

There will be an equitable distribution of overtime.

The Company will post classification seniority for the affected employees.

Laundry

The Employer shall post known overtime dates every two (2) weeks. Sign-up sheets will be provided; and only interested, qualified employees may sign the sheet. The sign-up sheet will be available for sign-up until five (5) days prior to the date the over tie is needed.

There will be an equitable distribution of overtime.

The Company will post classification seniority for the affected employees.

Porter

The Employer shall post known overtime dates every ten (10) days. Sign-up sheets will be provided; and only interested, qualified employees may sign the sheet. The sign-up sheet will be available for sign-up until two (2) days prior to the date the overtime is needed.

There will be an equitable distribution of overtime.

The Company will post classification seniority for the affected employees.

IN WITNESS WHEREOF, there parties hereto, by there duly-designated representatives, have hereunder set their hands this 19th day of November, 2010, in Clark County, Nevada.

EMPLOYER:	UNION:
WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT AND CASINO	CULINARY WORKERS UNION LOCAL 226
By: Stanley S. Cha	By: Kevin K
Its: V.P. of Human Resources	Its: Chief Neg.

SIDE LETTER #5

BELL DEPARTMENT

This is to confirm that the schedule of payments and distribution of gratuities as set forth below will be maintained for the duration of the labor agreement:

1. Service Charge for deliveries to guests' room (exclusive of luggage): Bell Persons receive Fifty Cents ($.50) to deliver an item outside the room (i.e., door knob "goodie" bag) and One Dollars ($1.00) to deliver an item inside the room. This is a per room delivery, not a per item delivery.

2. Flower Deliveries: Bell Persons are paid Three Dollars ($3.00) for delivery of flowers from the gift shop. If a guest and/or outside flower company wants flowers delivered to a room, this is treated as a routine front, with no guarantee of gratuity.

3. Newspaper Deliveries: Bell Persons and/or Dispatcher are paid Twenty Cents ($.20) per paper delivered to the doorstep of the guestroom.

4. Bus Group Service Charge Distributions: Bus groups are usually charged an average of Three Dollars ($3.00) per person for the deliver/pick-up of luggage. Bell Captains receive fifteen percent (15%) from the total service charge, after which Bell Persons doing the check-in receive sixty percent (60%) of the balance of the service charge, and Bell Persons doing the checkout receive the remaining forty percent(40%). If a service charge is collected for luggage delivery and the Bell Person does not provide the service, the balance of the service charge (after Captain's fifteen percent (15%) is retained by the Employer to offset salaries and wages. If the Bell Person carries less than fifty-one percent (51%) of the group, the employee receives One Dollar and Fifty Cents ($1.50) per person, with fifteen percent (15%) going to the Captain and the balance going to the Employer.

5. Bus Group Assignments: Assignments are made to the low Bell Person based on the "PAX" count, which is a cumulative total of the number of people for which bags were moved. New Bell Persons are averaged in upon their position date. Low Bell Person is low for the shift; however, Captains have the discretions to reassign or change based on last-minute limo runs or other business-related issues.

6. Promotional Events and Complimented Guests: There is no guaranteed gratuity or service charge for these activities. They are treated as regular Front.

7. Limo Runs: One (1) point is assigned for departures and one(1) point for arrivals, which are accumulated for the duration of employment and tracked on the "limo" board. The lowest point Bell Person on the shift is assigned as many runs as possible during the shift. The second lowest is assigned the next run; however, Captains have discretion to reassign or change based upon last-minute runs and/or Bell Persons not available. New Bell Persons are averaged in upon their position date. Bell Persons are paid an additional Four Dollars (4.00) per hour (above

Initialed

base wage) for limo and other authorized runs. Runs over one (1) hour and five (5) minutes are billed two (2) hours (exclusive of time for gas and maintenance runs). Tips are at the discretion of the guest; however, for Sales Department VIP transports, "entertainment runs," Employer pays a gratuity to the driver.

IN WITNESS WHEREOF, there parties hereto, by there duly-designated representatives, have hereunder set their hands this 19th day of November, 2010, in Clark County, Nevada.

EMPLOYER:	UNION:
WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT AND CASINO	CULINARY WORKERS UNION LOCAL 226
By: Stacy S.	By: Kim K.
Its: V.P. of Human Resources	Its: Chief Neg.

SIDE LETTER #6

INVOLUNTARY RELEASE

Already implemented in Article 7.02.

IN WITNESS WHEREOF, there parties hereto, by there duly-designated representatives, have hereunder set their hands this 19th day of November, 2010, in Clark County, Nevada.

EMPLOYER:	UNION:
WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT AND CASINO	CULINARY WORKERS UNION LOCAL 226
By: _____	By: _____
Its: V.P. of Human Resources	Its: Chief Neg.

SIDE LETTER #7

HOLIDAY PAY

In the event a pattern of early out request based on illness occurs on holidays, the Union agrees it will meet with the Employer for the purpose of correcting such abuse.

IN WITNESS WHEREOF, there parties hereto, by there duly-designated representatives, have hereunder set their hands this 19th day of November, 2010, in Clark County, Nevada.

EMPLOYER:	UNION:
WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT AND CASINO	CULINARY WORKERS UNION LOCAL 226
By: _____	By: _____
Its: V.P. of Human Resources	Its: Chief Neg.

4580526_9.DOC

MEMORANDUM OF AGREEMENT

Extension of the Collective Bargaining Agreement Executed on November 19, 2010

THIS AGREEMENT is made and entered into this 7TH day of DECEMBER, 2010 by and between WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT (hereinafter referred to as "Employer") and the CULINARY WORKERS UNION LOCAL 226 (hereinafter referred to as "Union"), and attached to and made a part of the Collective Bargaining Agreement executed on November 19, 2010 (the "CBA").

1. By its own terms, the CBA is set to expire on December 10, 2010. The Employer and the Union mutually agree and desire to extend the CBA for ninety (90) days from December 10, 2010 or until March 10, 2011.

2. Either the Employer or the Union may give a written notice of desire not to renew and to renegotiate the CBA ("Notice") no later than seven (7) calendar days before the March 10, 2011 deadline (or by March 3, 2011). If such Notice is given, the parties will confer with respect to when, where, and how new negotiations will begin.

3. If no Notice is given by March 3, 2011, the CBA shall be deemed to renew automatically on a month-to-month basis from the new March 10, 2011 expiration date (e.g., until April 10, May 10, June 10, etc.), unless Notice is given pursuant to Paragraph 5.

4. During the period when the CBA is being renewed on a month-to-month basis, either the Employer or the Union may give Notice no later than seven (7) calendar days before the expiration of every month-to-month term. If such Notice is given, the parties shall confer with respect to when, where, and how new negotiations will begin.

5. Notwithstanding the foregoing paragraphs, if the Employer sells the property located at 2500 East Second Street, Reno, Nevada 89595 (i.e., the Grand Sierra Resort and Casino) to a third party during the ninety-day (90) initial extension period or any month-to-month renewal period thereafter, the CBA will remain in effect for thirty (30) days after the property sale closes, unless either party has already given Notice, and the Union or the buyer may seek to immediately confer with respect to when, where, and how new negotiations will begin.

EMPLOYER:	UNION:
WORKLIFE FINANCIAL, INC. dba GRAND SIERRA RESORT AND CASINO	CULINARY WORKERS UNION LOCAL 226
By: Shelby S Ogden	By: Kevin Kline
Its: V.P. of Human Resources	Its: International Vice President UNITE HERE

4931687_2.DOC

CULINARY WORKERS UNION LOCAL 226 - RENO

1135 TERMINAL WAY SUITE 100
RENO, NV 89502

PHONE: ~~(775) 689-8670~~ 702-610-0201

~~FAX: (775) 689-8674~~

Fax

To: ANTHONY HALL From: KEVIN KLINE

Fax: 775-786-6179 Date: 12/7/10

Phone: Pages: 2

Re: CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Comments: Please sign- FAX back to me to #: 702-386-9517 ATTENTION KEVIN KLINE

COHEN|JOHNSON|PARKER|EDWARDS
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
sjohnson@cohenjohnson.com
375 E. Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400

SUSAN HEANEY HILDEN, ESQ.
Nevada Bar No. 5358
shilden@meruelogroup.com
CHRIS DAVIS, ESQ.
Nevada Bar No. 6616
chris.davis@slslasvegas.com
2500 East Second Street
Reno, Nevada 89595
Telephone: (775) 789-5362

Attorneys for Defendants

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

EDDY MARTEL (also known as MARTEL-RORIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS and WHITNEY VAUGHAN on behalf of themselves and all others similarly situated, Plaintiffs, v. HG STAFFING, LLC, MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT, and DOES 1 through 50, inclusive, Defendants.	Case No.: CV16-01264 **REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT**

POINTS AND AUTHORITIES

I. INTRODUCTION

The state law wage claims alleged in the First Amended Class Action Complaint ("Complaint") of Plaintiffs Eddy Martel ("Martel"), Mary Anne Capilla ("Capilla"), Janice

Jackson-Williams (Williams) and Whitney Vaughan ("Vaughan") (collectively, "Plaintiffs") are untimely and without merit. Contrary to Plaintiffs' contentions, the Nevada Supreme Court has expressly endorsed motions to dismiss based on statute of limitations grounds and has never adopted tolling for class action claims pending in federal court. Plaintiffs' claims should therefore be dismissed to the extent they are barred by the two (2) year statute of limitation found in NRS 608.260.

Plaintiffs' argument for a three (3) year statute of limitation is entirely based on misinformation. The Nevada Supreme Court has expressly held that claims under Nevada's Minimum Wage Amendment are subject to the two (2) year statute of limitation found in NRS 608.260 because that statute is the most closely analogous with respect to wage claims. That same reasoning supports applying the two (2) year limitation in NRS 608.260 to all of Plaintiffs' wage claims. Plaintiffs improperly argue for a three (3) year limitation in NRS 11.190(3)(a), even though its express terms foreclose its application where claims are subject to penalties such as those found in NRS Chapter 608. Plaintiffs filed their complaint on June 14, 2016, all claims accruing before June 14, 2014 are bared, including all of Vaughan's, Capilla's and Martel's claims, and all but six (6) months of Williams' claims.

Plaintiffs concede that they have failed to exhaust the statutorily mandated administrative remedies required to maintain wage claim under NRS Chapter 608. Plaintiffs also concede that that they failed to make a good faith attempt to collect wages, require by NAC 608.155(1), before filing suit. Accordingly, Plaintiffs' State law wage claims, other than their minimum wage claim, are barred due to Plaintiffs admitted refusal to meet these prerequisites of exhaustion and good faith.

Plaintiffs do not dispute that they are seeking to pursue an almost identical class action that was rejected by the federal district court in *Sargent v. HG Staffing, LLC*, Case No. 3:13-cv-453-LRH-WGC, 171 F. Supp. 3d 1063 (D. Nev. 2016), Mot. Ex. 1, and also by the Ninth Circuit Court of Appeals in *Sargent v. HG Staffing, LLC*, Case No. 16-80044, Mot. Ex. 2. Contrary to Plaintiffs' unsupported argument, Plaintiffs Martel, Capilla, and Vaughan's (collectively the "*Sargent* Parties") claims are precluded because they were parties to the *Sargent* action, by virtue

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

of voluntarily filling consents to join that action, and therefore class certification was not required to grant party status. *See* Mot. Ex. 3, Sargent Action, Docket with Party List. While Plaintiff Williams was not a party, Plaintiffs do not dispute that she is in privity with the parties in *Sargent* because she seeks to represent them, and therefore is also barred by *Sargent.* Plaintiffs also cannot dispute that Judge Hicks' well-reasoned decision denying class certification in the *Sargent* action is sufficiently firm to afford preclusion because the issue of class certification in the *Sargent* action was fully briefed and tested on appeal. Accordingly, Plaintiffs' class action claims are barred by both issue preclusion and the first-to-file rule.

Plaintiffs again have failed to plead facts necessary to establish their statutory wage claims. Courts have uniformly dismissed wage claims where Plaintiffs fail to identify even one week in which Plaintiffs were not paid the proper wage by alleging the number of hours worked and the amount that Plaintiffs were underpaid, all of which are required facts necessary to state a wage claim.

Plaintiffs also do not dispute that Plaintiff Williams failed to exhaust the grievance procedures set forth in the collective bargaining agreement which covered Williams. Plaintiffs' assertion that the collective bargaining agreement was unenforceable because it was not signed has been repeatedly rejected by the courts. Authority cited by Plaintiffs does not contradict the numerous authorities which have held that the failure to follow grievance procedures in the collective bargaining agreement when pursing state law statutory wage claims mandates dismissal. Plaintiff Williams also does not dispute that her statutory overtime claims are without merit because, under Nevada law, those statutory overtime provisions do not apply when the collective bargaining agreement provides otherwise for overtime.

Finally, Plaintiffs do not address, much less dispute, that they are not entitled to seek class certification on behalf of GSR employees that are represented by a union because the union is the exclusive representative with respect to wages. Accordingly, Plaintiffs concede that Federal law prohibits former employees from using a class action to usurp the Union's role as the exclusive representative for an employee's bargaining unit. Accordingly, as Plaintiffs claims

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

have no merit and are untimely, this Court should grant GSR's motion and dismiss Plaintiffs' Complaint, with prejudice.

II. ARGUMENT

A. All or Part of Plaintiffs' Claims Are Barred by the Statute of Limitations.

1. Plaintiffs' Admit that Their Minimum Wage Claims Are Subject to a Two (2) Year Statute of Limitation.

Plaintiffs admit that in *Perry v. Terrible Herbst, Inc*., 132 Nev. Adv. Op. 75, 383 P.3d 257, 260-62 (2016), the Nevada Supreme Court held that claims made under the Minimum Wage Amendment ("MWA"), added to the Nevada Constitution, are governed by the two-year statute of limitation found in NRS 608.260 for statutory minimum wage claims. *See* Op. at 23:5-7. Plaintiffs also admit that "Vaughn's last day worked was June 18, 2013," "Capilla's last day worked was Sept. 19, 2013," "Martel's last day worked was June 13, 2014," and "Williams' last day worked was in December 2015." *See* Op. at 22:23 – 23:1. As Plaintiffs filed their original complaint on June 14, 2016, all of Vaughn's, Capilla's, and Martel's minimum wage claims are admittedly outside the two-year limitation period and should be dismissed with prejudice. Also, all but six (6) months of Williams' minimum wage claims are admittedly outside the two-year statute of limitations and should be dismissed.

2. All of Plaintiffs' Wage Claims Are Subject to a Two (2) Year Statute of Limitation.

Plaintiffs do not dispute that in *Perry* the Nevada Supreme Court ruled that "when ***a statute*** lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law." 383 P.3d at 260-62 (emphasis added). Plaintiffs wrongly argue this express rule in *Perry* is limited to the analogous cause of action found in the Minimum Wage Amendment of the Nevada Constitution even though the Nevada Supreme Court expressly held that the rule applies to a "**statute**" that "lacks an express limitation period." *See* Op. at 23:8-15. Rather than creating a narrow rule that only applied to constitutional amendments, the Nevada Supreme Court was expanding a statutory rule

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

to include constitutional amendments. Accordingly, this rule in *Perry* has even greater force with respect to analogous wage claims made under NRS Chapter 608.

Plaintiffs admit that "NRS Chapter 608 lacks an express limitation period." Op. at 22:14-15. Plaintiffs do not dispute that the two (2) year limitation in NRS 608.260 is the "most closely analogous" limitation period with respect to all of their wage claims.[1] Plaintiffs therefore concede that under the express ruling in *Perry*, all of their claims are subject to a two-year limitation period.[2]

Plaintiffs' reliance on NRS 11.190(3)(a) to support its claims for a three (3) year limitation period is only made possible by ignoring language from the statute. Plaintiffs admit NRS 11.190(3)(a) provides for a three (3) year limitation only for an "action upon a liability

[1] Plaintiffs did not attempt to dispute that the two (2) year limitation periods found in NRS 608.260 and NRS 11.290(1)(a), governing wage claims against Nevada Contractors, are the most closely analogous" limitation periods. Plaintiffs have also conceded that the Nevada Labor Commissioner has also recognized a two-year limitation period is the most analogous for claims under NRS Chapter 608. *See* NAC 607.105 ("the Commissioner will not accept any claim or complaint based on an act or omission that occurred more than 24 months before the date on which the claim or complaint is filed"); *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 963, 194 P.3d 96, 104 (2008) (recognizing Labor Commissioner's "special expertise" as to NRS Chapter 608); *Nevada Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 5–6, 866 P.2d 297, 300 (1994) (holding a district court is "obligated to give deference to the construction afforded" by the "agency charged with the duty of administering an act" because "the agency is impliedly clothed with power to construe it"); *State ex rel. Nevada Tax Comm'n v. Saveway Super Serv. Stations, Inc.*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983) (holding "[g]reat deference will be afforded to an administrative body's interpretation when it is within the statutory language; moreover, the Legislature's acquiescence in an agency's reasonable interpretation indicates that the interpretation is consistent with legislative intent").

[2] Plaintiffs imply that because the Nevada Supreme Court in *Perry* did not expressly rule that the two (2) year limitation found in NRS 608.260 applied to all wage claims under NRS Chapter 608 and the Legislature did not expressly apply the limitation found in NRS 608.260 to all of Chapter 608, that somehow forecloses this Court from reaching this inevitable result. *See* Op. at 12:23-28. It is hardly surprising that the Legislature did not include an express limitation period for non-minimum wage claims under Chapter 608 because the Legislature did not expressly provide any relief for non-minimum wage claims, but such relief had to be implied. It is also hardly surprising that this Court would likewise be required to imply the most analogous statute of limitation to those implied wage claims. While the Nevada Supreme Court did not address whether the two-year limitation found in NRS 608.260 applies to all wage claims in NRS Chapter 608, the Court was not asked to do so. The rule in *Perry*, however, is a statutory rule which is fully applicable in this case. Plaintiffs simply offer no justification for refusing to apply *Perry*, other than Plaintiffs want to apply a longer limitation period.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

created by statute, ***other than a penalty or forfeiture.***" *See* Op. at 3:17-22. Plaintiffs intentionally ignore the phrase "other than a penalty or forfeiture" because Plaintiffs are fully aware and admit that their wage claims made under NRS Chapter 608 are subject to a "penalty," therefore precluding the application of NRS 11.190(3)(a). *See* Op. at 25:23-24 n.16, 26:12-14, 26:20-21 n.17; *see also* NRS 608.040 ("Penalty for failure to pay discharged or quitting employee"); NRS 608.050 ("Wages to be paid at termination of service: Penalty"); NRS 608.195(2) (providing for an "administrative penalty" for violation of "NRS 608.005 to 608.195"). Even if this Court choose to apply a statute of limitation under NRS Chapter 11, which the Nevada Supreme Court found in *Perry* to be inapplicable to wage claims, a two (2) year limitation would still be required by NRS 11.190(4)(b) (emphasis added) which applies to an "action upon a statute ***for a penalty or forfeiture***, where the action is given to a person or the State, or both, except when the statute imposing it prescribes a different limitation." *See Algarin v. CTX Mortg. Co., LLC*,, Case No. 3:11-CV-229-RCJ-VPC, 2012 WL 3205519, at *4 (D. Nev. Aug. 3, 2012) (holding that claims brought under NRS Chapter 598D were barred under two (2) year limitation found in NRS 11.190(4)(b) because NRS Chapter 598D.110 expressly provided for a penalty in addition to compensatory damages).[3]

Plaintiffs also ignore that their wage claims are ***not*** an "action upon a liability created by statute," which is a prerequisite for NRS 11.190(3)(a) to apply. Liability for wages under NRS Chapter 608 is created by contract, not statute. *See* NRS 608.012 (defining "wages" as the "amount an employer ***agrees*** to pay an employee for the time the employee has worked"). Without a contract for wages, there cannot be any liability under NRS Chapter 608. In *Gonzalez*

[3] NRS 608.140 also provides a penalty in the form of attorney fees for the employee in a "suit for wages." *See Gonzalez*, 99 F. Supp. at 1015 (holding the two (2) year limitation in NRS 11.190(4)(b) applied as the statute provided treble damages and the "costs of bringing the action and reasonable attorney's fees," which the court both found to be a "penalty" because "the amount Plaintiffs would receive is larger than their actual damages"); *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 420 132 P.3d 1022, 1029 (2006) (finding attorney fee awarded by statute to be a "penalty"). This attorney fee provision is clearly a penalty imposed on employers as employers are not similarly entitled to attorney fees if employees wage claims are unsuccessful. Accordingly, as claims under NRS Chapter 608 provides for an amount more than actual damages, the two (2) year limitation found in NRS 11.190(4)(b) would be applicable.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

v. Pac. Fruit Exp Co, 99 F. Supp. 1012, 1015 (D. Nev. 1951), the court held that the "phrase 'liability created by statute' means a liability which would not exist but for the statute." *See also Torrealba v. Kesmetis*, 124 Nev. 95, 102 & n.10, 178 P.3d 716, 722 & n.10 (2008) (citing *Gonzales* with approval and finding the same meaning). The *Gonzales* court refused to find "liability created by statute" when the employer remains liable to the employee regardless of the statute. 99 F. Supp. at 1015. Even if NRS Chapter 608 failed to imply a cause of action for wages, employers would still be subject to a common law claim for wages. Accordingly, NRS 11.190(3)(a) does not apply, but instead the more analogous two (2) year limitation found in NRS 608.260 applies to all of Plaintiffs' wage claims. By Plaintiffs' own admission, all of Vaughn's, Capilla's, and Martel's wage claims are admittedly outside the two-year limitation period and should be dismissed with prejudice. Also, all but six (6) months of Williams' wage claims are admittedly outside the two-year statute of limitations and should be dismissed.

3. The Nevada Supreme Court Has Expressly Held that the Statute of Limitation May Be Raised in a Motion to Dismiss.

Plaintiffs' argument that statute of limitations may not be asserted in a motion to dismiss is nothing short of frivolous. *See* Op. at 2:9-11. In *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. Adv. Op. 18, 300 P.3d 124, 128 (2013), the Nevada Supreme Court expressly held that a "court may dismiss a complaint for failure to state a claim upon which relief can be granted when an action is barred by the statute of limitations." The Court reasoned that "[w]hen the facts are uncontroverted, as we must so deem them here, the application of the statute of limitations is a question of law" subject to a motion to dismiss. *Id*.

Here, Plaintiffs indisputably filed their original complaint on June 14, 2016. Based on a two (2) year statute of limitation for wage claims, all claims accruing before June 14, 2014 are bared. Plaintiffs' Complaint asserts claims from March 2011. *See* Complaint at 19:7 – 20:17, ¶ 54. Accordingly, Plaintiffs' claims, both individual and class claims, accruing between March 2011 and June 14, 2014 are barred and should be dismissed. Again, by Plaintiffs' own admission, all of Vaughn's, Capilla's, and Martel's wage claims are admittedly outside the two-year limitation period and should be dismissed with prejudice. Also, all but six (6) months of

Williams' wage claims are admittedly outside the two-year statute of limitations and should be dismissed.

4. All of Plaintiffs' Claims Need Not Be Subject to Dismissal to Apply the Statute of Limitations, but instead, Plaintiffs' Claims Should Be Dismissed to the Extent They Are Barred by the Statute of Limitations.

Plaintiffs' argue, without support, that Defendants may only seek dismissal based on the statute of limitations if all Plaintiffs and all claims are barred by the statute of limitations. *See* Op. at 24:17 – 25:3. This argument defies logic as it would enable untimely Plaintiffs, such as Vaughan, Capilla and Martel, to avoid dismissal of their untimely claims simply by joining those with another's timely claim -- nothing short of an absurd result. Counsel for plaintiffs made this identical argument in *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 901-02 (9th Cir. 2013), which was summarily rejected by the Ninth Circuit. The Ninth Circuit held that the "district court properly dismissed the state [law wage] claims ***to the extent they accrued more than two years*** before the [employees] filed suit." *Id*. at 902 (emphasis added); *Figueroa v. D.C. Metro. Police Dep't*, 633 F.3d 1129, 1136 (D.C. Cir. 2011) (affirming dismissal of wage claims accruing after statute of limitation expired, but reversing dismissal of claims accruing before expiration of the statute of limitation because "each failure to pay overtime begins a new statute of limitations period as to that particular event"); *Tyus v. Wendy's of Las Vegas, Inc.*, Case No. 214-CV-00729-GMN-VCF, 2015 WL 1137734, at *3 (D. Nev. Mar. 13, 2015) (partially "dismiss[ing] with prejudice all wage claims accruing more than two years before Plaintiffs filed suit").

Accordingly, this Court should dismiss all of Plaintiffs' wage claims "to the extent they accrued" more than two (2) years before Plaintiffs filed suit. Based on the statute of limitations, this Court should therefore dismiss all of the claims of Plaintiff Vaughan, Capilla and Martel, and all but six (6) months of Williams' claims.

5. Plaintiffs Have ***NOT* Cited Any Authority Supporting Cross-Jurisdictional Tolling and the Nevada Supreme Court Has Never Adopted Cross-Jurisdictional Tolling.**

As predicted, Plaintiffs are attempting to extend the deadline for filing their claims based on tolling of putative class members' claims. While Plaintiffs string cite *Jane Roe Dancer I-VII*

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

v. Golden Coin, Ltd., 124 Nev. 28, 34, 176 P.3d 271, 275 (2008) to support its claim of tolling, *Jane Roe Dancer* did not involve the prohibited cross-jurisdictional tolling. There, the tolling occurred in a single class-action, filed in a single state court, and only because the named plaintiff was not an appropriate class representative which required a putative class member to substitute for the named plaintiff. *Id*. at 31-34, 176 P.3d at 273-75. Plaintiffs simply ignore the long line of authority which has held that even though states courts "permit tolling for purported class members who file individual suits ***within the same court system after class status is denied***," those courts uniformly reject tolling "during the pendency of a class action in federal court" because cross-jurisdictional tolling of a "state statute of limitations" would "increase the burden on that state's court system" and would expose the state court system to the evils of "forum shopping." *Portwood v. Ford Motor Co*., 701 N.E.2d 1102, 1103-05 (Ill. 1998) (emphasis added); *see also Clemens v. DaimlerChrysler Corp*., 534 F.3d 1017, 1025 (9th Cir. 2008) (holding the "weight of authority and California's interest in managing its own judicial system counsel us not to import the doctrine of cross-jurisdictional tolling into California law"); *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 944 (Penn. Super 2002) (rejecting cross-jurisdictional tolling based on the persuasive reasoning in the Illinois Supreme Court's decision in *Portwood*); *Maestas v. Sofamor Danek Grp., Inc*., 33 S.W.3d 805, 808–09 (Tenn. 2000) (rejecting "the doctrine of cross-jurisdictional tolling in Tennessee" because it would "sanction . . . forum shopping" and would improperly "grant to federal courts the power to decide when Tennessee's statute of limitations begins to run," which "outcome is contrary to our legislature's power to adopt statutes of limitations and the exceptions to those statutes" and therefore would "offend the doctrines of federalism and dual sovereignty"); *Casey v. Merck & Co*., 722 S.E.2d 842, 845 (Va. 2012) (rejecting the "tolling of a statute of limitations based upon the pendency of a putative class action in another jurisdiction"); *Bell v. Showa Denko K.K*., 899 S.W.2d 749, 757–58 (Tex. App. 1995), writ denied (Oct. 5, 1995) (rejecting argument that "that *American Pipe* operates to toll our state statute of limitations" because under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, where a claim is derived from state law, as is appellant's suit, state law governs the tolling of the statute of limitations").

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Contrary to Plaintiffs' unsupported assertions, this case is a prime example of why this Court should also reject cross-jurisdictional tolling in order to prevent forum shopping. Plaintiffs imply that all of their state law wage claims were dismissed prior to considering certification. *See* Op. at 1:9-15. Plaintiffs' state law minimum wage claims, however, had yet to be dismissed when the federal district court denied certification in *Sargent v. HG Staffing, LLC*, Case No. 3:13-cv-453-LRH-WGC, 171 F. Supp. 3d 1063 (D. Nev. 2016) (Mot. Ex. 1), and when the Ninth Circuit Court of Appeals summarily rejected Plaintiffs' appeal of that decision in *Sargent v. HG Staffing, LLC*, Case No. 16-80044 (Mot. Ex. 2). Plaintiffs do not dispute that they have improperly split their federal wage claims from their state law wage claims in order prevent the federal court from again denying certification. *See* Motion at 8:19-28 & n.2. As with the majority of other states, this Court should prohibit such blatant forum shopping by rejecting the notion of cross-jurisdictional tolling of the statute of limitations.[4] As the Nevada Supreme Court has never adopted cross-jurisdictional tolling, Plaintiffs' claims have not been tolled during the pendency of the federal action in *Sargent* and this Court should dismiss all claims which accrued before June 14, 2014, including all claims asserted by Plaintiffs Vaughan, Capilla and Martel.

B. Plaintiffs Admit that Even under Federal Law, Class Claims, Accruing Before June 14, 2014, Are Barred.

Plaintiffs concede that, in a unanimous opinion, the United States Supreme Court, in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804, 1807-08 (2018), held that tolling does not apply to class action claims because the tolling under Rule 23 "does not permit the maintenance of a follow-on class action past expiration of the statute of limitation." The Court reasoned "Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on," and to allow tolling of class action claims

[4] Plaintiffs also admit that pursuant to NRS 11.500, the Nevada Legislature has determined that a statute of limitations should only be tolled based on an action filed in another jurisdiction when "the court lacked jurisdiction over the subject matter of the action," (which it did not here), and then limited tolling to "[n]inety days after the action is dismissed." Op. at 24:26-28, n. 15. Plaintiffs, however, ignore the obvious point that the Legislature knows how to provide for tolling, and this Court should not seek to provide for tolling where the Legislature has failed to do so.

"would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation." Plaintiffs also concede that both the Nevada and Federal Rule 23 evince a preference for preclusion of untimely successive class actions. *Compare* Fed. R. Civ. P. 23(c)(1)(a) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action") *with* Nev. R. Civ. P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained"). Finally, Plaintiffs do not dispute the Nevada Supreme Court follows decisions the United States Supreme Court when interpreting class action requirements of Nev. R. Civ. P. 23 *See Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 734 n.4, 291 P.3d 128, 136 n.4 (2012); *McClendon v. Collins*, 132 Nev. Adv. Op. 28, 372 P.3d 492, 494 (2016) ("federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts"). Plaintiffs, therefore, also concede that, under Nev. R. Civ. P. 23, Plaintiffs' class action claims are not tolled

Despite the fact that both Nevada and Federal Rule 23 are interchangeable, Plaintiffs sole justification for ignoring *China Agritech* is its misrepresentation that the Nevada Supreme Court's in *Golden Coin* tolled successive class action claims. *See* Op. at 27:10 – 28:27. As already set forth, *Golden Coin* only involved a single class-action, filed in a single state court, and did not involve tolling of class action claims for successive class actions, which is precluded by the very terms of Nev. R. Civ. P. 23. Contrary to Plaintiffs' argument, the statute of limitations has not been tolled so that they may repeatedly assert one class action after another. The United States District Court in *Sargent* already declined to certify the identical claims raised in this action as a class action. Plaintiffs do not dispute that to allow tolling of class action claims would permit Plaintiffs to repeatedly file new class action claims, based on the same set of facts, as long as another of GSR's more than 8000 employees is persuaded by Plaintiffs' attorney to file, thus creating an endless stream of class actions. This Court, just like the United

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

State Supreme Court, should refuse to permit Plaintiffs to prolong class action litigation further. This Court should therefore dismiss all class action claims that accrued before June 14, 2014.

C. Plaintiffs First, Third and Fourth Claims for Relief Should Be Dismissed for the Failure to Exhaust Administrative Remedies with the Labor Commissioner as Required by NRS Chapter 607.

Plaintiffs do not dispute that they failed to seek any remedy before the Labor Commissioner. Plaintiffs also do not dispute that the Nevada Supreme Court, in *State Department of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013), the Nevada Supreme Court expressly held "the exhaustion doctrine applies" when the agency "statutorily maintains original jurisdiction" over the claims asserted. Plaintiffs have not and cannot dispute that the Labor Commissioner "statutorily maintains original jurisdiction" with respect to wage claims under NRS Chapter 608. Plaintiffs therefore concede that their wage claims asserted under NRS Chapter 608 must be dismissed for failing to exhaust their administrative remedies.

In *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 961, 194 P.3d 96, 102 (2008), the Nevada Supreme Court explained that the "Legislature has entrusted the labor laws' enforcement to the Labor Commissioner" and "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. The Court expressly held that "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 (emphasis added). Contrary to Plaintiffs' implied argument, the Labor Commissioners authority to hear claims is ***not*** limited to instances where the employee "cannot afford a private attorney to take his or her wage case." *See* Op. at 8:13-16 & n.4. While the Labor Commissioner is certainly free to prosecute claims on behalf of those without financial resources, the Nevada Supreme Court expressly ***rejected*** any argument that "the Labor Commissioner may choose not to decide a complaint" because "the labor statutes, including NRS 607.205 and NRS 607.207, ***require*** the Labor Commissioner to hear and decide complaints seeking enforcement of the labor laws." *Baldonado*, 124 Nev. at 962–63, 194 P.3d at 103–04

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

(emphasis added). As there can be no doubt that the Labor Commissioner has original jurisdiction over all of wage claims asserted under NRS 608.005 to 608.195, there is also no doubt that Plaintiffs were required to exhaust their administrative remedies with the Labor Commissioner before asserting those claims.

Plaintiffs are apparently under the mistaken impression that the original jurisdiction which mandates exhaustion is synonymous with exclusive jurisdiction. *See* Op. at 7:8-12, 8:9-13, 9:3-7. In *Brown v. Pitchess*, 531 P.2d 772, 774 (Cal. 1975), however, 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 the Nevada Supreme 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 she asserts under NRS 608.005 to 608.195.

Plaintiffs misconstrue *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499 (Nev. 2017), to contend that the Nevada Supreme Court rejected the argument that the administrative remedies expressly provide by the legislature need not be exhausted prior to seeking judicial relief. *See* Op. at 7:3 – 9:10. The issue of exhaustion of administrative was not even mention by the Court in *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499 (Nev. 2017). The 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 laws.'" *See Neville*, 406 P.3d at 502 quoting *Baldonado*, 124 Nev. at 954, 194 P.3d at 98. While the Nevada Supreme 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

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

the statute.[5] In *Stein v. Forest Pres. Dist. of 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

[5] *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) (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").

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

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 sought, provides for "trial de novo" upon seeking judicial review, and "***does not provide for an unconditional 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 the Nevada Supreme Court found an implied private right of action for wage claims under NRS Chapter 608, the 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. Plaintiffs do not dispute that 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. Plaintiffs' contention that they need not exhaust the administrative remedies establish 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).

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

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

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." Plaintiffs do not dispute that under the express terms of NRS 607.215, the court may only order a "trial de novo" after the Labor Commissioner conducts a hearing, issues a written decision, and a petition for judicial review is filed by a party. *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 court may act "only upon the [lower] court's determination that the requirements of [the statute] have been met").

Contrary to Plaintiffs' argument, the Nevada Supreme Court's rationale for finding an implied right of action in *Neville* is fully consistent with the well-established rule that administrative remedies must be exhausted. The Court's first justification for implying a private right of action was that "NRS 608.160 allows for the assessment of attorney fees in a private cause of action for recovery of unpaid wages." *Neville*, 406 P.3d at 503. As NRS 607.215 provides for a "trial de novo" after review by the Labor Commissioner, the assessment of attorney fees under NRS 608.160 insures that an aggrieved employee had the ability to be made whole if, after a trial de novo, the court determined that the employer failed to pay the wages required by NRS Chapter 608. The only other justification for implying a private right of action was that the Labor Commissioner has authority to bring a private action for wages on behalf of employees who have "a valid and enforceable claim for wages." *Neville*, 406 P.3d at 503-04. Accordingly, even the Labor Commissioner cannot bring a private action for wages until he has administratively ruled that the employee has a valid and enforceable claim. It would be absurd to believe that an employee could seek such a remedy without first presenting his or her claim to the Labor Commissioner so he could similarly pass on the validity of that claim. In fact, Plaintiffs do not dispute that 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").

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Plaintiffs wrongly assume, without any supporting legal authority, that the Labor Commissioner and the courts have concurrent jurisdiction over wage claims under NRS Chapter 608.[6] 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 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").

[6] Even if Plaintiffs' assumption were not entirely mistaken, Plaintiffs still would be required to exhaust their administrative remedies with the Labor Commissioner. In *Miss Am. 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 this 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.

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 the Nevada Supreme Court, the United States Supreme Court, and courts throughout the country.[7] Plaintiffs have not and cannot dispute that they had an adequate remedy through

[7] *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 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").

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

administrative channels, provided by statute," to pursue their wage claims under NRS 608.005 to 608.195. Plaintiffs do not question the Labor Commissioner's "fairness or impartiality." Plaintiffs further have "not denied that no attempt has been made to pursue that remedy." Accordingly, this Court's only recourse is to dismiss Plaintiffs' First, Third and Fourth Claims for Relief for failure to exhaust their administrative remedies.

D. Plaintiffs' First, Third and Fourth Claims for Relief Should Also Be Dismissed for Failing to Make Good Faith Attempt to Collect Their Wages Before Filing Their Claim for Wages with this Court.

Plaintiffs do not dispute that NAC 608.155(1) requires: "Before an employee may file a claim for wages unpaid when due, the employee shall make a good faith attempt to collect any wages due the employee from an employer at the normal place and in the normal method that payment is made to employees of the employer" or that the Labor Commissioner had full authority under NRS 607.160 to require such a good faith attempt before filing a claim. Instead, Plaintiffs again rely on *Neville* to argue this prerequisite does not apply to implied private rights of action under NRS Chapter 608. *See* Op. at 8:19 - 9:2. Again, Neville does not even mention NAC 608.155, much less dispense with this prerequisite.

Plaintiffs have not and cannot allege facts showing that they have made any good faith effort to collect wages due before filing their wage claims. Plaintiffs' letter, attached to its opposition as Exhibit 3, states no amount owed to each individual plaintiff, but like Plaintiffs' complaints, makes wild estimates as to amounts owed to "the typical person employed by GSR" without any rational or factual basis for making such claims. Such unsupportable estimates can hardly be deemed to be a good faith attempt to collect actual wages actually owed. *See Casino Properties, Inc. v. Andrews*, 112 Nev. 132, 135, 911 P.2d 1181, 1183 (1996) (holding that "good faith" requires "meaningful participation" by providing sufficient information to enable the other party to "act on such information"). Accordingly, this Court should dismiss Plaintiffs' First, Third and Fourth Claims for relief, with prejudice, for failing to meet the mandatory prerequisite found in NAC 608.155(1).

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

E. Plaintiffs Lack Standing to Represent Union Employees, Who Are Exclusively Represented by their Respective Unions.

Plaintiffs do not dispute that, pursuant to 29 U.S.C. § 159(a), they may not pursue class actions on behalf of union employees because they are not union representatives, who have the exclusive right to represent members of the union with respect wages. Plaintiffs therefore concede that, by seeking to represent union employees in this action, they are attempting to usurp the respective unions' roles as the exclusive representatives for their bargaining units by attempting to pursue a class action on behalf of those employees. Accordingly, Plaintiffs concede that they lack standing to represent such union employees and that their class action claims seeking to do so should be dismissed.

F. Plaintiffs Again Have Failed to State a Claim for Wages, Including Minimum Wages.

Plaintiffs simply ignore this Court holding that a complaint fails to state a claim for unpaid wages when Plaintiffs do not identify any one week in which any one plaintiff was paid less than the required wage by alleging how many hours that plaintiff worked in that week, the plaintiff's rate of pay, how much that plaintiff was paid, and how much that plaintiff believes he or she is owed for a given week." *See* Order dated 2018-10-09, at 9:19 - 10:13 citing *Pruell v. Carita Chirsti*, 678 F.3d 10, 14 (1st Cir 2012 (affirming dismissal of amended complaint where the complaint "does not provide examples (let alone estimates as to the amounts) of such unpaid time for either plaintiff or describe the nature of the work performed during those times."). Despite adding eleven (11) pages to their original complaint, Plaintiffs still fail to meet this minimal standard.

First, Plaintiffs do not point to any facts which would show that any plaintiff was paid less than the minimum wage in any given pay period. In fact, Plaintiffs do not even allege the amount they were paid in any pay period or attempt to show that the number of hours actually worked in a given pay period. Without such information, Plaintiffs are merely speculating that they were paid less than the minimum wage. Contrary to Plaintiffs' argument, a minimum wage claim is not established because a plaintiff alleges that he or she was unpaid for ten to twenty minutes. *See Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 115 (2d Cir.2013)

(an employee cannot state a claim for a minimum wage violation unless she alleges facts showing that her "average hourly wage falls below the federal minimum wage."). Without facts showing the number of hours worked during a pay period and the amount of compensation actually paid during that period, Plaintiffs cannot show that their wages actually fell below the minimum wage.

Second, Plaintiffs do not dispute that they fail to allege how much they were paid in any week. Plaintiffs have no basis to believe that they were underpaid when they do not know how much they were paid. Plaintiffs also concede that they fail to allege how many hours that each plaintiff worked in any one week, and comparing that to the amount actually paid based on each plaintiff's actual rate of pay. Plaintiffs therefore concede that they are merely speculating as to whether Plaintiffs were underpaid, which insufficient as a matter of law to state a wage claim.

Moreover, contrary to Plaintiffs arguments,[8] changing clothes and collecting equipment or supplies are ***not*** deemed to be work and therefore are ***not*** compensable under NRS Chapter

[8] In a footnote 11 of their Opposition (Op. at 12:20-28), Plaintiffs rely *In re: Amazon.Com, Inc. Fulfillment Ctr. Fair Labor Standards Act (FLSA) & Wage & Hour Litig*., 905 F.3d 387, 408 (6th Cir. 2018) to claim that Nevada Supreme Court would deviate from the definition of work found in the Portal to Portal Act, which defines the term work for the FLSA. The Sixth Circuit, however, erroneously found that the Portal to Portal Act did not define "work" for purposed of the FLSA, but merely "excludes certain work activities from being compensable." *In re: Amazon.Com*, 905 F.3d at 399. Both the Nevada Supreme Court and United States Supreme Courts, however, recognized that the Portal to Portal Act altered the court's earlier judicial definition of the word "work." In *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28, (2005) (emphasis added), the United States Supreme Court explained that: "***Other than its express exceptions for travel to and from the location of the employee's "principal activity," and for activities that are preliminary or postliminary to that principal activity***, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms "work" and "workweek," or to define the term "workday." Cited with approval in *Rite of Passage, ATCS/Silver State Acad. v. State, Dep't of Bus. & Indus., Office of Labor Com'r*, Case No. 66388, 2015 WL 9484735, at *1 n.3 (Nev. Dec. 23, 2015). In other words, the Portal to Portal Act ***does change*** the description or definition of term "work" for "activities that are preliminary or postliminary" to an employee's principal activity because that is one of the two recognized ways the Portal to Portal Act altered the definition of the term "work."

Moreover, in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 885, 336 P.3d 951, 956 (2014), the Nevada Supreme Court expressly held that where "a statute that requires this court's interpretation implicates broad questions of public policy, the divergent acts of foreign jurisdictions dealing with similar subject matter may properly inform that interpretation." The Court found that the Legislature wanted to avoid "burden on businesses and potential confusion"

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

608. *See Integrity Staffing Sols., Inc. v. Busk,* 135 S. Ct. 513, 517-19 (2014)(holding that "preliminary and postliminary" activities are non-compensable work, even though the "employer required [the] particular activity" or "the activity is for the benefit of the employer," such as "changing clothes" or "checking in and out and waiting in line to do so," because these activities are not "an intrinsic element of [the employee's principal] activities" or "one with which the employee cannot dispense if he is to perform those activities"); *Balestrieri v. Menlo Park Fire Prot. Dist*., 800 F.3d 1094, 1001 (9th Cir. 2015) (holding that firefighters that come in early "before the shift, gathering and transporting turnout gear . . . , that activity is 'preliminary'" and not compensable under the FLSA because "it is not 'intrinsic' to the firefighting activity that he is employed to perform"); *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 955-57 (Nev. 2014) (relying on cases interpreting the FLSA to interpret Nevada wage law because the Legislature has long relied on the federal "wage law to lay a foundation of worker protections that this State could build upon" and because if the FLSA and Nevada wage law "were inharmonious it would increase [employer] operation costs and bring about inefficiency because [employers] would have to keep two sets of books"); *Aguilar v. Mgmt. & Training Corp*., Case No. CV 16-00050 WJ/GJF, 2017 WL 4804361, at *19 - *21 (D.N.M. Oct. 24, 2017) (holding that "Plaintiffs' FLSA claims with regard to pre-and post-shift activities also apply to Plaintiffs' state law claim" even though the state wage act "contains no analog to the federal Portal-to-

---

should Nevada Wage Law and the FLSA "fail to operate harmoniously." *Id*. at 886, 336 P.3d at 957. The Court ruled that where "the Legislature ***has not clearly signaled*** its intent that Nevada's [wage law] should deviate from the federally set course, . . . our state's and federal . . . wage laws should be harmonious." *Id* at 888, 336 P.3d at 958 (emphasis added). Neither Plaintiffs, nor Sixth Circuit, have pointed to anything in Nevada Wage law clearly signaling an intent to depart from the FLSA, as amended by the Portal to Portal Act, with respect to what constitutes work. The Portal to Portal Act was adopted in 1947, prior to Nevada wage laws imposing the obligation on employers to compensate employees for work, which were passed no sooner than 1965. *See* NRS 608.250 (minimum wage law adopted in 1965); NRS 608.018 (overtime law adopted in 1975); NRS 608.016 (payment for each hour of work law adopted in 1985). While NRS Chapter 608 provides numerous definitions, it does not define the term "work" at all, much less differently from the previously enacted Portal to Portal Act. If the Legislature wished to signal a course different from the Portal to Portal Act, it certainly would have adopted a different definition, as it did for other terms. Because the Legislature has not clearly signaled it intent to deviate from the federally set course found in the Portal to Portal Act, this Court should follow that course as well, as required by the Nevada Supreme Court.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Portal Act" because courts look to the FLSA when interpreting state law wage statutes). Since these preliminary or postliminary activities are not work as a matter of law, they cannot support a claim for unpaid wages.

Plaintiffs have again failed to provide any facts showing that any plaintiff was underpaid in a given workweek required to state a claim for unpaid wages because they are merely speculating that they were not paid the proper wage. As Plaintiffs fail to allege facts showing the underpayment of wages, Plaintiffs' Complaint should again be dismissed, but this time with prejudice.

G. Plaintiff Williams' Claims for Wages and Overtime Are Barred for Failing to Exhaust Grievance Procedures of the Collective Bargaining Agreement.

Plaintiffs do not dispute that union employees must exhaust the grievance procedures in a valid Collective Bargaining Agreement ("CBA") or face dismissal of the employee's state law wage claims. Instead, Plaintiffs argue that Plaintiff Williams is not subject to a valid CBA because it is unsigned. *See* Op. at 30:21 - 32:1. Courts have uniformly held that unsigned drafts of collective bargaining agreements are enforceable. In *Bloom v. Universal City Studios*, 933 F.2d 1013, 1991 WL 80602 at *1 (9th Cir. 1991), the Ninth Circuit held that the lack of signatures on collective bargaining agreement was not material when employer continued to treat the CBA as binding and effective and employee pointed to no evidence to the contrary. This ruling has been repeatedly reaffirmed. *See Line Const. Ben. Fund v. Allied Elec. Contractors, Inc*., 591 F.3d 576, 580 (7th Cir. 2010) (holding a "signature to a collective bargaining agreement is not a prerequisite to finding an employer bound to that agreement"); *N.L.R.B. v. Haberman Const. Co.*, 618 F.2d 288, 294 (5th Cir. 1980) (holding that "a union and employer's adoption of a labor contract is not dependent on the reduction to writing of their intention to be bound"); *Warehousemen's Union Local No. 206 v. Cont'l Can Co*., 821 F.2d 1348, 1350 (9th Cir. 1987) (explaining that collective bargaining agreement are enforceable "regardless of whether either party later refuses to sign a written draft"); *N.L.R.B. v. Electra-Food Mach., Inc*., 621 F.2d 956, 958 (9th Cir. 1980) (holding oral agreement was sufficient to create a binding collective agreement even though the written agreement was unsigned).

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Larry Montrose specifically affirmed that the CBA was in effect, that both GSR and Culinary Union have treated the CBA as binding by employing the CBA's grievances procedures, and that Plaintiff Williams, along with other putative class members, were covered by the CBA. *See* Mot. Ex. 4, Montrose Declaration, at 1-2, ¶¶ 2-6. As both GSR and the Culinary Union have treated the CBA as binding, Plaintiffs' unsupported argument to the contrary has no merit. Because Plaintiff Williams and the other putative class members that are similarly covered by the CBA do not allege that they have exhausted the required grievance procedures under the CBA, their claims must be dismissed. *See Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 836 N.E.2d 837, 842 (Ill. App. 2005) (explaining that "[f]ederal labor policy provides that when resolution of a state law claim depends on an analysis of the terms of the agreement, the claim must either be arbitrated as required by the collective bargaining agreement or dismissed as preempted under section 301 of the Labor Management Relations Act").

Plaintiff Williams appears to argue that her wage and overtime claims exist independently of the CBA and therefore are not subject to the CBA grievance procedures. With respect to overtime, Plaintiff Williams does not dispute that the CBA expressly provides otherwise for overtime (*see* Mot. Ex. 4, Montrose Dec., at p. 1, ¶ 2; Mot. Ex. 4A, CBA, Article 9.01, at p. 15), and therefore, pursuant to NRS 608.018(3), Plaintiff Williams and other union putative class members are not entitled to statutory overtime under NRS 608.018,[9] but are only entitled to overtime under the CBA. Accordingly, NRS 608.018 does not apply to Plaintiff Williams and the other union putative class members, and their Second Cause of Action for statutory overtime should be dismissed. *See Wuest v. California Healthcare W.*, Case No. 3:11-CV-00855-LRH, 2012 WL 4194659, at *5 (D. Nev. Sept. 19, 2012) (holding that overtime guarantees of NRS 608.018 are suspended where the CBA "provides otherwise" for overtime

[9] *See* NRS 608.018(3) (providing that the overtime "provisions of subsections 1 and 2 do not apply to . . . (e) Employees covered by collective bargaining agreements which provide otherwise for overtime").

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

payments—that is, when the CBA contains a negotiated provision on the same subject but different from the statutory provision").

While Plaintiffs claim that their state law wage claims are not mentioned at all in the CBA (*see* Op. at 29:8-10), Plaintiffs ignore that the CBA expressly specifies amount, method, and timing of payment of wages and overtime. *See* Mot. Ex. 4, Montrose Dec., at p. 1, ¶ 2; Mot. Ex. 4A, CBA, at pp. 9, 15, and CBA Exhibit 1. Plaintiff Williams' statutory claims for wages or overtime therefore are not independent of the collective bargaining agreement, but are expressly dependent upon finding a breach of that agreement to maintain those claims. In *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 107–09 (4th Cir. 2014), the Fourth Circuit held that statutory wage claims of plaintiffs should be "dismissed as preempted by § 301 of the LMRA" when plaintiffs "did not pursue the grievance and arbitration procedures provided by the CBA" because "any entitlement the plaintiffs have in this case to unpaid wages under the [state's] Wages Act must stem from the CBA that governed the terms and conditions of their employment, including their wages." Courts have uniformly reached this same conclusion.[10] *See Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 7-9 (1st Cir. 2012) (holding that a statutory state-law wage claim could only be asserted after exhausting the grievance procedures of the collective bargaining agreement because those claims necessarily relied on the amount of wages provided in the collective bargaining agreement even if those amounts were altered or enlarged by state law); *Wheeler v. Graco Trucking Corp.*, 985 F.2d 108, 113 (3d Cir. 1993) (holding that before, asserting state law statutory wage claims, plaintiff "was first required to

[10] Plaintiffs cite *Jacobs v. Mandalay Corp.*, 378 Fed. Appx. 685 (9th Cir. 2010) for the proposition that state law statutory wage claims are not always dependent on an interpretation of a collective bargaining agreement. *See* Op. at 30:7-20. *Jacobs*, however, involved the question of complete preemption required to assert federal jurisdiction and did not address whether the claims were preempted because the grievance procedures of the collective bargaining agreement were not exhausted. *See Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989) (holding the "jurisdictional issue of whether 'complete preemption' exists is very different from the substantive inquiry of whether a 'preemption defense' may be established"). As set forth above, when the exhaustion issue is raised and addressed, courts have uniformly held that the grievance procedures of the collective bargaining agreement must be exhausted prior to asserting state law statutory wage claims or be dismissed as preempted by § 301 of the Labor Management Relations Act.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

attempt to make use of the exclusive grievance and arbitration procedures contained in the collective bargaining agreement").

Because Plaintiff Williams' statutory claims for wages or overtime are expressly dependent upon finding a breach of the CBA to maintain those claims, she was required to pursue those claims by means of the grievance procedures set forth in the collective bargaining agreement. *See* Mot. Ex. 4, Montrose Dec., at p. 1, ¶ 2; Mot. Ex. 4A, CBA, at p. 26-27. Williams, however, concedes that she failed to exhaust the grievance procedures in the collective bargaining agreement and therefore her first, third, and fourth causes of action should be dismissed.

H. Plaintiffs' Wrongful Attempt to Re-Litigate the Federal District Court's Order, Denying Certification of an Identical Class Action, Is Barred by Issue Preclusion.

Plaintiffs do not dispute that Judge Hicks, in his well-reasoned order dated March 22, 2016, already determined that Plaintiffs' wage claims cannot proceed as a class action or collective action based on the exact same set of facts alleged in Plaintiffs' current complaint in this action. *See* Mot. Ex. 1, *Sargent*, 171 F. Supp. 3d at 1073-77. Plaintiffs admit that issue preclusion prevents re-litigation of those issues when: "(1) the issue decided in the prior litigation [is] identical to the issue presented in the current action; (2) the initial ruling [was] on the merits and have become final; (3) the party against whom the judgment is asserted [was] a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated." *See* Op. at 16:10-15; *see also Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008). Plaintiffs, however, wrongly claim that the issue preclusions test has not been met. *See* Op. at 16:10-16.

1. The Issues with Respect to Class Certification in *Sargent* Were Identical to Those Raised in this Action and Were Actually and Necessarily Decided.

Contrary to Plaintiffs' unsupportable arguments, the issues raised and decided in the *Sargent* Action, with respect to class certification, were identical to those raised in this action. In *Alcantara ex rel. Alcantara v. Wal-Mart Stores*, Inc., 130 Nev. Adv. Op. 28, 321 P.3d 912, 916–17 (2014), the Nevada Supreme Court held that "[i]ssue preclusion cannot be avoided by

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case." In *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nevada*, 116 Nev. 415, 420–21, 997 P.2d 130, 134 (2000), the Court held issue preclusion applies "even though the causes of action are substantially different, if the same fact issue is presented." The Court explained that where a "common issue was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties." *Id*.

In their Complaint, Plaintiffs seek to certify a class action based on the same factual allegations as the wage claims that were brought in the *Sargent* Action. *Compare* Complaint at 4:7 – 27:28 *with* Mot. Ex. 5, *Sargent* Complaint at 4:14 – 9:21, 12:21 – 17:7. Plaintiffs' fifth cause of action in *Sargent* for Failure to Pay Minimum Wages in Violation of the Nevada Constitution and NRS 608.250, is the same as Plaintiffs' second cause of action in this case for Failure to Pay Minimum Wages in Violation of the Nevada Constitution.

In seeking class certification of the minimum wage claims in the *Sargent* Action, Plaintiffs were obligated to make the same arguments, with respect to NRCP 23 class certification requirements of numerosity, commonality, typicality, adequacy, and predominance, in seeking to certify to their state law minimum wage claim in this action, as well as with respect to all other state law claims asserted in this action. *See* Reply Ex. 1, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification filed in *Sargent* Action. Defendants were obligated to rebut those same arguments with respect to NRCP 23 class certification. *See*. Reply Ex. 2, Opposition to Plaintiffs Motion for Class Certification filed in *Sargent* Action. After this extensive briefing the federal court expressly found that "Plaintiffs have failed to meet their burden to show why the claim should be certified as a class action." *Sargent, LLC*, 171 F. Supp. at 1074.

These identical issues must be resolved before this Court may certify this action as a class action. Plaintiffs' argument that the federal court denied class certification because Plaintiffs failed to make certain arguments, or failed to seek certification of certain sub-classes, is unavailing because Plaintiffs make no claim that any impediment beyond their controls

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

prevented them from making such arguments in the *Sargent* Action. *See* Op. at 13:14-18. In *Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir.2011), the Ninth Circuit explained that "[i]f a party could avoid issue preclusion by finding some argument it failed to raise in the previous litigation, the bar on successive litigation would be seriously undermined." Quoted with approval by *Alcantara*, 130 Nev. Adv. Op. 28, 321 P.3d at 917. The court in *Paulo* held that the "fact that a particular argument [with respect to a particular claim] was not made by the [party] and not addressed by the district court does not mean that the issue [with respect to that claim] was not decided" for purposed of issue preclusion. 669 F.3d at 917–18. The court reasoned that "[i]f a new legal theory or factual assertion raised in the second action is relevant to the issues that were litigated and adjudicated previously, the prior determination of the issue is conclusive on the issue despite the fact that new evidence or argument relevant to the issue was not in fact expressly pleaded, introduced into evidence, or otherwise urged." *Id*. at 918.; s*ee also Kamilche Co. v. United States*, 53 F.3d 1059, 1063 (9th Cir. 1995) (holding that "once an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case" because "[a]ny contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue is subsumed in that issue and precluded by the effect of the prior judgment as collateral estoppel"), opinion amended on reh'g sub nom, 75 F.3d 1391 (9th Cir. 1996). Plaintiffs may not avoid issue preclusion merely because they failed to raise an argument in the *Sargent* Action.

Even if the issue of class certification of Plaintiffs' state law wage claims had not been raised and decided in the *Sargent* Action, issue preclusion would still bar class certification in this action. In *Sargent*, the federal court held that the *Sargent* Plaintiffs could not establish that their federal wage claims could be pursued as collective action. 171 F. Supp. 3d at 1079-84. The court, in *Sargent*, found that "individualized inquiries would also have to be conducted to determine whether any of the class members worked off-the-clock during any given week, and if so, how many hours were worked" and therefore held that "[b]ecause these issues are central to the question of liability, treatment of plaintiffs' claims on a collective basis is inappropriate." *Id*. at 1081. The court in *Sargent* also found that GSR's "individualized defenses" prevent

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

certification because "determining whether and when a particular Plaintiff regularly engaged in additional work and calculating the aggregate amount of time worked is an inherently individualized inquiry." *Id.* at 1082. The court in *Sargent* concluded that "[e]ach plaintiff's case requires consideration of different background facts and different testimony based on each employee's work activities" and therefore "failing to decertify the conditionally-certified class will unfairly and prejudicially require Defendants to prepare for and present hundreds of different trials simultaneously." *Id.* at 1083. These decisions with respect to FLSA collective action certification preclude any finding of commonality, typicality or predominance required for class certification in this case because the "'similarly situated' requirement [required to certify a collective action under the FLSA] is less stringent than . . . Rule 23(b)(3)'s requirement that common questions predominate for a 23(b)(3) class to be certified." *See O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 584 (6th Cir. 2009), abrogated on other grounds by *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

Accordingly, the issues of commonality, typicality and predominance, required to be established in this action, were actually and necessarily litigated in the *Sargent* Action and the federal court found that Plaintiffs could not establish these factors, or even the less stringent "similarly situated" standard required for collective action certification.

2. The Ruling in the *Sargent* Action Was Final for Purposes of Issue Preclusion.

Plaintiffs admits that the Nevada Supreme Court looks "to the Restatement (Second) of Judgements to inform its law on preclusion issues." Op. at 14:12-13. The Restatement (Second) of Judgments § 13 (1980) states that "for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be ***sufficiently firm*** to be accorded conclusive effect." Comment g to § 13 of the Restatement explained that factors showing that a prior adjudication was "sufficiently firm" include: "the parties were fully heard;" "the court supported its decision with a reasoned opinion;" and "the decision was subject to appeal or was in fact reviewed on appeal. . . ." All of these factors have been met.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Prior to the entry of federal court's order, the parties fully briefed the issue of class certification and the issue of collective action certification. The federal court provided a well-reasoned opinion denying not only class certification, but also decertifying the FLSA collective action for failing to meet the "similarly situated" standard, which as already set forth is much less stringent than the standard required to certify a class action under Nev. R. Civ. P. 23. *See* Mot. Ex. 1, *Sargent*, 171 F. Supp. 3d at 1079-84. Finally, the denial of class certification in the *Sargent* Action was the subject of an appeal to the Ninth Circuit which was summarily denied.[11] *See* Mot. Ex. 2, *Sargent v. HG Staffing Inc.*, Case No. No. 16-80044, Order filed June 13, 2016. Accordingly, all of the factors have been met to find that federal court's order in the *Sargent* Action was "sufficiently firm" to be afforded preclusive effect. *See Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1118 (Colo. App. 2008) (holding, pursuant to the Restatement (Second) of Judgments § 13, that the "denials of class certification" satisfied "the finality of judgment element of issue preclusion" when the "named plaintiffs [in the prior action] had an opportunity to be heard" with respect to certification issue and there was an "opportunity for review" in the prior action); *see also Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir. 1988) (holding that interlocutory decisions of a district court were "final for purposes of issue preclusion" because a "final judgment" for purposes of issue preclusion "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect"); *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 360 (3d Cir. 1999) (holding "decisions not final for purposes of appealability may nevertheless be sufficiently final to have issue preclusive effect"); *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) (holding that judgment was final for purposes of claim preclusion even though it was subject to a pending Rule 59(e) motion) cited with approval by *Brewer v. State*, 125 Nev. 1021, 281 P.3d 1157, 2009 WL 1492228 (2009).

[11] Plaintiffs insinuations that they did not litigate the issue of class certification and that the federal court did not decide the issue is belied by their own appeal of the issue. If the issue was not litigated and decided, the appeal would serve no purpose. The issue was finally decided once the Ninth Circuit denied the appeal.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

3. Plaintiffs Were Parties in the *Sargent* Action or in Privity with Them.

Plaintiffs Martel, Capilla and Vaughan ("*Sargent* Plaintiffs") became parties to the entire *Sargent* Action by executing their voluntary consent to join that action. *See Prickett v. DeKalb Cty*., 349 F.3d 1294, 1297 (11th Cir. 2003) (holding that "by referring to them as 'party plaintiffs,'" in 29 U.S.C. § 216(b), "Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs"). Contrary to Plaintiffs' argument, the *Sargent* Plaintiffs became parties with respect to the action as a whole. *See Prickett,* 349 F.3d at 1297 (holding that "plaintiffs do not opt-in or consent to join an action as to specific claims, but as to the action as a whole" because congress did "not indicate that opt-in plaintiffs have a lesser status than named plaintiffs insofar as additional claims are concerned"); *Fengler v. Crouse Health Sys., Inc*., 634 F. Supp. 2d 257, 262 (N.D.N.Y. 2009) (holding "once a potential [FLSA] plaintiff opts in, that person is a party to the action, not just to a claim"). In fact, the *Sargent* Action expressly lists Martel, Capilla and Vaughan as parties to that action.[12] *See* Mot. Ex. 3, Docket with Party List filed in *Sargent* Action.

While Plaintiff Williams was not a party to the *Sargent* Action, she is in privity with them. In *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc*., 571 F.3d 299, 312 (3d Cir. 2009), the Third Circuit held that a nonparty is in privity with a party for purposes of preclusion when the nonparty "attempts to bring suit as the designated representative of someone who was a party in the prior litigation." *Citing Taylor v. Sturgell*, 553 U.S. 880, 895 (2008). Williams,

[12] Even if the *Sargent* Plaintiffs would have been permitted to become parties only to the FLSA action, as they now claim, they did not do so, and it would make no difference in any event. First, the consent signed by Plaintiffs broadly state, in capital letters, "I CONSENT TO JOIN THIS LAWSUIT." *See* Op. Ex. 5, Martel Consent to Join. Contrary to Plaintiffs argument, the *Sargent* Plaintiffs did not limit this consent by providing: "This provision does not apply to other federal and to state law claims." The phrase "[t]his provision" does not refer to the consent itself which is not a provision at all, but refers to the provision in 29 U.S.C. 216(b), previously quoted in the consent, that an employee cannot be a party to an FLSA action without filing a consent. *See* Op. Ex. 5, Martel Consent to Join. Second, and more importantly, even if the *Sargent* Plaintiffs were only parties to the FLSA action, as previously set forth, the federal courts decision that they were "not similarly situated" to other employees with respect to their FLSA wage claims precludes any finding that they meet the requirements of commonality, typicality and predominance required for class certification because the "similarly situated" standard is far less stringent.

along with the *Sargent* Plaintiffs, are now attempting to represent all of those listed as plaintiffs in the *Sargent* Action, based on their filing consents in that action. Accordingly, Plaintiff Williams is in privity with parties to the *Sargent* Action and therefore bound by its results. *See Belle v. Univ. of Pittsburgh Med. Ctr*., Case No. CIV-A-13-1448, 2014 WL 4828899, at *4 n.2 (W.D. Pa. Sept. 29, 2014) (holding that named-plaintiffs who seek to represent parties in a previous FLSA collective action were in "privity" with those parties because "traditional notions of privity may extend bar to nonparty . . . where 'the nonparty attempts to bring suit as the designated representative of someone who was a party in the prior litigation'"). Accordingly, all Plaintiffs in the action were either parties to the *Sargent* Action, or in privity with parties to the *Sargent* Action.

As all the requirements of issue preclusion have been met, Plaintiffs are precluded from relitigating the federal court's order which denied certification of the very class that Plaintiffs now seek to certify. This Court therefore shall dismiss all of Plaintiffs' class action claims.

I. Plaintiffs' Wrongful Attempt to Re-Litigate the Federal District Court's Order Denying Certification of an Identical Class Action Should Also Be Denied on Principles of Comity and the First-to-File Rule.

Plaintiffs do not dispute that the first-to-file rule is a doctrine of comity providing that "where substantially identical actions are proceeding in different courts, the court of the later-filed action should defer to the jurisdiction of the court of the first-filed action by either dismissing, staying, or transferring the later-filed suit." S*AES Getters S.p.A. v. Aeronex, Inc*., 219 F.Supp.2d 1081, 1089 (S.D.Cal.2002) cited with approval by *Sherry v. Sherry*, Case No. 62895, 2015 WL 1798857, at *1 (Nev. Apr. 16, 2015). Under the first-to-file Rule, the two actions need not be identical, only substantially similar. *See Inherent.com v. Martindale–Hubbell*, 420 F.Supp.2d 1093, 1097 (N.D.Cal.2006), also cited with approval by *Sherry*, Case No. 62895, 2015 WL 1798857, at *1. Plaintiffs agree that *Wright v. RBC Capital Markets Corp*., Case No. CIV-S-09-3601-FCD-GGH, 2010 WL 2599010, at *5 (E.D. Cal. June 24, 2010) accurately reflects the factors required to establish the first-to-file rule, which include: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues." *See* Op. at 10:20-21.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Each of these *Wright* factors have been met because: (1) the *Sargent* Action was filed first in 2013, and that the parties fully briefed the issue of class certification, which was denied by the district court; (2) all of the Plaintiffs in this action were parties to the *Sargent* Action, or are in privity with them; and (3) Plaintiffs are seeking class certification of the identical claims raised in the *Sargent* Action on behalf of the very same class of employees. *See Wright*, 2010 WL 2599010, at *5 -*7 (finding dismissal of class claims "appropriate" under the first-to-file rule when the issue of class certification was "fully briefed," the prior "court rendered its decision," and the prior class action was brought "on behalf of the very same class of . . . employees that plaintiff seeks to represent here on the same core issues at stake in the [prior] action"). Just as in *Wright*, it would be a misuse of this Court's and GSR's resources to permit Plaintiffs and their counsel to relitigate the issues of class certification. *See also Baker v. Home Depot USA, Inc.*, Case No. 11-C-6768, 2013 WL 271666, at *5 (N.D. Ill. Jan. 24, 2013) (refusing to consider class claims under the first-to-file rule when class certification sought in previous cases were "materially identical to the instant action").

Because Plaintiffs cannot dispute that the elements of the first-to-file rule have been met in this action, Plaintiffs misrepresent that the first to file rule only applies to action filed in federal court. *See* Op. at 21:16 - 22:7. See *Gabrielle v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, Case No. 66762, 2014 WL 5502460, at *1–2 (Nev. Oct. 30, 2014) (holding district court erred in failing to apply the first to file rule when a similar action had previously been filed in federal court); *Hicks v. Brownstone Holdings*, LLC, Case No. 74676-COA, 2018 WL 6818528, at *1 (Nev. App. Dec. 20, 2018) (affirming "the district court's decision to apply the first-to-file rule and dismiss the matter" when action was filed first in another state). This Court should therefore dismiss this action pursuant to the first-to-file rule, and thus preventing counsel for Plaintiffs from burdening the Court with an endless stream of class action lawsuits involving almost identical class action claims.

J. Plaintiffs Should ***NOT* Again Be Permitted to Amend.**

Realizing that their Amend Complaint is as defective as their original complaint, Plaintiffs again improperly seek leave to amend with no indication as to how any amendment

could cure Plaintiffs' defective Complaint. *See* Op. at 32:11-14. Rule 7(b)(1) of the Nevada Rules of Civil Procedure provides that an "application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." In *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999), the Eleventh Circuit, relying upon an identical Fed. R. Civ. P. 7(b)(1), held that to satisfy this rule a "motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment." *See also Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 801 (1969) (holding district court properly denied motion to amend where "there is no showing of the nature or substance of the proposed amendment or what the appellant expects to accomplish by it"); *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008) (holding "that granting leave to amend a complaint where the plaintiff has not submitted a proposed amendment is inappropriate"); *Greening v. United States*, 85 F.3d 635, 1996 WL 241534 at *3 (9th Cir. 1996) (explaining "there is substantial authority that Rules 7(b)(1) and 15(a) require that a copy of the proposed pleading accompany the motion to amend"); *Kostyu v. Ford Motor Co.*, 798 F.2d 1414, 1986 WL 16190 at *2 (6th Cir. 1986) (holding district court properly denied motion to amend when "plaintiff did not submit a proposed amended complaint and failed to disclose what amendments he intended to make").

Likewise, Plaintiffs neither attached a proposed amended complaint to their motion for leave to amend, nor do they attempt to describe the substance of that amendment. Instead, Plaintiffs merely conclude in one sentence that "Plaintiffs should be granted leave to file an amended complaint to cure any deficiencies noticed by the Court." *See* Op. at 32:11-14. Such a conclusion however does not meet Rule 7(b)(1)'s requirement to "state with particularity" the grounds for the motion and provides no basis for this Court to determine whether "justice so requires" an amendment as set forth in Nev. R. Civ. P. 15(a). *See Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906 (6th Cir. 2002) (holding that implicit in Rule 15(a) "is that the district court must be able to determine whether 'justice so requires,' and in order to do this, the court must have before it the substance of the proposed amendment"); *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186-87 (10th Cir. 1999) (holding "that a request for

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

leave to amend must give adequate notice to the district court and to the opposing party of the basis of the proposed amendment before the court is required to recognize that a motion for leave to amend is before it"). Plaintiffs' motion to amend therefore lacks support and should be denied.

Plaintiffs request to amend should also be denied as futile. In *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), the Nevada Supreme Court held that "leave to amend should not be granted if the proposed amendment would be futile." The Court found that a "proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim." *Id.* A claim which "would not survive a motion to dismiss" is an example of an "impermissible" claim. *See Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 973 (Nev. App. 2015).

In addition to moving to dismiss for failing to state a wage claim, the moving papers supporting GSR's motion to dismiss outlined numerous meritorious grounds for dismissal, such as: (1) the two-year statute of limitation; (2) failure to exhaust administrative remedies; (3) failure to exhaust grievance procedures; (4) issue preclusion; (5) comity and the first to file rule; and (6) lack of standing. Even if Plaintiffs had proffered the required amended complaint, any amendment would not survive the grounds set forth in GSR's motion to dismiss. As any and all of Plaintiffs' wage claims should be dismissed as a matter of law, Plaintiffs' motion to Amend is futile and should also be denied. *See Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (holding a "claim would be futile because the case would still fail to survive a motion to dismiss") *Glick v. Koenig*, 766 F.2d 265, 268–69 (7th Cir.1985) (if amended complaint could not withstand motion to dismiss, motion to amend should be denied as futile).

III. CONCLUSION

Pursuant to the foregoing, this Court should grant GSR's motion and dismiss Plaintiffs' First Amended Class Action Complaint with prejudice.

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

AFFIRMATION

The undersigned does hereby affirm that the preceding document and the exhibits attached hereto do not contain the personal information of any person.

Dated this 11th day of March 2019

COHEN|JOHNSON|PARKER|EDWARDS

By: */s/ H. Stan Johnson*
H. Stan Johnson, Esq.
Nevada Bar No. 00265
375 E. Warm Spring Road, Suite 104
Las Vegas, Nevada 89119

Attorneys for Defendants

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

PROOF OF SERVICE

CASE NAME: Martel et. al vs. HG Staffing, LLC. at el.
Court: District Court of the State of Nevada
Case No.: CV16-01264

On the date last written below, following document(s) was served as follows:

REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

_____ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States Mail, Las Vegas, Nevada and addressed to:
____X____ by using the Court's CM/ECF Electronic Notification System addressed to:
_____ by electronic email addressed to :
_____ by personal or hand/delivery addressed to:
_____ By facsimile (fax) addresses to:
_____ by Federal Express/UPS or other overnight delivery addressed to:

Mark R. Thierman, Esq.
Leah L. Jones, Esq.
THIERMAN| BUCK LAW FIRM
7287 Lakeside Drive
Reno, Nevada 89511
Attorney for Plaintiffs

DATED the 11th day of March 2019.

/s/ Ryan Johnson
An employee of
COHEN|JOHNSON|PARKER|EDWARDS

EXHIBIT INDEX

Exhibit	Description	Pages
1	*Sargent v. HG Staffing, LLC*, Case No. 3:13-cv-453-LRH-WGC, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification	52
2	*Sargent v. HG Staffing, LLC*, Case No. 3:13-cv-453-LRH-WGC, Opposition to Plaintiffs Motion for Class Certification	53

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN|JOHNSON|PARKER|EDWARDS
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
sjohnson@cohenjohnson.com
375 E. Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400

SUSAN HEANEY HILDEN, ESQ.
Nevada Bar No. 5358
shilden@meruelogroup.com
CHRIS DAVIS, ESQ.
Nevada Bar No. 6616
chris.davis@slslasvegas.com
2500 East Second Street
Reno, Nevada 89595
Telephone: (775) 789-5362

Attorneys for Defendants

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

EDDY MARTEL (also known as MARTEL-RORIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS and WHITNEY VAUGHN on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

HG STAFFING, LLC, MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT, and DOES 1 through 50, inclusive,

Defendants.

Case No.: CV16-01264

NOTICE OF ENTRY OF ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS

NOTICE IS HEREBY GIVEN that Order partially granting Defendants HG STAFFING, LLC, MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT's motion to dismiss filed on February 2, 2019, was entered on June 7, 2019, a copy of which is attached hereto.

AFFIRMATION

The undersigned does hereby affirm that the preceding document and the exhibits attached hereto do not contain the personal information of any person

Dated this 28th day of June 2019

COHEN|JOHNSON|PARKER|EDWARDS

By: */s/ H. Stan Johnson*
H. Stan Johnson, Esq.
Nevada Bar No. 00265
Chris Davis, Esq.
Nevada Bar No. 06616
375 E. Warm Spring Road, Suite 104
Las Vegas, Nevada 89119

Attorneys for Defendants

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN | JOHNSON | PARKER | EDWARDS
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

PROOF OF SERVICE

CASE NAME: Martel et. al vs. HG Staffing, LLC. at el.
Court: District Court of the State of Nevada
Case No.: CV16-01264

On the date last written below, following document(s) was served as follows:

NOTICE OF ENTRY OF ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS

_____ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States Mail, Las Vegas, Nevada and addressed to:

__X__ by using the Court's CM/ECF Electronic Notification System addressed to:

_____ by electronic email addressed to :

_____ by personal or hand/delivery addressed to:

_____ By facsimile (fax) addresses to:

_____ by Federal Express/UPS or other overnight delivery addressed to:

Mark R. Thierman, Esq.
Leah L. Jones, Esq.
THIERMAN| BUCK LAW FIRM
7287 Lakeside Drive
Reno, Nevada 89511
Attorney for Plaintiffs

DATED the 28th day of June 2019.

/s/ Ryan Johnson
An employee of
COHEN|JOHNSON|PARKER|EDWARDS

CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

EDDY MARTEL (also known as MARTEL-RODRIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS and WHITNEY VAUGHAN on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

HG STAFFING, LLC, MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT, and DOES 1 through 50, inclusive,

Defendants.
_____/

Case No. CV16-01264

Dept. No. 6

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS

Before this Court is a *Motion to Dismiss First Amended Complaint* ("*Motion*") filed by Defendants HG STAFFING, LLC and MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT (collectively, "GSR" unless individually referenced), by and through their counsel, Cohen|Johnson|Parker|Edwards.

Plaintiffs EDDY MARTEL (also known as MARTEL-RODRIGUEZ) ("Mr. Martel"), MARY ANNE CAPILLA ("Ms. Capilla"), JANICE JACKSON-WILLIAMS ("Ms. Jackson-Williams"), and WHITNEY VAUGHAN ("Ms. Vaughan") (collectively, "Plaintiffs"), on behalf of

themselves and all others similarly situated, filed *Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint* ("*Opposition*"), by and through their counsel, Thierman Buck, LLP. GSR filed its *Reply in Support of Motion to Dismiss Amended Complaint* ("*Reply*") and submitted the matter for decision thereafter.

I. FACTUAL AND PROCEDURAL HISTORY

This action arises out of an employment dispute between Plaintiffs and GSR regarding wages paid by GSR to Plaintiffs and similarly situated employees. On June 14, 2016, Plaintiffs filed a *Class Action Complaint* ("*Complaint*") alleging GSR maintained the following policies, practices, and procedures which required various employees to perform work activities without compensation: (1) GSR's Cash Bank Policy, (2) Dance Class Policy, (3) Room Attendant Pre-Shift Policy, (4) Pre-Shift Meeting Policy, (5) Uniform Policy, and (6) Shift Jamming Policy. *Complaint*, pp. 4-8. As a result of said policies, Plaintiffs allege four causes of action against GSR: (1) Failure to Pay Wages for All Hours Worked in Violation of NRS 608.140 and 608.016, (2) Failure to Pay Minimum Wages in Violation of the Nevada Constitution, (3) Failure to Pay Overtime Wages in Violation of NRS 608.140 and 608.018, and (4) Failure to Timely Pay All Wages Due and Owing Upon Termination Pursuant to NRS 608.140 and 608.020-.050. Id., pp. 11-15.

On October 9, 2018, this Court entered its *Order After Hearing Granting Defendants' Motion to Dismiss* ("*Order*"). The Court found Plaintiffs failed to provide sufficient information to support its claims, and therefore granted GSR's *Motion to Dismiss*. Thereafter, Plaintiffs filed *Plaintiffs' Motion for Reconsideration of the Court's Order Granting Defendant's Motion to Dismiss or in the Alternative Leave to File an Amended Complaint* ("*Motion for Reconsideration*") requesting the Court reconsider its *Order* pursuant to NRCP

Rule 60(b). *Motion for Reconsideration*, p. 2. This Court entered its *Order Re Motion for Reconsideration* denying Plaintiffs request on the grounds they failed to state a claim but granting Plaintiffs leave to amend their *Complaint*.

On January 29, 2019, Plaintiffs filed their *First Amended Complaint* ("*FAC*") asserting the same four (4) claims. Thereafter, GSR filed the instant *Motion* requesting this Court dismiss the *FAC* pursuant to NRCP 12(b)(5). *Motion*, p. 2. GSR contends the claims asserted in the *FAC* "have no more merit than Plaintiffs' original claims." *Motion*, p. 2.

First, GSR contends all of Plaintiffs' claims asserted after June 14, 2014 are barred by the two-year statute of limitations pursuant to NRS 608.260. *Motion*, p. 5. GSR asserts the Nevada Supreme Court held claims made under the Minimum Wage Amendment ("MWA") are governed by a two-year statute of limitations. *Motion*, p. 5; citing Perry v. Terrible Herbst, Inc., 132 Nev. Adv. Op. 75, 383 P.3d 257, 260-62 (2016). GSR further asserts, all individual and class claims brought prior to June 14, 2014 are not tolled pursuant to Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark, 407 P.3d 702 (Nev. 2017) and China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1804 (2018). *Motion*, p. 9.

Second, GSR maintains Plaintiffs' First, Third, and Fourth claims should be dismissed for failure to exhaust administrative remedies with the labor commissioner as required by NRS Chapter 607. *Motion*, p. 11. GSR argues Plaintiffs were required to first file and pursue their state law wage claims with the Nevada Labor Commissioner before seeking relief from this Court. *Motion*, p. 11; citing NRS 608.016; Allstate Ins. Co. v. Thrope, 123 Nev. 565, 571-72, 170 P.3d 989, 993-94 (2007).

Third, GSR argues Plaintiffs First, Third, and Fourth Claims for Relief should be dismissed for failing to make good faith attempt to collect their wages before filing their claim

for wages with the Court. *Motion*, p. 13; citing NAC 608.155(1).

Fourth, GSR asserts Plaintiffs lack standing to represent union employees because they are exclusively represented by their respective unions pursuant to 29 U.S.C.A Section 159(a). *Motion*, p. 14.

Fifth, GSR contends Plaintiffs have again failed to state a claim for wages, including minimum wages. *Motion*, p. 15. GSR argues Plaintiff do no allege any facts which would show that any plaintiff was paid less than the minimum wage and do not allege how much they were paid in any week. *Motion*, p. 16. GSR asserts Plaintiffs failure to claim how much they worked in a week results in mere speculation as to whether Plaintiffs were underpaid. *Motion*, p. 16.

Sixth, GSR maintains Ms. Jackson-Williams' claims for wages and overtime are barred for failing to exhaust grievance procedures of the collective bargaining agreement. *Motion*, p. 17. GSR argues Ms. Jackson-Williams is subject to a collective bargaining agreement and, therefore, her statutory claims for wages or overtime are dependent upon finding a breach of that agreement to maintain those claims. *Motion*, p. 18. Moreover, GSR asserts Ms. Jackson-Williams is not entitled to overtime pursuant to NRS 608.018 because the collective bargaining agreement provides otherwise. *Motion*, p. 19.

Seventh, GSR contends Plaintiffs' claims are barred by claim and issue preclusion. *Motion*, p. 20. GSR maintains United States District Judge Hicks already determined Plaintiffs' wage claims cannot proceed in a class action; and, they are therefore barred from re-litigating the federal district court's judgment denying class certification. *Motion*, p. 2; citing Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008). Lastly, GSR argues Plaintiffs should not be able to re-litigate the federal action on principles

of comity and the first-to-file rule. *Motion*, p. 23.

In their *Opposition*, Plaintiffs first maintain they are not required to exhaust administrative remedies with the Office of the Labor Commissioner prior to filing suit. *Opposition*, p. 7; citing Neville v. Terrible Herbst, Inc., 133 Nev. Adv. Op. 95, 406 P.3d 499, 504 (Dec. 7 2017).

Second, Plaintiffs assert they meet the pleading standard because they alleged specific work activities for which they are not paid their minimum wage, provided estimated damages owed to Plaintiffs and the putative classes, and provided documentary evidence in their possession and control specifying hours, dates, and times worked without pay. *Opposition*, p. 9.

Third, Plaintiffs maintain their claims are not barred by issue or claim preclusion because their Nevada wage claims were not certified in the Sargant action. *Opposition*, p. 13. Specifically, the federal court never reached determination of the state law claims because it dismissed them on the "incorrect premise" that Nevada employees do not have a private right of action for wage claims, at summary judgment, and prior to the court's decertification order. *Opposition*, p. 13.

Fourth, Plaintiffs contend its claims are not barred by any statutes of limitation. *Opposition*, p. 22. Plaintiffs contend NRS 11.190(3)(a)'s three-year statute of limitation for "an action upon liability created by statute, other than a penalty or forfeiture" applies to this action because NRS Chapter 608 lacks an express limitation period and NRS 11.190 provides the three-year statute of limitation applies "unless further limited by specific statute. . . ." *Opposition*, p. 22; citing NRS 11.190.

//

Plaintiffs further contend Defendants reliance on Perry is impermissibly broad because the Court did not hold a two-year statute of limitation period applicable to the Minimum Wage Amendment, extended to NRS 608 private causes of action claims. *Opposition*, p. 23.

Fifth, Plaintiffs maintain their claims are not preempted by any alleged collective bargaining agreement because they are only trying to enforce the statutory obligation to pay overtime. *Opposition*, p. 29.

In their *Reply*, Defendants reiterate that a two-year statute of limitations applies to the claims. *Reply*, p. 2. Defendants assert Plaintiffs concede they did not exhaust administrative remedies or grievance procedures. *Reply*, p. 3. Lastly, Defendants assert Plaintiff do not address or dispute that they are not entitled to seek class certification on behalf of GSR employees represented by a union. *Reply*, p. 3.

II. STANDARD OF REVIEW; LAW AND ANALYSIS

A complaint should be dismissed under NRCP 12(b)(5) "only if it appears beyond a doubt" that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim. Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008); Blackjack Bonding v. City of Las Vegas Mun. Court, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). When analyzing the merits of a 12(b)(5) motion to dismiss, the court recognizes all of the factual allegations in the plaintiff's complaint as true, and draws all inferences in favor of the non-moving party. Id. Dismissal is appropriate "where the allegations are insufficient to establish the elements of a claim for relief." Stockmeier v. Nevada Dept. of Corr. Psychological Review Panel, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008); see also Torres v. Nev. Direct Ins. Co., 131 Nev. Adv. Op. 54, 353

P.3d 1203, 1210 (2015) (same). Nevada is a notice-pleading jurisdiction, therefore, "[t]he test for determining whether the allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of the claim and the relief requested." Ravera v. City of Reno, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984); W. States Const., Inc. v. Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); NRCP 8.

A. All Claims Accruing Prior to June 14, 2014 are Barred by the Statute of Limitations

1. A Two-Year Statute of Limitations Applies to all Claims

The Minimum Wage Act (MWA) guarantees employees payment of a specified minimum wage and gives an employee whose employer violates the MWA the right to bring an action against his or her employer in Nevada. Perry v. Terrible Herbst, Inc., 383 P.3d 257, 258 (Nev. 2016). A two-year statute of limitation applies to actions for failure to pay the minimum wage in violation of the Nevada constitution. Id. at 262. This two-year statute of limitation period applies to NRS 608 statutory wage claims that are analogous to a cause of action for failure to pay an employee the lawful minimum wage. Id. Accordingly, a two-year statute of limitation applies to: Plaintiffs' First Cause of Action for Failure to Pay Wages for All Hours Worked in Violation of NRS 608.140 and 608.016; Second Cause of Action for Failure to Pay Minimum Wages in Violation of the Nevada Constitution; Third Cause of Action for Failure to Pay Overtime Wages in Violation of NRS 608.140 and 608.018; and, Fourth Cause of Action for Failure to Timely Pay All Wages Due and Owing Upon Termination Pursuant to NRS 608.140 and 608.020-.050.

//

//

2. Cross Jurisdictional Tolling Does Not Apply

Class-action tolling suspends the statutes of limitation for all purported members of the class until a formal decision on class certification has been made, or until the individual plaintiff opts out of the class. Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark, 407 P.3d 702 (Nev. 2017). Cross-jurisdictional class-action tolling suspends the statutes of limitation for all purported class members even if the class action was pending in a different jurisdiction than where the later suit is brought. Id.

The United States Supreme Court in American Pipe held the timely filing of a class action tolls the applicable statutes of limitation for all persons encompassed by the class complaint. The Court further ruled that, where class action status has been denied, members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character.

Recently, however, the United State Supreme Court declined to apply American Pipe tolling to successive class action claims, holding the maintenance of a follow-on class action past the expiration of the statute of limitations is not permitted. China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1803, 201 L. Ed. 2d 123 (2018). The Court explained that allowing tolling for successive class actions would allow the statute of limitation to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. Id.

Whether cross-jurisdictional tolling applies to a case like the present case is an issue that has not yet been decided by the Nevada Supreme Court. See Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark, 407 P.3d 702 (Nev. 2017). In Achron Corp, the Court declined to consider the issue, finding an advisory mandamus was not warranted because the issue was not raised in the district court. Id. Nevertheless, the case presented

compelling grounds to refrain from recognizing cross-jurisdictional tolling. Specifically, cross-jurisdictional class-action tolling would allow the federal judiciary's actions to indefinitely extend the statutes of limitation beyond a five-year period of repose under NRS 11.500. Id. Moreover, Achron Corp was considered before the United States Supreme Court's decision in China Agritech, Inc.

This issue has been similarly addressed in regards to individual actions. In Clemens v. Daimler Chrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008), the Ninth Circuit held American Pipe does not "mandate cross-jurisdictional tolling as a matter of state procedure." The Illinois Supreme Court addressed this issue in Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1103-05 (Ill. 1998), holding a state "statute of limitations is not tolled during the pendency of a class action in federal court," even though the court had previously "adopted the American Pipe rule for class actions filed in Illinois state court." The Court reasoned such cross-jurisdictional tolling of a state statute of limitation would "increase the burden on that state's court system" because it would expose the state court system to the evils of "forum shopping." Id. at 1104. The court further found that because "state courts have no control over the work of the federal judiciary, . . . [s]tate courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action." Id. at 1104.

Moreover, pursuant to NRS 11.500, the Nevada Legislature has determined that a statute of limitation should only be tolled based on an action filed in another jurisdiction when "the court lacked jurisdiction over the subject matter of the action," (which it did not here), and then limited tolling to "[n]inety days after the action is dismissed."

Here, Plaintiffs filed their *Complaint* on June 14, 2016. As such, all claims accruing before June 14, 2014 are barred unless cross-jurisdictional tolling applies. Under the

unique facts of this case, the Court finds cross-jurisdictional tolling does not apply. The Court looks to the history of this litigation. Specifically, Plaintiffs in this case previously brought a substantially similar action in the Second Judicial District Court for the State of Nevada. The case was removed to federal court where class certification was denied and the case dismissed. Plaintiffs again seek recourse in the Second Judicial District Court and assert their claims were tolled by the federal action.

To permit tolling claims under these specific circumstances provides for never-ending successive class actions because the statute of limitation would never expire. Newly named plaintiffs could always file a class complaint that would resurrect the litigation. Accordingly, class action claims shouldn't be tolled. Therefore, all of Plaintiffs' class action claims that accrued prior to June 14, 2014, two (2) years before Plaintiffs filed their *Complaint*, are barred and shall be dismissed.

Plaintiffs' *Complaint* alleges that Plaintiff Capilla was employed by GSR from "March 2011" to "September 2013;" Plaintiff Vaughan was employed by GSR from "August 2012" through "June 2013;" Plaintiff Martel was employed by GSR from "January 2012" to "July 2014;" and Plaintiff Williams was employed by GSR from "April 2014" to "December 2015." *See* Complaint at 3, ¶¶ 5 - 8. Accordingly, all of Ms. Capilla and Ms. Vaughan's claims, all but one (1) month of Mr. Martel's claims, and all but eighteen (18) months of Ms. Jackson-Williams' claims are dismissed.

B. Remaining Claims

Two Plaintiffs remain pursuant to this Court's dismissal of all claims accrued prior to June 14, 2016. First, Mr. Martel's claims regarding a one-month period remains; and, second, Ms. Jackson-Williams' claims remains regarding an eighteen months period. GSR assert the remaining claims should be dismissed for (1) failure to exhaust administrative remedies of the collective bargaining agreement; (2) issue preclusion; (3) claim preclusion; (4) lack of standing to represent union employees; and, (5) failure to state a claim.

The Court addresses each argument in turn.

1. Mr. Martel and Ms. Jackson-Williams are not Required to Exhaust Administrative Remedies

Where an administrative agency has exclusive jurisdiction over statutory claims, the failure to exhaust administrative remedies before proceeding in district court renders the matter unripe for district court review. Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). A private cause of action generally cannot be implied when an administrative official is expressly charged with enforcing a section of laws. Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 194 P.3d 96 (2008). However, the Nevada Supreme Court has determined an employee has a private right to pursue claims for unpaid wages pursuant to NRS 608.140. Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark, 406 P.3d 499, 504 (Nev. 2017). As such, the Labor Commissioner does not have exclusive jurisdiction over statutory claims. Therefore, Plaintiffs were not required to exhaust administrative remedies before proceeding to district court.

2. Issue and Claim Preclusion Does not Apply

In Five Star Capital Corp. v. Ruby, the Nevada Supreme Court set forth a three-part test for determining whether claim preclusion applies to a later action: (1) [T]he parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. 124 Nev. at 1054. In Five Star Capital Corp., the Court reasoned, claim preclusion applies to preclude an entire second suit that is based on the same set of facts and circumstances as the first suit. Id.

The Court also set forth a four-part test for determining whether issue preclusion applies to a later action:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) **the initial ruling must have been on the merits and have become final**; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation"; and (4) the issue was actually and necessarily litigated.

124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (citations omitted) (emphasis added).

Here, class certification was never addressed in Sargent for the Nevada wage claims and the Court in Sargent has since reversed the grant of summary judgment in light of Neville. There is no issue or claim preclusion because class certification was never independently decided; there has been no ruling on the merits of any of the employees' FLSA or Nevada wage claims; and, the Plaintiffs' NRS 608 and Nevada Constitution minimum wage claims have not actually and necessarily been litigated.

3. Standing to Represent Union Employees

Pursuant to 29 U.S.C. § 159(a),

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a). In Baker v. IBP, Inc., 357 F.3d 685, 690 (7th Cir. 2004), the Seventh Circuit held that where a "suit is at its core about the adequacy of the wages [the employer] pays," individual employees may not represent union workers in a class action when the Union has not breached its duty of fair representation.

The court reasoned that union workers "have a representative—one that under the NLRA is supposed to be 'exclusive' with respect to wages" and therefore "Plaintiffs' request to proceed on behalf of a class of all workers shows that they seek to usurp the union's role." Id. at 686, 690. Moreover, state law rights and obligations that do not exist

independently of private agreements, and that can be waived or altered by agreement as a result, are pre-empted by those agreements. MGM Grand Hotel-Reno, Inc. v. Insley, 102 Nev. 513, 517, 728 P.2d 821, 824 (1986).

Plaintiffs do not dispute that they may not pursue class actions on behalf of union employees because they are not union representatives, who have the exclusive right to represent members of the union with respect wage. However, Plaintiffs dispute that an enforceable collective bargaining agreement was in place. Specifically, Plaintiffs argue that: (1) the CBA is not valid and has expired by its own terms on or about May 1, 2011 (over seven years ago); (2) because it has expired and no subsequent CBA has been ratified or signed, Plaintiffs may sue in this Court for unpaid wages, overtime wages, and penalties due; and, (3) even if the CBA was valid it does not provide otherwise for overtime wages and Plaintiffs may bring their claims in this Court. See *Opposition*, generally. The Court declines to consider evidence, such as the collective bargaining agreement, outside the pleadings at this time.[1] Considering the claims in Plaintiffs' *Complaint* as true, and drawing all conclusions in favor of the Plaintiffs, dismissal in not appropriate on these grounds.

4. Failure to State a Claim

As stated dismissal is appropriate pursuant to NRCP 12(b)(5) "where the allegations are insufficient to establish the elements of a claim for relief." Stockmeier v. Nevada Dept. of Corr. Psychological Review Panel, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008); see also Torres v. Nev. Direct Ins. Co., 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1210 (2015) (same). Nevada is a notice-pleading jurisdiction, therefore, "[t]he test for determining whether the allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of the claim and the relief

[1] The Court notes this issue may be more appropriate for a motion for summary judgment.

requested." Ravera v. City of Reno, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984); W. States Const., Inc. v. Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); NRCP 8.

Plaintiffs filed their *FAC* on January 29, 2019. This Court finds Plaintiffs have provided sufficient factual allegations regarding hours worked and exacting estimates of shifts and unpaid hours and for the applicable time period to put Defendants on notice of the nature and basis of the claims and relief requested. See *FAC*, generally.

III. ORDER.

The Court finds a two-year statute of limitation applies to this case. As such, the Court dismisses all of Ms.Capilla and Ms. Vaughan's claims, all but one (1) month of Mr. Martel's claims, and all but eighteen (18) months of Ms. Jackson-Williams' claims. However, the Court declines to dismiss the remaining claims at this time.

Based on the foregoing, and good cause appearing thereto,

IT IS HEREBY ORDERED Defendants' *Motion to Dismiss* is GRANTED, in part, and DENIED, in part.

Dated this 7th day of June, 2019.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 11th day of June, 2019, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

MARK THIERMAN, ESQ.

SUSAN HILDEN, ESQ.

H. JOHNSON, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows

Judi Bre

CV16-01264