IN THE SUPREME COURT OF THE STATE OF NEVADA

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-Appellants,

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

Defendants-Respondents.

Case No. 82161

District Court Case No.: CV16-01264

APPELLANTS' MOTION FOR LEAVE TO AMEND DOCKETING STATEMENT

Mark R. Thierman, Nev. Bar No. 8285
Joshua D. Buck, Nev. Bar No. 12187
Leah L. Jones, Nev. Bar No. 13161
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Attorneys Plaintiffs-Appellants

COME NOW Plaintiffs-Appellants 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 (hereinafter "Plaintiffs-Appellants"), by and through their attorneys of record, Thierman Buck, LLP, and hereby request leave to file an amended docketing statement pursuant to Nevada Rules of Appellate Procedure ("NRAP") 14 and 27.

Plaintiffs-Appellants make this request because the docketing statement previously filed asserted based on the appearance that the claims of all parties had been finally adjudicated, however after further review it appears there are some claims remaining in the District Court specific to Plaintiff-Appellant Jackson-Williams.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PERTINENT PROCEDURAL HISTORY

On November 3, 2020 the District Court entered its most recent order Granting Respondents' Motion for Summary Judgment, stating "IT IS HEREBY ORDERED summary judgment is entered in favor of GSR and against Plaintiffs." *See* Exhibit A, "Notice of Appeal" at Exhibit 1, "Nov. 3, 2020 MSJ Order" attached to the Declaration of Leah L. Jones, hereinafter "Jones Dec." at ¶3. Plaintiffs-Appellants filed their Notice of Appeal on November 25, 2020. *Id.* . Plaintiffs-

Appellants' Notice of Appeal was filed by the Clerk of this Court on December 4, 2020.

On December 17, 2020, Plaintiffs-Appellants filed their docketing statement asserting at question 24 that "the order appealed from adjudicated ALL the alleged claims below and the rights and liabilities of ALL the parties to the action or consolidated actions below." Accordingly, question 25 did not list (a) any claims remaining below, (b) any parties remaining below, and (c) did not include a certification that the judgement or order appealed from was a final judgment pursuant to NRCP 54(b).

Plaintiffs-Appellants' opening brief was originally due on April 21, 2021. Plaintiffs-Appellants sought from the Clerk of the Court and were granted a 14-day extension with Plaintiffs-Appellants' Opening Brief now due May 5, 2021. During final review of Plaintiffs-Appellants' opening brief, it appears that there are claims remaining in the District Court. Thus, Plaintiffs-Appellants seek leave to file an amended docketing statement.

II. ARGUMENT

NRAP 14(3) sets forth the purpose of the docketing statement as a means "to assist the Supreme Court in identifying jurisdictional defects, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases

for expedited treatment and assignment to the Court of Appeals, and compiling statistical information." *See* NRAP 14(3). Because "this court is one of limited, appellate jurisdiction, we may not presume that we have jurisdiction over a docketed appeal. Rather, the burden rests squarely upon the shoulders of a party seeking to invoke our jurisdiction to establish, to our satisfaction, that this court does in fact have jurisdiction." *Moran v. Bonneville Square Assocs*, 117 Nev. 525, 527 (Nev. 2001).

NRAP 14(4) requires that the "docketing statement shall state specifically all issues that a party in good faith reasonably believes to be the issues on appeal. The statement of issues is instrumental to the court's case management procedures, however, such statement is not binding on the court and the parties' briefs will determine the final issues on appeal." *See* NRAP 14(4).

In addition, NRAP 14(4)(c) warns that the consequences of failing to follow NRAP 14 and to fully and accurately complete the docketing statement may result in "sanctions on counsel or appellant if it appears the information provided is incomplete or inaccurate" and may result in dismissal of the appeal if deemed appropriate by the Court. *See* NRAP 14(4)(c). Furthermore, Counsel is required to provide a signed verification that the information provided in the docketing statement is true and complete.

On December 17, 2020, Plaintiffs-Appellants filed their docketing statement asserting at question 24 that "the order appealed from adjudicated ALL the alleged claims below and the rights and liabilities of ALL the parties to the action or consolidated actions below." Accordingly, question 25 did not list (a) any claims remaining below, (b) any parties remaining below, and (c) did not include a certification that the judgement or order appealed from was a final judgment pursuant to NRCP 54(b).

Upon further review of the District Court's November 3, 2020, Order Granting Respondents' Motion for Summary Judgment ("November 3, 2020 MSJ Order"), Plaintiffs-Appellants are of the opinion that the District Court did not "adjudicate[] ALL the alleged claims below and the rights and liabilities of ALL the parties to the action or consolidated actions below."

The November 3, 2020 MSJ Order adjudicated the claims for the sole two (2) remaining parties to the original action, Plaintiffs Eddy Martel and Janice Jackson-Williams.[1] *See* Jones Dec. at ¶3, Exhibit A, "Notice of Appeal" at Exhibit 1, "November 3, 2020 MSJ Order". In its November 3, 2020 MSJ Order, the Court dismissed all of Plaintiff Martel's claims on the grounds that he was barred by the

[1] In the District Court's November 3, 2020 Order, the Court reiterated that its June 7, 2019 Order granting in part and denying in part Respondents' Motion to Dismiss, Plaintiffs Appellants Capilla and Vaughan claims were barred by a two-year statute of limitations. The Court's June 7, 2019 Order is attached to Exhibit A to Jones Dec., "Notice of Appeal" at Exhibit 2, June 7, 2019 Order.

statute of limitations. *Id.* at p. 15, ¶16. The Court then dismissed Plaintiff Jackson-Williams' overtime claim and held that she did not have standing to represent other union employees in any putative class action. *Id.* at p. 19, ¶28. The Court, however, denied Respondents' motion for summary judgment against Plaintiff Jackson-Williams on the grounds that all of her wage claims should be dismissed for failing to exhaust the union grievance procedure. *Id.* at p. 20, ¶33. Accordingly, upon further review of the District Court's November 3, 2020 MSJ Order, Plaintiff Jackson-Williams' individual claims for unpaid non-overtime wages remain; specifically, Plaintiff Jackson-Williams' first, second, and fourth causes of action for (1) failure to compensate 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, and (4) failure to timely pay all wages due and owing in violation of NRS 608.140 and 608.020.050 are still pending in the District Court.[2]

Thus, Plaintiffs-Appellants seek leave to file an amended docketing statement in order to comply with NRAP 14.

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[2] Plaintiffs-Appellants met and conferred via telephonic means with Respondents' Counsel on April 22, 2020 regarding potential remaining claims. Respondent indicated that it was their belief that the District Court's Nov. 3, 2020 order disposed of all of Plaintiffs-Appellants' claims. *See* Jones Dec. at ¶4.

III. CONCLUSION

For the reasons set forth above, Plaintiffs-Appellants' respectfully request that the Court grant leave to amend the docketing statement.

April 23, 2021

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ Leah L. Jones
Mark R. Thierman, Bar No. 8285
Joshua D. Buck, Bar No. 12187
Leah L. Jones, Bar No. 13161
Joshua R. Hendrickson, Bar No. 12225
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 7287 Lakeside Drive, Reno, Nevada 89511. On April 23, 2021, the **APPELLANTS' MOTION FOR LEAVE TO AMEND DOCKETING STATEMENT** was served on the following by using the Supreme Court's eFlex System:

Susan Heaney Hilden, Esq.
shilden@meruelogroup.com
2500 East Second Street
Reno, Nevada 89595
Tel: (775) 789-5362
Attorney for Respondents-Defendants

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 23, 2021 at Reno, Nevada.

/s/ Brittany Manning
An Employee of Thierman Buck LLP

IN THE SUPREME COURT OF THE STATE OF NEVADA

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-Appellants, HG STAFFING, LLC, MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT Defendants-Respondents.	Case No. 82161 District Court Case No.: CV16-01264 **DECLARATION OF LEAH L. JONES IN SUPPORT OF APPELLANTS' MOTION FOR LEAVE TO AMEND DOCKETING STATEMENT**

Mark R. Thierman, Nev. Bar No. 8285
Joshua D. Buck, Nev. Bar No. 12187
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Attorneys Plaintiffs-Appellants

I, Leah L. Jones, hereby declare and state:

1) I am an Associate attorney with Thierman Buck, LLP, and I am admitted to practice law in the states of Nevada and California. I am also admitted to the United States District Court District of Nevada, Central District of California, Northern District of California, Eastern District of California, Southern District of California, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States.

2) I am one of the attorneys' of record for Plaintiffs-Appellants 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 (hereinafter "Plaintiffs-Appellants"), and submit this declaration in support of Plaintiffs-Appellants' request for leave to file an amended docketing statement pursuant to Nevada Rules of Appellate Procedure ("NRAP") 14 and 27.

3) Attached as Exhibit A is a true and correct copy of Plaintiffs-Appellants Notice of Appeal filed on November 25, 2020, hereinafter "Notice of Appeal," which includes as Exhibit 1 thereto, a copy of the District Court's November 3, 2020 order, granting Respondents' motion for summary judgment, hereinafter, "Nov. 3, 2020 MSJ Order."

4) During final review of Plaintiffs-Appellants' opening brief, it appears that there are claims remaining for Plaintiff-Appellant Jackson-Williams in the District Court. I contacted Counsel for Respondents, Ms. Susan Heaney Hilden on the afternoon of April 22, 2021 at her office telephone number regarding potential remaining claims. Ms. Heaney Hilden indicated that it was Respondents' belief that the District Court's Nov. 3, 2020 MSJ Order disposed of all of Appellants' claims.

5) I understand that I may be subject to sanctions in the event that the accompanying Motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

April 23, 2021

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ Leah L. Jones
Mark R. Thierman, Bar No. 8285
Joshua D. Buck, Bar No. 12187
Leah L. Jones, Bar No. 13161
Joshua R. Hendrickson, Bar No. 12225
Attorneys for Plaintiffs-Appellants

EXHIBIT A

Notice of Appeal

EXHIBIT A

$2515
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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-Appellants, HG STAFFING, LLC, MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT Defendants-Respondents	Case No.: 16-cv-01264 **PLAINTIFFS'-PETITIONERS' NOTICE OF APPEAL PURSUANT TO NRAP 3(c)**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT Plaintiffs-Petitioners EDDY MARTEL (also known as MARTEL-RODRIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS, and WHITNEY VAUGHAN ("Plaintiffs-Petitioners") on behalf of themselves and all others similarly situated, hereby appeal to the Supreme Court of Nevada from the Second Judicial District Court's November 2, 2020 Order and the Second Judicial District Court's June 7, 2019 Order.

1. A copy of the 11/2/20 Order Granting Motion for Summary Judgment is attached as Exhibit 1.
2. A copy of the 6/7/19 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss is as Exhibit 2.

AFFIRMATION

The undersigned does hereby affirm that the proceeding document to be filed in the Second Judicial District Court in the State of Nevada, County of Washoe, does not contain the social security number of any person.

DATED: November 25, 2020

Respectfully Submitted,

THIERMAN BUCK LLP

/s/Leah L. Jones
Mark R. Thierman
Joshua D. Buck
Leah L. Jones
Joshua R. Hendrickson
Attorneys for Plaintiffs-Petitioners

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INDEX OF EXHIBITS

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2.	June 7, 2019 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss	16

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that on this date I electronically filed the foregoing **PLAINTIFFS'-PETITIONERS' NOTICE OF APPEAL PURSUANT TO NRAP 3(c)** with the Clerk of the Court by using the e-Flex filing system which will send a notice of electronic filing to the following:

H. JOHNSON, ESQ. for HG STAFFING, LLC, et al
SUSAN HILDEN, ESQ. for HG STAFFING, LLC, et al

Pursuant to NRCP 5(b), I hereby further certify that service of the foregoing was also made by depositing a true and correct copy of the same for mailing, first class mail, postage prepaid thereon, at Reno, Nevada to the following:

Chris Davis, Esq.
2500 East Second Street
Reno, NV 89595

Attorney for Defendants

DATED this 25th day of November, 2020

/s/ Brittany Manning
An Employee of Thierman Buck LLP

EXHIBIT 1

November 2, 2020 Order Granting

Motion for Summary Judgment

EXHIBIT 1

F I L E D
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2020-11-03 11:55:01 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8144546

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 MOTION FOR SUMMARY JUDGMENT

Before this Court is the *Defendants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication* ("*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.

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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' Response to Defendants' Motion for Summary Judgment/Summary Adjudication* ("*Response*") by and through their counsel, Thierman Buck, LLP. GSR filed its *Reply in Support of Defendants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication* ("*Reply*") and submitted the matter for decision thereafter.

I. FACTUAL AND PROCEDURAL HISTORY.

This action arises out of an employment dispute between Plaintiffs, employees, and GSR, employer, regarding wages paid by GSR to Plaintiffs and similarly situated employees. Mr. Martel was employed as an attendant in the Bowling Center. Ms. Capilla was employed as a dealer. Ms. Jackson-Williams was employed as a room attendant. And, Ms. Vaughan was employed as a dancing dealer (part cards dealer, part go-go dancer). See *Class Action Complaint* ("*Complaint")* and *First Amended Class Action Complaint ("FAC")*, generally. On June 14, 2016, Plaintiffs filed their *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 assert four (4) claims for relief 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 their claims and granted GSR's *Motion to Dismiss*. *Order*, pp. 9-10. 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* on January 9, 2019 and denied Plaintiffs' request on the grounds they failed to state a claim but granted Plaintiffs leave to amend their *Complaint*. *Order Re Motion for Reconsideration*, pp. 8-9.

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On January 29, 2019, Plaintiffs filed their *FAC* asserting the same four (4) claims. Thereafter, GSR filed its *Motion to Dismiss First Amended Complaint* ("*Motion to Dismiss*"), requesting this Court dismiss the *FAC* pursuant to NRCP 12(b)(5). *Motion to Dismiss*, p. 2. GSR argued the claims asserted in the *FAC* "have no more merit than Plaintiffs' original claims." *Motion to Dismiss*, p. 2. On June 7, 2019, the Court entered its *Order Granting, in Part, and Denying, in Part, Motion to Dismiss* ("*MTD Order*") concluding a two-year statute of limitation applies to the Plaintiffs' claims. *MTD Order*, p. 7. As such, the Court dismissed 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. *MTD Order*, p. 14.

On May 23, 2019, GSR filed its *Motion for Summary Judgment on all Claims Asserted by Plaintiffs Martel, Capilla and Vaugh* (sic) ("*First MSJ*") and argued Plaintiffs claims are barred by claim preclusion. *First MSJ*, p. 4.

On June 28, 2019, GSR filed its *Answer to First Amended Class Action Complaint* ("*Answer*"). In addition to admissions and denials to Plaintiffs' allegations in the *FAC*, GSR asserted, among other affirmative defenses: failure to state a claim; claims are barred, in whole or in part, by the applicable statute of limitations; and, claims are barred due to GSR's full performance of underlying obligations. *Answer*, generally.

On July 8, 2019, GSR filed *Defendants' Second Motion for Summary Judgment as to Plaintiff Martel; Motion for Summary Adjudication on Plaintiffs' Lack of Standing to Represent Union Employees; and Motion for Summary Judgment as to Plaintiff Jackson-Williams* ("*Second MSJ*"). GSR made the following arguments: (1) Mr. Martel's claims are time-barred; (2) Plaintiffs lack standing to represent union employees who are exclusively represented by their unions; (3) Ms. Jackson-Williams' claims are barred for failing to

exhaust grievance procedures of the Culinary Collective Bargaining Agreement ("CBA") and/or based on federal preemption; and, (4) Ms. Jackson-Williams' claim for overtime is barred pursuant to NRS 608.018 because the CBA provides otherwise for overtime. See *Second MSJ*, generally.

On July 9, 2019, before this Court rendered its decision on the *First MSJ* and *Second MSJ*, GSR filed its *Notice of Filing Petition for Writ of Mandamus and/or Prohibition* ("*Petition*") with the Supreme Court of Nevada. In the *Petition*, GSR argued the dismissal of Plaintiffs' first, third, and fourth claims for relief is mandatory on the grounds: Plaintiffs failed to exhaust administrative remedies as required by NRS Chapter 607; legislative mandated remedies must be exhausted despite an implied private right of action; and, NRS 607.215 requires Plaintiffs exhaust administrative remedies before pursuing wage claims under NRS 608.005 to 608.195. See *Petition*, generally.

This Court entered its *Order Re Stipulation to Stay All Proceedings and Toll of the Five Year Rule* ("*Stipulation*") on July 17, 2019 and withdrew GSR's pending motions for summary judgment from submission, without prejudice, allowing renewal upon the Supreme Court of Nevada's decision. *Stipulation*, p. 9.

On May 7, 2020, the Supreme Court of Nevada entered its *Order Denying Petition*. The Supreme Court of Nevada reasoned Neville v. Eighth Judicial Dist. Court held, by necessary implication, exhaustion of administrative remedies is not required before filing an unpaid-wage claim in district court. 133 Nev. 77, 406 P.3d 499 (2017).

On June 9, 2020, GSR filed the instant *Motion* and renewed the claims presented in the *Second MSJ* filed on May 23, 2019. GSR asserts Mr. Martel's claims are time-barred because the Court's June 7, 2019, *Order Granting, in Part, and Denying, in Part, Motion to*

Dismiss found a two-year statute of limitations applies, barring claims accruing prior to June 14, 2014. Mr. Martel worked his last shift on June 12, 2014. *Motion*, p. 3. GSR argues Ms. Jackson-Williams' claims are barred for failing to exhaust grievance procedures of the Culinary CBA and/or based on federal preemption because state law rights that can be altered by CBAs are preempted by CBAs and employees must make use of the grievance procedures in the CBAs or the claims will be dismissed as preempted by federal law. *Motion*, p. 4; citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210-20 (1985); MGM Grand Hotel-Reno, Inc. v. Insley, 102 Nev. 513, 517, 728 P.2d 821, 824 (1986). GSR contends Ms. Jackson-Williams' claim for overtime is barred because Article 9.01 of the CBA entitled, "WORK, SHIFTS, WORKWEEK, AND OVERTIME," "provides otherwise" for overtime, therefore exempting Ms. Jackson-Williams from the overtime provisions in Sections 1 and 2 of NRS 608.018. *Motion*, pp. 5-6. GSR argues the Plaintiffs lack standing to represent union employees who are exclusively represented by their respective unions. This is so, GSR maintains, because they are not in the same unions and the bargaining representatives of each union have not been given the opportunity to be present. *Motion*, p. 7; citing 29 U.S.C. § 159(a); Vaca v. Sipes, 386 U.S. 171, 186 (1967).

In the *Response,* Plaintiffs argue Mr. Martel's claim is not time-barred because an employee's claim for unpaid wages accrues thirty (30) days after the employment relationship ends. *Response*, p. 2; citing NRS 608.040-.050. Additionally, Plaintiffs argue GSR admitted it violated overtime requirements when it sent Mr. Martel and hundreds of other current and former employees checks for the unpaid overtime but did not pay continuation wages as mandated by NRS 608.040 and 608.050. Id. Plaintiffs assert, based on what they contend is black letter law, purported union employees are not required to

exhaust internal union grievance procedures before filing suit. *Response,* p. 12; citing NRS 608.140 and 608.050. Plaintiffs next argue courts consistently find union and non-union employees can sue for and on behalf of each other when all allege they are victims of unlawful pay practices. *Response*, p. 13. Plaintiffs state Ms. Jackson-Williams is entitled to statutory overtime protections because the Culinary CBA is not a valid and operable CBA since it is an unsigned draft, and even if operable, the CBA does not provide overtime benefits beyond those conferred by NRS 608.018. *Response*, pp. 17-18. Plaintiffs request the opportunity to conduct further discovery on whether the Culinary Union and the CBA are operational if the Court is inclined to hold the CBA is valid. *Response*, p. 17.

In its *Reply,* GSR argues Mr. Martel conceded his underlying wage claims are barred by the applicable statute of limitation, and his derivative waiting time penalty claims under NRS 608.040 and 608.050 fail because they are contrary to accrual of claims case law and statutory language. *Reply*, p. 1. GSR argues Courts have repeatedly rejected assertions similar to Plaintiffs' assertion the Culinary CBA is invalid due to lack of execution. *Reply*, p. 2. GSR further maintains the Culinary CBA has affirmed the validity of the CBA. Id. GSR contends during the entire term of her GSR employment Ms. Jackson-Williams was subject to the CBA, and the CBA "provides otherwise" for overtime, disqualifying Ms. Jackson-Williams from receiving overtime compensation. *Reply*, p. 9-10. GSR argues Ms. Jackson-Williams' claims for overtime are barred both because she did not exhaust the valid and binding CBA grievance procedures. *Reply*, pp. 12-13. GSR states, pursuant to 29 U.S.C. § 159(a), the Culinary Union is the exclusive representative of the employees and Plaintiffs have not alleged a breach of the duty of fair representation, thereby conceding Plaintiffs cannot represent the employees. *Reply*, p. 16. Finally, GSR argues Plaintiffs are not

entitled to further discovery under NRCP 56(d) because Plaintiffs failed to provide the requisite affidavit. *Reply*, p. 17; citing Choy v. Ameristar Casinos, Inc., 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) and Bakerink v. Orthopaedic Assocs., Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978).

II. STANDARD OF REVIEW; APPLICABLE LAW AND ANALYSIS

Summary judgment is appropriate under Rule 56 of the Nevada Rules of Civil Procedure "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). Further, a fact is material if the fact “might affect the outcome of the suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The pleadings and other proof "must be construed in a light most favorable to the nonmoving party," who bears the burden to "do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment" in favor of the moving party. Id., 121 Nev. at 732, 121 P.3d at 1031. The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. Id., 121 Nev. at 731, 121 P.3d at 1031.

The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial. Cuzze, 123 Nev. at 602, 172 P.3d at 134. If the moving party will bear the burden of persuasion, that

party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence. Id. If the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production in two ways: (1) the moving party may submit evidence which negates an essential element of the nonmoving party's claim, or (2) the moving party may merely point out the absence of evidence to support the nonmoving party's case. Id. Therefore, in such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, **introduce specific facts** that show a genuine issue of material fact. Id. "The non-moving party must not simply rely on the pleadings and must do more than make 'conclusory allegations [in] an affidavit.'" Choi v. 8th Bridge Capital, 2020 WL1446700, Slip Copy, March 25, 2020 (C.D. Cal.), citing, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990); see also, Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986). "Summary judgment must be granted for the moving party if the nonmoving party 'fails to make showing sufficient to establish an element essential to that party's case, and on which that party bears the burden of proof at trial.'" Choi v. 8th Bridge Capital, 2020 WL1446700, Slip Copy, March 25, 2020 (citing same).

In this case, GSR is the moving party that may submit evidence negating an essential element of Plaintiffs' claims, point out the absence of evidence, or establish the elements of a defense. Plaintiffs are the nonmoving party who must introduce specific facts that show a genuine issue of material fact exists.

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Pursuant to NRCP 56, even if the undisputed factual matters are established, a party must still establish the party is entitled to judgment as a matter of law. Kuptz-Blinkinsop v. Blinkinsop, 136 Nev. ___, ___, 466 P.3d 1271, 1273 (2020) (citing Wood v. Safeway, Inc., 121 Nev. at 729, 121 P.3d at 1029 (2005)).

III. FINDINGS OF UNDISPUTED MATERIAL FACT.

The Court finds the following material facts are undisputed:

1. The *Complaint* was filed in this matter on June 14, 2016.

2. GSR is an employer. *FAC*, ¶ 10; *Answer*, ¶ 8.

3. Mr. Martel was employed from on or about January 25, 2012 through June 13, 2014. *FAC*, ¶ 20, 34, 49; *Motion*, p. 2; *Response*, p. 6.

4. Mr. Martel was employed as an arcade attendant and was not covered by a union or a collective bargaining agreement. *Response*, p. 7.

5. Mr. Martel voluntarily resigned from his employment with GSR on June 14, 2014. Decl. of Eddy Martel-Rodriguez, ¶ 4; *Reply*, p. 3, n.1.

6. Mr. Martel's timeclock indicates he clocked into his final shift at GSR at 6:10 p.m. on June 12, 2014. Mr. Martel clocked out on June 13, 2014 at 12:26 a.m. *Motion*, p. 2, Ex. 1, Decl. of Eric Candela; *Response*, p. 6.

7. Mr. Martel was paid every two weeks and last paycheck was paid on June 16, 2014. *Reply*, Ex. 1, Decl. of Cynthia Williams, ¶ 3.

8. Ms. Jackson-Williams was employed as a guest attendant from April 2014, through December, 2015. *FAC*, ¶ 6; *Motion*, p. 2; *Response*, p. 7.

9. The Culinary CBA is unsigned. *Motion*, p. 7, n.1; *Response*, p. 16; Decl. of Susan Heaney Hilden, ¶ 2.

10. Article 9.01 of the Culinary CBA provides:

> The workweek pay period shall be from Friday through Thursday. For purposes of computing overtime, for an employee scheduled to work five (5) days in one (1) workweek, any hours in excess of eight (8) hours in a day or forty (40) hours in a week shall constitute overtime. For an employee scheduled to work four (4) days in one (1) workweek, any hours worked in excess of ten (10) hours in a day or forty (40) hours in a week shall constitute overtime. . . . Employees absent for personal reasons on one (1) or more of their first five (5) scheduled days of work in their workweek shall work at the Employee's request on a scheduled day off in the same workweek at straight time.

Motion, p. 6; *Motion*, Ex. 2, Decl. of Susan Hilden, Ex. 1; *Response*, pp. 18-19.

11. Pursuant to the Operating Engineers CBA, GSR recognizes the International Union of Operating Engineers Stationary Local No. 39 AFL-CIO as "the exclusive bargaining representative for . . . all draftsmen, carpenters, engineers, locksmiths, painters, upholsters, certified pool operators and engineering department laborers." *Motion*, Ex. 2, Decl. of Susan Hilden, ¶ 11; *Response*, p. 6.

12. Pursuant to the IATSE CBA, GSR recognizes the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC LOCAL Union No. 362 ("IATSE") as "the Exclusive collective bargaining representative for . . . all entertainment department employees performing carpentry, electrical, electronic, sound and property work, including stage hands, stage technicians, stage laborers, lounge technicians, convention technicians, spotlight operators and technicians, stage electricians, sound personnel, projectionists, operators of all audio-visual equipment used in connection with the Employer's entertainment and convention operations and all wardrobe personnel . . ." *Motion*, Ex. 2, Decl. of Susan Hilden, ¶12; *Response*, p. 6.

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13. The Culinary Union has filed grievances under the Culinary CBA, and arbitrations have taken place. *Motion*, Ex. 2, Decl. of Susan Heaney Hilden, ¶¶ 3-7; Ex. 3, Decl. of Larry Montrose, ¶ 5.

14. To the extent any of the following conclusions of law include, or may be construed to include, findings of fact, they are incorporated here.

IV. CONCLUSIONS OF LAW.

To the extent any of the foregoing findings of fact constitute, or may be construed to constitute, conclusions of law they are incorporated here:

A. STATUTE OF LIMITATION.

1. 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 (2016).

2. 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.

3. The 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.

4. NRS 608.040 provides:

> 1. If an employer fails to pay:
> (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or
> (b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less.
> 2. Any employee who secretes or absents himself or herself to avoid payment of his or her wages or compensation, or refuses to accept them when

> fully tendered to him or her, is not entitled to receive the payment thereof for the time he or she secretes or absents himself or herself to avoid payment.

NRS 608.040.

5. NRS 608.050 provides:

> 1. Whenever an employer of labor shall discharge or lay off employees without first paying them the amount of any wages or salary then due them, in cash and lawful money of the United States, or its equivalent, or shall fail, or refuse on demand, to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of the employees may charge and collect wages in the sum agreed upon in the contract of employment for each day the employer is in default, until the employee is paid in full, without rendering any service therefor; but the employee shall cease to draw such wages or salary 30 days after such default.
> 2. Every employee shall have a lien as provided in NRS 108.221 to 108.246, inclusive, and all other rights and remedies for the protection and enforcement of such salary or wages as the employee would have been entitled to had the employee rendered services therefor in the manner as last employed.

NRS 608.050.

6. When a derivative claim is dependent on the success of an underlying claim and the underlying "claim having not been established," then the derivative claim "must fail as well." Turner v. Mandalay Sports Entm't, LLC, 124 Nev. 213, 222 n.31, 180 P.3d 1172, 1178 n.31 (2008).

7. A two-year statute of limitation applies to the claims in this action. Claims which accrued prior to June 14, 2014 are therefore barred by the statute of limitation. See *Order Granting, in Part, and Denying, in Part, Motion to Dismiss* pp. 7-11.

8. Mr. Martel maintains his fourth cause of action for waiting time penalties under NRS 608.040 and 608.050 is timely because his cause of action did not accrue until thirty (30) days after his last day of work.

9. Based on its plain language, NRS 608.050 is inapplicable to Mr. Martel. Section 608.050 applies to employees who are discharged or laid off by their employer. See NRS 608.050(1). Mr. Martel resigned from his job.

10. Section 608.040 of the Nevada Revised Statutes does not apply to wages that are not accrued during the final pay period of the employee.

11. No shift jamming, no off-the-clock banking, and no pre-shift meetings occurred during Mr. Martel's final pay period. Mr. Martel's last shift ended on June 13, 2014.

12. Therefore, the two-year statute of limitation applies to Mr. Martel's claims. The *Complaint* was filed on June 14, 2016.

13. NRS 608.040 does not save Mr. Martel's claims. "[W]hen a statute 'is clear on its face, a court cannot go beyond the statute in determining legislative intent.'" State v. Lucero, 249 P.3d 1226, 1228 (2011) (citing Robert E. v. Justice Court, 99 Nev. 443, 445 (1983)). The Court finds NRS 608.040 is clear on its face that it does not apply to all wages, but rather wages due for the pay period before the employee is discharged or quits. Nothing in the statute indicates the rule applies to previously unpaid wages or exists to create a cause of action for those wages.

14. The 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.

15. Defendants met their burden and established their statute of limitation defense to Plaintiffs' claims as a matter of law.

16. Summary judgment should be entered on each of Mr. Martel's claims as they are time-barred.

17. After application of the two-year statute of limitation, Ms. Jackson-Williams' claims remain for an eighteen-month period only.

B. CBA VALIDITY AND ABILITY TO PROVIDE OTHERWISE FOR OVERTIME

1. Validity of the CBA

18. The CBA purportedly expired by its own terms on or about May 1, 2011. The CBA has not been extended by signature, however, GSR contends the CBA has been extended by ratification.

19. Unsigned CBAs have been found valid and operative when an employer has continued to treat the CBA as binding and effective and employee could not point to evidence to the contrary. Bloom v. Universal City Studios, 933 F.2d 1013, 1991 WL 80602 at *1 (9th Cir. 1991) (unpublished); See Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17, 24 n. 6 (1962) (finding CBA valid even when parties did not negotiate directly and did not consolidate signatures on one document).

20. A union will generally be held defunct if it has ceased to exist as an effective labor organization and is no long fulfilling responsibilities in administering the contract. Hershey Chocolate Corp., 121 NLRB 901, 911, 42 LRRM 1460 (1958); see also Pioneer Inn Associates v. N.L.R.B., 578 F.2d 835, 839-40 (1978) (explaining inactivity, failure to monitor contract provisions, and failure to pursue grievances may indicate a failure to administer the contract).

21. Signatures on collective bargaining agreements are "not a prerequisite to finding an employer bound to that agreement." Line Const. Ben. Fund v. Allied Elec. Contractors, Inc., 591 F.3d 576, 580 (7th Cir. 2010); N.L.R.B. v. Electra-Food Mach. Inc., 621 F.2d 956, 958 (9th Cir. 1980) (holding oral agreements are sufficient to create binding collective bargaining agreements even when written agreement is unsigned); N.L.R.B. v. Haberman Const. Co., 641 F.2d 351, 356 (5th Cir. 1981) (en banc) ("[A] union and employer's adoption of a labor contract is not dependent on the reduction to writing of their intention to be bound").

22. If the union and the employer continue to operate as if the CBA is operative, the CBA is binding. Here, the union and GSR engaged in arbitration and negotiation when mandated by the CBA. GSR continued to negotiate and arbitrate with the union on multiple occasions. For example, Mr. Montrose confirmed he interacts with the Culinary Union Representative Nicolaza De La Puente weekly and he was notified of at least two different grievances in 2015. *Motion,* Decl. of Larry Montrose, Ex B., Ex. C. The CBA was "ratified by the Union on November 17, 2011, and it was in effect through March 10, 2018, when a subsequent Culinary CBA was ratified." *Motion*, Decl. of Susan Heaney Hilden, ¶ 2. An arbitration was held on August 25, 2016, in which the parties introduced the CBA as Joint Exhibit 1. *Motion*, Decl. of Susan Heaney Hilden, ¶ 2. Following the August 25, 2016, arbitration, the Culinary Union submitted a Post-Hearing Brief dated October 24, 2016 in which the Union states, "Local 226 has been party to three successive collective-bargaining agreements at the hotel casino that is now known as the Grand Sierra Resort." Id. Plaintiffs contend the CBA expired in May of 2011 but provide the Court with no evidence to dispute

that the union and the GSR continued to treat the CBA as binding. Undisputed evidence confirms the CBA was valid and operative.

2. The CBA "provides otherwise" for overtime

23. NRS 608.018(1)-(2) governs compensation for overtime and reads:

> 1. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate set forth in NRS 608.250 works:
> (a) More than 40 hours in any scheduled week of work; or
> (b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.
> 2. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate set forth in NRS 608.250 works more than 40 hours in any scheduled week of work.

NRS 608.018(1)-(2).

24. Section 608.018(3) of the Nevada Revised Statutes provides, "[t]he provisions of subsections 1 and 2 do not apply to . . . (e) Employees covered by collective bargaining agreements which provide otherwise for overtime . . ." NRS 608.018(3) (emphasis added).

25. The CBA provides:

> The workweek pay period shall be from Friday through Thursday. For the purposes of computing overtime, for an employee scheduled to work five (5) days in one (1) workweek, any hours in excess of eight (8) hours in a day or forty (40) hours in a week shall constitute overtime. For an employee scheduled to work four (4) days in one (1) workweek, any hours worked in excess of ten (10) hours in a day or forty (40) hours in a week shall constitute overtime. Overtime shall be effective and paid only after the total number of hours not worked due to early ours is first subtracted from the total number of hours actually worked per shift, per workweek. Overtime shall not be paid under this Section for more than one (1) reason for the same hours worked. Employees absent for personal reasons on one (1) or more of their first five (5) scheduled days of work in their workweek shall work at the Employer's request on a scheduled day off in the same workweek at straight time. If the employer anticipates such scheduling, the Employer provide five (5) days' advance notice.

> This provision will remain in effect for the duration of this Agreement. However, at the expiration of the Agreement, the Employer shall have the right to compute and pay overtime in accordance with the provisions of existing federal and state law, and Union employees shall not have the right to overtime pay above and beyond the applicable federal and state law requirements.

See *Motion*, Ex. 2A, p. 15.

26. CBAs "provide otherwise" for overtime payments when the CBA "contains a negotiated provision on the same subject but different from the statutory provision." Firestone v. Southern California Gas Co., 219 F.3d 1063, 1067, 164 L.R.R.M. 2897, 2897 (9th Cir. 2000); Jacobs v. Mandalay Corp., 378 F. App'x 685, 687 (9th Cir. 2010) ("[S]ection 608.018 exempts from coverage those employees 'covered by collective bargaining agreements which provide otherwise for overtime.").

27. The instant CBA "provides otherwise" for overtime. The CBA provides otherwise for overtime because there are differences in both the practical effects of the overtime provisions in NRS 608.018 and in the CBA's overtime provisions, as well as the textual provisions. For example, NRS 608.018(1) provides that an employer shall pay 1 1/2 times the employee's regular wage when the employee works more than 40 hours in a week or more than 8 hours in a day. The CBA does not specify what the pay rate shall be. Additionally, the CBA provides for overtime regardless of the employee's wage, while NRS 608.018 only mandates overtime for employees making more than 1 1/2 the minimum wage. NRS 608.018 provides overtime regardless of how many days are worked in a week, while the CBA allows overtime only when employees work five days in one workweek. NRS 608.018 does not limit overtime if an employee misses a scheduled day and works an alternate day, however, the CBA does. Accordingly, the CBA "provides otherwise" for overtime.

28. The CBA "provides otherwise" for Ms. Jackson-Williams' claim for overtime and NRS 608.018 does not provide a legal basis for her claim.

3. Grievance Procedures of the Culinary CBA

29. Section 301 of the Labor Management Relations Act states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties....

Labor Management Relations Act of 1947 § 301(a), 29 U.S.C. § 185(a) (1982).

30. Employees may pursue claims for unpaid wages through a private cause of action and without enforcing the claim through the Labor Commissioner. Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark, 133 Nev. 777, 782, 406 P.3d 499, 504 (2017).

31. State law rights and obligations that do not exist independently of private agreements can be waived or altered by agreement as a result and are pre-empted by those agreements. MGM Grand Hotel-Reno, Inc. v. Insley, 102 Nev. 513, 517, 728 P.2d 821, 824 (1986) (citing Allis Chalmers v. Lueck, 471 U.S. 202, 105 S.Ct. 1904 (1985)).

32. Workers do not have to submit to arbitration procedures when redressing grievances because a CBA provides contractual rights, but workers may have an independent statutory right to enforce individual rights. Albertson's, Inc. v. United Food & Commercial Workers Union, ALF-CIO & CLC, 157 F.3d 758, 762 (9th Cir.).

33. Whether Ms. Jackson-Williams must follow the grievance procedures contained in the CBA depends on whether she has an independent statutory right to enforce her claims for wages and overtime outside of the CBA. Ms. Jackson-Williams brought claims for Failure to Pay Wages for All Hours Worked in Violation of NRS 608.140 and 608.016, Failure to Pay Overtime Wages in Violation of the Nevada Constitution, Failure to Pay Minimum Wages in Violation of NRS 608.140 and 608.018, and Failure to Pay All

Wages Due and Owing Upon Termination Pursuant to NRS 608.140 and 608-040-050. The State of Nevada provides independent statutory rights to each of Ms. Jackson-Williams' claims through the Nevada Revised Statutes and the Nevada Constitution. Albertson's Inc. explains, "in filing a lawsuit under [a statute], an employee asserts independent statutory rights . . . The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." 157 F.3d at 761. Since there are state-law rights at issue, Ms. Jackson-Williams' claims are not preempted, and the claims are not mandated to proceed through the grievance procedure of the CBA.

4. Lack of Standing to Represent Union Employees

34. Section 159(a) of the United States Code states:

> 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).

35. Baristas, bartenders, and cocktail servers are represented by the Culinary CBA; construction workers are covered by the Operating Engineers CBA; and, technicians are represented by the AFL-CIO Local Union. Plaintiffs, as members of the "shift jamming class" attempt to represent union members from other sub-classes.

36. Employees may bring an action against an employer without exhausting contractual remedies, but the employees must "prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." Vaca v. Sipes, 386 U.S. 171, 186, 87 S.Ct. 903, 914 (1967).

37. When employees sue to vindicate "uniquely personal rights" as opposed to rights reserved to unions like picketing, renegotiating a contract, or protesting relocation, the employees have standing to sue on their own behalf and on behalf of other union members. Lucas v. Bechtel Corp., 633 F.2d 757, 759 (9th Cir. 1980) (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562, 96 S.Ct. 1048, 1055 (1976)).

38. 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 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.

39. Plaintiffs do not assert the Union has breached its duty of fair representation. The CBA is valid and operative. Plaintiffs cannot represent those other union members who are represented by separate unions without asserting those union representatives breached their duty of fair representation.

C. PLAINTIFFS' REQUEST FOR ADDITIONAL DISCOVERY PURSUANT TO NRCP 56.

40. Nevada Rules of Civil Procedure Rule 56 provides:

> (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

NRCP 56(d).

41. A party opposing summary judgment pursuant to NRCP 56(d) has the burden of affirmatively demonstrating by a good-faith affidavit (1) the identification of the specific facts that further discovery would reveal; (2) the specific reasons why such evidence is presently unavailable; and (3) how those facts would preclude summary judgment. Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortgage Corp., 525 F.3d 822, 827 (9th Cir. 2008); Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 657, 669-70, 262 P.3d 705, 714 (2011).

42. Plaintiffs request additional discovery to ascertain whether the CBA is valid or not. Plaintiffs have not provided an affidavit, have not articulated the specific reasons why the evidence they need is unavailable to them, and have not stated how those facts would preclude summary judgment.

V. CONCLUSION AND ORDER.

Based on the foregoing findings of fact and conclusions of law and good cause appearing therefore,

IT IS HEREBY ORDERED summary judgment is entered in favor of GSR and against the Plaintiffs.

DATED this 2nd day of November, 2020.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 3rd day of November, 2020, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

H. JOHNSON, ESQ.
JOSHUA BUCK, ESQ.
SUSAN HILDEN, ESQ.
LEAH JONES, ESQ.
MARK THIERMAN, 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:

Heidi Boe

_____

EXHIBIT 2

June 7, 2019 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss

EXHIBIT 2

FILED
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Jacqueline Bryant
Clerk of the Court
Transaction # 7310764

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.

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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.

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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

Audra Bre

CV16-01264