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' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Plaintiffs-Appellants Eddy Martel, Mary Anne Capilla, Janice Jackson-Williams, and Whitney Vaughan are all natural persons, none of whom have stock or ownership interest in any entity involved in these proceedings, and none have a parent or subsidiary company or corporation.

The undersigned counsel of record further certifies that the firm of **Thierman Buck, LLP**, and its attorneys Mark R. Thierman (Nev. Bar No. 8285), Joshua D. Buck (Nev. Bar No. 12187), Leah L. Jones (Nev. Bar No. 13161), and Joshua R. Hendrickson (Nev. Bar No. 12225) are the only attorneys who have appeared for Appellants in the case or who are expected to appear in this Court.

Dated: August 11, 2021

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I. INTRODUCTION

This Appeal is brought by Plaintiffs-Appellants employees who seek to enforce their rights to minimum wages, overtime wages, and continuation wages conferred by Nevada statutory law and the Nevada Constitution Minimum Wage Amendment. Unfortunately, the District Court's manifest misunderstanding of Nevada statutory wage and hour law has prevented these hourly-paid employees from receiving compensation for the hours they worked on behalf of and at the direction of their employer. Through two of its orders and one clarification, the District Court has been given three opportunities to provide relief to the employee Appellants, but instead has misinterpreted statutory law, made erroneous findings of fact that are not supported by the record, and made legally unsound rulings on novel issues of law that prevent the employees from seeking redress through the courts.

Consequently, Plaintiffs-Appellants appeal the following three (3) orders:

(1) The June 7, 2019, Order Granting, in Part, and Denying, in Part, Respondents' Motion to Dismiss. *See* Joint Appendix "JA" at Vol. 10, pp. 2013-2027, hereinafter "June 2019 Order." In the June 2019 Order, the Court held that a two-year statute of limitation applies to Appellants' Nevada Revised Statute ("NRS") 608.016, 608.018, and 608.020-.050 wage claims as opposed to the general three-year limitation period for statutory violations set forth in NRS 11.190(3)(a). (*Id.*, p. 2019.) Absent specific statutory direction to the contrary, NRS 11.190(3)(a)

provides a general three-year limitations period for "an action upon a liability created by statute." *See* NRS 11.1930(3)(a). The Nevada Legislature is perfectly capable of providing for a different statutory period where it wishes to limit a limitations period, as it did with NRS 608.250-260. But because the Legislature has not set forth specific statutory periods for NRS 608.016, 608.018, and/or 608.020-.050 claims, the general three-year statutory period must apply and the District Court's decision to the contrary should be reversed.

(2) The November 3, 2018, Order granting Respondents' Second Motion for Summary Judgment. *See* JA at Vol. 15, pp. 2945-2967, §B, hereinafter "November 2020 Order." In the November 2020 Order, the District Court committed three (3) reversible errors. First, The District Court concluded Plaintiff-Appellant Martel's (individually referred to hereinafter as "Appellant Martel") continuation wage claims were time barred by the inappropriately applied two-year limitations period. (*Id.* at pp. 2956-2957.) The District Court erred by concluding that Appellant Martel's continuation wage claims began to run on the last day that he performed work (*id.* at pp. 2957-2958), even though a claim for continuation wages brought pursuant to NRS 608.020-.050 does not fully accrue until 30-days after the employment relationship ended, which was within two years from the date of filing the complaint.

Second, the District Court held that Plaintiff-Appellant Jackson-Williams (individually referred to hereinafter as "Appellant Jackson-Williams") was not eligible for Nevada statutory overtime, because of the collective bargaining exception contained in NRS 608.018(e).[1] *See* JA at Vol. 15, pp. 2945-2967, §B. The District Court erred by concluding that Appellant Jackson-Williams was not eligible for Nevada statutory overtime because (1) there was not an operable Culinary CBA during the relevant time period asserted in this case, and (2) even if a Culinary CBA was operable, the CBA does not "provide otherwise for overtime."

Third, the District Court held that Appellant Jackson-Williams could not represent a putative class of union and non-union employees for statutory wage violations based on a determination of law that "the union was the exclusive representative of union employees." (*Id.* at pp. 2964-2965.) This is also incorrect. Even if Appellant Jackson-Williams was a union employee during a portion of her employment, now as former employee, Appellant Jackson-Williams can represent union and non-union employees alike, without having to rely on the union to prosecute the claims. *Lucas v. Bechtel Corp.,* 633 F.2d 757, 759-60 (9th Cir. 1980) ("The individuals have sued to vindicate their uniquely personal rights to the wages

[1] NRS 608.018(3)(e) contains two (2) conditions that the employer must meet in order to prove the exemption: (1) the employees must be covered by a valid and operable collective bargaining agreement, and (2) the collective bargaining agreement must "provide otherwise for overtime."

claimed under the allegedly breached agreements, not rights reserved to the union such as picketing, renegotiating a contract or protesting a plant relocation.").

(3) The District Court's June 21, 2021, Order clarifying the November 2020 Order as a final judgement granting summary judgment in favor of Defendants-Respondents on all non-overtime wage claims by all Plaintiffs-Appellants made additional puzzling determinations of law and fact. (*See* JA at Vol. 16, pp. 3125-3131, hereinafter "June 2021 Clarification"). In the 2021 Clarification, the District Court stated:

> "The Court acknowledges eighteen (18) months of Ms. Jackson-Williams' claims were not time-barred. *November Order*, p. 15, ¶ 17. However, Ms. Jackson-Williams claims for Failure to Pay Overtime Wages in Violation of NRS 608.140 and 608.018 are barred because the Court found the CBA provided otherwise for overtime and wages. *November Order*, p. 19, ¶ 28. While the Court did find Ms. Jackson-Williams' could proceed without undertaking the grievance procedure of the CBA, the Court nevertheless found Ms. Jackson-Williams did not have standing to bring her claims because Plaintiffs did not prove the union as a bargaining agent breached its duty of fair representation in its representation of the employees, barring her claims. *November Order*, p. 21, ¶ 39. Accordingly, the Court found summary judgment appropriate in favor of Defendants and against each of Ms. Jackson-Williams' claims.

(*Id.* at pp. 3129-3130.) The June 2021 Clarification highlights the District Court's fundamental misunderstanding (and misapplication) of Nevada's wage-hour statutes. Even though the District Court acknowledged Appellant Jackson-

Williams' claims were not time barred, and that she was not required to file a grievance through the union, the District Court effectively barred Appellant Jackson-Williams individually (and on behalf of all Nevada union employees) from asserting any non-overtime statutory wage claims based upon a fictionalized "union exception." While there is a collective bargaining exception to the payment of statutory overtime under NRS 608.018(e) if certain conditions are met, there are no union exceptions to the payment of minimum wages or regular rate wages pursuant to the Nevada Minimum Wage Amendment and/or wages claims brought pursuant NRS Chapter 608.

Accordingly, Plaintiffs-Appellants submit that the District Court erred in numerous respects with regard to Appellants' wage claims asserted in this action.

II. JURISDICTIONAL STATEMENT

Pursuant to Nevada Rules of Appellate Procedure ("NRAP") 28(a)(4)(A) and (C) this Court has jurisdiction over this case pursuant to NRAP 3A(b)(1) from the appealable determination of a final order of the Second Judicial District Court ("District Court") wherein the District Court granted summary judgment in favor of Defendants-Respondents and against Plaintiffs-Appellants' on all claims alleged. (*See* JA at Vol. 15, pp. 2945-2967, November 2020 Order; *see also* JA at Vol. 16, pp. 3125-3131, June 2021 Clarification.)

Pursuant to NRAP 28(a)(4)(B) Plaintiffs-Appellants' appeal is timely because Plaintiffs-Appellants first filed their notice of appeal of the District Court's November 3, 2020 Order granting summary judgment against Plaintiffs-Appellants and in favor of Defendants-Respondents on November 25, 2020. (JA at Vol. 15, pp. 2994-3037.) The notice of appeal was filed on December 4, 2020 by the District Court through electronic means by using the Court's eflex Electronic Notification System and pursuant to NRAP 4(a)(1).

A briefing schedule was set, with Plaintiffs-Appellants' opening brief due April 21, 2021. However, Plaintiffs-Appellants sought leave from the Court to amend their docketing statement filed on December 17, 2020 as inaccurate because Plaintiffs-Appellants believed that certain claims of Appellant Jackson-Williams remained pending below. Thus, it appeared to Plaintiffs-Appellants that the challenged order was not appealable as a final judgment pursuant to NRAP 3A(b)(1).

On April 29, 2021, the Court issued an order to show cause why Plaintiffs-Appellants' appeal should not be dismissed for lack of jurisdiction. Plaintiffs-Appellants filed their amended docketing statement on April 30, 2021 and timely filed their response to the Court's order to show cause on June 1, 2021 alerting the Court that Plaintiffs-Appellants had filed an expedited request for clarification from the District Court. On June 15, 2021, the Court construed Plaintiffs-Appellants'

response as a motion for an extension of time to respond, extending Plaintiffs-Appellants' response to July 15, 2021.

On June 21, 2021, the District Court clarified that its November 3, 2020, Order was a final judgement and order granting summary judgment in favor of Defendants-Respondents on all claims made by all Plaintiffs-Appellants. (JA at Vol. 16, pp. 3125-3131.) On June 22, 2021, Plaintiffs-Appellants filed their supplemental response to the Court's order to show cause attaching the District Court's clarified order and this Court reinstated the briefing schedule.

III. ROUTING STATEMENT

This case is properly before the Nevada Supreme Court pursuant to NRAP 17(a)(12) because it involves questions of first impression and matters raising as principal issues questions of statewide importance to private employees and employers in Nevada.

Plaintiffs-Appellants appeal the June 2019 Order granting in part and denying in part Defendants-Respondents' Motion to Dismiss, wherein the District Court held that Plaintiffs-Appellants' NRS 608.016, 608.018, and 608.020-.050 statutory wage claims are subject to a two (2) year limitations period, as opposed to the general three-year limitations period for statutory violations set forth in NRS 11.1930(3)(a). (JA at Vol. 10, pp. 2013-2027.)

Plaintiffs-Appellants also appeal the November 2020 Order granting Defendants-Respondents' Motion for Summary Judgment, wherein the District Court held: (1) Appellant Martel's continuation wage claims were time barred by a two-year limitations period because he resigned his job and no wage violations took place during his final pay period (JA at Vol. 15, p. 2958); (2) Respondent met its burden of proof that Appellant Jackson-Williams was exempted from statutory overtime pursuant NRS 608.018 because she was subject to a valid collective bargaining agreement ("CBA") that provided overtime benefits beyond those conferred by statute (*Id.* at pp. 2959-2963); and (3) Appellant Jackson-Williams cannot represent other union employees for unpaid wage claims arising pursuant Nevada statutory law because the union is the exclusive representative of union employees. (*Id.* pp. 2954-2967.) Because the District Court's November Order appeared to keep active Appellant Jackson-Williams individual MWA and NRS 608.040-.050 continuation wage claims, Plaintiffs-Appellants sought clarification from the District Court.

The District Court's June 21, 2021 Order clarified that the District Court granted summary judgment in favor of Defendants-Respondents and against all Plaintiffs-Appellants on all claims. (JA at Vol. 16, pp. 3125-3131.) The District Court explained that although the two-year statute of limitations established in the District Courts' June 7, 2019 Order (JA at Vol. 10, pp. 2013-2027) and reiterated in

the District Court's November 3, 2020 Order (JA at Vol. 15, pp. 2958-2959) provided that Appellant Jackson-Williams had eighteen (18) months of wage claims that were not time-barred (JA at Vol. 16, p. 3129), Appellant Jackson-Williams' claims for violations of NRS 608.140 and 608.018 were barred because the District Court had held that the CBA provided otherwise for overtime wages. (*Id.*) The District Court further explained, that "[w]hile the Court did find Ms. Jackson-Williams could proceed without undertaking the grievance procedure of the CBA, the Court nevertheless found Ms. Jackson-Williams did not have standing to bring her claims because Plaintiffs did not prove the union as a bargaining agent breached its duty of fair representation in its representation of the employees, barring her claims." (*Id.*)

IV. ISSUES PRESENTED

1. Whether the District Court erred by holding that the CBA in question was valid and exempted Appellant Jackson-Williams from seeking overtime pursuant to NRS 608.018; and

2. Whether the District Court erred by holding that Appellant Jackson-Williams could not represent a putative class of union employees for statutory wage and MWA violations on the grounds that the union was the exclusive representative of union employees;

3. Whether the District Court erred by holding, by necessary implication in its Clarification Order, that Nevada union employees cannot seek non-overtime wage claims pursuant to the Nevada Minimum Wage Amendment and NRS Chapter 608;

4. Whether the District Court erred by holding that statutory wage claims brought pursuant to various provisions of NRS Chapter 608 (none of which contain a specific limitations period) are subject to a two-year statute of limitations, as opposed to the general three-year limitations period for statutory violations that the Nevada Legislature mandated in NRS 11.190(3)(a).

5. Whether the District Court erred by holding that the statute of limitations for a claim for continuation wages pursuant to NRS 608.020-.050 begins to run on the last day an employee works even though the wages under that statutory provision do not fully accrue until 30-days after the employment relationship ends;

6. Whether the District Court erred by holding that Nevada employees can only seek continuation wages pursuant to NRS 608.020-.050 for alleged wages violations that occur during the last pay period before an employee's separation from employment;

7. If the District Court did not err by holding that Nevada employees can only seek continuation wages pursuant to NRS 608.020-.050 for alleged wages violations that occur during the last pay period before an employee's separation from employment, did the District Court nonetheless err by concluding that Appellant Martel did not assert a claim for unpaid wages during his last pay period worked.

V. STATEMENT OF THE CASE

This action arises out of an employment dispute between the Plaintiff-Appellant employees (collectively "Appellants" or "Plaintiffs-Appellants") and the Defendant-Respondent employer HG Staffing, LLC, MEI-GSR Holdings, the Grand Sierra Resort ("Respondents" or "Defendants-Respondents"), regarding alleged unpaid wages. Appellants asserted two (2) general theories for wage liability in the District Court. First, Appellants allege Respondents maintained policies, practices,

and procedures which required employees to perform work activities without compensation—*i.e.*, off-the-clock work. Second, Appellants allege that Respondents did not pay daily overtime pursuant to NRS 608.018 when employees worked over eight (8) hours in a workday, which is defined by Nevada law as a rolling 24-hour period of time. (*See* NRS 608.126.) Pursuant to these two theories, Appellants asserted the following four (4) causes of action pursuant to Nevada's wage-hour laws: (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. (First Amended Complaint, the operative complaint at JA at Vol. 5, pp. 906-1060.)

More specifically, Appellants allege that Appellant Jackson-Williams, who was employed as a room attendant/housekeeper, was required to attend pre-shift meetings without pay. Appellants also allege that Appellant Martel, who was employed as an attendant in the Bowling Center, was required to conduct banking activities and attend pre-shift meetings without pay. Appellants also allege that Appellant Martel was not compensated daily overtime when he worked over eight (8) hours in a workday. Appellants allege that Appellant Capilla, who was employed as a dealer, was required to attend pre-shift meetings without pay. And Appellants

allege that Appellant Vaughan, who was employed as a dancing dealer (part cards dealer, part go-go dancer), was required to attend dance/choreography classes without pay.

VI. STATEMENT OF FACTS

A. Relevant Procedural Background

On June 14, 2016, Appellants filed a class action complaint against Respondents in the Second Judicial District Court for the State of Nevada for alleged unpaid wages on behalf of themselves and all similarly situated individuals, asserting four Nevada state law wage and hour violations: (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. (Original complaint at JA at Vol. 1, pp. 1-109.)

On July 25, 2016, Respondents removed the case to federal court arguing that Appellants' "claims are preempted by Section 301 of the Labor Relations Management Act ("LRMA") of 1947." (JA at Vol. 8, pp. 1523-1536.) On December 6, 2016, United States District Court Judge Robert Jones issued his order remanding the case back to the District Court rejecting Respondent's assertion that the LRMA preempted Appellants' claims, because the Plaintiffs-Appellants' claims were

created by Nevada state law and were not substantially dependent on the terms of the CBA. Specifically, Judge Jones held that "[a]ll of Plaintiffs' claims arise specifically under Nevada law, independently of any CBA. Plaintiffs' claims are expressly based on NRS 608.016 …; NRS 608.018 …; and NRS 608.020-050 … ." (JA, at Vol. 8, pp. 1523-1536, §III.a.) Judge Jones further opined that resolving Plaintiffs-Appellants' claims would not require interpretation of the CBA and that "[m]erely looking to a CBA to calculate the amount of unpaid wages does not trigger Section 301 preemption" for Plaintiffs-Appellants' NRS and MWA claims. (*Id.* at pp. 1532-1533, § III.b.)

On January 1, 2017, Respondents filed their first Motion to Dismiss, which was stayed pending this Court's decision in *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499. 504 (Nev. 2017).[2] The stay was lifted on December 27, 2012 and Respondents filed their second Motion to Dismiss on January 22, 2018.[3]

[2] Respondents' first motion to dismiss and the corresponding documents are not included in the Joint Appendix pursuant to NRAP 30(b) because they are not essential to the decision of the issues presented by the appeal.

[3] Respondents' second motion to dismiss and the corresponding documents are not included in the Joint Appendix pursuant to NRAP 30(b) because they are not essential to the decision of the issues presented by the appeal.

On October 9, 2018, the Second Judicial District Court entered its Order Granting Defendants-Respondents' Motion to Dismiss, holding that the Appellants failed to provide sufficient information to support their claims.[4] (JA at Vol. 5, pp. 884-894.) Thereafter, Appellants filed a Motion for Reconsideration of the Court's Order Granting Respondents' Motion to Dismiss or in the alternative Leave to File an Amended Complaint pursuant to NRCP Rule 60(b). After full briefing, the Court granted Appellants leave to file an amended complaint, on January 9, 2019. (JA at Vol. 5, 895-905.)

On January 29, 2019, Appellants filed their First Amended Complaint ("FAC" and operative complaint) asserting the same four (4) causes of action. (JA at Vol. 5, pp. 906-1060.) Respondents filed a Motion to Dismiss First Amended Complaint, pursuant to NRCP 12(b)(5). (JA at Vol. 5-7, pp. 1061-1475.) Appellants opposed on February 28, 2010. (JA Vol. 8, pp. 1476-1644.) Respondents replied in support on March 11, 2010. (JA at Vol. 9, pp. 1645-1789.) Appellants filed supplemental authority on April 3, 2019. (JA at Vol. 9, pp. 1790-1865.)

On June 7, 2019, the Court entered its Order Granting, in Part, and Denying, in Part, Respondents' Motion to Dismiss. (JA at Vol. 10, pp. 2013-2027.) In that Order the Court held that a two-year statute of limitation applies to Appellants' statutory NRS 608.016, 608.018, and 608.020-.050 wage claims. (*Id.*, p. 2019.) As

[4] This Order is not being appealed.

such, the Court dismissed all of Ms. Capilla's 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. (*Id.*, p. 2022.)[5] The District Court's Order on the applicable statute of limitations for statutory wage claims represents Appellants' fourth issue on appeal.

During the period while Respondents' Motion to Dismiss the FAC was being briefed, on May 23, 2019, Respondents filed a Motion for Summary Judgment on all Claims Asserted by Plaintiffs-Appellants Martel, Capilla, and Vaughan, arguing Appellants' claims were barred by claim preclusion. ("First MSJ") (JA at Vol. 10, pp. 1866-1918). Appellants opposed on June 3, 2019. (JA at Vol. 10, 1919-2012). Respondents replied in support on June 10, 2019. (JA at Vol. 10, pp. 2028-2041).[6]

Next, Respondents filed their Answer to Appellants' FAC on June 28, 2019. (JA at Vol. 10, pp. 2060-2069.) Shortly thereafter, on July 8, 2019, Respondents filed a Second Motion for Summary Judgment as to Plaintiff-Appellant Martel; Motion for Summary Adjudication on Plaintiffs' Lack of Standing to Represent

[5] The District Court decided other issues in its 6/7/19 Order but Appellants have only appealed the Court's decision on the applicable statute of limitations for non-minimum wage claims brought under various sections of NRS Chapter 608.

[6] The District Court's Order was dated 6/7/19, three days prior to Respondents' reply in support of the First MSJ. However, the Notice of Entry of Order was not filed until 6/28/19. (JA at Vol. 10, pp. 2042-2059.)

Union Employees; and Motion for Summary Judgment as to Plaintiff Jackson-Williams. ("Second MSJ".) (JA at Vol. 11, pp. 2070-2309.)

However, on July 9, 2019, before Appellants opposed and before the District Court rendered its decision on the First MSJ, Respondents filed a Notice of Filing Petition for Writ of Mandamus and/or Prohibition ("Petition") with the Supreme Court of Nevada. In the Petition, Respondents argued the dismissal of Appellants' first, third, and fourth claims for relief was mandatory on the grounds that the employee-Plaintiffs failed to exhaust administrative remedies as required by NRS Chapter 607; legislatively mandated remedies must be exhausted despite an implied private right of action; and NRS 607.215 requires employee-plaintiffs to exhaust administrative remedies before pursuing wage claims under NRS 608.005 to 608.195 in court. The District Court granted the Parties' request to stay all proceedings pending the Supreme Court of Nevada's decision and withdrew both of Respondents' pending motions for summary judgment from submission, without prejudice, allowing renewal upon the Supreme Court of Nevada's decision. (JA at Vol. 12, pp. 2372-2374.)

On May 7, 2020, this Court issued its decision affirming the District Court, stating, "[i]n *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499. 504 (Nev. 2017), we held, by necessary implication, that exhaustion of administrative remedies is not required before filing an unpaid-wage claim in district

court." *HG Staffing, LLC; and MEI-GSR Holdings, LLC, D/B/A Grand Sierra Resort v. Second Judicial Dist. Court in & for Cty. of Washoe,* No. 79118 (Nev. May 7, 2020). (JA at Vol. 12, pp. 2375-2376).

On June 9, 2020, Respondents renewed their Second MSJ on the following grounds:

> Defendants HG STAFFING LLC, and MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT (collectively "GSR"), by and through their counsel of record, hereby move, pursuant to Nev. R. Civ. P. 56, for: (1) summary judgment as to Plaintiff Martel, on grounds that all of his claims are barred by the two-year statute of limitations; and (2) summary judgment as to Plaintiff Jackson-Williams on grounds that she failed to exhaust grievance procedures of the collective bargaining agreement to which she was subject, and also is not entitled to overtime under that collective bargaining agreement. If the Court declines to grant summary judgment as to either Plaintiff on these grounds, Defendants request summary adjudication on: (1) Plaintiffs' lack of standing to represent union employees in a class action, and (2) Plaintiff Jackson-Williams' Third Cause of Action on grounds that she is not entitled to overtime under NRS 608.018.

(JA at Vol. 12-13, pp. 2377-2679.) Appellants timely opposed on July 1, 2020. (JA at Vol. 14, pp. 2680-2830). Respondents replied in support on July 16, 2020. (JA at Vol. 15, pp. 2831-2944). On November 3, 2020, the District Court granted Respondents' Second MSJ, in part. (JA at Vol. 15, pp. 2945-2967.)

B. The District Court's November 3, 2020 Order Granting Respondents' Second MSJ

Respondents raised four arguments in support of their Second MSJ. The District Court granted Respondents' Second MSJ, in part on three of Respondents' arguments: (1) all of Appellant Martel's claims were time barred, (2) Appellant Jackson-Williams could not assert a statutory overtime claim under NRS 608.018 because the CBA provided otherwise for overtime, and (3) Appellant Jackson-Williams could not represent a class of union employees because the union was the exclusive representative. The District Court denied Respondents' Second MSJ on the fourth argument, holding that Appellant Martel and Appellant Jackson were not required to exhaust a union grievance procedure prior to filing suit. (*Id.*)

The District Court's reasoning for granting Respondents' Second MSJ is more fully set forth below.

1. The District Court's Holding That Respondents Had Met Their Burden Of Demonstrating That There Was A Valid Collective Bargaining Agreement That Exempted Plaintiff Jackson-Williams From Statutory Overtime

NRS 608.018 governs the payment of overtime when an employee works over eight (8) hours in a workday and/or over forty (40) hours in a workweek. *See* NRS 608.018. An employer is exempted from daily and/or weekly overtime only if it can prove that one of the exemptions contained within Subsection 3 applies. *See* NRS 608.018(3). In this case, Respondents alleged that they are exempt from Nevada's

overtime requirements pursuant to Subsection 3(e) which states that an employer does not have to pay statutory overtime to "Employees covered by collective bargaining agreements which provides otherwise for overtime." (JA at Vol. 12, pp. 2381-2382; *see also* JA at Vol. 15, pp. 2838-2842.) Despite Respondents' failure to present anything more than an unsigned, redline draft of a purported agreement that had previously expired on its own terms, the District Court concluded that Respondents had met their burden that Appellant Jackson-Williams was covered by a valid collective bargaining agreement. (JA at Vol. 15, pp. 2959-2963.) The District Court then concluded that the collective bargaining agreement "provided otherwise" for overtime beyond the provisions guaranteed by NRS 608.018. (*Id.* at p. 2962, ¶27.) This holding represents Appellants' first issue on Appeal.

2. The District Court Stated That Appellant Jackson-Williams Could Not Represent A Class Of Union Employees For The Remaining Claims Under NRS 608.016, the Nevada Constitutional Minimum Wage Amendment, and Continuation Wages Under NRS 608.020-.050

Although the District Court denied Respondents' Second MSJ on the grounds that Appellant Jackson-Williams was not required to exhaust the grievance procedure under the purported collective bargaining agreement (JA at Vol. 15, pp. 2963-2964), the District Court curiously ruled that Appellant Jackson-Williams could not represent a class of union employees in a wage claim that was based on Nevada statutory and constitutional violations (as opposed to violations of the

purported collective bargaining agreement) because, in the District Court's view, the union was the only entity that could bring such claims. (JA at Vol. 15, pp. 2964-2965.) The Court stated:

> 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.

(*Id.* at p. 2965, ¶39.) This represents Appellants' second issue on Appeal. As set forth more fully in the discussion section of this brief, the District Court confuses a union's exclusivity of representation for claims pursued under a union contract with an employee's right to seek class-wide relief on statutory violations regardless of union membership.

3. The District Court's Holding That Appellant Martel's Claims Were Time-Barred

The District Court's decision to grant Respondents' Second MSJ against Appellant Martel on the grounds that he was time-barred was based on numerous novel issues of law that must be finally resolved by this Court. First, the District Court reiterated its holding that all wage claims brought under NRS Chapter 608 are subject to a 2-year statute of limitations, as opposed to the general 3-year limitations for statutory violations pursuant to NRS 11.190(3)(a). (JA at Vol. 10, pp. 2013-2027, § II.A1 at p. 7.) The District Court extrapolated this Court's recent decision

in *Perry v. Terrible Herbst, Inc.*, to limit all wage claims brought pursuant to NRS Chapter 208. *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 258 (2016) (holding that the express 2-year limitation for asserting minimum wage claims under NRS 608.250-.260 should be applied with equal force for a claim brought under the Nevada Constitutional Minimum Wage Amendment, wherein there is no express limitations period). The District Court stated that, "The two-year statute of limitations 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."[7] (*Id*.)

Having held that all of Plaintiffs-Appellants' claims were subject to a two-year statute of limitations, the District Court next held that Appellant Martel's claims were time-barred because he last performed work for Respondents one (1) day past the two-year limitations period. (JA at Vol. 15, pp. 2957-2958.) In doing so, the District Court made yet more novel conclusions of law with respect to when an employee may properly assert a claim for continuation wages under NRS 608.020-.050, when such a claim for continuation wages accrues, and made an unsupported factual finding that Appellant Martel did not suffer any wage loss in his last pay period of employment. (*Id.*) Specifically, without any legal support, the District

[7] The District Court reiterated this holding in its November 2020 Order (JA at Vol. 15, pp. 2956-2959, § IV.A) stating a two-year statute of limitations applies to NRS 608 statutory wage claims.

Court concluded that "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." (*Id.* at ¶¶10-12.) The District Court stated, "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 that rule applies to previously unpaid wages or exists to create a cause of action for those wages." (*Id.* at ¶13.) Remarkably, the District Court further concluded that "[n]o shift jamming, no off-the-clock banking, and no pre-shift meeting occurred during Mr. Martel's final pay period." (*Id.* at ¶11.) These holdings represent Appellants' fifth, sixth, and seventh issues on Appeal. As set forth fully in the discussion section of this brief, the District Court's novel legal conclusions with respect to NRS 608.020-.050 are seriously flawed and its factual conclusions are unsupported by the record.

C. The District Court's Clarification Of The November 3, 2020 Order

Based on the District Court's holding that Appellant Jackson-Williams' alleged claims fell within the purported two-year statutory period and that she did not have to resort to the grievance procedures of the purported CBA, Appellants believed that Appellant Jackson-Williams' MWA and NRS 608.040-.050 continuation claims remained pending below. Accordingly, Appellants sought clarification of the November 3, 2020 order, which the District Court provided in its June 21, 2021 order. (JA, at Vol. 16, pp. 3125-3131.)

The District Court's June 21, 2021 Order clarified the District Court's intent to enter summary judgment in favor of Defendants-Respondents and against all Plaintiffs-Appellants on all claims. The District Court explained that although the two-year statute of limitations determined in the District Courts' June 7, 2019 Order (JA at Vol. 10, pp. 2013-2027) and reiterated in the District Court's November 3, 2020 Order (JA at Vol. 15, pp. 2945-2967) provided Appellant Jackson-Williams with eighteen (18) months of wage claims that were not time-barred (JA, at Vol. 16, p. 3129), Appellant Jackson-Williams' claims for NRS 608.140 and 608.018 were barred because the District Court's November 3, 2020 order held that the CBA provided otherwise for overtime wages. (*Id.* at pp. 3129-3130.) The District Court further explained, that "[w]hile the Court did find Ms. Jackson-Williams could proceed without undertaking the grievance procedure of the CBA, the Court nevertheless found Ms. Jackson-Williams did not have standing to bring her claims because Plaintiffs did not prove the union as a bargaining agent breached its duty of fair representation in its representation of the employees, barring her claims." (*Id.* at p. 3130.) In so holding, the District Court has effectively held that Nevada union employees who are covered by a purportedly valid collectively bargaining agreement cannot assert non-overtime wage claims in court.

VII. SUMMARY OF ARGUMENT

(1) The District Court erred by holding that the CBA in question was valid and that it barred Appellant Jackson-Williams from seeking overtime pursuant to NRS 608.018. Appellant Jackson-Williams and all other similarly situated employees may properly assert a claim for unpaid daily overtime pursuant to NRS 608.018 because: (1) there was not an operable Culinary CBA during a significant part of the relevant time period asserted in this case and (2) even if the Culinary CBA was operable, the CBA does not "provide otherwise for overtime" so as to exempt purported union members from receiving overtime under NRS 608.018. The purported CBA in effect up until the Respondents provided one as an exhibit to their Motion for Summary Judgement and dated November 1, 2016, was a nine-plus-year old unsigned, undated, redlined document that expired on its own terms May 2011. Thus, there was no valid CBA in effect between May 2011 and November 1, 2016. (JA at Vol. 14, pp. 2829.)[8] Both purported CBAs include identical text in the overtime provision that specifically states, "This provision will remain in effect for

[8] Respondents provided through declaration supporting their Reply in Support of Summary Judgement a CBA dated 11/1/16 to 10/31/23, which differs in some respects from the CBA expired in May 2011. However, the new CBA quoted here, includes the exact same language as the old CBA. The CBA purportedly valid during a significant portion of the class period expired by its own terms May 2011. (JA at Vol. 14, pp. 2829.) Accordingly, employees covered by the expired CBA and/or the Culinary Union would only be entitled to overtime as guaranteed to them by the federal Fair Labor Standards Act (FLSA) and/or by NRS 608.018.

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."* (JA Vol. 15, p. 2893.) (emphasis added.) Accordingly, all employees covered by the Culinary Union and any purported CBA would only be entitled to overtime as guaranteed to them by the federal Fair Labor Standards Act (FLSA) and/or by NRS 608.018. This does not meet the criteria of "provid[ing] otherwise for overtime." Both CBAs include the identical overtime provision that does not guarantee Culinary Union employees overtime above what is provided by Nevada state statute because the Culinary CBA and NRS 608.018 provide for daily overtime over 8 hours in a workday and weekly overtime over 40 hours in a workweek. Thus, the CBA *does not provide otherwise* for overtime premium pay and the District Court must be reversed.

(2) The District Court erred by holding that Appellant Jackson-Williams could not represent a putative class of union employees for statutory wage violations on the grounds that the union was the exclusive representative of union employees. Regardless of whether any of the Appellants in this case were at one point in time subject to a valid CBA, courts continually find that union and non-union members can sue for statutory wage violations on behalf of other employees regardless of

union membership. *See Lucas v. Bechtel Corp.,* 633 F.2d 757, 759-60 (9th Cir. 1980) ("The individuals have sued to vindicate their uniquely personal rights to the wages claimed under the allegedly breached agreements, not rights reserved to the union such as picketing, renegotiating a contract or protesting a plant relocation."); *see also L. Mets Lerwill v. Inflight Motion Pictures,* 582 F.2d 507, 511 (9th Cir. 1978). The statutory wage claims that form the basis for Appellants' and all of Respondents' employees' claims were properly before the District Court. *See Clark Cty. Sch. Dist. v. Riley*, 116 Nev. 1143, 1148, 14 P.3d 22, 24–25 (2000) (this court has jurisdiction to determine questions of statutory law that may or may not fall outside of collective bargaining agreements). And Appellants and all putative class members claims share a common interest and have all suffered the same alleged injuries, specifically, a failure by their employer, Respondents, to pay statutorily required wages. Accordingly, Appellants in this action must be allowed to represent union and non-union employees alike and the District Court should be reversed.

(3) The District Court erred by holding, by necessary implication in its June 2021 Clarification Order, that Nevada union employees cannot seek non-overtime wage claims under the Nevada Minimum Wage Amendment and NRS Chapter 608. The District Court has effectively barred Plaintiff-Appellant Jackson-Williams (and all Nevada union employees) from asserting any non-overtime statutory wage claims based upon a fictionalized "union exception." While there is a collective bargaining

exception to the payment of statutory overtime under NRS 608.018(e) if certain conditions are met, there are no union exceptions to the payment of minimum wages or regular rate wages pursuant to the Nevada Minimum Wage Amendment and/or wages claims brought under NRS 608.016 for all hours worked, and NRS 608.020-.050 continuation wages. Accordingly, Appellant-Jackson-Williams must be allowed to assert her own MWA and/or NRS 608.016 and NRS 608.020-.050 claims as well as represent a putative class of union and non-union employees alike, and thus, the District Court must be reversed.

(4) The District Court erred by holding that statutory wage claims brought under various provisions of NRS Chapter 608 (none of which contain a specific limitations period) are subject to a two-year statute of limitations, as opposed to the general three-year limitations period for statutory violations that the Nevada Legislature mandated as set forth in NRS 11.190(3)(a). The Nevada Legislature, through NRS 11.190(3)(a), provided for a three three-year limitations periods for statutory claims. Absent specific statutory direction to the contrary, NRS 11.190(3)(a) provides a general three-year limitations period for "an action upon a liability created by statute." *See* NRS 11.1930(3)(a). Indeed, the Legislature is perfectly capable of providing for a different statutory period where it wishes to limit a limitations period, as it did with NRS 608.250-260. But because the Legislature has not set forth specific statutory periods for NRS 608.016, 608.018, and/or

608.020-.050 claims, the general three-year statutory period applies and the District Court's decision to the contrary should be reversed.

(5) The District Court erred by holding that the statute of limitations for a claim for continuation wages pursuant to NRS 608.020-.050 begins to run on the last day an employee works because a claim for continuation wages under NRS 608.040 and/or NRS 608.050 does not fully accrue until 30-days after the employment relationship ends. Appellant Martel last performed work on June 13, 2014, which was 2 years and 1 day from the day that Appellants filed their complaint. (JA at Vol. 14, pp. 2685) However, Appellant Martel's last day worked is not the deciding factor in whether he has submitted a timely claim for unpaid wages and continuation wages under NRS 608.020-.050; the deciding factor is whether he filed his claim no later than two years after the expiration of the 30 day continuation wage period following his separation from employment. There are two independent and separate statutes that provide for continuation wages (30-days wages under each statute) when a separated employee does not receive everything that is owed to him/her/them at the time of termination. *See* NRS 608.040 and NRS 608.050. An employee's claim for continuation wages does not accrue until 30-days ***after*** the employment relationship ends. *Id.* Therefore, even if the District Court was correct that a two-year limitations period applies to wage claims under NRS 608.016, 608.018, and 608.020-.050, Appellant Martel's continuation wage claim statute of limitations did

not expire until two years from the 30-day continuation wages period following the last day he worked. Because Appellant Martel filed his complaint within two years from the date when his wage claims accrued—*i.e.*, 30-days from his last day worked—his claims for continuation wages were timely filed and the District Court should be reversed.

(6) The District Court erred by holding that Nevada employees can only seek continuation wages under NRS 608.020-.050 for alleged wages violations that occur during the last pay period before an employee's separation from employment. The District Court's pronouncement would effectively let employers fail to pay wages the employee earned in the month, year, or years prior to the last pay period without any penalty whatsoever, if the employer correctly pays the employee for the final week(s) or days of the employee's final pay period. This is an absurd result and not what the Legislature had in mind in adopting NRS 608.020-.050. The Court in *Doolittle v. Eighth Judicial Dist. Court,* quoting chapter 71, Stats. 1919, p. 121, §2776, NCL[9] and what would become NRS 608.020-.050, acknowledged that the term of service by the employee on behalf of his/her/their employer could be "by the hour, day, week or month," and that "each of his employees may charge and collect

[9] *See* https://www.leg.state.nv.us/Statutes/29th1919/Stats191901.html#Stats191901page121 Last visited 8/9/21.

wages in the sum agreed upon in the contract of employment for each day his employer is in default, until he is paid in full, without rendering any service therefore, provided, however, he shall cease to draw such wages or salary thirty days after such default." *Doolittle v. Eighth Judicial Dist. Court,* 54 Nev 319, 15 P. 2d 684, 684-85 (1932); *see also Bowers v. Charleston Hill Nat. Mines, Inc.,* 50 Nev. 99, 256 P. 1058 (1927) (*citing* Stats. 1925 p. 226.)[10] The District Court ignores the fact that the continuation wage statutes contemplated a duration of employment that could last for a period greater than the last pay period of an employee's term of employment. Accordingly, because Appellants Martel and Jackson-Williams provided labor to Respondents but were not paid all wages due and owing at the time of separation from employment, the District Court must be reversed.

(7) Even if the District Court did not err by holding that Nevada employees can only seek continuation wages under NRS 608.020-.050 for alleged wages violations that occur during the last pay period before an employee's separation from employment, the District Court nonetheless erred by concluding that Appellant Martel did not assert a claim for unpaid wages during his last pay period worked. Appellant Martel's time records indicate he clocked in on June 12, 2014, at 6:10 p.m. and clocked out from his final shift at 12:26 a.m. on June 13, 2014, (JA at Vol.

[10] *See* https://www.leg.state.nv.us/Statutes/32nd1925/Stats192502.html Last visited 8/9/21.

14, p 2685), which is two years and one day from the date Appellants filed their original complaint on June 14, 2016. (JA at Vol. 1, pp. 1-109.) In Appellants' FAC and operative complaint, Appellant Martel alleged he was required to conduct pre- and post-shift work without compensation. As a cash-bank carrying employee, Appellant Martel further alleged that Respondents "required [him] to collect his bank of money at the dispatch cage prior to proceeding to his workstation without compensation." (JA at Vol. 5, p. 910, ¶18.) "Similarly, at the end of his regularly scheduled shifts, Plaintiff Martel was required to reconcile and deposit his cash bank to the same dispatch cage without compensation." (*Id.*) Appellant Martel "estimate[d] it took him approximately 15 minutes to perform banking activities for which he was not paid the minimum, regular rate, or overtime wages required by law." (*Id.* at p. 911, ¶19.) Respondents admit that Appellant Martel's final "next regular pay date would have been June 19, 2014. [] Seven days from his last day was June 20, 2014, so his final wages were due by June 19, 2014 – the earlier date" based on NRS 608.030. (JA at Vol. 15, p. 2835.) Respondents also admit that Appellant Martel was paid every two weeks, with "[h]is final paycheck, which was May 31 through June 13, 2014." (*Id.* at p. 2835-2836.) Consequently, Appellant Martel's final two-week period of work would have been May 31, 2014 through June 14, 2014 with his paycheck due on June 16, 2014. (*Id.*) Respondents then indicate that on June 1, 2014, Appellant Martel worked an eight (8) hour shift. (*Id.* at p. 2836.)

This does not include the 15 minutes minimum wage and overtime wages he was entitled to for the unpaid banking activities alleged in Appellants' complaint. Thus, Appellant Martel worked at least one day during his last pay period where he is arguably entitled to minimum wages and overtime wages, which would support a derivative claim for continuation wages under NRS 608.020-.050. Accordingly, Appellant Martel's claim for continuation wages must be remanded to the District Court.

VIII. ARGUMENT

A. The District Court Erred By Finding A Valid CBA That Exempted Appellants From Receiving Overtime Pursuant To NRS 608.018

The District Court erred in dismissing Appellants' NRS 608.018 statutory wage claim because Respondents have not carried their burden of demonstrating that their employees are exempt from overtime under NRS 608.018. *See, e,g., Flores v. City of San Gabriel*, 824 F.3d 890, 897 (9th Cir. 2016) ("The employer bears the burden of establishing that it qualifies for an exemption under the [FLSA]."); *Busk v. Integrity Staffing Sols., Inc. (In re Amazon.com, Inc., Fulfillment Ctr. Fair Labor Standards Act (FLSA) & Wage & Hour Litig.),* 905 F.3d 387, 398 (6th Cir. 2018) ("[W]hen interpreting state provisions that have analogous federal counterparts, Nevada courts look to federal law unless the state

statutory language is "materially different" from or inconsistent with federal law.") (internal citations omitted).

NRS 608.018(3)(e) contains two (2) conditions that the employer must meet in order to prove the exemption: (1) the employees must be covered by a valid and operable collective bargaining agreement, and (2) the collective bargaining agreement must "provide otherwise for overtime." Respondents failed to meet either condition because (1) the purported CBA expired by its own terms in May 2011, prior to Appellants' filing of their complaint, and (2) even if it was determined to be valid, it does not provide otherwise for overtime.

1. The CBA purportedly in effect up to November 1, 2016 expired by its own terms in May 2011.

Respondents have provided three purported CBAs at differing periods throughout this litigation, two of which cannot be held to be valid and none which "provide otherwise for overtime" sufficient to meet NRS 608.018(3)(e)'s overtime exemption.

The first purported CBA has one signatory date of December 7, 2010. (JA at Vol. 8, p. 1643.) Respondents provided this CBA titled "Collective Bargaining Agreement between Worklife Financial, Inc. dba Grand Sierra Resort and Casino and Culinary Workers Union Local 226 2009-2010." (JA at Vol. 8, pp. 1574-1644.) This particular CBA expired by its own terms in May 2011. The 2009-2010 CBA

was originally set to expire on December 10, 2010. (*See* JA at Vol. 8, p. 1607 and Vol. 14, p. 2793.)[11] The employer at the time, Worklife Financial, Inc. dba Grand Sierra Resort and Casino, and the Culinary Workers Union Local 226 agreed to extend the 2009-2010 CBA until March 10, 2011, pursuant to a Memorandum of Agreement: "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." (JA at Vol. 8, p. 1643 and Vol. 14, p. 2829.).

Critically, however, the parties' Memorandum of Understanding provided a 30-day termination of the CBA should the property be sold:

> 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 sales 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.

(JA at Vol. 8, p. 1643 and Vol. 14, p. 2829.).

[11] Article 24: Termination – 24.01. The Agreement shall be in full force and effect for eighteen (18) months from June 10, 2009, which is the date when the Union ratified the Agreement. Accordingly, the Agreement shall expire on December 10, 2010.

This is precisely what happened here. The property was sold to Respondents and closed on or about March 31, 2011. Neither the union nor Respondents engaged in subsequent negotiations following the sale of the property. Accordingly, under the terms of both the CBA and the Memorandum of Understanding, the 2009-2010 CBA "expired by its own terms on or around May 1, 2011." (JA at Vol. 8, p. 1529.)

Second, with Respondents' January 2018 Motion to Dismiss, Respondents provided another purported CBA titled, "Collective Bargaining Agreement between Worklife Financial, Inc. dba Grand Sierra Resort and Casino and Culinary Workers Union Local 226 ~~2009~~-2010-2020." (JA at Vol. 2-3, pp. 432-505.) (Strikethrough in original.) This particular CBA was an undated, unsigned, underlined, and redlined draft. (*Id.*) Specifically, there is no date as to when or if the CBA was entered into, (*id.* at pp. 438, 471, 481,) and the underlines, redlines, and handwritten question marks in the margins throughout the document indicate that the document was a draft only and not a final agreement of the parties. (*Id.* at p. 438, 441, 443 450, 460-461, 468). There are no signatures on the document, and there is nothing to indicate whether the proposed edits were adopted or whether the draft agreement was ever adopted in any form by the parties. (*Id.* at 469, 470-471, 481). This document also included a new draft of the Termination Article which states:

> **Article 24: Termination** – 24.01.
> The Agreement shall be in full force and effect ~~for eighteen (18) months~~ _____ from ~~June 10, 2009~~, ____ _____, which is the date when the Union ratified the Agreement. Accordingly, the Agreement shall expire on ~~December 10, 2010~~ _____.

(JA at Vol. 2, p. 466.) (Strikethrough in original.)

Third, with Respondents' July 2020 Motion for Summary Judgement, Respondents provided yet another purported CBA titled, "Collective Bargaining Agreement between Grand Sierra Resort and Casino and Culinary Workers Union Local 226 November 1, 2016-October 2023." (JA at Vol. 15, pp. 2877-2943) This document states, "AGREEMENT. This Agreement is made and entered into as of the 1st day of November 2016 …" (*id.,* p. 2883) yet none of the signatory pages include dates. (*Id.* at pp. 2915, 2932, 2934-35, 2937-39, 2941-43.)

As an initial matter, Appellants filed their lawsuit on June 14, 2016. (JA at Vol. 1, pp. 1-109.) It took Respondents until July 2020, just over four years after the fact to provide any signed, albeit never dated CBA, which must be seen as an attempt to circumvent Appellants' lawsuit.[12]

[12] Respondents can prove, at best, that the 2016-2020 was an actual signed agreement. Plaintiffs-Appellants claims, however, stretch back up to 3-years from the date of the initial filing of this action, or June 14, 2013. Accordingly, even if this Court were to affirm the District Court that the 2016-2020 collective bargaining agreement was "valid", it would only cover the time period alleged in this case dating from 2016 onward and would have not impact on the pre-November 1, 2016 claims asserted herein.

Nevertheless, even if certain terms or practices of any of the CBAs could be construed to still be in effect, the text of the overtime provisions in all of them is identical. Specifically, they all state, "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.*** (Compare JA Vol. 8, p. 1589 to Vol. 15, p. 2893 with Vol. 2, p. 447 to "November 1, 2016-October 2023" Vol. 15, p. 2893.) (Emphasis added.) Because the "2009-2010" purported CBA expired by its own terms May 2011 and because the "~~2009~~-2010-2020" was never finalized or ratified and there was thus no valid CBA in affect for the six-year period between the expiration of the purported "2009-2010" CBA and the later "November 1, 2016-October 2023" CBA, employees are entitled to overtime pay as established by statute for, at a minimum, that six-year period of time where there was no valid CBA governing the parties' employment relationship. The overtime provisions for employees covered by the Culinary Union and any purported CBA reverted to overtime as guaranteed to them by the federal Fair Labor Standards Act (FLSA) and/or by NRS 608.018 because all potentially applicable CBAs had expired and thus do not meet

NRS 608.018(3)'s first exemption. This also does not meet the criteria of "provid[ing] otherwise for overtime."

2. Both the May 2011 expired CBA and the purported November 1, 2016 CBA do not provide otherwise for overtime.

Even if the District Court was correct that one or more of the purported CBAs are valid, the second criteria for proving NRS 608.018(3)(e)'s exemption is not met because all three purported Culinary CBAs do not "provide otherwise for overtime." To "provide otherwise for overtime" is to provide overtime above and beyond what is required by statutes.[13]

The relevant overtime provision contained in the "2009-2010" which expired by its own terms May 2011, and the "~~2009~~-2010-2020," and the "November 1, 2016-October 2023" purported Culinary CBA, is as follows:

> **9.01. Shift and Weekly Overtime.**
> 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 (l) workweek, any hours in excess of eight (8) hours in a day or forty (40) hours in a week shall constitute overtime. For

[13] *See e.g.*, https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1975/AB219,1975.pdf, at pp. 8 (last visited Jun. 30, 2020) ("[T]he goal of this piece of legislation [including NRS 608.018] is to humanize working conditions for all and to provide a minimum standard of decency particularly for those who are not represented by collective bargaining.").

> 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 outs 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 (I) reason for the same hours worked, Employees absent for personal reasons on one (l) 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 shall 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.

(*Compare* "2009-2010" at JA at Vol. 8, p. 1589 to "~~2009~~-2010-2020" at JA at Vol. 2, p. 447 to "November 1, 2016-October 2023" Vol. 15, p. 2893.) Based on the identical language in all three CBAs, the purported Culinary CBA did not "provide otherwise for overtime" in two (2) respects. First, as discussed directly above, the "2009-2010" CBA expired by its own terms in May 2011 and thus employees are entitled to overtime as guaranteed to them by the by NRS 608.018 as alleged in Appellants' FAC.

Second, even if the District Court was correct in holding that the "2009-2010" expired CBA was subsequently ratified, the overtime provisions in all three agreements parrot the language of NRS 608.018. The identical provisions of each and every one of them do not guarantee Culinary Union employees overtime above what is provided by Nevada state statute. Again, the language of all three Culinary CBAs state in relevant part:

> 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.

(*See e.g.,* "2009-2010" at JA at Vol. 8, p. 1589; "~~2009~~-2010-2020" at JA at Vol. 2, p. 447; "November 1, 2016-October 2023" Vol. 15, p. 2893.)

By comparison, NRS 608.018 states in relevant part:

> 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.

The CBAs and NRS 608.018 have identical meaning. They each provide for daily overtime over 8 hours in a workday, and weekly overtime over 40 hours in a workweek. "Provides otherwise" for overtime means something above and beyond the statutory floor. Since none of the Culinary CBAs provide otherwise for overtime premium pay for employees who work hours in excess of eight (8) hours in a day or forty (40) hours in a workweek beyond what is provided under NRS 608.018, Respondents are not exempted from NRS 608.018.

Accordingly, the District Court erred in holding any purported CBA provides otherwise for overtime and thus erred in dismissing Appellants' NRS 608.018 claims.

B. Appellants Have Standing To Represent All Employees, Both Purported Union Employees And Non-Union Employees, Because They All Allege That They Are Victims Of Respondents' Unlawful Pay Practices

Even assuming the validity of one or more of the purported CBAs, Appellants and all putative class members share a common interest and have all suffered the same alleged injuries—specifically, a failure by their employer (Respondents) to pay statutorily required wages. Regardless of whether any of the named Appellants in this case were at one point in time subject to a valid CBA (*see* argument in section A, above), courts continually find that union and non-union members can sue for

and on behalf of each other. *See Lucas v. Bechtel Corp.,* 633 F.2d 757, 759-60 (9th Cir. 1980) ("The individuals have sued to vindicate their uniquely personal rights to the wages claimed under the allegedly breached agreements, not rights reserved to the union such as picketing, renegotiating a contract or protesting a plant relocation.") *citing, Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 562, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976); *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 511 (9th Cir. 1978); *Brown v. Sterling Aluminum Products Corp.,* 365 F.2d 651, 657 (8th Cir. 1966), *cert. denied,* 386 U.S. 957, 87 S.Ct. 1023, 18 L.Ed.2d 105 (1967).

Here, the statutory wage claims that form the basis for Appellants' and all of Respondents' employees' claims were properly before the District Court. *See Clark Cty. Sch. Dist. v. Riley*, 116 Nev. 1143, 1148, 14 P.3d 22, 24–25 (2000) (this court has jurisdiction to determine questions of statutory law that may or may not fall outside of collective bargaining agreements); *see also* Order to Remand, JA at Vol. 8, pp. 1523-1536.[14]

[14] *Cf.* (JA, at Vol. 8, pp. 1523-1536, §III.a.). In remanding this action back to the District Court, Respondents' assertions that the purported CBAs somehow conferred jurisdiction for Appellants' MWA and statutory claims to the union have been soundly rejected. Judge Jones explained, that "[a]ll of Plaintiffs' claims arise specifically under Nevada law, independently of any CBA. Plaintiffs' claims are expressly based on NRS 608.016 …; NRS 608.018 …; and NRS 608.020-050 … ." Judge Jones further held that resolving Plaintiffs-Appellants' claims would not require interpretation of the CBA and that "[m]erely looking to a CBA to calculate

In addressing claims under Title VII of the Civil Rights Act, the court in *Woodford v. Safeway Stores, Inc.,* explained it best when the court reasoned:

> A rule disqualifying discharged employees from representing current employees as a matter of law would be intolerable, since it would allow an unscrupulous employer to immunize himself from class action suits. The fact that the employee does not seek reinstatement should not change this result. . . . The extent of their dissatisfaction and their freedom from fear of retaliation makes these former employees among the most likely plaintiffs in Title VII actions. To bar them from representing current employees unless they stay on the job would either impose a hardship on individuals who feel that those jobs offer them no future, or prevent class treatment in a significant number of cases. The Court finds that in these circumstances the dangers to Title VII enforcement outweigh the dangers arising from the differing interests of former and current employees, particularly since the divergent interests are limited to one area, and a court should thus be able to monitor the conduct of the action to assure that adequate representation is being provided.

Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 490, n. 6 (N.D. Cal. 1978). The same reasoning must apply to Appellants' statutory wage claims here.

Accordingly, Appellants have standing to represent union and non-union employees, as well as current and former employees, and the District Court erred in preventing Appellants from so doing.

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the amount of unpaid wages does not trigger Section 301 preemption" for Plaintiffs-Appellants' NRS and MWA claims. (*Id.* at pp. 1532-1533, § III.b.

C. The District Court Erred In Dismissing Appellant Jackson-Williams' Non-Overtime Claims Based On A Fictitious Requirement That Only The Union Could Assert Non-Overtime Wage Claims Brought Pursuant To The Nevada Minimum Wage Amendment And NRS Chapter 608

Regardless of whether Appellant Jackson-Williams was covered by a purported CBA, there is no union contract exception to the MWA or non-overtime provisions to NRS Chapter 608. While there is a collective bargaining exception to the payment of statutory overtime pursuant NRS 608.018(e) if certain conditions are met—which have not been met as analyzed in section A, above—there are no union exceptions to the payment of minimum wages or regular rate wages pursuant to the Nevada Minimum Wage Amendment and/or non-overtime wages claims brought under NRS Chapter 608.

Appellants have provided the District Court with three opportunities to provide MWA and statutorily mandated relief to employees, including an explicit invitation in Appellants' Motion for Clarification, which reminded the District Court that Appellant Jackson-Williams still had claims pending before the District Court because: (1) the District Court recognized Appellant Jackson-Williams has 18 months remaining on her claim, and (2) therefore as a result the November 2020 Order only entered summary judgment against Appellant Jackson-Williams on her overtime claim and did not enter judgment against her remaining wage claims for failure to compensate for all hours worked in violation of NRS 608.140 and

608.016 (first cause of action), failure to pay minimum wages in violation of the Nevada Constitutional (second cause of action), and the derivative failure to pay all wages due and owing in violation of NRS 608.020-050 (fourth cause of action). (JA at Vol. 16, pp. 3038-3054.)

The June 2021 Clarification Order specifically states:

> "The Court acknowledges eighteen (18) months of Ms. Jackson-Williams' claims were not time-barred. *November Order*, p. 15, ¶ 17. However, Ms. Jackson-Williams claims for Failure to Pay Overtime Wages in Violation of NRS 608.140 and 608.018 are barred because the Court found the CBA provided otherwise for overtime and wages. *November Order*, p. 19, ¶ 28. While the Court did find Ms. Jackson-Williams' could proceed without undertaking the grievance procedure of the CBA, the Court nevertheless found Ms. Jackson-Williams did not have standing to bring her claims because Plaintiffs did not prove the union as a bargaining agent breached its duty of fair representation in its representation of the employees, barring her claims. *November Order*, p. 21, ¶ 39. Accordingly, the Court found summary judgment appropriate in favor of Defendants and against each of Ms. Jackson-Williams' claims.

(JA, at Vol. 16, pp. 3129-3130.)

The net effect of the District Court's ruling is that Nevada union employees cannot sue for non-overtime claims when a union is involved. This is not what the law provides and the District Court must be reversed.

D. NRS 608.016, 608.018, And 608.020-.050 Statutory Wage Claims Carry A Three-Year Statute Of Limitations Period As Opposed To A Two-Year Limitations Period

Appellants' state-law NRS 608.016, 608.018, and 608.020-.050 statutory claims are governed by the three-year limitations period set forth in NRS 11.190(3)(a). NRS 11.190 – Periods of limitations—states in relevant part: Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:

> (3) Within 3 years:
>
> (a) An action upon a liability ***created by statute***, other than a penalty or forfeiture. (Emphasis added.)

The Legislature is perfectly capable of providing for a different statutory period where it wishes to limit a limitations period, as it did with NRS 608.250-260. For example, NRS 608.260 "further limit[s] by specific statute" the general three-year default period by mandating a shorter two-year limitations period for actions brought specifically under NRS 608.250.[15] NRS 608.260 does not purport

[15] NRS 608.260 provides in full that "[i]f any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is

to limit causes of action arising under different statutory or constitutional provisions, and by its plain language limits only claims under NRS 608.250. Nor do other provisions within NRS 608 impose internal limitations periods similar to NRS 608.260. Had the Legislature intended to impose such limitations, it could have easily done so.[16] The Legislature's decision not to do so indicates its intent that, other than claims specifically arising out of NRS 608.250, all other statutory wage and hour claims are subject to the more general three-year limitations period set forth in NRS 11.190. By specifically including a limitations period for claims arising out of NRS 608.250 while remaining silent as to claims arising from other statutory provisions, the Legislature indicated that the statute provides an exception, not a general rule. Accordingly, transforming NRS 608.260's specific exception into a generally applicable rule by applying it to statutes outside the context of NRS 608.250 that do not contain similar limiting language would be

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not a bar to the action." Again, most of the provisions of NRS Chapter 608 have no specific statute of limitations, thereby indicating a three-year statute of limitations under NRS 11.190(3).

[16] In the most recent 81st, 2021 Legislative Session, the Legislature again addressed this issue when it specifically provided for a two-year statute of limitation in Senate Bill 107. In so doing the Legislature codified that "Section 2 of this bill requires the default statute of limitation to apply to certain causes of action whose statute of limitations is not otherwise prescribed by law, *regardless of whether the underlying cause of action is analogous to any other cause of action* with a statute of limitations expressly prescribed by law." *See* https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7410/Text# Approved by the Governor on May 27, 2021. Last visited August 5, 2021.

improper. A court cannot read into a statute words that are not there. *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) ("The doctrine of *expressio unius est exclusio alterius* 'as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'").

Accordingly, the District Court erred in limiting Plaintiffs-Appellants' NRS 608.016, 608.018, and 608.020-.050 wage claims to a two-year limitations period as opposed to the general three-year limitations period.

E. Even If The Two-Year Limitation Applies To Continuation Wage Claims Pursuant to NRS 608.020-.050, Appellant Martel Has A Valid NRS 608.020-.050 Claim For Continuation Wages

In granting Respondents' Motion for Summary Judgment on Appellants' claims pursuant NRS 608.020-.050, the District Court erred in multiple respects. First, as discussed directly above, the District Court erroneously limited Appellants' NRS 608.020-.050 claims to a two-year statute of limitations. In addition, the District Court erred because: (1) NRS 608.020-.050 claims do not accrue until 30 days *after* the employment relationship ends, (2) a continuation wage claim is not limited to violations that occur during the last pay period worked; and (3) even if the District Court was correct that Appellant Martel must suffer a wage loss during the last pay period worked, the factual record supports that Appellant Martel did suffer

a wage loss during the last pay period he worked, thus providing grounds for a NRS 608.020-.050 continuation wage claim even under the artificially limited, incorrect interpretation of the statute adopted by the District Court.

1. Continuation wages pursuant to NRS 608.020-.050 do not accrue until 30 days a*fter* the employment relationship ends.

The District Court places a false start on the running of the statute of limitations for a continuation wage claim. It belies common sense that a statute of limitations on a claim can begin to run before a claim even accrues. This is particularly true where the conduct forming the basis for the claimed violation is ongoing and the violation continuing. As set forth herein, a claim under NRS 608.040 and 608.050 cannot and does not fully accrue until 30-days following the last day an employee works.

Nevada law is very clear, an employer must compensate an employee all wages due and owing to an employee at a time certain depending on whether the employment is involuntarily or voluntarily separated from employment. *See* NRS 608.020 ("Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately."); *see also* NRS 608.030 ("Whenever an employee resigns or quits his or her employment, the wages and compensation earned and unpaid at the time of the employee's resignation or quitting must be paid no later than: (1) The

day on which the employee would have regularly been paid the wages or compensation; or (2) Seven days after the employee resigns or quits, whichever is earlier.")[17]

In the event that an employee is not paid all his/her/their wages at the time of separation of employment, the employee's wages continue until he or she is paid in full or for up to 30-days, whichever is earlier. The Nevada Legislature enacted two separate and independent statutes to provide for these continuation wages. *See* NRS 608.040 and NRS 608.050; *see also Evans v. Wal–Mart Stores, Inc.*, No. 14-16566,

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[17] The District Court reasoned in its November 2020 Order that because Appellant Martel resigned from his job and because no "shift jamming, no off-the-clock banking, and no pre-shift meetings occurred during [his] final pay period," his claims were barred. (JA at Vol 15, pp. 2983-2984.) However, the District Court failed to acknowledge the fact that NRS 608.030 – Payment of employee who resigns or quits employment – states in its entirety:

> Whenever an employee resigns or quits his or her employment, the wages and compensation earned and unpaid at the time of the employee's resignation or quitting must be paid no later than:
> 1. The day on which the employee would have regularly been paid the wages or compensation; or
> 2. Seven days after the employee resigns or quits, whichever is earlier.

Thus, any employee of Respondents who quit, resigned, or was terminated, who was not paid wages *during any point* of their employment, and did not receive said payment on the date which he or she would have regularly been paid, or seven days (whichever is earlier) after the last date of employment, is entitled to waiting time penalties/continuation wages.

2016 WL 4269904, at *1 (9th Cir. Aug. 15, 2016) (permitting the recovery of continuation wages under both NRS 608.040 and 608.050).

Appellant Martel last performed work on June 13, 2014, which was 2 years and 1 day from the day that Appellants filed their complaint. (JA at Vol. 14, p. 2685) However, Appellant Martel's last day worked is not the deciding factor in whether he has submitted a timely claim for unpaid wages and continuation wages under NRS 608.020-.050. An employee's claim for unpaid wages and continuation wages accrues 30-days ***after*** the employment relationship ends, rendering Appellant Martel's claim timely. *See* NRS 608.040-.050.

Specifically, NRS 608.040 - Penalty for failure to pay discharged or quitting employee **-** states in relevant part:

> 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.

Likewise, NRS 608.050 – Wages to be paid at termination of service: Penalty; employee's lien **–** states in its entirety:

> 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. (Emphasis supplied.)
>
> 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.

Both NRS 608.040 and 608.050 contemplate that the employee would not be working during the 30 days in which continuation wages are due. Indeed, NRS 608.050 specifically states the employee would not be "rendering any service." Accordingly, the District Court must be reversed.

2. <u>There is no requirement that an employee be limited to continuation wages for violations occurring during the last pay period worked.</u>

The District Court's ruling would effectively sanction employer wage theft. Under the District Court's ruling an employer could legally fail to pay wages for work the employee performed in the month, year, or years prior to the last pay period

without any penalty whatsoever, if the employer correctly pays the employee for the final week(s) or days of the employee's final pay period. This is an absurd result and not what the Legislature had in mind in adopting NRS 608.020-.050. The Court in *Doolittle v. Eighth Judicial Dist. Court,* quoting chapter 71, Stats. 1919, p. 121, §2776, NCL[18] and what would become NRS 608.020-.050, acknowledged that the term of service by the employee on behalf of his/her/their employer could be "by the hour, day, week or month," and that "each of his employees may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default, until he is paid in full, without rendering any service therefore, provided, however, he shall cease to draw such wages or salary thirty days after such default." *Doolittle v. Eighth Judicial Dist. Court,* 54 Nev 319, 15 P. 2d 684, 684-85 (1932); *see also Bowers v. Charleston Hill Nat. Mines, Inc.,* 50 Nev. 99, 256 P. 1058 (1927) (*citing* Stats. 1925 p. 226.)[19] The District Court ignores the fact that the continuation wage statutes contemplated a duration of employment that could last for a period greater than the last pay period of an employee's term of employment. Accordingly, the District Court must be reversed.

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[18] *See* https://www.leg.state.nv.us/Statutes/29th1919/Stats191901.html#Stats191901page121 Last visited 8/9/21.

[19] *See* https://www.leg.state.nv.us/Statutes/32nd1925/Stats192502.html Last visited 8/9/21.

3. Even if an employee must suffer an underlying wage violation in the last pay period worked, the factual record supports that Appellant Martel suffered a wage loss, which would give rise to continuation wages.

Even if the District Court did not err by holding that Nevada employees can only seek continuation wages under NRS 608.020-.050 for alleged wages violations that occur during the last pay period before an employee's separation from employment, the District Court nonetheless erred by concluding that Appellant Martel did not assert a claim for unpaid wages during his last pay period worked. Appellant Martel's time records indicate he clocked in on June 12, 2014, at 6:10 p.m. and clocked out from his final shift at 12:26 a.m. on June 13, 2014, (JA at Vol. 14, p. 2685), which is two years a one day from the date Appellants filed their original complaint on June 14, 2016. (JA at Vol. 1, pp. 1-109.) In Appellants' FAC and operative complaint, Appellant Martel alleged he "worked shifts over eight (8) hours per shift one or more times a week on a regular basis and worked jammed shifts … during the relevant time period." (JA at Vol. 5, p. 909, ¶14.) As a cash-bank carrying employee, Appellant Martel further alleged that Respondents "required [him] to collect his bank of money at the dispatch cage prior to proceeding to his workstation without compensation." (*Id.* at p. 910, ¶18.) "Similarly, at the end of his regularly scheduled shifts, Plaintiff Martel was required to reconcile and deposit his cash bank to the same dispatch cage without compensation." (*Id.*) Appellant Martel "estimate[d] it took him approximately 15

minutes to perform banking activities for which he was not paid the minimum, regular rate, or overtime wages required by law." (*Id.* at p. 911, ¶19.) Respondents admit that Appellant Martel's final "next regular pay date would have been June 19, 2014. [] Seven days from his last day was June 20, 2014, so his final wages were due by June 19, 2014 – the earlier date" based on NRS 608.030. (JA at Vol. 15, p. 2835.) Respondents also admit that Appellant Martel was paid every two weeks, with "[h]is final paycheck, which was May 31 through June 13, 2014." (*Id.* at p. 2835-2836) Thus, Appellant Martel's final two week period of work would have been May 31, 2014 through June 14, 2014 with his paycheck due on June 16, 2014. (*Id.*)

Respondents further admit that on June 1, 2014, Appellant Martel worked an eight (8) hour shift. (*Id.* at p. 2836.) This does not include the 15 minutes minimum wage and overtime wages he was entitled to for the unpaid banking activities alleged in Appellants' complaint. Accordingly, if Appellants are successful on any of their underlying wage claims, Appellant Martel will have a derivative NRS 608.020-.050 continuation wage claim, which occurred in the last pay period worked. Accordingly, the District Court erred in dismissing Appellants' claim for continuation wages under NRS 608.020-.050.

IX. CONCLUSION

The June 2021 Clarification in particular illustrates the District Court's fundamental misunderstanding of wage and hour laws, thereby casting doubt on all of the District Courts findings of law and fact. For the foregoing reasons, the District Court erred in granting Respondents' motions for summary judgment and this Court should reverse the June 7, 2019, November 3, 2020, and June 21, 2021 Orders.

August 11, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and the page length or type volume limitations of NRAP 32(a)(7) because:

- This brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14-point font size and Times New Roman.

- This brief contains less than 14,000 words (13,410), as measured by Microsoft's Office 365 (word count) program, including footnotes, but excluding the disclosure statement, table of contents, table of authorities, required certificate of service, and certificate of compliance with these Rules.

I hereby certify that I have read the **Appellant's Opening Brief**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

Dated: August 11, 2021

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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 August 11, 2021, the **Appellants' Opening Brief** was served on the following by using the Supreme Court's eFlex System:

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

Executed on August 11, 2021 at Reno, Nevada.

/s/ Brittany Manning
An Employee of Thierman Buck LLP