**IN THE SUPREME COURT OF THE STATE OF NEVADA**

| | |
|---|---|
| EDDIE MARTEL (also known as MARTEL-RODRIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS and WHITNEY VAUGHAN, on behalf of themselves and all others similarly situated,<br><br>Appellants,<br><br>vs.<br><br>HG STAFFING LLC; AND MEI-GSR HOLDINGS LLC,<br><br>Respondents. | Docket Number: 82161<br><br>District Court Case No.: A-16-01264 |



**JOINT APPENDIX VOLUME 4 OF 16**

Mark R. Thierman, Nev. Bar No. 8285
Joshua D. Buck, Nev. Bar No. 12187
Leah L. Jones, Nev. Bar No. 13161
Joshua R. Hendrickson, Nev. Bar No. 12225
THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, Nevada 89511
Tel. (775) 284-1500
Fax. (775) 703-5027
*Attorneys for Plaintiffs-Appellants*

## ORDERS ON APPEAL

| DATE | DESCRIPTION | VOLUME | PAGES |
|---|---|---|---|
| 6/7/2019 | Order Granting in Part and Denying in Part Respondents' Motion to Dismiss First Amended Complaint | 10 | 2013 - 2027 |
| 11/3/2020 | Order Granting Respondents' Motion for Summary Judgment | 15 | 2942 - 2964 |
| 6/21/2021 | Order Granting Motion for Clarification of November 3, 2020 Order; Order Clarifying Prior Order | 16 | 3125 - 3131 |

## ALPHABETICAL INDEX

| DATE | DESCRIPTION | VOLUME | PAGES |
|---|---|---|---|
| 5/5/2021 | Appellants' Motion for Clarification of November 3, 2020 Order Granting Summary Judgment in Favor of Defendants | 16 | 3038 - 3124 |
| 6/3/2019 | Appellants' Response in Opposition to Respondents' Motion for Summary Judgment on All Claims Asserted by Plaintiffs Martel, Capilla and Vaughan | 10 | 1919 - 2012 |
| 7/1/2020 | Appellants' Response in Opposition to Respondents' Motion for Summary Judgment/Summary Adjudication | 14 | 2680 - 2830 |
| 2/5/2018 | Appellants' Response in Opposition to Respondents' Motion to Dismiss | 3 | 540 - 631 |

| | | | |
|---|---|---|---|
| 2/28/2019 | Appellants' Response in Opposition to Respondents' Motion to Dismiss Appellants' First Amended Complaint | 8 | 1476 - 1644 |
| 6/29/2018 | Appellants' Supplement to Appellants' Opposition to Respondents' Motion to Dismiss | 4 | 776 - 809 |
| 4/3/2019 | Appellants' Supplemental Authority in Support of Appellants' Opposition to Respondents' Motion to Dismiss | 9 | 1790 - 1865 |
| 6/14/2016 | Class Action Complaint | 1 | 1 - 109 |
| 1/29/2019 | First Amended Complaint | 5 | 906 - 1060 |
| 6/15/2016 | Jury Demand | 1 | 110 - 111 |
| 11/25/2020 | Notice of Appeal to Nevada Supreme Court | 15 | 2994 - 3037 |
| 6/28/2019 | Notice of Entry of Order Granting in Part and Denying in Part Respondents' Motion to Dismiss First Amended Complaint | 10 | 2042 - 2059 |
| 8/10/2021 | Notice of Entry of Order Granting Motion for Clarification of November 3, 2020 Order; Order Clarifying Prior Order | 16 | 3132 - 3142 |
| 11/6/2020 | Notice of Entry of Order Granting Respondents' Motion for Summary Judgment | 15 | 2968 - 2993 |
| 5/7/2020 | Order Denying Respondents' Petition | 12 | 2375 - 2376 |

| | | | |
|---|---|---|---|
| 6/7/2019 | Order Granting in Part and Denying in Part Respondents' Motion to Dismiss First Amended Complaint | 10 | 2013 – 2027 |
| 6/21/2021 | Order Granting Motion for Clarification of November 3, 2020 Order; Order Clarifying Prior Order | 16 | 3125 - 3131 |
| 11/3/2020 | Order Granting Respondents' Motion for Summary Judgment | 15 | 2945 - 2967 |
| 10/9/2018 | Order Granting Respondents' Motion to Dismiss | 5 | 884 - 894 |
| 12/27/2017 | Order Lifting Stay | 1 | 129 |
| 1/9/2019 | Order RE: Motion for Reconsideration | 5 | 895 - 905 |
| 7/20/2018 | Order RE: Motion to Dismiss | 4 | 881 – 883 |
| 8/1/2017 | Order RE: Stipulation to Stay All Proceedings | 1 | 128 |
| 7/17/2019 | Order RE: Stipulation to Stay All Proceedings and Toll of the Five-Year Rule | 12 | 2372 – 2374 |
| 7/18/2016 | Proof of Service on Counsel of Record for HG Staffing, LLC | 1 | 124 - 127 |
| 7/18/2016 | Proof of Service on Counsel of Record for MEI-GSR Holdings, LLC dba Grand Sierra Resort | 1 | 120 - 123 |
| 7/18/2016 | Proof of Service on HG Staffing, LLC | 1 | 116 - 119 |
| 7/18/2016 | Proof of Service on MEI-GSR Holdings, LLC dba Grand Sierra Resort | 1 | 112 - 115 |

| | | | |
|---|---|---|---|
| 6/28/2019 | Respondents' Answer to First Amended Class Action Complaint | 10 | 2060 - 2069 |
| 5/23/2019 | Respondents' Motion for Summary Judgment on All Claims Asserted by Plaintiffs Martel, Capilla, and Vaughn | 10 | 1866 - 1918 |
| 6/9/2020 | Respondents' Motion for Summary Judgment, or in the Alternative, Summary Adjudication – Part 1 | 12 | 2377 - 2549 |
| 6/9/2020 | Respondents' Motion for Summary Judgment, or in the Alternative, Summary Adjudication – Part 2 | 13 | 2550 - 2679 |
| 1/22/2018 | Respondents' Motion to Dismiss – Part 1 | 1 | 130 - 240 |
| 1/22/2018 | Respondents' Motion to Dismiss – Part 2 | 2 | 241 - 480 |
| 1/22/2018 | Respondents' Motion to Dismiss – Part 3 | 3 | 481 - 539 |
| 2/15/2019 | Respondents' Motion to Dismiss Appellants' First Amended Complaint with Prejudice – Part 1 | 5 | 1061 - 1123 |
| 2/15/2019 | Respondents' Motion to Dismiss Appellants' First Amended Complaint with Prejudice – Part 2 | 6 | 1124 - 1363 |
| 2/15/2019 | Respondents' Motion to Dismiss Appellants' First Amended Complaint with Prejudice – Part 3 | 7 | 1364 - 1475 |
| 6/10/2019 | Respondents' Reply in Support of Motion for Summary Judgment on All Claims Asserted by Plaintiff Martel | 10 | 2028 - 2041 |

| | | | |
|---|---|---|---|
| 2/22/2018 | Respondents' Reply in Support of Motion to Dismiss | 3 | 632 - 652 |
| 3/11/2019 | Respondents' Reply in Support of Motion to Dismiss Amended Complaint | 9 | 1645 - 1789 |
| 7/16/2020 | Respondents' Reply in Support of Respondents' Motion for Summary Judgment, or in the Alternative Summary Adjudication | 15 | 2831 - 2944 |
| 7/8/2019 | Respondents' 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 – Part 1 | 11 | 2070 - 2309 |
| 7/8/2019 | Respondents' 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 – Part 2 | 12 | 2310 - 2371 |
| 6/29/2018 | Respondents' Supplement in Support of Motion to Dismiss | 4 | 653 - 775 |
| 7/19/2018 | Transcript from 7/19/2018 Hearing on Motion to Dismiss | 4 | 810 - 880 |

# CHRONOLOGICAL INDEX

| DATE | DESCRIPTION | VOLUME | PAGES |
|---|---|---|---|
| 6/14/2016 | Class Action Complaint | 1 | 1 - 109 |
| 6/15/2016 | Jury Demand | 1 | 110 - 111 |
| 7/18/2016 | Proof of Service on MEI-GSR Holdings, LLC dba Grand Sierra Resort | 1 | 112 - 115 |
| 7/18/2016 | Proof of Service on HG Staffing, LLC | 1 | 116 - 119 |
| 7/18/2016 | Proof of Service on Counsel of Record for MEI-GSR Holdings, LLC dba Grand Sierra Resort | 1 | 120 - 123 |
| 7/18/2016 | Proof of Service on Counsel of Record for HG Staffing, LLC | 1 | 124 - 127 |
| 8/1/2017 | Order RE: Stipulation to Stay All Proceedings | 1 | 128 |
| 12/27/2017 | Order Lifting Stay | 1 | 129 |
| 1/22/2018 | Respondents' Motion to Dismiss – Part 1 | 1 | 130 - 240 |
| 1/22/2018 | Respondents' Motion to Dismiss – Part 2 | 2 | 241 - 480 |
| 1/22/2018 | Respondents' Motion to Dismiss – Part 3 | 3 | 481 - 539 |
| 2/5/2018 | Appellants' Response in Opposition to Respondents' Motion to Dismiss | 3 | 540 - 631 |
| 2/22/2018 | Respondents' Reply in Support of Motion to Dismiss | 3 | 632 - 652 |
| 6/29/2018 | Respondents' Supplement in Support of Motion to Dismiss | 4 | 653 - 775 |

| | | | |
|---|---|---|---|
| 6/29/2018 | Appellants' Supplement to Appellants' Opposition to Respondents' Motion to Dismiss | 4 | 776 - 809 |
| 7/19/2018 | Transcript from 7/19/2018 Hearing on Motion to Dismiss | 4 | 810 - 880 |
| 7/20/2018 | Order RE: Motion to Dismiss | 4 | 881 – 883 |
| 10/9/2018 | Order Granting Respondents' Motion to Dismiss | 5 | 884 - 894 |
| 1/9/2019 | Order RE: Motion for Reconsideration | 5 | 895 - 905 |
| 1/29/2019 | First Amended Complaint | 5 | 906 - 1060 |
| 2/15/2019 | Respondents' Motion to Dismiss Appellants' First Amended Complaint with Prejudice – Part 1 | 5 | 1061 - 1123 |
| 2/15/2019 | Respondents' Motion to Dismiss Appellants' First Amended Complaint with Prejudice – Part 2 | 6 | 1124 - 1363 |
| 2/15/2019 | Respondents' Motion to Dismiss Appellants' First Amended Complaint with Prejudice – Part 3 | 7 | 1364 - 1475 |
| 2/28/2019 | Appellants' Response in Opposition to Respondents' Motion to Dismiss Appellants' First Amended Complaint | 8 | 1476 - 1644 |
| 3/11/2019 | Respondents' Reply in Support of Motion to Dismiss Amended Complaint | 9 | 1645 - 1789 |
| 4/3/2019 | Appellants' Supplemental Authority in Support of Appellants' Opposition to Respondents' Motion to Dismiss | 9 | 1790 - 1865 |

| | | | |
|---|---|---|---|
| 5/23/2019 | Respondents' Motion for Summary Judgment on All Claims Asserted by Plaintiffs Martel, Capilla, and Vaughn | 10 | 1866 - 1918 |
| 6/3/2019 | Appellants' Response in Opposition to Respondents' Motion for Summary Judgment on All Claims Asserted by Plaintiffs Martel, Capilla and Vaughan | 10 | 1919 - 2012 |
| 6/7/2019 | Order Granting in Part and Denying in Part Respondents' Motion to Dismiss First Amended Complaint | 10 | 2013 - 2027 |
| 6/10/2019 | Respondents' Reply in Support of Motion for Summary Judgment on All Claims Asserted by Plaintiff Martel | 10 | 2028 - 2041 |
| 6/28/2019 | Notice of Entry of Order Granting in Part and Denying in Part Respondents' Motion to Dismiss First Amended Complaint | 10 | 2042 - 2059 |
| 6/28/2019 | Respondents' Answer to First Amended Class Action Complaint | 10 | 2060 - 2069 |
| 7/8/2019 | Respondents' 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 – Part 1 | 11 | 2070 - 2309 |
| 7/8/2019 | Respondents' Second Motion for Summary Judgment as to Plaintiff Martel; Motion for Summary | 12 | 2310 - 2371 |

| | | | |
|---|---|---|---|
| | Adjudication on Plaintiffs' Lack of Standing to Represent Union Employees; and Motion for Summary Judgment as to Plaintiff Jackson-Williams – Part 2 | | |
| 7/17/2019 | Order RE: Stipulation to Stay All Proceedings and Toll of the Five-Year Rule | 12 | 2372 – 2374 |
| 5/7/2020 | Order Denying Respondents' Petition | 12 | 2375 - 2376 |
| 6/9/2020 | Respondents' Motion for Summary Judgment, or in the Alternative, Summary Adjudication – Part 1 | 12 | 2377 - 2549 |
| 6/9/2020 | Respondents' Motion for Summary Judgment, or in the Alternative, Summary Adjudication – Part 2 | 13 | 2550 - 2679 |
| 7/1/2020 | Appellants' Response in Opposition to Respondents' Motion for Summary Judgment/Summary Adjudication | 14 | 2680 - 2830 |
| 7/16/2020 | Respondents' Reply in Support of Respondents' Motion for Summary Judgment, or in the Alternative Summary Adjudication | 15 | 2831 - 2944 |
| 11/3/2020 | Order Granting Respondents' Motion for Summary Judgment | 15 | 2945 - 2967 |
| 11/6/2020 | Notice of Entry of Order Granting Respondents' Motion for Summary Judgment | 15 | 2968 - 2993 |
| 11/25/2020 | Notice of Appeal to Nevada Supreme Court | 15 | 2994 - 3037 |

| | | | |
|---|---|---|---|
| 5/5/2021 | Appellants' Motion for Clarification of November 3, 2020 Order Granting Summary Judgment in Favor of Defendants | 16 | 3038 - 3124 |
| 6/21/2021 | Order Granting Motion for Clarification of November 3, 2020 Order; Order Clarifying Prior Order | 16 | 3125 - 3131 |
| 8/10/2021 | Notice of Entry of Order Granting Motion for Clarification of November 3, 2020 Order; Order Clarifying Prior Order | 16 | 3132 - 3142 |

**4105**
**COHEN|JOHNSON|PARKER|EDWARDS**
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
sjohnson@cohenjohnson.com
375 E. Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400

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

Attorneys for Defendants



**IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF WASHOE**

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

Plaintiffs,

v.

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

Defendants.

Case No.: CV16-01264

**DEFENDANTS' SUPPLEMENT IN SUPPORT OF MOTION TO DISMISS**

//

//

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

## POINTS AND AUTHORITIES

## I. INTRODUCTION

In an Order dated May 9, 2018, this Court requested supplemental briefing on the following issues: "(1) which statute of limitation the parties contend applies to NRS Chapter 608 wage claims, how any such limitation period affects statutory wage violations that are ongoing, and whether expiration of a limitation period would require dismissal or simply a limitation on damages; (2) the impact of the Sargent court's denial of certification on the issue of preclusion and whether such analysis is affected by the fact that the Sargent court granted summary judgment against Plaintiffs' on their statutory wage claims and thus did not address the merits of certification as to those claims; [3] whether the aforementioned issue of preclusion is impacted by the Nevada Supreme Court's recent decision in Neville; and [4] how the aforementioned issues might affect a tolling analysis under American Pipe." Below is Defendants' response to the issues raised by the Court.

## II. ARGUMENT

### 1. The Two-Year Statute of Limitations Found NRS 680.260, NRS 11.209(1) and/or NRS 11.190(4)(b) Applies to Plaintiffs' NRS Chapter 608 Wage Claims.

Other than NRS 608.260, Chapter 608 has no express statute of limitations for wage claims. While the two-year limitations period in NRS 608.260 expressly applies to minimum wage claims under NRS 608.250, in *Perry v. Terrible Herbst, Inc*., 132 Nev. Adv. Op. 75, 383 P.3d 257, 260-62 (2016), the Nevada Supreme Court applied the two-year limitations period in NRS 608.260 to Plaintiffs' minimum wage claim under Nevada's Minimum Wage Amendment. In rejecting Plaintiffs' argument that the four-year limitations period in NRS 11.220 applied, the Court held "when a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law." *Id.* Plaintiffs do not and cannot dispute that the two-year limitations period in NRS 608.260,[1]

[1] NRS 608.260, in pertinent part, provides: "If 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

governing minimum wage claims under NRS 608.250, and/or NRS 11.209(1),[2] governing wage claims against Nevada Contractors are the "most closely analogous" limitations period with respect to all of Plaintiffs' wage claims.

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

recover the difference between the amount paid to the employee and the amount of the minimum wage."

[2] NRS 11.209(1) provides: "No action against an original contractor for the recovery of wages due an employee of a subcontractor or other contractor acting under, by or for the original contractor, or contributions, premiums or benefits required to be made or paid on account of the employee, or any other indebtedness for labor performed by the employee owed to an employee may be commenced more than 2 years after the date the indebtedness for labor should have been made or paid by the subcontractor."

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

Plaintiffs further cannot dispute that a two-year limitations period is the only limitations period that makes sense for wage claims under NRS Chapter 608 because, as the Court recognized in *Perry* that "NRS 608.115 requires employers to maintain an employee's record of wages for only two years." 383 P.3d at 262. If a longer limitations period applied, "an employee could bring a claim after the employer is no longer legally obligated to keep the record of wages for the employee." *Id.* Accordingly, ***all*** of Plaintiffs' wage claims are subject to a two-year limitations period. *See Roces v. Reno Hous. Auth*., 300 F. Supp. 3d 1172, 1179 (D. Nev. 2018) (holding "[u]nder Nevada law, a two-year statute of limitations applies to actions for unpaid minimum or overtime wages").

Plaintiffs' reliance on NRS 11.190(3)(a) to support their argument for a three-year limitations period (1) ignores the Court's analysis in *Perry*, (2) ignores the Labor Commissioner's decision that a two-year limitations period applies to all wage claims under NRS Chapter 608, (3) ignores NRS 608.115 's requirement that employers maintain employees' wage records for only two years, and (4) is only made possible by ***deleting*** language from the statute. *See* Op. at 14:12-13. NRS 11.190(3)(a) (emphasis added), in full, provides for a three (3) year limitation for an "action upon a liability created by statute, ***other than a penalty or forfeiture***." Plaintiffs intentionally deleted the phrase "other than a penalty or forfeiture," without providing the required punctuation signaling the deletion, because Plaintiffs' counsel is fully aware that wage claims under NRS Chapter 608 are subject to a "penalty," therefore precluding the application of NRS 11.190(3)(a). *See* NRS 608.040 ("Penalty for failure to pay discharged or quitting employee"); NRS 608.050 ("Wages to be paid at termination of service: Penalty"); NRS 608.195(2) (providing for an "administrative penalty" for violation of "NRS 608.005 to 608.195"); NRS 608.140 (providing a penalty in the form of attorney fees for the employee in a "suit for wages").[3] As claims under NRS Chapter 608 provides for an amount more than actual damages, NRS 11.190(3)(a) is not applicable.

[3] This attorney's fees provision is clearly a penalty imposed on employers, as employers are not similarly entitled to attorney's fees if employees' wage claims are unsuccessful. The Nevada Supreme Court has recognized that an award of attorney fees is a "penalty." *See, e.g. In re Estate*



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

Even if this Court chose to apply a statute of limitations under NRS Chapter 11, a two-year limitations period would still be required by NRS 11.190(4)(b) (emphasis added) which applies to an "action upon a statute ***for a penalty or forfeiture***, where the action is given to a person or the State, or both, except when the statute imposing it prescribes a different limitation." *See Algarin v. CTX Mortg. Co., LLC*, Case No. 3:11-CV-229-RCJ-VPC, 2012 WL 3205519, at *4 (D. Nev. Aug. 3, 2012) (holding that claims brought under NRS Chapter 598D were barred under two-year limitations period found in NRS 11.190(4)(b) because NRS Chapter 598D.110 expressly provided for a penalty in addition to compensatory damages).

**a. Plaintiffs Have *NO* "Ongoing" Wage Claims under NRS Chapter 608**.

The two-year statute of limitations for NRS Chapter 608 is not affected by any "ongoing" wage claims because Plaintiffs no longer work for GSR. Plaintiffs' Complaint alleges: Whitney Vaughan was last employed by GSR in June 2013, Mary Anne Capilla was last employed by GSR in September 2013, Eddy Martel was last employed by GSR in July 2014, and Janice Jackson-Williams was last employed by GSR in December 2015. *See* Complaint, ¶¶ 5- 8. Plaintiffs are no longer entitled to wages under NRS Chapter 608 once they ceased working for GSR. *See* NRS 608.010 (emphasis added) (defining employee as "both male and female persons ***in the service of an*** employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed"); NRS 608.012 (emphasis added) (defining "wages" as the "amount which an employer agrees to pay ***an employee*** for the time the employee has worked, computed in proportion to time; (2) and commissions owed to the employee, but excludes any bonus or arrangement to share profits").

**b. Plaintiffs' Wage Claims Should Be Dismissed to the Extent that Any Pay Period Is Outside the Two-Year Statute of Limitations.**

In *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. Adv. Op. 18, 300 P.3d 124, 128 (2013), the Nevada Supreme Court expressly held that a "court may dismiss a complaint for failure to state a claim upon which relief can be granted when an action

*and Living Trust of Miller, 125 Nev. 550, 553 (Nev. 2009)* (stating that NRCP 68(f) and NRS 17.115 provide for a fee-shifting "penalty").

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

is barred by the statute of limitations." The Court reasoned: When the facts are uncontroverted, as we must so deem them here, the application of the statute of limitations is a question of law" subject to a motion to dismiss. *Id*. Here, Plaintiffs filed their complaint on June 14, 2016. Based on a two-year statute of limitations for wage claims, all claims accruing before June 14, 2014 are bared and should be dismissed. *See Perry*, 383 P.3d at 259, 262 (affirming district court's order granting Terrible Herbst's motion for judgment on the pleadings and dismissing Perry's claim because she filed her class action lawsuit "[m]ore than two years after she last worked for Terrible Herbst").

Courts construing wage claims under NRS Chapter 608 have held that such claims should be dismissed to the extent any pay period is outside the statute of limitations. In *Rivera v. Peri & Sons Farms, Inc*., 735 F.3d 892, 902 (9th Cir. 2013) (emphasis added), the Ninth Circuit held that the "district court properly dismissed the [Nevada] state statutory and constitutional [wage] claims ***to the extent*** they accrued more than two years before the [employees] filed suit." *See also Tyus v. Wendy's of Las Vegas, Inc*., Case No. 214-CV-00729-GMN-VCF, 2015 WL 1137734, at *3 (D. Nev. Mar. 13, 2015) (partially "dismiss[ing] with prejudice all [Nevada] wage claims accruing more than two years before Plaintiffs filed suit").

These courts dismissed these wage claims "to the extent" employees sought recovery for wages outside the two-year statute of limitations because the "continuing violation" doctrine does not apply to wage claims. In *Knight v. Columbus, Ga.*, 19 F.3d 579, 582 (11th Cir. 1994), the Eleventh Circuit ***rejected*** the contention that the failure to pay wages under the FLSA involves "one on-going violation" and ***rejected*** the argument "that the plaintiffs should be able to recover for the entire duration of the violation, without regard to the fact that it began outside the statute of limitations window." The court held that an employee's FLSA wage claims survive the two-year statute of limitations only "insofar as it involves paychecks, received during the relevant statute of limitations period, which did not include payment for overtime that was worked." *Id*. at 583. The Court reasoned that because "each violation gives rise to a new cause of action, each failure to pay overtime begins a new statute of limitations period as to that particular event" and therefore employees only "have a non-barred cause of action with respect

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

to any [FLSA wage] claims . . . that accrued within two years . . . of the date the complaint was filed." *Id.*; *see also Figueroa v. D.C. Metro. Police Dep't*, 633 F.3d 1129, 1132, 1135-36 (D.C. Cir. 2011) (affirming dismissal of wage claims accruing after statute of limitations expired, but reversing dismissal of claims accruing before expiration of the statute of limitations because "each failure to pay overtime begins a new statute of limitations period as to that particular event"); *O'Donnell v. Vencor Inc*., 466 F.3d 1104, 1113 (9th Cir. 2006) (holding that although the failure to pay wages in violation of statute "may have been continuing, the continuing violation doctrine does not permit [the employee] to recover back pay for discriminatory pay periods outside the applicable statute of limitations period" because each paycheck that was in violation of statute "constitutes a separate violation of the [law] with a cause of action accruing [and the running of the limitations period commencing] upon the receipt of the discriminatory paycheck").[4]

Accordingly, based on the two-year statute of limitations for wages, Plaintiffs' wage claims should be dismissed to the extent they accrued before June 14, 2014 -- two years before Plaintiffs filed their complaint. Capilla's and Vaughan's claims should be dismissed completely, all but one (1) month of Martel's claims should be dismissed, and all but eighteen (18) months of Williams' claims should be dismissed.

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

In their opposition to Defendants' motion to dismiss, Plaintiffs did not dispute that Judge Hicks' well-reasoned order dated March 22, 2016 in the *Sargent* action -- denying class certification on Plaintiffs' state law minimum wage claim and decertifying Plaintiff's FLSA collective action -- was based on the exact same factual allegations and identical legal issues of

[4] The Nevada Supreme Court has urged courts to look to cases construing the FLSA when state precedent interpreting NRS Chapter 608 is lacking. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 958 (2014), (looking to FLSA cases and adopting same test for establishing a minimum wage claim under the FLSA and Nevada's minimum wage laws); *In re Amazon.com, Inc., Fulfillment Ctr. Fair Labor Standards Act (FLSA) & Wage & Hour Litig*., 261 F. Supp. 3d 789, 794 (W.D. Ky. 2017) (holding "Nevada courts look to federal wage-and-hour law where state precedent is lacking").

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

class certification as Plaintiffs' claims in this case. Instead, Plaintiffs argued, albeit wrongly, that they were not parties to the *Sargent* action or in privity with them, and that the *Sargent* order was not sufficiently final to be accorded preclusive effect. *See* Op. at 9:3 – 10:14. Accordingly, Plaintiffs have waived any argument that the first prong of issue preclusion, that "the issue decided in the prior litigation [is] identical to the issue presented in the current action," has not been meet. *See Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (stating that the district court properly construed the failure to oppose a motion as admitting that the motion had merit and consenting to granting the motion); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding a "point not urged in the [district] court ... is deemed to have been waived"); EDCR 2.20(i) (a "memorandum of points and authorities which consists of bare citations to statutes, rules, or case authority does not comply with this rule and the court may decline to consider it').

Nevertheless, the issues raised and decided in the *Sargent* action, with respect to class certification, were identical to those raised in this action. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (relying upon the same four factors "used by the majority of state and federal courts," to establish issue preclusion, and holding that one of those factors is that "the issue decided in the prior litigation must be identical to the issue presented in the current action"). In *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc*., 130 Nev. Adv. Op. 28, 321 P.3d 912, 916–17 (2014), the Nevada Supreme Court held that "[i]ssue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case." In *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nevada*, 116 Nev. 415, 420–21, 997 P.2d 130, 134 (2000), the Court held issue preclusion applies "even though the causes of action are substantially different, if the same fact issue is presented." The Court explained that where a "common issue was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties." *Id.*

In their Complaint, Plaintiffs seek to certify a class action based on the same exact factual allegations as the wage claims on behalf of GSR employees that were brought in the *Sargent*

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

action. *Compare* Complaint at 4:11 – 16:17 *with* Motion Exhibit 5, Sargent Complaint at 4:14 – 9:21, 12:21 – 17:7. Plaintiffs' fifth cause of action in *Sargent* for Failure to Pay Minimum Wages in Violation of the Nevada Constitution and NRS 608.250, is the same as Plaintiffs' second cause of action in this case for Failure to Pay Minimum Wages in Violation of the Nevada Constitution. This claim was not disposed of on summary judgment in the *Sargent* action, and was considered by the Court in denying class certification.

In seeking class certification of the wage claims in the *Sargent* action, Plaintiffs were obligated to make the same arguments with respect to NRCP 23 class certification requirements of numerosity, commonality, typicality, adequacy, and predominance with respect to their state law minimum wage claim and their state law claim for overtime. *See* Exhibit 1, *Sargent v. HG Staffing, LLC*, Case No.: 3:13-CV-453-LRH-WGC, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification. Defendants were obligated to rebut those same arguments with respect to NRCP 23 class certification. *See* Exhibit 2, *Sargent v. HG Staffing, LLC*, Case No.: 3:13-CV-453-LRH-WGC, Memorandum of Points and Authorities in Support of Defendants' Opposition to Motion for Class Certification. These identical issues must be resolved in this action before this Court may certify this action as a class action.

Regarding Plaintiffs' minimum wage claim in *Sargent*, the federal district court found: "Plaintiffs have simply failed to address their fifth cause of action for Failure to Pay Minimum Wages in Violation of the Nevada Constitution and NRS 608.250 while seeking class certification." *Sargent v. HG Staffing, LLC*, 171 F. Supp. 3d 1063, 1074 (D. Nev. 2016). The court held that because "Plaintiffs did not address this cause of action, there is nothing for the Court to perform a rigorous analysis on, and the Plaintiffs have failed to meet their burden to show why the claim should be certified as a class action." *Id*. The court therefore ruled that "class certification as to Plaintiffs' fifth cause of action is denied." *Id*.

While the federal district court found that Plaintiffs did not adequately support their motion for class certification in the *Sargent* action, that does not prevent this Court from applying the principals of issue preclusion. Any other result would reward a party for its failure to litigate necessary issues with the ability to continue to harass adverse parties in perpetuity.

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

Plaintiffs were required to support their motion for class certification with respect to its minimum wage claim in the *Sargent* action with the same evidence required to establish numerosity, commonality, typicality, adequacy, and predominance in this action. The fact that Plaintiffs failed to do so does not give them a second bite at the apple in this action.

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

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

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

liability, treatment of plaintiffs' claims on a collective basis is inappropriate." *Id*. at 1081. The court in *Sargent* also found that GSR's "individualized defenses" prevent certification because "determining whether and when a particular Plaintiff regularly engaged in additional work and calculating the aggregate amount of time worked is an inherently individualized inquiry." *Id.* at 1082. The court in *Sargent* concluded that "[e]ach plaintiff's case requires consideration of different background facts and different testimony based on each employee's work activities" and therefore "failing to decertify the conditionally-certified class will unfairly and prejudicially require Defendants to prepare for and present hundreds of different trials simultaneously." *Id.* at 1083. These decisions with respect to FLSA collective action certification absolutely preclude any finding of commonality, typicality or predominance required for class certification in this case because the "'similarly situated' requirement [required to certify a collective action under the FLSA] is less stringent than . . . Rule 23(b)(3)'s requirement that common questions predominate for a 23(b)(3) class to be certified." *See O'Brien v. Ed Donnelly Enterprises, Inc*., 575 F.3d 567, 584 (6th Cir. 2009), abrogated on other grounds by *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

There simply can be no dispute that the issues and facts required to establish class certification in this action have been resolved by the *Sargent* action. As federal district court concluded that Plaintiffs failed to meet their burden when seeking to establish the requirements for Rule 23 class certification, and could not even meet the less stringent standard for collective action certification under the FLSA, this Court should not permit Plaintiffs to re-litigate those issues in this case.

**3. The Nevada Supreme Court's Decision in *Neville* Did Not Mention the Requirements for Class Certification or Collateral Estoppel and Therefore Has No Impact on Whether the *Sargent* Action Precludes Class Certification in this Action**.

In *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499 (Nev. 2017), the Nevada Supreme Court did not mention or address the requirements of preclusion or class certification, much less provide a ruling impacting those issues. *Neville* only recognized a private right of action for certain wage claims under NRS Chapter 608. While Neville permits such wage claims in this Court, the decision did not change the requirements for preclusion or

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

class certification. No one disputes that prior to *Neville*, employees had a private right of action with respect minimum wage claims and that Plaintiffs asserted such a claim in the *Sargent* action. As set forth above, by falling to meet the requirements for class certification with respect to Plaintiffs' minimum wage claims in *Sargent*, Plaintiffs are precluded from seeking class certification of a minimum wage claim, or any other State law wage claims, in this court. All such State law wage claims involve the same issues of numerosity, commonality, typicality, adequacy, and predominance in this action. Additionally, *Sargent* involved certification of federal wage claims based on the same exact factual allegations, but requiring a far less stringent standard than class certification of Nevada state law wage claims based on the same facts. As Plaintiffs could not meet that lesser standard, they cannot meet the higher standard require for class certification in this action. *Neville* does not change this analysis.

**4. The Tolling Analysis in *American Pipe* Does Not Apply to this Action**.

With regard to the Court's question about how the aforementioned issues might affect a tolling analysis under *American Pipe*, they do not have an impact because the tolling recognized in *American Pipe* does not apply in this case. In *Casey v. Merck & Co.*, 653 F.3d 95, 100 (2d Cir. 2011), the Second Circuit held when "evaluating the timeliness of state law claims," a court "must look to the law of the relevant state to determine whether, and to what extent, the statute of limitations should be tolled by the filing of a putative class action in another jurisdiction." For that reason, in *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (emphasis added), the Ninth Circuit held that the rule of *American Pipe*—which allows tolling within the federal court system in federal question class actions—***does not*** "mandate cross-jurisdictional tolling as a matter of state procedure." Accordingly, *American Pipe* simply does not apply to this state law action.

While Plaintiffs string cite *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 34, 176 P.3d 271, 275 (2008) to support its claim of tolling, *Jane Roe Dancer* did ***not*** involve the prohibited cross-jurisdictional tolling that Plaintiffs seek in this case. There, the tolling occurred in a single class-action, filed in a single state court, and only because the named plaintiff was not an appropriate class representative, which required a putative class member to substitute for the

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

named plaintiff. *Id*. at 31-34, 176 P.3d at 273-75. Plaintiffs ignore the fact that Nevada has ***not*** adopted cross-jurisdictional tolling. *See Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 407 P.3d 702 (Nev. 2017) (recognizing that the issue of "cross-jurisdictional class-action tolling" has not yet been decided in Nevada). Plaintiffs further ignore the long line of authority holding that even though state courts "permit tolling for purported class members who file individual suits ***within the same court system after class status is denied***," courts uniformly reject tolling "during the pendency of a class action in federal court" because cross-jurisdictional tolling of a "state statute of limitations" would "increase the burden on that state's court system" and would expose the state court system to the evils of "forum shopping." *Portwood v. Ford Motor Co*., 701 N.E.2d 1102, 1103-05 (Ill. 1998) (emphasis added);[5] *see also Clemens v. DaimlerChrysler Corp*., 534 F.3d 1017, 1025 (9th Cir. 2008) (holding the "weight of authority and California's interest in managing its own judicial system counsel us not to import the doctrine of cross-jurisdictional tolling into California law"); *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 944 (Penn. Super 2002) (rejecting cross-jurisdictional tolling based on the persuasive reasoning in the Illinois Supreme Court's decision in *Portwood*); *Maestas v. Sofamor Danek Grp., Inc*., 33 S.W.3d 805, 808–09 (Tenn. 2000) (rejecting "the doctrine of cross-jurisdictional tolling in Tennessee" because it would "sanction . . . forum shopping" and would improperly "grant to federal courts the power to decide when Tennessee's statute of limitations begins to run," which "outcome is contrary to our legislature's power to adopt statutes of limitations and the exceptions to those statutes" and therefore would "offend the doctrines of federalism and dual sovereignty"); *Casey v. Merck & Co*., 722 S.E.2d 842, 845 (Va. 2012) (rejecting the "tolling of a statute of limitations based upon the pendency of a putative class action in another jurisdiction"); *Bell v. Showa Denko K.K*., 899 S.W.2d 749, 757–58 (Tex. App. 1995), writ denied (Oct. 5, 1995) (rejecting argument that "that *American Pipe* operates to toll our state statute of

[5] While the Nevada Supreme Court, like the Illinois Supreme Court, has adopted tolling of individual claims during the pendency of a class action in State Court (*see Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 34, 176 P.3d 271, 275 (2008)), Nevada has never adopted cross-jurisdictional tolling. *See Archon Corp*, 407 P.3d at 702 (recognizing that the issue of "cross-jurisdictional class-action tolling" has not yet been decided in Nevada).



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

limitations" because under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, where a claim is derived from state law, as is appellant's suit, state law governs the tolling of the statute of limitations").

Notably, Plaintiffs also admit that pursuant to NRS 11.500, the Nevada Legislature has determined that a statute of limitations should only be tolled based on an action filed in another jurisdiction when "the court lacked jurisdiction over the subject matter of the action," (which it did not here), and then limited tolling to "[n]inety days after the action is dismissed." Op. at 16:6-8. Plaintiffs ignore the obvious point that the Legislature knows how to provide for tolling, and this Court should not provide for cross-jurisdictional tolling where the Legislature has failed to do so. *See State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 225 (1879) ("[w]here a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other"); *Builders Ass'n of N. Nevada v. City of Reno*, 776 P.2d 1234, 1235 (Nev.1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute"). Accordingly, tolling under *American Pipe* is unavailable.

## III. CONCLUSION

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

**Affirmation Pursuant to NRS § 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security numbers of any person.

Dated this 29th day of June 2018

COHEN|JOHNSON|PARKER|EDWARDS

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

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

| EXHIBIT | DESCRIPTION | PAGES |
|---|---|---|
| 1 | Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification (filed in Sargent v. HG Staffing, LLC, Case No.: 3:13-CV-453-LRH-WGC) | 52 |
| 2 | Opposition to Plaintiffs' Motion for Class Certification (filed in Sargent v. HG Staffing, LLC, Case No.: 3:13-CV-453-LRH-WGC) | 53 |

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

**PROOF OF SERVICE**

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

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

**DEFENDANTS' SUPPLEMENT IN SUPPORT OF MOTION TO DISMISS**

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

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

DATED the 29th day of June 2018.

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

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

# Exhibit 1

# Exhibit 1

Mark R. Thierman, Nev. Bar No. 8285
mark@thiermanbuck.com
Joshua D. Buck, Nev. Bar No. 12187
josh@thiermanbuck.com
Leah L. Jones, Nev. Bar No. 13161
leah@thiermanbuck.com
THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, Nevada 89511
Tel. (775) 284-1500
Fax. (775) 703-5027

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

TIFFANY SARGENT, BAILEY CRYDERMAN, SAMANTHA L. IGNACIO (formerly SCHNEIDER), VINCENT M. IGNACIO, HUONG ("ROSIE") BOGGS, and JACQULYN WIEDERHOLT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No.: 3:13-CV-453-LRH-WGC

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Table of Contents

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Table of Authorities

Cases

Statutes



THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

**THIERMAN BUCK LLP**
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

***"The new owners came in and they cleaned house."***

GSR employee comment, Exhibit 1 to the Declaration of Leah L. Jones ("Cohen Report"), P. 8.

---

The Great Recession of 2008 dramatically affected the lives of millions of Americans in many different ways. For employees at the Grand Sierra Resort and Casino ("GSR"), the Great Recession represented a turning point in the employment relationship with their employer. Following a brief period of bank ownership, the GSR was purchased on a fire sale by the Meruelo Group, which owns and operates Defendants HG Staffing LLC and MEI-GSR Holdings LLC d/b/a Grand Sierra Resort ("Defendants" or "GSR"). *See* http://archive.rgj.com/article/20110223NEWS/110223042/New-owners-Grand-Sierra-Resort-announced (last visited Aug. 26, 2015). The new ownership took over and changed everything, slashing and burning labor costs in an attempt to maximize profits and create a new Vegas-style, younger looking, casino. Defendants have, in many ways, achieved their desired result but at a real cost to its employees; a cost that was both unlawful and immoral. In order to achieve its goal, Defendants extracted free labor from its hard working employees and eliminated its older workforce in favor of younger employees. GSR employees now seek to bind together to remedy the wrongs committed by Defendants.

One way in which Defendants cut costs and maximized profits was by requiring employees to work without pay. Defendants maintained and enforced two formal policies that resulted in a de facto policy of employees not being paid for all the hours that they worked. First, Defendants stressed the employees must be ready to work at their assigned workstations at the beginning of their scheduled shift. "Being ready to work" meant that employees had to collect any and all items of equipment they would be required to use during their workday prior to the start of their shift, without pay for the time it took to obtain those items. Likewise, the employees would have to return those items to their

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

proper storage places after the end of their shift "on their own time". Second, and interrelated to the "ready for work" policy, Defendants maintained a strict no overtime policy. This meant employees would have to continue working, and to perform their pre and/or post shift work-related tasks off the clock so that they recorded hours only within the time frame of their shift, regardless of the actual time it took to do the work. And since the work almost always lasted longer than allotted shift times, all hours which were rounded to the nearest fifteen minutes increments almost always favored the employer. Defendants abused the rules allowing for flexibility of rounding for accounting ease was in fact simply fifteen minutes per shift of non-compensable working time.[1]

The overwhelming evidence gathered by Plaintiffs and submitted in support of this motion demonstrates the staggering effect of these policies:

- 54 declarations attesting that Defendants suffered and permitted employees to perform work without compensation;
- A survey indicating that nearly 80% of employees across job titles and departments worked off-the-clock; and
- Data analysis that shows employees were always disadvantaged to the tune of 26.6 minutes per day in uncompensated work.

The net loss to employees as a result of Defendant's policies was almost a half an hour pay per shift, which over the course of the statute of limitations period involved in this case represents an approximate $12 million dollars in lost wages. Or, in other words, Defendants effectively subsided 28% of the $42.45 million purchase price they paid for the GSR by not paying its employees. *See* http://usatoday30.usatoday.com/sports/basketball/nba/2011-10-27-1065023568_x.htm (last visited Aug. 26, 2015).

[1] Defendants demanded employees perform work without compensation in two ways: (1) off-the-clock, meaning employees were to perform work activities before clocking-in and/or after clocking-out and (2) rounding hours, meaning that employees would perform work while still technically being on-the-clock but due to Defendants' rounding policy, that time was rounded off of employee timekeeping records.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

In addition to benefiting from free labor, Defendants also slashed their labor costs by systematically eliminating older employees, thereby reducing their longevity expenses (increased wages, health, and retirement benefits) and concocting a new GSR image. To put it simply, older workers did not "fit" into the new GSR. New, sexier form fitting uniforms were pushed upon all employees in an effort to shame older employees into quitting. When uniform shamming did not achieve its desired result, older employees were removed from their long held shifts and placed on graveyard. As a last resort, older workers were simply written up for whatever reason and terminated. This was not a coincidence; it was Defendants' policy to get rid of older employees.

## II. PROCEDURAL POSTURE

Plaintiffs Tiffany Sargent, Bailey Cryderman, Samantha Ingnacio, Vincent Ingnacio, Huong Boggs, and Jacqulyn Wiederholdt, originally filed this collective and class action against Defendants on June 21, 2013. (Doc. 1.) Plaintiff filed the operative second amended complaint ("SAC") on June 13, 2014, and allege that Defendants (1) failed to pay wages for all hours worked in violation of 29 U.S.C. § 201, *et seq.*; (2) failed to pay overtime in violation of 29 U.S.C. § 207; (3) failed to pay overtime at the correct rate in violation of 29 U.S.C. § 207; (4) failed to compensate for all hours worked in violation of NRS 608.140 and 608.016; (5) failed to pay minimum wages in violation of the Nevada Constitution and NRS 608.250; (6) failed to pay overtime in violation of NRS 608.140 and 608.018; (7) failed to timely pay all wages due and owing in violation of NRS 608.140 and 608.020-050; (8) have made unlawful chargebacks in violation of NRS 608.140 and 608.100; and (9) engaged in age discrimination in violation of 29 U.S. C. § 621 and NRS 613.330. (Doc. 47.)

The factual record is little changed since this Court conditionally certified this case as a group action under the Fair Labor Standards Act ("FLSA") and directed that notice be mailed to "all current and former non-exempt hourly paid employees who were employed by defendant at any time [during the class period]." (Doc. 40.) Pursuant the Court's order, the FLSA notice was mailed to 4,748 class members and, out of those, 480 class members decided to opt-in to the FLSA portion of the lawsuit. *See* Exhibit 2, "CPT Group, Inc. Weekly

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Report 2015/08/28" Declaration attached to the Jones Dec. at ¶ 8. These 480 individuals have decided to become party plaintiffs and will have a pending case against Defendants for unpaid wages, regardless of the outcome of this motion for class certification or Defendants' anticipated motion for decertification under the FLSA.

Prior to the filing of this action, Defendant filed a motion for partial summary judgment on Plaintiffs' Nevada state law wage and hour claims. (Doc. 135.)[2] In its motion, Defendant contends, among other things, that Nevada employees do not have a private right of action to sue for unpaid wages in court despite the Nevada Supreme Court's guidance stating otherwise. *See Baldonado v. Wynn Las Vegas*, LLC, 124 Nev. 951, 966 n. 33, 194 P.3d 96, 106 (2008) ("[T]wo other statutes in NRS Chapter 608 . . . expressly recognize a civil enforcement action to recoup unpaid wages: NRS 608.140 (civil actions by employees to recoup unpaid wages) and NRS 608.150 (civil actions by the district attorney to recoup unpaid wages from general contractors)."); *Csomos v. Venetian Casino Resort, LLC*, 2011 Nev. Unpub. LEXIS 1629, 5-6 (Nev. 2011) ("It is doubtful that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. (citation omitted). The legislative scheme is consistent with a private cause of action for employees and the Legislature enacted the statute to protect employees, supporting a private cause of action under NRS 608.040.").

Although Plaintiff's contest the merits of Defendant's motion, the fact that Defendants' make such a class wide motion for partial summary judgment confirms that class certification is appropriate here. The legal questions involved in that motion are the same for all class members, which is one of the necessary requirements for commonality and predominance that are discussed in the following pages. Indeed, Defendant embraces such

[2] Plaintiffs initially filed their own motion for partial summary judgment on their claims for continuation wages pursuant to NRS 608.020-.050 based on Defendants' admission that it did not pay certain former employees overtime that was owed to them. (Doc. 125.) Plaintiffs withdrew their motion for summary judgment without prejudice to be filed, if at all, at a later date following this Court' ruling on this motion. (Doc. 138.)

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

certification—"GSR requests that all of its argument found in this partial motion for summary judgment apply to all class members as well." (Doc. 135, at p. 10 n. 3.)

Plaintiffs now file this motion for Rule 23 Class certification of the "Unpaid Wage" Class of all non-exempt hourly workers employed by Defendants (*i.e.*, "Class Members") at any time from June 21, 2009 until the date of judgment after trial herein (*i.e.*, "Class Period"). The facts show that Defendant required, suffered and/or permitted all the members of the class of hourly employees to perform work off the clock, either by directly requiring them to do work before punching in and/or after punching out each shift, or by inappropriately rounding their time in favor of the employer in violation of Nevada law.[3] Plaintiffs further seek to certify the following subclasses:

- The Shift Jamming Subclass. All members of the Nevada Class who earned less than $12.38 an hour, who did not have at least 16 hours between shifts, and who were not paid overtime for all hours worked in excess of 8 hours in a workday, (collectively "Shift Jamming Subclass Members".)
- The Waiting Time Subclass. All members of the Nevada Class who are former employees of Defendants, (collectively "Waiting Time Subclass Members").
- The Age Discrimination Subclass. All members of the Nevada Class who are over the age of 40 and have been terminated from employment by Defendants, (collectively the "Age Discrimination Subclass").

## III. STATEMENT OF FACTS

[3] Unlike the regulations for neutral rounding under the Fair Labor Standards Act at 29 C.F.R. § 785.48(b), NRS 608.016 requires payment for every hour worked, without excuse. And even if the federal regulations were to be applied, Defendants have demonstrably violated the rule against favoring the employer. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1126 (C.D. Cal. 2011).

*The new management made it a "nightmare" to work at GSR.*

Ordas Dec. (Bates No. PLAINTIFF 408-411) at ¶ 22.[4]

---

Immediately upon taking over as the new owners of the GSR, Defendants instituted various new initiatives in support of their cost cutting culture. Employees were expected to either submit to the new culture, or be terminated. For the purpose of this action, the new GSR required employees to work without pay and to drink from the fountain of youth in order to keep their jobs.

**A. GSR's "No Overtime" and "Ready for Work" Policies**

*[W]hen the new ownership took over employees were told that GSR would not pay overtime.*

Yount Dec. (Bates No. PLAINTIFF 456-459) at ¶ 7.

*The way the no overtime rule worked was if you were required to work more than 8 hours a day or more than 40 hours a week, you had to clock out and then do your work, or you got written up. This rule applied to all hourly employees.*

Cryderman Dec. (Doc. No. 18-4) at ¶ 8.

---

In order to cut labor costs, Defendants instituted a strict no overtime policy for all hourly employees.[5] Absent prior authorization, employees would not be permitted to

[4] Named-Plaintiff declarations are submitted in support of this motion as Exhibit A and are cited by using the Declarant's last name and previously filed ECF Doc. No. Putative class member declarations are submitted in support of this motion as Exhibit B. These declarations are in alphabetical order and include Bates numbers. Hereinafter, these declarations will be cited by using the Declarants last name and Bates number.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

work any overtime hours.[6] This policy, in of itself, does not necessarily violate any state of federal law. Indeed, a company has a right to manage its workforce as it sees fit—so long as

[5] *See* Exhibit 3, Deposition of Jason Braelow, at 29:14-29:15, ("Our team members are expected to come to work, ready to work."); Exhibit 4, Depositions of Tiffany Sargent, at 49:18-19, (Overtime was not permitted. And if anyone was -- if anyone had overtime they would be written up.) p. 49; Exhibit 5, Deposition of Bailey Cryderman, at 91:23-92:1, (Throughout the night, [Kumar would ask], "What time did you clock in tonight? Okay, make sure you don't -- make sure you are clocked out and don't have any overtime."); Exhibit 6, Deposition of Vincent Ignacio at 65:10-65:16, (received verbal warnings for working overtime); Exhibit 7, Deposition of Martha Roybal, at 15:2-15:3 (...we were told not to clock in until we were ready to go to work."); Almaraz Dec. (Bates No. PLAINTIFF 328-329) at ¶ 14 ("They are very strict about overtime. It was just common knowledge that this is the way it worked."); Baker Dec. (Bates No. PLAINTIFF 336-337) at. ¶ 14 (same); Berry Dec. (Bates No. PLAINTIFF 338-340) at ¶ 20 (same); Bukowski Dec. (Bates No. PLAINTIFF 347-348) at ¶ 13 (same); Clay Dec. (Bates No. PLAINTIFF 356-357) at ¶ 12 (same); Duran Dec. (Bates No. PLAINTIFF 364-365) at ¶ 9 (same); Hines Dec. (Bates No. PLAINTIFF 378-380) at ¶ 13 (same); Larson, S. Dec. (Bates No. PLAINTIFF 398-401) at ¶ 19 (same); Park Dec. (Bates No. PLAINTIFF 412-413) at ¶ 19 (same); Seuffert Dec. (Bates No. PLAINTIFF 428-429) at ¶14 (same); Stoltz Dec. (Bates No. PLAINTIFF 436-437) at ¶ 9 (same); Bryant Dec. (Bates No. PLAINTIFF 345-346) at ¶ 15 ("They were very strict about not getting any overtime. If the next crew coming on was running late, I had to clock out, keep working and wait to be relieved. I was told I had to do this by Robin."); Dill Dec. (Bates No. PLAINTIFF 360-361) at ¶ 7 ("All of our supervisors told us we had to do this. They were very strict about this policy."); Hallmark Dec. (Bates No. PLAINTIFF 372-373) at ¶ 8 ("Supervisors told me that GSR had a very strict no overtime policy so we always had to clock out and then back in for a half hour lunch. Sometimes I had to work through my lunch and I believe I was not compensated for that time.").

[6] Exhibit 8, Deposition of Arturo Pineda, at 55:2-55:9, (clocked out be finished banking so wouldn't get in trouble); Exhibit 9, Deposition of Maria Ducker, at 69:14-69:18, (would get in trouble for overtime); Allen Dec. (Bates No. PLAINTIFF 325-327) at ¶ 14 ("I was told that if I wanted the job, this is the way it worked and we would be fired for having any overtime."); Almaraz Dec. (Bates No. PLAINTIFF 328-329) at ¶ 14 (same), Auifiero Dec. (Bates No. PLAINTIFF 333-335) at ¶ 13 (same); Baker Dec. (Bates No. PLAINTIFF 336-337) at ¶ 14 (same); Berry Dec. (Bates No. PLAINTIFF 338-340) at ¶ 20 (same); Bolin Dec. (Bates No. PLAINTIFF 343-344) at ¶ 17 (same); Bukowski Dec. (Bates No. PLAINTIFF 347-348) at ¶ 13 (same); Carter Dec. (Bates No. PLAINTIFF 352-353) at ¶ 14 (same); Duran Dec. (Bates No. PLAINTIFF 364-365) at ¶ 9 (same); Bliss Dec. (Bates No. PLAINTIFF 341-342) at ¶ 14 ("I remember hours being dropped down if you worked over the hour time so that it was not over the hour time at all, even if that time was worked."); Geppert-Browning Dec. (Bates No. PLAINTIFF 370-371) at ¶ 14 ("I was told what times to write down, because it was easier for the manager to do the paperwork if my time started and ended on the hour, regardless if I

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

it management style does not violated labor and employment laws. The problem, however, is when a "no overtime" policy intersects with an employer policy that employees be ready

---

worked over. Thus, I was not getting paid for all the time I actually worked."); Hallmark Dec. (Bates No. PLAINTIFF 372-373) at ¶ 9 ("In order to make sure we were following GSR's policy of no overtime, I had to clock out no later than 3 minutes after the end of my shift. However, each and every shift I worked, the work was not done by the time I clocked out so I had to stay and finish whatever project I was working on."); Holt Dec. (Bates No. PLAINTIFF 381-382) at ¶ 9 ("GSR was very concerned about not getting any overtime. We were told the only time there would be overtime is if we were short staffed."); Ignacio, Samantha Dec. (Bates No. PLAINTIFF 385-388) at ¶ 6 ("Customers would complain that we were taking too long and want their money back if I didn't help my co-workers. I was not allowed to clock in for this time because GSR has a no overtime policy."); Ignacio, Vincent Dec. (Bates No. PLAINTIFF 389-391) at ¶ 10 ("My supervisors knew that I and my fellow employees were having to work this extra time without pay but told us we could not get any overtime hours. In fact, my Supervisor Connor Fountain made all Grand Adventure employees sign a memo indicating we had to collect our keys, et cetera prior to clocking in."); Kelley Dec. (Bates No. PLAINTIFF 392-394) at ¶ 9 ("We were told we had to do this because GSR has a no overtime policy and we must make sure to clock in within those seven minutes."); Kirk Dec. (Bates No. PLAINTIFF 395-397) at ¶ 13 ("We were all told by our supervisors that we could not incur any overtime, and was threatened with write-ups if we did. They all told us this."); Morgan Dec. (Bates No. PLAINTIFF 404-407) at ¶ ¶19 - 20 ("If the bar I was working at was busy, managers would tell us that we could not incur overtime and would threaten to write us up for working overtime. I complained numerous times to my managers Les Arlind (spelling unknown) and Brittany Gamboa who both told me and fellow bartenders that GSR did not pay overtime."); Taylor-Caldwell Dec. (Bates No. PLAINTIFF 438) at ¶ 8 ("If you clocked in more than 7 minutes before or after your shift you were reprimanded for unapproved overtime. I was verbally reprimanded for this twice."); Vance Dec. (Bates No. PLAINTIFF 439-440) at ¶ 9 ("On occasion, I would return my cash bank after clocking out. I would do this because I have been told by numerous supervisors than absolutely no overtime is allowed. Some of those supervisors include Twylia Little, Lucy Clark, Scott Hughes (cashier's managers), and Kathy Fitzgerald (food and beverage manager)."); Vinci Dec. (Bates No. PLAINTIFF 443-444) at ¶ 11 ("I once stayed 1 1/2 hours after my shift to help the bartenders on the next shift and was verbally reprimanded for it. I believe I was paid overtime for that particular day, but I was told that I would be in trouble if I ever went over 8 hours."); Woodhouse Dec. (Bates No. PLAINTIFF 449-453) at ¶ 11 ("I was told no one can work overtime."); Yount Dec. (Bates No. PLAINTIFF 456-459) at ¶ 15, ("I was told by my supervisors that I could not incur any overtime, and was threatened with write-ups if I did incur overtime."); Sargent Dec. (Doc No. 18-5) at ¶ 7 ("On the first day, Mr. Kumar told me the company had a no overtime rule"); Cryderman Dec. (Doc No. 18-4) at ¶ 8 ("Mr. Kumar had a no overtime rule for all employees of the GSR").

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

to work with all their tools and equipment at the start of their shift time (*i.e.*, "ready to work" policy), then the true policy is simply to work all overtime hours "off the clock".[7] The no overtime policy coupled with too much work was really an "off the clock" policy.

As demonstrated by the facts below, complying with these two edicts—a no overtime policy and a ready to work policy—is fundamentally impossible. An employee who must be armed with all items required for their jobs at the start of his or her shift (*e.g.*, keys, radios, cash bank, tools) ***but*** is prohibited from incurring overtime means they must perform these work related activities without compensation. Defendants are no dummies. They understand that employees cannot comply with these policies without the

[7] Exhibit 5, Cryderman Dep. at 56:16-56:17, (Got there early "because I had jobs I had to get done, and if they weren't done I would hear about it."); Exhibit 10, Deposition of Marc Strassner at 46:13-46:23 (must be clocked in and ready to work.); Wolff Dec. (Bates No. PLAINTIFF 447-448) at ¶¶ 10, 13 ("We were told to have our tools & be ready to work by 7:00."; "Although I don't recall any manager's names, I was told by numerous managers to be ready to work before clocking in."); Bliss Dec. (Bates No. PLAINTIFF 341-342) at ¶ 7 ("I would get there early to make sure I would be clocked in according to the 7-minute time requirement and ready to start at my shift time."); Bryant Dec. (Bates No. PLAINTIFF 345-346) at ¶ 12 ("As a cocktail waitress, I had to clock in under the same 7-minute rule as described above. Regardless, I had to be clocked in by 11:15 and ready to work."); Morgan Dec. (Bates No. PLAINTIFF 404-407) at ¶ 12 ("I had to have my cash and be ready to start my on-bar shift at exactly 10:00 a.m., where I would again swipe in with my I.D. at the cash register I was working."); Vinci Dec. (Bates No. PLAINTIFF 443-444) at ¶ 9 ("I was not told specifically to do these things off the clock, but it was understood that they needed to be done before you clocked in. For example, if I did not get towels before I clocked in and then there were no towels after I clocked in, I would get in trouble for not being ready for my shift."); Bolin Dec. (Bates No. PLAINTIFF 343-344) at ¶ 7 ("I would often arrive for work 30 to 60 minutes before my shift began. I would come in early to get the bar area ready, cut fruit, meet with vendors and clean prior to being clocked in as it was expected to have my bar area ready by the time my regularly scheduled shift started, yet they did not provide any time to do so. Bartenders had to be ready to open upon your shift beginning, even though we weren't allowed to clock in any earlier than 7 minutes before our shift. Although this was against GSR's policy, management was aware that I arrived early to complete these tasks prior to every shift I worked."); Drummer Dec. (Bates No. PLAINTIFF 362-363) at ¶ 6 ("I would typically arrive about 30 minutes early for my shift so I could swipe in at security, load my cart, get my room assignments and keys and clock in. I wasn't specifically told to do these activities before I clocked in, however, it was understood that when you clock in at 9:00 you need to be ready to work.").

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

performance of unpaid work. This is the point of having these policies. The net effect of which was that Defendants maintained a property wide de facto policy of requiring employees to work without pay.

**B. GSR's *De Facto* Policy and Practice Was to Suffer and Permit Employees to Work Without Compensation**

Defendants suffered and permitted employees to work without compensation by requiring them to perform the work "off-the-clock", meaning that employees' time was not recorded in the time keeping system, or pursuant to Defendants' rounding policy, which would round employee hours to the nearest 15-minute increment.

Q (Plaintiffs' Counsel): Regarding clocking in and clocking out? [Procedures]

A (Mr. Burdick): Clocking in and clocking out is a -- there is an overall policy for the company ....

Q: And what is the procedure for clocking in for your casino ops personnel?

A: Clocking in to our KRONOS time system. Before they start any work they clock in. If they are scheduled to start at 8:00 o'clock in the morning, they have a seven-minute window in front and behind that to clock in.

Q: They have a seven-minute window in front and behind?

A: Yes. So seven minutes before to seven minutes after.

Q: And do you know if they start at 8:00 –

A: Uh-huh.

Q -- and they clock in at 7:53, do you know what time the clock starts on? Like is it rounded to the nearest hour?

A: To the hour, yes.

Q: And if I was late and I clocked in at 8:06 would it go back?

A: Back to 8:00.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Q: Okay. And clocking out, what is the procedure for clocking out?

A: The same thing. Clocking out, you are due to home at 4:30 or 4:00 o'clock, you have a seven-minute window in front of and behind the 4:00 o'clock hour.

Q: And if I was supposed to go home at 4:00 o'clock and I clocked out at 4:09?

A: You would be paid until 4:15.

Q: To the nearest quarter hour?

A: Correct.

Q: And if for some reason I came in at 7:50 as opposed to 7:53, do you know where the clock would start?

A: The clock would start -- it's supposed to start at the quarter hour before.

Q: Okay. And that is a procedure and a policy?

A: I believe that's our policy on the property.

*See* Exhibit 11, Deposition of Ralph Burdick at 29:8-30:21.

Inevitably, as demonstrated by the evidence below, whether employees were "on-the-clock" or "off-the-clock", they were not compensated for performing work.

**1. Supervisors Enforce GSR's Policy and Practice to Suffer and Permit Work Without Compensation**

***Our Supervisors were constantly telling us "Get off the clock! Get off the clock!"***

Hallmark Dec. (Bates No. PLAINTIFF 372-373) at ¶ 9.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Defendants' supervisors enforced the company's *de facto* policy and practice of demanding employees work off the clock.[8] Leroy Curtis, a supervisor in the Arcade and a putative class member who was deposed by Defendants, stated that he was told by upper management that Arcade workers must collect their cash bank off the clock:

> Q (Plaintiffs' Counsel): In this interrogatory you stated that you were instructed to tell arcade workers to collect their banks prior to clocking in; is that correct?
>
> A (Mr. Curtis): That is correct.
>
> Q: Who instructed you to tell arcade workers to collect their banks prior to clocking in?
>
> A: That would be Greg McMurray and Rashimi.
>
> Q: It also says that you were instructed to tell arcade workers to reconcile their banks after clocking out?
>
> A: That is correct.
>
> Q: . . . . And who told you that?
>
> A: That would be Greg McMurray and Rashimi. . . . .

*See* Exhibit 12, Deposition of Leroy Curtis, at 61:10-62:8.[9]

---

[8] *See* Exhibit 4, Sargent Dep. at 63:18-64:18, (supervisors told to write people up for overtime); Cryderman Dec. (Doc. No. 18-4) at ¶ 14 (stating that she personally conducted pre-shift meetings when employees were off-the-clock).

[9] Mr. Curtis ultimately disobeyed his supervisors' orders and was reprimanded for doing so:

> Q: And did you, in fact tell arcade workers that they had to collect their banks prior to clocking in?
> A: No.
> Q: And why did you not tell employees that they had to check their banks?
> A: I told them if you are going to be here at work you need to be clocked in and get paid for your work?
> Q: And were you reprimanded for telling employees that?
> A: I was talked to, yeah. A stern talking to.

Exhibit 12, Curtis Dep. at 62:10-62:20.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Tiffany Sargent, a food and beverage supervisor enforced Defendants' no overtime policy:

> (Ms. Sargent): "Overtime was not permitted. And if anyone was -- if anyone had overtime they would be written up."
>
> Q (Defendant's Counsel): "...so there was a no overtime rule in effect?"
>
> A: "Correct."

*See* Exhibit 4, Sargent Dep. at 49:18-49:23. This resulted in Defendants' policy and practice to suffer and permit work off the clock:

> Q (Defendant's Counsel): "You believed the hotel was, was demanding employees work off the clock; is that correct?
>
> A: (Ms. Sargent): "Yes."
>
> . . . .
>
> Q: "Would it be an accurate statement that these employees willingly worked off the clock.?"
>
> A: "Not willingly. It's not willing when you have no choice but to do so; otherwise you lose your job."

*Id*. at 63:18-63:22, 98:2-98:5.

Human resource personnel similarly suffered and permitted work be performed without compensation. Ann Woodhouse, Assistant the VP of Human Resources and Assistant to the Director of Human Resources, was instructed to perform work off-the-clock and understood that all hourly employees were told the same. *See* Woodhouse Dec. (Bates No. PLAINTIFF 449-453) at ¶¶ 6-12. It is clear from this evidence from supervisory and human resource personnel at the GSR that Defendants' policy and practice was to extract free labor from all hourly employees, regardless of job department or position, by suffering and permitting them to work without pay.

**2. Class Member Experiences Confirm GSR's Policy and Practice to Suffer and Permit Work Without Compensation**

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Class member testimony confirms the supervisor testimony described above. Indeed, while class members who worked in different job departments may have performed different pre and post shift activities, their overall experiences were all common—Defendants suffered and permitted them to work without pay:

**Housekeepers** collect their cleaning carts, cleaning products, paperwork, and attend pre-shift meetings without receiving compensation for these pre shift activities; they are similarly not paid for returning their cleaning cart and paperwork post shift;[10]

**Bartenders** collect their cash banks and prepare their bar pre shift; they deposit their bank and clean their bar post shift;[11]

**Waitresses** change into and out of their uniforms on company premises and cannot take them home. They are also required to attend pre-shift meetings. Some, the "servtainers" and waitresses in the clubs, are required to attend dance classes;[12]

---

[10] *See* Exhibit 13, Deposition of Cathy Benson at 19:17-24:6; 64:2-64:21; Kirk Dec. (Bates No. PLAINTIFF 395-397) at ¶¶ 7-15 (had to collect keys, cart and paperwork before clock in and had to clock out before returning carts and tools); Bryant Dec. (Bates No. PLAINTIFF 328-329) at ¶¶ 6-9 (had to collect keys, cart and paperwork before clock in and had to clock out before returning carts and tools); Bryant Dec. (Bates No. PLAINTIFF 345-346) at ¶ 7 (would get in trouble if didn't follow 7-minute rule).

[11] *See* Exhibit 8, Pineda Dep. at p. 46:19-47:16; Duran Dec. (Bates No. PLAINTIFF 364-365) at ¶ 15 (bank); Morgan Dec. (Bates No. PLAINTIFF 404-407) at ¶¶ 9-16 (pre and post shift bank); Powers Dec. (Bates No. PLAINTIFF 418-419) at ¶ 6 (collecting wine and beer openers, signing in at the office); Ramirez Dec. (Bates No. PLAINTIFF 420-423) at ¶¶ 12, 14 (pre and post shift bank, stock the bar); Bolin Dec. (Bates No. PLAINTIFF 343-344) at ¶ (pre and post shift bank, stock the bar); Walls Dec. (Bates No. PLAINTIFF 445-446) at ¶ 7 (set up and stock the bars).

[12] *See* Exhibit 4, Sargent Dep. at 47:19-47:24; 151:1-152:6, (pre-shift meetings for waitress); Cryderman Dec. (Doc. No. 18-4) at ¶ 14 (conducted pre-shift meetings with waitresses); Armstrong Dec. (Bates No. PLAINTIFF 330-332) at ¶ 7 (cocktail waitresses were required to change their uniforms on property); Bryant Dec. (Bates No. PLAINTIFF 345-346) at ¶¶ 11, 14 (uniform and pre-shift meeting); Corral Dec. at ¶¶ 6, 8(uniform, pre-shift meetings, and dance classes); Faust Dec. (Bates No. PLAINTIFF 366-369) at ¶¶ 6-9, 12 (pre-shift meetings, uniform inspection, uniform changing); Hines Dec. (Bates No. PLAINTIFF 378-380) at ¶¶ 6-12 (uniform changing, pre-shift meetings, uniform inspection, and cashing

**Slot attendants** collect and return keys, radios, iPods, and cash banks pre and post shift;[13]

**Dealers** have to attend pre-shift meetings;[14]

**Cashiers** collect and deposit cash banks pre and post shift;[15]

**Laborers** attend pre-shift meetings; they collect and deposit their tools pre and post shift;[16]

**Security officers** attend pre-shift meeting; they pick up and drop off keys, radios, paperwork pre and post shift;[17]

---

out tips); Holt Dec. (Bates No. PLAINTIFF 381-382) at ¶ 6-10 (uniform changing and pre-shift meeting); Ordas Dec. (Bates No. PLAINTIFF 408-411) at ¶ 13 (cash bank).

[13] *See* Exhibit 14, Deposition of Huong "Rosie" Boggs at p. 151:9-151:16, 123:4-123:10, (required to pick up keys, radio, and iPod before clocking in and after clocking out); Exhibit 15, Deposition of Jacqulyn Wiederholt at p. 140:15-140:25 (return keys, radio, iPod after clocked out); Exhibit 9, Ducker Dep. at p. 16:4-16:7 (required to pick up keys, radio, and iPod before clocking in), Henderson, Rodney Dec. (Bates No. PLAINTIFF 376-377) at ¶ 7 (had to collect and return keys and tools off the clock).

[14] *See* Exhibit 16, Deposition of Natalya Held at p. 20:24-21:22 (not clocked in for pre-shift meetings); Auifiero Dec. (Bates No. PLAINTIFF 333-335) at ¶¶ 9-10 (table games: pre-shift meetings); Carter, Teresa Dec. (Bates No. PLAINTIFF 352-353) at ¶ 7 (table games dealer: pre-shift meetings); Plascencia Dec. (Bates No. PLAINTIFF 416-417) at ¶ 6 (table games dealer: pre-shift meetings); Smith, Brandi Dec. (Bates No. PLAINTIFF 432-433) at ¶¶ 6-9 (dancer/dealer: pre-shift meetings, changing in and out of uniforms); Vaughn Dec. (Bates No. PLAINTIFF 441-442) at ¶¶ 6-9 (dancer/dealer: pre-shift meetings, changing in and out of uniforms).

[15] Ignacio, Samantha Dec. (Bates No. PLAINTIFF 385-388) at ¶¶ 7, 9, 16 (collect cash bank, prep work such as collecting food, ice, napkins, etc., pre-shift meetings); Seuffert Dec. (Bates No. PLAINTIFF 428-429) at ¶ 9 (cash bank, told to start working before clocking in); Vance Dec. (Bates No. PLAINTIFF 439-440) at ¶ 9; (cash bank); Hughes Dec. (Bates No. PLAINTIFF 383-384) at ¶¶ 7-8 (pre-shift meetings, cash bank).

[16] Allen Dec. (Bates No. PLAINTIFF 325-327) at ¶¶ 10, 12 (pre-shift meetings, collect and return tools off the clock); Hallmark Dec. (Bates No. PLAINTIFF 372-373) at ¶ 9 (was told to clock out on time but had to continue working); Pierce Dec. (Bates No. PLAINTIFF 414-415) at ¶¶ 9-10 (had to collect radios and keys for the technicians); Wolff Dec. (Bates No. PLAINTIFF 447-448) at ¶¶ 9-12 (had to collect and return tools prior to clocking in and after clocking out).

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

**Front desk attendants** collect and deposit cash banks pre and post shift;[18] and

**Other employees** perform any and all of the activities described above in addition to such things as picking up pastries (Starbuck's barista) and collecting tip sheets, turning on computers, and checking phone messages (HR administrative assistant).[19]

The chart below summarizes the experiences of 54 class members who attest that they were suffered and permitted to work without compensation at the GSR.

| Name | Position | Pre-Shift Meetings | Bank | Uniform | Miscellaneous Activities (*e.g.*, keys, radios, classes, etc.) |
|---|---|---|---|---|---|
| Allen, Paul | Carpenter | x | | | x |
| Almaraz, Michael | Security Officer | x | | | x |
| Armstrong, Martha | Cocktail Waitress | | | x | x |
| Aufiero, Richard | Table Games Supervisor | x | | | |
| Baker, Hillary | Front Desk Agent | | x | | |

[17] *See* Exhibit 10, Strassner Dep. at p. 46:25-47-8, (briefing and collecting radios orior to clock in) Almaraz Dec. (Bates No. PLAINTIFF 328-329) at ¶¶ 7-10 (pre-shift meetings, collect radio and keys); Callan Dec. (Bates No. PLAINTIFF 349-351) at ¶¶ 9-10 (pre-shift meetings, collect radio, keys and paperwork); Reader Dec. (Bates No. PLAINTIFF 424-427) at. ¶¶ 7-8 (pre-shift meetings, collect radio); Smith, Gabriel Dec. (Bates No. PLAINTIFF 434-435) at ¶ 8 (had to be in uniform and have radio and keys before clocking in); Strassner Dep. at 20:11-20:14.

[18] Clay Dec. (Bates No. PLAINTIFF 356-357) at ¶ 9-10 (cash bank); Henderson, Brett Dec. (Bates No. PLAINTIFF 374-375) at ¶ 6 (cash bank).

[19] Carter, Tiffany Dec. (Bates No. PLAINTIFF 352-353) at ¶ 9 (pool supervisor: cash bank); Larson, Sara Dec. (Bates No. PLAINTIFF 398-401) at ¶¶ 9-11 (Starbucks barista: cash bank, changing into uniform, collecting fresh pastries, had to start coffee before clock in); Martel-Rodriguez Dec. (Bates No. PLAINTIFF 402-403) at ¶ 6 (bowling attendant: cash bank); Sheppard Dec. (Bates No. PLAINTIFF 430-431) at ¶ 10 (shuttle driver: collect keys and badge); Stoltz Dec. (Bates No. PLAINTIFF 436-437) at ¶ 7 (had to set up station prior to clocking in otherwise supplies would be gone); Woodhouse Dec. (Bates No. PLAINTIFF 449-453) at ¶¶ 6, 8 (Assistant Director of Human Resources: turn on lights, computers, etc., before clocking in, had to clock out and return to work).

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

| | | | | | |
|---|---|---|---|---|---|
| Berry, Claire | Bartender | x | x | | x |
| Bliss, Briggette | Starbucks | | x | | x |
| Bolin, Frances | Bartender | | x | | x |
| Bryant, Alexis | Housekeeper; Cocktail Waitress | | | x | x |
| Bukowski, Patrick | Bartender | | x | | x |
| Callan, Katrina | Security Officer | | | | x |
| Carter, Teresa | Table Games Dealer | x | | | x |
| Carter, Tiffany | Pool Supervisor | | x | | x |
| Clay, Jessica | Front Desk Agent | | x | | x |
| Corral, Shenna | Cocktail Waitress | x | | x | x |
| Dill, Nathan | Bell Clerk | | | | x |
| Drummer, Maria | Housekeeper | | | | x |
| Duran, David | Bartender | | x | | x |
| Faust, Shelley | Cocktail Waitress | x | | x | x |
| Geppert-Browning, Rhonda | Waitress | | | x | x |
| Hallmark, Kathy | A/V; Stage Tech | | | | x |
| Henderson, Brett | Front Desk Agent | | x | | |
| Henderson, Rodney | Slot Technician | | | | x |
| Hines, Bridgette | Cocktail Waitress | x | | x | x |
| Holt, Imogen | Cocktail Waitress | x | | x | |
| Hughes, Patricia | Cashier | x | x | | x |
| Ignacio, Samantha | Cashier | x | | | x |
| Ignacio, Vincent | Lead Attendant | | x | | x |
| Kelley, Suzy | Waitress | x | | | |
| Kirk, Christina | Housekeeper | | | | x |
| Larson, Sara | Starbucks; Cocktail Waitress | | x | x | x |
| Martel-Rodriguez, Eddy | Bowling Attendant | | x | | x |
| Morgan, Robert | Bartender | | x | | x |
| Ordas, Natalie | Cocktail Waitress | | x | | x |
| Park, Sean | Bartender | | x | | |
| Pierce, Steve | Lead Supervisor | | | | x |
| Plascencia, Marcella | Dealer | | | | x |
| Powers, Beverly | Bartender | | x | | x |
| Ramirez, Antonio | Bartender | x | x | | x |
| Reader, Thomas | Security Officer | x | | | x |
| Seuffert, Nicole | Cashier; Relief Supervisor | | x | | x |
| Sheppard, Michael | Bus Driver | | | | x |
| Smith, Brandi | Dancer/Dealer | x | | x | x |
| Smith, Gabriel | Security Officer | | | x | x |
| Stoltz, Richard | Waiter | | | | x |

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

| | | | | | |
|---|---|---|---|---|---|
| Taylor- Caldwell, Salina | Administrative Assistant | | | | x |
| Vance, Darlene | Cashier | | x | | x |
| Vaughan, Whitney | Dancer/Dealer | x | | x | x |
| Vinci, Damien | Bar Back, Bus Person | | | | x |
| Walls, Michael | Bartender | | | | x |
| Wolff, Dana | A/V Stage Tech | | | | x |
| Woodhouse, Ann | HR Executive Assistant | x | | | x |
| Woolley, Karla | Cashier | | | | x |
| Yount, Destiny | Arcade Attendant | x | x | | x |

### 3. Scientific Survey of Class Members Confirms GSR's Policy and Practice to Suffer and Permit Work Without Compensation

Plaintiffs' Counsel retained Malcolm Cohen, an MIT trained Economics Ph.D. with specialties in Econometrics and Labor Economics, to conduct a class wide survey regarding Defendants' policy and practice of suffering and permitting employees to work off the clock. His findings confirm the class member attestations mentioned above—nearly 80% of survey respondents worked off the clock during their employment at GSR. *See* Exhibit 1, "Cohen Report," at pp. 1, 5, 7-8.

Mr. Cohen's survey was statistically significant and telling. It represented ¼ current employees and ¾ former employees. *Id.* at p. 5. It was comprised of a cross-section of job titles and departments at the GSR. *Id.* The survey neutrally asked about activities that respondents performed prior to clocking in and after clocking out. *Id.* Nearly 80% of respondents indicated that they performed work off the clock, with almost 1 out of 4 total respondents stating they had been specifically instructed by supervisors to not clock in, or out, despite the fact that they were performing work related tasks. *Id.* at p. 10. With 25% of employees specifically being instructed to work off the clock and nearly 80% of employees performing work off the clock, it is clear from these statistics that Defendants maintained a property wide policy of suffering and permitting work without compensation.

But even though Mr. Cohen's survey highlights that an overwhelming number of respondents performed off-the-clock work similar to the work attested to by Plaintiffs and

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

putative class members, the survey and the report does not completely capture all work being performed without pay because it did not address the rounding issue. As mentioned above, Defendants maintained a rounding policy whereby it would round employee hours to the nearest 15-minute increment. The net effect of this rounding policy, as set forth below, was that even though employees were "on-the-clock", they were not paid for performing work during the rounded hours.

**4. Class Member Data Corroborates Class Member Experiences Regarding GSR's Policy and Practice to Suffer and Permit Work Without Compensation**

In addition to the class wide survey that was conducted, Plaintiffs' Counsel retained analyst James R. Toney to look at different data points produced during discovery.[20] Mr. Toney specializes in data analysis and damages exposure in wage an hour matters and has been provide such analyses in over 300 cases. *See* Exhibit 17, "Toney Report" at p. 1. Mr. Toney performed two separate data analysis to determine whether the data confirmed the testimony provided by the named-Plaintiffs and putative class members.

First, Mr. Toney compared the available data from GSR's employee entrance tracker and the rounded clock times.[21] As a result of this data comparison, Mr. Toney discovered that employees spent 36.6 minutes on property without receiving any compensation. In order to account for walking time to and from the place where an employee engaged in his or her first and last compensable activity, Mr. Toney deducted 10 minutes per workday (5

[20] Defendants only produced data for the individuals who had opted-in to the FLSA portion of this action and refused to produce data on behalf of the entire putative class. Plaintiffs believe that this "sampling" is enough to corroborate putative class member testimony. In the event that this case is certified as a class action, Plaintiffs retain their right to seek the additional data during the "damages phase" of discovery.

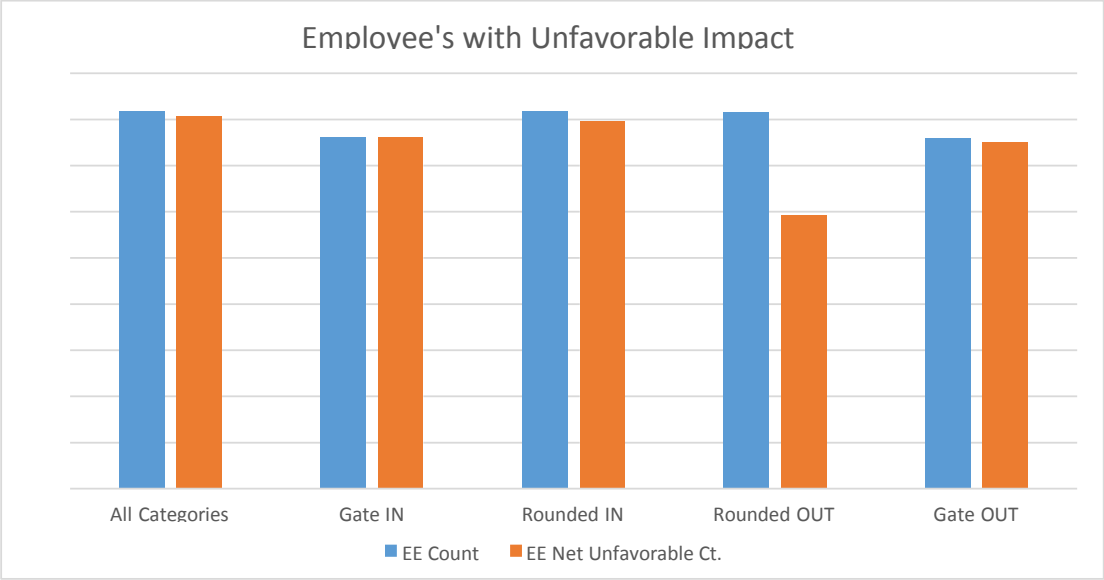
[21] Defendants required all hourly employees to use an employee entrance/exit and swipe their employee badge upon entering/exiting the property. As a result, Plaintiffs requested the data from that swipe to determine the time when an employee entered and exited the facility. This data point is referred to as "Gate IN" or "Gate OUT" in Mr. Toney's report.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

minutes pre and 5 minutes post) from the time spent on property. *See* Toney Report, at p. 5. Taking in conjunction with the survey results and class member representative testimony, Mr. Toney found that employees spend, on average, 26.6 minutes performing work without compensation. *See* Toney Report at p. 6.

Second, Mr. Toney compared employee actual clock in/out times versus the rounded in/out time. In doing so, the data clearly showed that employees were always disadvantaged by Defendants' rounding policy, which further corroborates class member attestations that they were required to clock-in early in order to perform work activities that were ultimately uncompensated because Defendants took that time away from the employee.

As the chart below demonstrates, employees were always disadvantaged by Defendants' policies and practices (which corroborates the testimony of GSR employees):




The consistency in which employees are disadvantaged financially by GSR's policies is remarkable—and unlawful. *See, e.g.*, 29 C.F.R. § 785.48(b) (Rounding is proper only if the rounding of employee hours does "not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."); *Eddings v. Health Net, Inc.*, 2012 WL 994617 (C.D. Cal. Mar. 23, 2012) (An employer's rounding

practices comply with 29 C.F.R. § 785.48(b) only "if the employer applies a consistent rounding policy that, on average, favors neither overpayment nor underpayment.").

**C. GSR's Shift Jamming Policy**

> ***An audit of our payroll system revealed that overtime was not being paid accurately for certain team members. Nevada law states that if an individual works over 8 hours in a 24 hour period, and does not earn at least 1-1/2 times the minimum wage, overtime must be paid.***
>
> Jones Dec. at ¶ 24, Exhibit 18 (Letter To Employees)

Defendants have admitted to not paying employees properly for jammed shifts.[22] "Shift jamming" is a term used for the practice when an employer does not schedule at least sixteen (16) hours between employee shifts. Under Nevada's wage and hour law, an employer must pay an employee[23] overtime if she works over eight (8) hours in a twenty-four (24) hour period of time.

[22] Q: Can you look at Exhibit 4, please. Just I want to clear up that. That second paragraph – looks like the first paragraph states that there was an audit on the payroll system, and it shows that people were not paid according to the OT-24/shift jamming law, correct?

A: Uh-huh.

Q: Is that correct?

A: Correct.

Q: Is that an accurate representation of that first paragraph?

A: Correct.

*See* Exhibit 18, Robinson Deposition at 29:10-29:20. Craig Robinson, Chief Financial Officer, admitted that GSR failed to follow Nevada's shift jamming rule, or as it is called by GSR, the "OT-24" law.

[23] This only pertains to hourly Nevada employees who make less than one and one-half (1 ½) times the minimum hourly rate.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Shift jamming subclass members were required to work jammed shifts[24], and did work jammed shifts[25], some even wanting to do so[26], however under the law, they must be paid for

[24] Dill Dec. (Bates No. PLAINTIFF 0360-0361 at ¶¶ 10-12, ("I was scheduled to work 4 p.m. to 12 a.m. and then be required to come back the following morning at 8:00 a.m. I am not sure I was paid the proper wage rate for these types of hours. I informed my supervisor Brandon that this schedule is not what was agreed to when I was hired. I was told the jammed schedule was mandatory and if I didn't do it, I would be fired.")

[25] Cryderman Dec. (Doc. No. 18-4) at ¶ 18, ("GSR also engaged in shift jamming for the cocktail waitress. It happened at special events like New Years and Super Bowl and at the Cantina (for dance practice). By the term shift jamming, I mean that the hourly paid employees who made less than one and one half times the minimum wage were not given a full 16 hours off between shifts, yet were not paid overtime rates when they came back in to work without the sixteen hour break.'); Ignacio, S. Dec. (Bates No. PLAINTIFF 0385-0388) at ¶ 15 ("I would work from 3:00 p.m. to 11:00 p.m. and then have to be back for opening around 10:00 a.m. ); Ignacio, V. Dec. (Bates No. PLAINTIFF 0389-0391); Baker Dec. (Bates No. PLAINTIFF 336-337) at ¶ 13, ("I was required to work 10 p.m. to 7 a.m. and then return that same evening at 10 p.m.."); Berry Dec. (Bates No. PLAINTIFF 338-340) at ¶¶ 14-15, ("During special events, I would work shifts with less than 16 hours between them. For instance, I would have to work until late at night and then return the following day within 7-10 hours of finishing my prior shift.); Bliss Dec. (Bates No. PLAINTIFF 341-342) at ¶ 12, ("I would also be scheduled to work the closing shift, which ended around 12:30 a.m. – 1:00 a.m. depending on when we completed our closing activities. I would then be scheduled for the following morning shift, around 10 a.m., or earlier, but do not believe I was paid overtime premium for these types of shifts, either."); Bolin Dec. (Bates No. PLAINTIFF 343-344) at ¶ 16, ("During special events, I would be required to end my shift, then return the following day within 7-10 hours of finishing my prior shift."); Duran Dec. (Bates No. PLAINTIFF 364-365) at ¶ 8, ("During special events, I would be required to end my shift, then return the following day within 7 to 10 hours of finishing my prior shift."); Geppert-Browning Dec. (Bates No. PLAINTIFF 370-371) at ¶12 ("I often worked 16-hour shifts due to the banquet events. I would then be required to return 3 to 4 hours later for the next event."); Ignacio, V. Dec. (Bates No. PLAINTIFF 389-391) at ¶ 12, ("I was also subject to shift jamming whereby I was required to work shifts with less than 16 hours of time between the end of one shift and the start of another. This would happen almost every shift I was scheduled to work. I do not believe I was paid the proper overtime rate for shift jammed work."); Ignacio, S. Dec. (Bates No. PLAINTIFF 385-388) at ¶ 15 ("I would work from 3:00 p.m. to 11:00 p.m. and then have to be back for opening around 10:00."); Held Depo, at 31:10-31:24, ("There also was, it was, I would say schedule jamming. Where there is a holiday event, like something big. I don't know Christmas. I mean, we had mainly big holiday. And so people would schedule, example [] 2:00 p.m. to 2:00 a.m., 12-hour shift. And I would get scheduled like that two days in a row.")

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

the jammed hours at their applicable overtime rate of pay. Again, Mr. Toney's expert analysis of the actual time records of employees provides further evidence that Defendants had a policy of jamming shifts. Mr. Toney found that 34% of records analyzed or roughly, 10% of the entire class was subject to shift jamming. *See* Exhibit 17, "Toney Report" at p. 8.

Failure to pay employees overtime premium for jammed shifts is yet another policy of Defendants that saved the company money at the expense of their employees' willingness to show up for work, adequately staff their positions, and serve GSR's customers.

**D. GSR's Campaign To Get Rid Of Its Older Workforce**

After Defendants purchased the GSR, they began to systematically eliminate the older workforce in favor of a younger, sexier, Vegas-style casino. Defendants' age discriminatory practices were planned, overt, and ruthless:

> ***I was told to go through the computer and make a list of all people 65 years of age or older . . . Shortly thereafter the people on the list I had generated were terminated.***
>
> Woodhouse Dec. (Bates No. PLAINTIFF 449-453) at ¶ 21.

Ann Woodhouse was employed by Defendants as the Assistant the VP of Human Resources and Assistant to the Director of Human Resources. *See* Woodhouse Dec. Bates No. PLAINTIFF 0449-0453 at ¶ 14. Ms. Woodhouse had personal knowledge of all the policies and procedures within GSR's Human Resources Department. *Id*. at ¶¶ 14-26. Ms. Woodhouse was instructed by her superiors to "go through the computer and make a list of all people 65 years of age or older on or about the first quarter of 2012 because the executives upstairs, Alex and Louis had decided to initiate new procedures. Shortly thereafter the people on the list I had generated were terminated." *Id.* at ¶ 21. GSR management would have weekly meetings about its older workforce and their attempt to eliminate those

[26] *See* Exhibit 10, Strassner Dep. at p. 28:11-28:20 ("I actually don't have a complaint working extra hours. I actually enjoy it.').

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

employees. *Id.* at ¶ 22. In order to effectuate Defendants' campaign to get rid of older employees, Defendants changed the uniforms so that they would be tighter fitting and more revealing:

> ***Some said [the GSR] was more like a strip club than a casino.***

Hines Dec. (Bates No. PLAINTIFF 378-380) at ¶ 20; *see also* Woodhouse Dec. at ¶ 24 ([I]n these [weekly] meetings management would have discussions about hiring people based on their physical attractiveness and ability to look good in the uniforms."); Exhibit 4, Sargent Dep. at 18:2-18:11 (When Ms. Sargent first applied at GSR she saw a Craigslist ad: "people that weren't spaghetti serving, sloppy, fat, unattractive females ... Servertainers that were attractive and that could fit in the uniform..."). Supervisor Sargent recalls GSR's ageist culture:

> A (Sargent): Things like [Kumar] mentioned at one time during a discussion that we had a lot of elderly cocktail waitresses that had been there for years and that we were trying to phase them out because they didn't fit the uniform, they were too old, so to look at things like – and I remember him walking the floor with me and he pointed out one of the older women, he said we could write her up for her nylons and just say it's the wrong color nude and write her up for it. That way we could start getting rid of them.
>
> Q (Defense Counsel): Is he the only one who said these things to you?
>
> A: The other supervisors, we discussed the same scenarios that Kumar had discussed with them. This was a common knowledge in our -- our department, because Kumar had discussed this with everyone.
>
> Q: Now, when you heard from Kumar his alleged statement regarding older cocktail waitresses at the GSR did you feel that to be an improper statement by Kumar?
>
> A: Yes
>
> Q: What did you do about it?

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

A: I Spoke with Les, the manager right below him, but he was still a direct supervisor to me. I spoke to him about what he had said and he, he shook his head. He agreed it was ridiculous. But he said that's what they are trying to do. They are weeding out all the older ones.

Q: Who is they?

A: Meaning GSR, like the upper execs.

. . . .

A (Sargent): He [Kumar], I mean, and to reword that, he said the way we could get rid of the older cocktail waitresses is to write them up for other things, not for being old, but for having the wrong colored nude nylons.

Q: (Plaintiff's Counsel) When I say "older", were they over 40?

A: Yes.

Q: Were they over 50?

A: Some were over 40, some were over 50. We might even have had a 60-year old.

*See* exhibit 4, Sargent Dep. at 71:18- 72:2, 73:16-73:20, 74:18-75:11, 164:8-164:22.

As described above, Defendants' campaign to get rid of older workers was created by management at the highest rank; it was put in action by Human Resources; it was relayed by front line supervisors; and the effects were felt by innocent employees. Their testimony below explains it all:

- **Martha Armstrong**: When the new owners came in, I was aware that they were trying to get rid of the older employees. The clientele in the Lounge used to be an older crowd but after the new owners took over, they started bringing in a younger clientele. Older people, good people that were outstanding employees, and had been at GSR for 20 years or more were being let go. I believe that I was terminated due to my age. I was training very young, pretty girls to take the place of the older ladies. Then when I worked on the next New Year's Eve, some of my long-term customers requested that I serve them and GSR wouldn't let me. And the next thing I knew, I was suspended for 2 weeks with no explanation. They told me they would call me and then about 4 week later they brought me in and terminated me. I was sent to HR and one of my supervisors, Les Arlin, was in the room and he said "I

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

don't want to do this." And then the head of HR, Sterling London (name spelling unknown), proceeded to fire me. Armstrong Dec. at ¶¶ 13-14.

- **Franis Bolin**: I was told by my supervisor Anil Kumar that I was too old to work behind a bar but that he "couldn't get rid of me just yet." He often told me I weighed too much and that I should try to look younger like the other girls if I wanted to keep my job. I didn't complain because I was afraid I would lose my job. I believe he fired me because I was too old. He only hired young, thin waitresses. He often made the younger girls change in his office. Bolin Dec. at ¶¶ 10-13.

- **Teresa Carter**: I was an older employee and was treated differently when the GSR took over the resort. They changed my hours to give the older employees the worse shifts, with minimal tips in order to push us out so they could hire younger employees. Because of all of this I did retire. Carter Dec. at ¶ 15.

- **Maria Ducker.** Q (Defense Counsel): So is it your claim that you were wrongfully terminated? A: I don't know how to answer that question, sir. I was wrongfully pushed out. Q: Wrongfully pushed out. I haven't heard that one. A: Well, they pushed me out, they forced me out. Exhibit 9, Cucker Dep. at p. 57:18-57:24.

- **Shelly Faust**: I feel that I was discriminated against because of my age after the Meruelos came in. First, they changed the server uniforms and made us wear clothing that was tight and revealing. They told us we would have a jacket with the uniform but it was never provided. I felt completely embarrassed wearing that uniform and some of the customers even commented that it looked like GSR was trying to embarrass the older people. Then in January 2013, during a pre-shift meeting Kumar told us that we had to "audition" for our jobs by dancing in order to stay on the swing shift. We were horrified. And any seniority we had was gone. The joke used to be that you had to work at GSR at least ten years and be over 40 before you could work the pit - the most lucrative position - because you had to earn it. Those of us that were there for ten or more years worked really hard to earn the right to be in the pit. Now Kumar wanted to have only young, pretty girls with no experience and who could do a dance in the pit because he said swing shift wasn't making any money. Really, he just wanted to get rid of us older people. I ultimately didn't "audition" because I was too humiliated and Kumar gave me a horrible schedule even though there were still 4 spots on the swing shift that were open that didn't require dancing. Even though the seniority of shift bidding was gone, I wasn't aware of any policy change where we could not "take out" someone who wanted to go home early. One time one of the servertainers in the pit asked me if she could go home early so I took her out, meaning that I

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

took her place in the pit for the remainder of the shift. One of my managers, Walter Hall, came up to me and said that Steve Rosen said I could not be in the pit. I was completely devastated and embarrassed. I did complain about this to Debra Kite, about this incident and called her when it happened. Debra was the HR manager who told me that she knew they had put new rules in but didn't know what they were. I even told her I believed it was age discrimination but she would only say that there are separate rules for the dancers. Nothing was ever done. Faust Dec. at ¶¶ 14-18.

- **Patricia Hughes**: Although I was never formally terminated from GSR, they just stopped calling me to come in. I believe one factor was my age. Also, my boss complained to me that she was told she had to get rid of some of the older ladies on the day shift. Hughes Dec. at ¶ 13.

- **Antonio Ramirez**: I believe I was fired because of my age. I was 58 years old when I was terminated. [W]hen the new owners took over GSR, the Meruelo Group, they indicated that they wanted to turn GSR into a Las Vegas style casino in Reno. They wanted to do this by getting younger, sexier staff members. For instance, some of the women who had been working there for 25 plus years who had built up seniority, who had good sections and repeat customers were told that if they wanted to stay they would have to pass dance classes or move to day or graveyard shift or they would be fired. Ramirez Dec. at ¶¶ 3-6.

Other employees, not just those who were actually discriminated against, knew about GSR's discriminatory policies and practices:

- **Claire Berry**: "I have also seen older employees treated differently by the management. It was common knowledge among employees that the uniforms were purposely changed to be smaller so many of the older ladies could not fit into them any longer. Berry Dec. at ¶ 22.

- **Shenna Corral**: It is well known that GSR is trying to get rid of older employees. For the older cocktail waitresses, they made them dance in order to get them off the swing shift or let them go entirely. Corral Dec. at ¶ 16.

- **Kathy Hallmark**: I was very aware that GSR was trying to get rid of older employees. It seemed like when the new owners came in the older employees were gone instantaneously. In my department there was an older group of guys who had worked there for a long, long time – they actually built the theater – called the "Sacred Seven." GSR got rid of them almost immediately. In one instance they told one guy (I don't recall his name) that he could either take his 3 years of vacation that he accrued or he would be terminated. At that

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

point, I decided to look for another job before I got fired. Hallmark Dec. at ¶ 14.

- **Rodney Henderson**: GSR was trying to get rid of older employees. They really went after the "old guard" that had been there since GSR was the Hilton. They would write them up for not complying with unreasonable tasks and fire them or would make conditions so miserable they would quit. They also let a lot of the older cocktail waitresses go because they didn't fit what GSR wanted to portray. Henderson Dec. at ¶ 13.

- **Bridgette Hines**: It was well known that GSR was trying to get rid of older employees. For the older cocktail waitresses, they made the uniforms more revealing and the older ladies couldn't wear them. GSR wanted young, pretty girls that would "fit the part." They wanted a "new look at GSR" and wanted to appeal to a younger clientele. I believe a couple of the older ladies were fired but most probably left on their own. Also, I worked with an older bartender and he was told he was too old and too overweight to work and they made him work a different shift. GSR was trying to draw in a different, younger crowd, but ultimately, they lost a lot of customers who had been coming in and spending money for over 20 years because they didn't like the environment anymore. Some said it was more like a strip club than a casino. Hines Dec. at ¶¶ 19-20.

- **Imogen Holt**: It was common knowledge that GSR was trying to get rid of the older and unattractive employees. It was right after the new owners came in. I left GSR for a better opportunity right around the time they changed the cocktail server uniforms and were going to start making them dance. Even if I had not been planning to leave GSR, I would have anyway with all the changes they were making. Holt Dec. at ¶ 13.

- **Suzy Kelley**: When the new owners came in, the demographic of GSR changed dramatically. I wasn't specifically told GSR was getting rid of older employees, but if you looked around, it was obvious the employees were a lot younger. It was a big noticeable change. Kelley Dec. (Bates No. PLAINTIFF 392-394) at ¶ 17.

- **Sara Larson**: When the new owners came in, it was well known that they were getting rid of the older employees. Kumar, the head of the beverage department made everybody in the department re-bid on their shifts. This wiped out all seniority and long-term employees were given bad shifts. They also changed the cocktail waitress' uniforms, started hiring young girls and forced employees to "audition" for their jobs. Because of this a lot of the older ladies left or were fired. I worked in the Lounge so I didn't have to dance. Larson Dec. at ¶ 23.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

- **Eddy Martel-Rodriguez**: It was common knowledge that the new owners of GSR were trying to get rid of older employees, especially the cocktail waitresses. It was obvious that when GSR changed the cocktail waitress uniforms, the older employees would not be able to wear them. Martel-Rodriguez Dec. at ¶ 15.

- **Natalie Ordas**: Many of the older employees were treated extremely poorly. I felt that the new management was forcing the older employees out of the company. I know of at least one former employee, Shelly Fox, who complained about being discriminated against by GSR management due to her age. Shelly ultimately left GSR to work at the Nugget. Ordas Dec. at ¶ 18.

- **Sean Park**: On or about July 2013, I had a conversation with my Director Megan (whose last name I can't recall) about becoming a "lead" bartender. During that conversation, Megan told me that if I wanted that position I would have to review other bartenders and that she "wanted to get rid of old bartenders." I was not comfortable with what she was asking so I decided not to pursue being promoted to "lead" bartender. I also felt that my refusal to evaluate the other bartenders in order to "get rid of the old" ones also had something to do with my termination. Park Dec. at ¶¶ 11, 13.

- **Richard Stoltz**: I was never told directly that GSR was trying to get rid of older employees. However, when the new owners took over the GSR property, the cocktail waitresses had to wear skimpy uniforms and a lot of the older employees quite because they could not wear the new uniforms. Stoltz Dec. at ¶ 12.

- **Darlene Vance**: I was never specifically told that older employees were let go for their age, but I do recall that GSR had a dinner for some of the older employees and a percentage of them were given "pink slips" at this dinner. Several older cashiers whose names I don't recall were let go for no specific reason. I feel it was because of their age. Vance Dec. at ¶¶ 12-13.

- **Whitney Vaughn**: I was told by the casino manager . . . that he wanted a younger atmosphere at GSR. He said that "the older employees were not as pretty and could not do the job well." He also said that myself and the other younger dealers were hired because we were "young and pretty." I knew a few older co-workers (whose names I can no longer recall) that lost their job for no specific reason. I believe it was because of their age. Vaughn Dec. at ¶¶ 15-16.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

## IV. ARGUMENT

Class certification under Rule 23 requires that the plaintiff satisfy all four prerequisites of Rule 23(a) and at least one of the three requirements of Rule 23(b). *See Amchem Prods. v. Windsor*, 521 U.S. 591 613-14 (1997). As recently summarized by the Supreme Court in *Wal- Mart Stores, Inc. v. Dukes*:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, 102 S.Ct. 2364, and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.*, at 161, 102 S.Ct. 2364; see *id.*, at 160, 102 S.Ct. 2364 ("[A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable"). Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.

131 S. Ct. 2541, 2548, 2551-52 (2011).

The court is invested with broad discretion in resolving the certification issue. *Rector v. City & County of Denver*, 348 F.3d 935, 949 (10th Cir. 2003). In the following analysis, Plaintiffs will address the four requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – along with the Rule 23(b)(3) requirement of predominanance for each of the claims that Plaintiffs seek to certify.

### A. Each of Plaintiffs' Proposed Rule 23 Classes Satisfies the Numerosity Requirement

Rule 23(a)(1) allows certification of a class where the proposed class "is so numerous that joinder of all class members would be impracticable." As a general rule, a putative class of forty or more will be found numerous. *See, e.g., Int'l Molders & Allied Workers' Local 164*

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

*v. Nelson*, 102 F.R.D. 457, 461 (N.D. Cal. 1983) (recognizing that a putative class of forty or more generally will be found 'numerous.'").

Here, the proposed Rule 23 class consists thousands of current and former GSR employees, 4,748 to be exact. (*See* Exhibit 19 attached to the Jones Declaration at ¶ 25.). The proposed subclasses are likewise sufficiently numerous:

- The proposed Shift Jamming Subclass consists of at least 1,161 employees (*see* Exhibit 18 at p. 33:17-33:20, [Defendants] admit 1,162 employees were subject to shift jamming without proper compensation; *see also* Exhibit 20 indicting 1,161 employees were effected[27]); and
- The proposed Waiting Time Subclass consists of at least 261 employees who were admittedly subject to shift jamming without proper compensation, ( *see* Exhibit 20 indicating 261 employees have since left Defendants employ[28]); and
- The proposed Age Discrimination Subclass consists of at least 133 persons, *see* Exhibit 21 indicating 133 employees who are over the age of 60 have been terminated between June 2010 and March 2012.[29]

Because joinder and individual management of this number of class and subclass members would be impracticable, Plaintiffs meet the numerosity requirement.

---

[27] Even if the Court decides that an employee subject to a collective bargaining agreement (CBA) has bearing on whether the individual employee is a putative member of this subclass, Defendants admit that of the 1,162 employees subject to shift jamming 283 were not covered by a CBA. Either way, Plaintiffs have satisfied the numerousity requirement.

[28] Defendants have refused to provide Plaintiffs with a list class members who have been terminated employment during the class period. Should this subclass be certified, Plaintiffs will seek a list of all employees who have terminated employment with Defendants during the relevant time period.

[29] Defendants have refused to provide Plaintiffs with a list of class members who are over 40 years of age and who have been subject to an adverse employment decision by the GSR during the class period. Should this subclass be certified, Plaintiffs will seek a list of all employees who have been subject to an adverse employment decision by the GSR during the relevant time period.

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

**B. The Proposed Rule 23 Classes Satisfy the Commonality Requirement**

The decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) is the United States Supreme Court's most recent pronouncement on the commonality standards applicable to class certification under Federal Rule 23. It is therefore appropriate at the outset to consider what the Court in that case held – and did not hold. The appeal in *Dukes* raised the primary issue of whether a nationwide class alleging gender discrimination under Title VII of the Civil Rights

Act of 1964 should have been certified under Rule 23(b)(2).[30] Calling it "one of the most expansive class actions ever," the Court found that the only potentially discriminatory policy in place for that entire class was, in actuality, a non-policy – giving local supervisors complete discretion over employment matters. *Id*. at 2546, 2554. Without evidence of any actual pattern or practice, the Court could not find that commonality existed: "Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id*. at 2552 (*emphasis in original*). Wal-Mart's policy of delegating employment decisions to its supervisors was "just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against* having uniform employment practices." *Id*. at 2554 (*emphasis in original*). The Court noted that, therefore, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions." *Id*.

In short, the *Dukes* court focused on the merits of that case only to the extent required to determine if any common policy or practice was in place – and found that where the only policy was explicitly "a policy against having uniform employment

[30] Accordingly, the Court did not consider nor address the predominance factor under Rule 23(b)(3).

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

practices," a common question could not be established. *Id*. at 2554. Although the *Dukes* court stated that analyzing the prerequisites of Rule 23 may entail "some overlap with the merits of the plaintiff's underlying claim," nothing in that decision requires or even endorses a court to make a final decision on the ultimate merits of a case at the certification stage. To do so would largely invalidate the need for litigation after certification and would, in essence, reduce the case to the incompletely-developed record at the time of certification. The *Dukes* decision did not "[work] some sea change in class action jurisprudence." *Wallace* B. *Roderick Revocable Living Trust v. XTO Energy*, No. 08-1330-JTM, 2012 WL 1059882 at *4 (D. Kan. March 28, 2012). "The decision simply reflects the application of the long-standing rule that class members suffer a common injury, to facts which clearly established that defendant had not adopted any uniform policy, but in fact had done precisely the opposite..." *Id*. As more fully explained below, Plaintiffs claims under Nevada wage and hour law are firmly based in Defendants' common policies and practices, and therefore satisfy the requirements for commonality.

**1. Plaintiffs' claims for unpaid wages raise common questions.**

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes,* 131 S. Ct. at 2545 (*quoting Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). "This does not mean merely that they have all suffered a violation of the same provision of law," but instead that their claim(s) "depend upon a common contention ... of such a nature that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Although "for purposes of Rule 23(a)(2) even a single common question will do," "[w]hat matters to class certification is not the raising of common 'questions'—even in droves— but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id*. at 2551, 2556.

Federal courts throughout the nation continue after the *Dukes* decision to routinely certify and maintain Rule 23 wage-and-hour class actions based upon the common issue of an employer's policy that allegedly leads to unpaid time. *See, e.g., Espinoza v. 953 Associates*

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

*LLC*, No. 10 CIV. 5517 SAS, 2011 WL 5574895 (S.D.N.Y. Nov. 16, 2011) (certifying issues of defendant's practice and policy regarding breaks, unpaid post-shift work activities, and company alteration of clock-in and clock-out times to match scheduled work times); *Mitchell v. Smithfield Packing Co., Inc.*, No. 4:08-CV-182-H 1, 2011 WL 4442973 (E.D.N.C. Sept. 23, 2011) (certifying class of employees paid pursuant only to scheduled shifts); *Lewis v. Alert Ambulette Serv. Corp.*, No. 11-CV-442, 2012 WL 170049 (E.D.N.Y. Jan. 19, 2012) (certifying class of employees based upon policy of non-payment of overtime and deductions). Whether a question will drive the resolution of the litigation necessarily depends on the nature of the underlying legal claims that the class members have raised. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 2835 (2015); *Parsons v. Ryan,* 754 F.3d 657, 676 (9th Cir.2014) ("commonality cannot be determined without a precise understanding of the nature of the underlying claims.").

The relevant standard is whether an employer "suffered or permitted" an employee to perform work. *See, e.g., Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008) ("Employ is defined in the Act as including "to suffer or permit to work[.]" *citing* 29 U.S.C. § 203(g)). "It is clear an employer's actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work." Id. at 287 (citation omitted); *Forrester v. Roth's I.G.A. Foodliner, Inc.,* 646 F.2d 413, 414 (9th Cir. 1981). "An employer who has knowledge that an employee is working, and who does not desire the work be done, ***has a duty to make every effort to prevent its performance***." *Id.* at 288 (emphasis added); *see also Forrester,* 646 F.2d at 414 ("An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation...."); *Mumbower v. Callicott,* 526 F.2d 1183, 1188 (8th Cir.1975) ("The employer who wishes no such work to be done has a duty to see it is not performed."); 29 C.F.R. § 785.13 ("In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed."). Ultimately, "[t]he reason an employee continues to work beyond his shift is immaterial; if the employer knows or has reason to believe that the employee continues to

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

work, the additional hours must be counted." *Reich Reich v. Dep't of Conservation & Natural Res., State of Ala.*, 28 F.3d 1076, 1082 (11th Cir. 1994).

Here, all class members worked at the same worksite, under the same management team, with the same human resource department, and under the same "no overtime" and "ready for work" edicts. Via these edicts—as demonstrated by the voluminous testimony, the scientific survey, and the data analysis submitted in support of this motion—Defendants' created a policy and practice of suffering and permitting hourly employees at the GSR to work without pay. This policy was common for all hourly employees. This common contention—that these systems and policies ultimately created an environment that required class members to work unpaid time and overtime hours—drives the resolution of the litigation and is the necessary common "glue" that holds the class claims together. The common impact of those policies and practices and the injury caused by them is a determinable measure of lost wages.

Unlike in *Dukes*, where the court was concerned that the policy at issue was the lack of centralized decision making power, there is damning evidence that upper management expected their hourly employees to work without compensation. Indeed, supervisors attest that they were instructed to make sure employees performed certain pre and post shift activities "off-the-clock" so as to comply with Defendants' strict "no overtime" policy. This is not case involving a rouge supervisor; rather the experiences of employees and supervisors alike cut across all departments and all job titles.

There are thus two (2) common questions that resolve this litigation on a classwide basis—one factual and one legal:

- Factual: Whether Defendants suffered and permitted class members to work without compensation; and
- Legal: Whether class members are entitled to compensation for the time spent engaging in pre and post shift activities.

The answer to these question is capable of classwide relief via representative testimony. *See Jimenez*, 765 F.3d at 1167 ("Since *Dukes* and *Comcast* were issued, circuit

courts including this one have consistently held that statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages."). Accordingly, the commonality requirement is satisfied as to these claims.

**2. Plaintiffs' claims for shift jamming are common to all subclass members.**

Defendants admit they violated Nevada overtime laws by shift jamming when it mailed checks for unpaid overtime wages to 1,162 employees. At least 279 (or 24.1%) were undeniably not covered by any purported union agreement.[31] (Doc. 135, p. 19 at fn. 10.) But Nevada's law requires 30 days of pay if an employee is not paid all wages due at the time of termination, no matter the reason for the failure to pay. NRS 608.050. Here, Defendants admit that they did not pay 1,162 employees correctly and 297 of those were terminated with wages due and owing. Union or nonunion, they must be compensated under NRS 608.050 as well.

The common questions for shift jamming subclass members who are union employees are as follows:

- Were the shift jamming subclass members covered by a valid and existing collective bargaining agreement?
- Did the collective bargaining agreement provide for overtime that exceeded the requirement as provided under Nevada's Revised Statutes?

Resolution of these questions will determine whether Plaintiffs' shift jamming claim is applicable to union employees. If the answer to both questions mentioned above is "yes", then these subclass members do not have a valid shift jamming claim against Defendants. If any of the answers to the above questions is "no", however, then these subclass members would have the same claim as non-union subclass members.

[31] To date, Defendants have failed to meet their burden that any putative class members are covered by valid collective bargaining agreements that provide overtime in excess of the statutory mandate. (See Doc. 139.)

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

The common questions for shift jamming subclass members who are non-union employees is:

- Did shift jamming subclass members receive 1 ½ times their regular rate of pay when they worked a shift less than 16 hours from the preceding shift?

Although this claim is a foregone conclusion—Defendant admits that it did not comply with Nevada's shift jamming rules—this claim is still common to all shift jamming subclass members and must be certified prior to Plaintiffs' filing a motion for summary judgment on this claim.

**3. Plaintiffs' claims for waiting time wages are common to all subclass members.**

Plaintiffs' waiting time claims are derivative of their other claims for failing to receive their proper wages upon separation from employment. As evidence by Defendants' motion for summary judgment, the questions relating to this claim are common for all subclass members. (Doc. 135 at pp. 25-26) (arguing that Nevada employees do not have a private right of action to assert waiting time claims or, alternatively, that a plaintiff-employee must prove bad faith on the part of an employer to recover such wages). First, there is a question as to whether Plaintiffs and subclass members have a private right to bring such a claim. Second, there appears to be a question whether Plaintiffs and the subclass must prove that Defendants acted in bad faith. These questions, as phrased by Defendants themselves, are common to all members of the subclass—although plaintiff disputes that there is any scienter or willfulness requirement under NRS 608.040-.050. (*See* Doc. 140 at pp. 23-24.) The ultimate common question, however, remains whether subclass members are entitled to 30-days additional pay under NRS 608.020-.050 when they have not been paid all their wages owed. Accordingly, the commonality requirement is met here.

**4. Plaintiffs' age discrimination claims are common to all subclass members**

As stated above, Plaintiffs, the putative class members, and numerous witnesses attest that Defendants engaged in a systematic campaign to get rid of its older employees. This

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

claim is not brought as an individual action alleging that Plaintiff Boggs or Plaintiff Wiederholdt were solely the victims of Defendants' discriminatory acts. Plaintiffs claim that Defendants instituted a policy to discriminate on the basis of age. There are thus two common questions present with this claim:

- Did Defendants institute a policy to discriminate on the basis of age?
- Did subclass members suffer an adverse employment action because of age?

If the answer to either question above is "no", Plaintiffs will be unsuccessful. Because these questions are capable of resolution in a single stroke, they meet the commonality prong of the class certification analysis.

### C. Plaintiffs Satisfy the Typicality Requirement

Rule 23(a)(3) requires that "the claims and defenses of the representative parties are typical of the claims and defenses of the class." For typicality to exist, class representative plaintiffs must have claims "reasonably co-extensive with those of absent class members," but need not be "substantially identical." *Hanlon,* 150 F.3d at 1020; *see also Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988) ("[D]iffering fact situations of class members do not defeat typicality...so long as the claims of the class representative and class members are based on the same legal or remedial theory."). The test is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hannon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)

The named plaintiffs satisfy the typicality requirements for the class and each subclass. All named Plaintiffs worked as casino employees at Defendants' Reno property.[32] All of the named plaintiffs used the same timekeeping systems and were subject to the same

[32] *See* Exhibit 4, Sargent Dep. at p. 30:10-30:12 and 74:11-74:14; Exhibit 5, Cryderman Dep. at p. 8:11-8:16; Ignacio, V. Dec. Bates No. PLAINTIFF 0389-0391 at ¶ 3; Ignacio, S., Dec. at Bates No. PLAINTIFF 0385-0388 at ¶ 3; Doc. 18-3, Boggs Dec. at ¶ 3; Doc. 18-6, Wiederholt Dec. at ¶ 3.

"no overtime" and "ready for work" policies mandated by Defendants.[33] All of the named plaintiffs report that they worked without receiving pay.[34]

Named Plaintiffs Sargent, Cryderman, Ignacio, S., and Ignacio V. report that they were subject to Defendants' shift jamming policy.[35] Indeed, Plaintiffs Cryderman, Ignacio, S., Ignacio, V., and Boggs all received the check from Defendants for uncompensated shift jamming. *See* Doc. 135, Exhibit 3, Humason Dec. at p. 43 ¶¶ 3-6.[36]

All named Plaintiffs are former employees, and therefore can represent the claim for unpaid wages due and owning at termination.[37]

Named Plaintiffs Rosie Boggs and Jacqulyn Wiederholt are both over the age of 40 and believe that they were terminated by Defendants because of their age.[38]

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

---

[33] *See* Exhibit 4, Sargent Dep. at 51:14-51:20 and 70:18-71:1; Exhibit 5, Cryderman Dep. at 23:12-23:25, 56:16-56:17 and 91:23-92:1; Exhibit 6, Ignacio, V. Dep. at 65:10-65:16; Exhibit 22, Ignacio, S. Dep. at 58:18-59:18 and 94:8-94:20; Exhibit 14, Boggs Dep. at 38:25-39:25; Exhibit 15, Wiederholt Dep. at 106:1-106:7.

[34] *See* Exhibit 4, Sargent Dep. at 80:4-80:14; Exhibit 5, Cryderman Dep. at 44:10-45:1 and 47:4-47:25; Exhibit 6, Ignacio, V. Dep. at 70:2-70:22; Exhibit 14, Boggs Dep. at 32:18-33:18 and 151:9-151:16, 123:4-123:10; Exhibit 15, Deposition Wiederholt Dep. at p. 140:15-140:25; Exhibit 22, Ignacio, S. Dep. at 58:18-59:18

[35] *See* Exhibit 4, Sargent Dep. at 84:10-84;16; Exhibit 5, Cryderman Dep. at 29:23-30:6; Ignacio, V. Dec. Bates No. PLAINTIFF 0389-0391 at ¶ 12; Ignacio, S., Dec. at Bates No. PLAINTIFF 0385-0388 at ¶ 15.

[36] As discussed in footnote 27, above, even if the Court determines that it must look to a valid CBA to determine whether an individual employee is a member of the shift jamming subclass, named Plaintiffs Cryderman and the Ignacios are not covered by any purported CBA and thus they remain typical to each subclass member. Alternatively, if the shift jamming subclass requires the employee to be covered by a CBA, named Plaintiff Boggs was purportedly a covered employee and thus would remain typical of the class.

[37] *See* Exhibit 4, Sargent Dep. at p. 30:10-30:12 and 74:11-74:14; Exhibit 5, Cryderman Dep. at p. 8:11-8:16; Ignacio, V. Dec. Bates No. PLAINTIFF 0389-0391 at ¶ 3; Ignacio, S., Dec. at Bates No. PLAINTIFF 0385-0388 at ¶ 3; Doc. 18-3, Boggs Dec. at ¶ 3; Doc. 18-6, Wiederholt Dec. at ¶ 3.

[38] *See* Doc. 18-4, Boggs Dec. at ¶10; Doc. 18-6, Wiederholt Dec. at ¶ 8.

In sum, the claims of the named plaintiffs are co-extensive with those of the class and subclasses they seek to represent. Therefore, the typicality requirements are met.

**D. The Proposed Class Representatives and Class Counsel will Adequately Represent the Classes**

The purpose of the adequacy requirement is to ensure that there are no potential "conflicts of interest between the named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. To satisfy this prerequisite, the plaintiffs must show "(1) that the representative's party's attorney be qualified, experienced and generally able to conduct the litigation; and (2) that the suit is not collusive and plaintiff's interests are not antagonistic to those of the remainder of the class." *In re United Energy Corp. Solar Modules Tax Shelter Investments Securities Litigation,* 122 F.R.D. 251, 257 (N.D. Cal. 1988). "[C]ertification will be refused on grounds of inadequate representation only where there is a fundamental conflict in interests between the representatives and non-representatives." *Wallace B. Roderick Revocable Living Trust, 2012* WL 1059882 at *8 (internal citations omitted).

Here, as stated above, the proposed named plaintiffs have claims that are co-extensive with those of the proposed classes. There is no evidence of antagonism or conflicts between the named plaintiffs and putative members of the class. Further, the named plaintiffs have demonstrated that they will vigorously prosecute the interests of the class by obtaining counsel with experience prosecuting wage and hour class actions, by responding to written discovery, and being available for deposition.

Plaintiffs' counsel is also adequate counsel for the class. Under Federal Rule 23(g), to determine adequacy of counsel, the Court should consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. The attorneys of Thierman Buck LLP has expended substantial work in identifying and investigating the claims in this action. They have actively and vigorously prosecuted these claims, including extensive discovery and motion

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

practice before this Court, as evidenced by the present certification motion. Thierman Buck LLP has substantial experience in handling class actions, extensive experience of the applicable law surrounding these claims, and have already committed significant resources to representing the class. *See* Declaration of Mark R. Thierman (hereinafter, "Thierman Dec.") at ¶¶ 4-13; Declaration of Joshua D. Buck (hereinafter, "Buck Dec.") at ¶¶ 4-6; Declaration of Leah L. Jones, (hereinafter, "Jones Dec.") at ¶ 1. Mr. Thierman has been practicing labor and employment law for thirty-eight years, and has focused on representing plaintiffs in large-scale wage and hour collective and class actions for the last twenty years. Thierman Dec. at ¶ 8. He has been counsel for a certified class in over 250 employment cases, the vast majority of which were overtime wage and hour cases. *Id.* at ¶ 9. Mr. Buck has dedicated his practice to representing employees in wage and hour class actions for over five years and, prior to that, Mr. Buck represented unionized employees resolve workplace disputes. *See* Buck Dec. at ¶ 5. Ms. Jones also focuses on wage and hour law and is involved in several Nevada collective and class actions over the past two years. Jones Dec. at ¶ 3. In short, Plaintiffs' counsel is adequate to protect and represent the interests of putative class members. Consequently, the adequacy requirement is met.

**E. Common Issues Predominate**

The predominance inquiry "focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152, 1162 (9th Cir), *cert. denied*, 534 U.S. 973,122 S. Ct. 395 (2001) ("Local Joint Executive Bd.") (quoting *Hanlon*, 150 F.3d at 1022). Common questions predominate over individual questions if they significantly and directly impact each class member's effort to establish liability and entitlement to relief, and their resolution "can be achieved through generalized proof." *See Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002).

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

Differences in individual damages do not defeat the predominance requirement. "[C]ourts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations and a recent dissenting decision of four Supreme Court Justices characterized the point as "well nigh universal." *Newberg on Class Actions* § 4:54 (5th ed.).[39] "Indeed, a class may also be certified solely on the basis of common liability, with individualized damages determinations left to subsequent proceedings." *Id.* In the Ninth Circuit, "damage calculations alone cannot defeat certification. We have said that '[t]he amount of damages is invariably an individual question and does not defeat class action treatment.'" *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).

**1. Common issues predominate over the general wage claims**

As in numerous other wage and hour class actions, the fact that this aspect of the wage and hour litigation arises from Defendants' policy to suffer and permit work without compensation strongly supports a finding that the predominance requirement is satisfied. *See, e.g., In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 527 F. Supp.2d at 1068; *reversed on other grounds* at 571 F.3d 953, 958 (9th Cir. 2009). Once plaintiffs have alleged

[39] *See also In re Urethanes Antitrust Litig.*, 237 F.R.D. at 452 (stating that "even if individualized issues predominate the issue of damages, the court believes that common questions nonetheless predominate in this case because common questions will govern the more difficult, threshold liability issues...."); *see also Hammer v. JP's Sw. Foods, L.L.C.*, 267 F.R.D. 284, 289 (W.D. Mo. 2010) ("Where [ ] common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain.") (*quoting Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003)); *Farmer v. DirectSat USA, LLC*, No. 08 C 3962, 2010 WL 3927640, at *22 (N.D. Ill. Oct. 4, 2010) ("When determining if plaintiffs have met the predominance requirement, district courts focus on questions of liability, not damages.") (finding that minor factual differences such as supervisors with "differing informal policies" or "the amount of hours worked per week and what off the clock work was performed" do not preclude a finding of predominance); *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 402 (C.D. Cal. 2008) ("In all wage and hour cases, liability and damages depend on the employees' actual wages and hours. Differences in wages and hours [among class members] often do not prevent class certification, if there are ways to avoid testimony by every class member.").

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

that there is a policy of systematically depriving employees of hours worked by virtue of this policy, it is defendants' obligation to demonstrate that the policy was lawful. *See, e.g., Forrester*, 646 F.2d at 414; 29 C.F.R. § 785.13. The common overarching question presented is whether Defendants' "no overtime", "ready for work" and "rounding" edicts resulted in a de facto policy of suffering and permitting employees to work without compensation. This question is common to all putative members of the Nevada class and predominates over individual issues, if any, regardless of the department where the class member worked or the type of pre and post shift activity performed. Indeed, whether the pre and post shift work being complained of here was performed by a housekeeper or a bartender, the pressure to perform work activities without compensation was the result of Defendants' policy and practice of suffering and permitting work without compensation to eliminate certain labor costs. Similarly, whether the class member was required to attend a pre-shift meeting or collect a cash bank is a distinction without a difference. The legal question of whether class members should be paid for the performance of these activities is the same. In sum, class treatment of Plaintiffs' unpaid wage claims clearly predominate over hundreds of individual cases that inevitably would be filed in pursuit of compensation for unpaid work.

**2. Common issues predominate over the shift jamming claims**

The same is true for Plaintiffs' shift jamming claims. As indicated by Defendants behavior of unilaterally trying to buy off Plaintiffs and subclass members and their motion for summary judgment (Doc. 135), none of Defendants defenses are unique to any particular individual. Indeed, Defendants admit that it did not pay shift jamming subclass members according to the Nevada's shift jamming rules. The remaining questions pertain to whether shift jamming subclass members are union members or not and, as explained in the commonality section above, those questions are common to these two subsets of employees.

**3. Common issues predominate over the waiting time claims**

There is no individual defense to whether former employees are entitled to 30-days pay under NRS 608.020-.050 for not receiving all their wages owed upon termination. It is a legal question to be decided by this Court. This determination is, thus, appropriate for

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

class wide treatment. Moreover, the allocation of damages may be readily determined based simply on reference to the total number of waiting time subclass members and their regular hourly rate upon termination. Based on these considerations, class treatment of Plaintiff's waiting time claims clearly predominates over hundreds of individual cases.

**4. Common issues predominate over the age discrimination claims**

Plaintiffs have asserted the age discrimination claims as class claim that resulted from Defendants' campaign to make GSR into a younger, hipper, Vegas-style casino. Defendants' deliberate decision to force older workers to retire, quit, or face termination because of their ages was a common experience for all older workers. Any individual issues that may arise—e.g., the individual ageist comments by management, differing disciplinary actions—all stem from Defendants' campaign to get rid of its older employees. Accordingly, rather than have fifty separate age discrimination trials, these claim are appropriate for class adjudication and statistical evidence proving Defendants' discriminatory conduct.

**F. A Class Action is the Superior Method of Adjudication**

The superiority inquiry focuses on promoting the interests of "efficiency, consistency, and insuring that the class members actually obtain relief." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001). A proper class action prevents identical issues from being "litigated over and over [,] thus avoid[ing] duplicative proceedings and inconsistent results" and helps class members obtain relief when they might be unable or unwilling to individually litigate an action for financial reasons or for fear of repercussion. *Id.* The factors to be considered are: (1) the class members' interests in controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties of managing the class action. FRCP 23(b)(3). "[C]onsideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most

profitably on a representative basis." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-92 (9th Cir. 2001).

Here, the situation is comparable to that of the Las Vegas Sands' former casino employees who sought damages for failure to provide a statutorily required 60-day notice before closure:

> This case involves multiple claims, some for relatively small individual sums. Counsel for the would-be class estimated that, under the most optimistic scenario, each class member would recover about $1,330. If plaintiffs cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to achieve.

*Local Joint Executive Bd.*, 244 F.3d at 1163 ("Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.")(citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)). In such a situation, the superiority requirement is "easily satisfied." *Id.*

The same is true, here. This case involves multiple claims for relatively small amounts of money. Furthermore, since this action involves the liability determination under a single policy, the inability to proceed as a class action here would necessitate the filing of hundreds of individual actions involving the exact same factual and legal questions. Turning to the second and third factors, it is entirely appropriate to have this action continue to proceed as a class in this forum. The alternative is that many of the putative class members who are entitled to seek back pay for the time they spent performing work without compensation will file separate individual lawsuits in this Court. Faced with potentially hundreds of lawsuits, the Court would then be faced with the issue of having to coordinate the proceedings as a time and costs savings remedy: As noted by a federal district court in a complex and large action such as this one:

> Here, the obvious alternative to a class action would be for plaintiffs to bring individual suits against defendants. This would be grossly inefficient, costly, and time consuming because the parties, witnesses, and courts would be forced to endure

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

> unnecessarily duplicative litigation. The hundreds, and perhaps thousands, of class members are dispersed across the country, each with relatively similar claims. Certainly, the most feasible way for these plaintiffs to pursue their claims is by way of a class action.

*In re Urethanes*, 237 F.R.D. 440, 453 (Lungstrum, J.) Thus, all of the requirements of Rule 23(b)(3) are met, and the classes should be certified.

## V. CONCLUSION

The facts of this case require no embellishment—they speak for themselves. Albeit shocking in the scale of its defiance of basic employment laws, Defendants systematically sought to limit its labor costs by taking the advantage of free labor and by ridding itself the expense of employing older workers. Defendants now seeks to absolve itself of any meaningful liability by claiming it cannot be held liable to a class of injured workers because its violations are so great and so many. Defendants' brazen defense must be rejected—Plaintiffs squarely meet (and significantly exceed) the standards for class certification under Rule 23. Accordingly, Plaintiffs' motion should be granted.

Dated this 3rd day of September 2015. THIERMAN BUCK LLP

/s/ Joshua D. Buck
Mark R. Thierman, Nev. Bar No. 8285
Joshua D. Buck, Nev. Bar No. 12187
Leah L. Jones, Nev. Bar No. 13161
7287 Lakeside Drive

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.com

# Exhibit 2

# Exhibit 2

**COHEN-JOHNSON, LLC**
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
sjohnson@cohenjohnson.com
CHRIS DAVIS, ESQ.
Nevada Bar No. 6616
cdavis@cohenjohnson.com
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
Telephone: (702) 823-3500
Facsimile: (702) 823-3400
Attorneys for Defendant

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

TIFFANY SARGENT, BAILEY CRYDERMAN, SAMANTHA L. IGNACIO (formerly SCHNEIDER), VINCENT M. IGNACIO, HUONG ("ROSIE") BOGGS, and JACQULYN WIEDERHOLT on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No.: 3:13-cv-453-LRH-WGC

**OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

# TABLE OF CONTENTS

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

## TABLE OF AUTHORITIES

Cases

Statutes



COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

## I. INTRODUCTION

In their Motion for Class Certification, Plaintiffs seek to certify an "Unpaid Wage Class" comprised of "all non-exempt hourly workers employed by defendant at any time form June 21, 2009, until the date of judgment after trial herein." The proposed class consists of at least 4,784 members, and will continue to grow over time. The proposed class covers job positions in every department, despite the fact that Plaintiffs worked in only six positions in three departments. The proposed class is based on the allegation that: "The facts show that Defendant required, suffered and/or permitted all the members of the class of hourly employees to perform work off the clock, either by directly requiring them to do work before punching in and/or after punching out each shift, or by inappropriately rounding their time in favor of the employer in violation of Nevada law." This is most definitely not what the facts show.

In fact, Plaintiffs' motion is founded on mythology. This mythology consists of declarations of Plaintiffs that were contradicted when they were cross-examined in deposition; declarations of fifty opt-in class members, which would likely also be contradicted upon cross-examination in deposition; an alleged "scientific survey" that has no basis in science and flouts established scientific research principles and common sense; and an unsubstantiated and erroneous analysis of "class member data."

The reality is quite different from the myth presented by Plaintiffs. Plaintiffs' deposition testimony, along with the deposition testimony of nine deposed opt-in class members, establishes that GSR permitted employees to work overtime, paid employees for overtime that they worked, and did not require employees to perform work off-the-clock. To the extent employees allegedly performed some tasks off-the-clock, this was an anomaly that did not occur pursuant to any GSR policy, and the time spent performing such tasks was de minimis and/or noncompensable time. Based on the deposition testimony and other clear evidence, Plaintiffs cannot establish that the proposed class, or any of the proposed subclasses, satisfy the requirements of Rule 23.

## II. STATEMENT OF FACTS

### A. The Declarations On Which Plaintiffs Rely Are Not A Trustworthy Source of "Facts," As Sworn Declarations And Discovery Responses Were Contradicted In Deposition Of Plaintiffs And Deposed Opt-In Plaintiffs.

Plaintiffs' "Statement of Facts" is based in part on Plaintiffs' declarations, and the attorney-drafted declarations of fifty putative class members submitted in support of the motion. While Defendants have had the opportunity to depose Plaintiffs, they have not had the opportunity to depose the fifty other declarants. The depositions of the named Plaintiffs, along with the depositions of nine opt-in plaintiffs who had provided sworn discovery responses, shows that the untested declarations are not a trustworthy source of facts. In deposition, three of the four named Plaintiffs who had provided attorney-drafted declarations prior to their depositions contradicted their declarations, and admitted that statements in their declarations were not based on personal knowledge. *See, e.g.,* Joint Exhibits to Defendants' Opposition to Plaintiffs' Motion for Class Certification and to Defendants' Motion for Decertification of FLSA Collective Action ("Joint Ex."), filed separately, Joint Ex. 1, Boggs Depo. at 125-132. (declaration incorrectly stated that fellow employees who clocked in after the 2:45 deadline would be disciplined, as she had no knowledge supporting that, and incorrectly stated that she got her cash bank before clocking in, as she got it after clocking in); Joint Ex. 2, Cryderman Depo. at 77-79, 83-86 (declaration incorrectly stated that "Mr. Kumar had a no overtime rule for all employees of the GSR," testifying that Kumar's supervision was limited to the "beverage department," and stating: "I don't know if it was Mr. Kuman had a no overtime rule for all employees. . . ; no factual basis for her statement that: "employees were often charged back by the house," as she had no knowledge of any instance when that occurred); Joint Ex. 5, Sargent Depo. at p. 111, ll. 1-11; pp. 65-66, 88-89, 91-92, 104-105 (declaration incorrectly stated that she witnessed other employees in food and beverage departments instructed to work off the clock, as she did not do so; she did not have personal knowledge to support the assertion that "every one of the several hundred people she supervised worked off the clock"; though her declaration stated that "like most employees, [her] paycheck was often not correct or late," she did not know how many employees were employed by GSR, and was aware of only a "handful" or employees

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

who had issues with their paychecks).

Similarly, in depositions taken of nine opt-in plaintiffs who had provided sworn, attorney-drafted discovery responses, they testified that the sworn responses were incorrect.[1] *See, e.g.*, Joint Ex. 8, Benson Depo. at 45-46, 49-50, 55-56 (sworn responses incorrectly stated that: guest room attendants were required to perform calisthenics prior to clocking in; that guest room attendants were required to clock out prior to returning keys and restocking cleaning supplies; and that as a required of continued employment they were required to conduct work tasks off the clock in order to not be reprimanded for working more than their scheduled hours); Joint Ex. 13, Pineda Depo. at 39, 41-43 (sworn responses incorrectly stated that he was required to change into his uniform at GSR before clocking in; he was required to change out of his uniform at GSR after clocking out; he was required to reconcile his cash bank after clocking out; he did not complain about any of this because it was a general understanding that as a requirement of continued employment employees would work off the clock to avoid reprimands for working more than their scheduled hours); Joint Ex. 12, Miller Depo. at 34-37 (sworn responses incorrectly stated that he was not allowed to remain clocked in after the end of his scheduled shift regardless of whether or not he had completed all his job tasks, and he was subject to shift jamming); Joint Ex. 7, Bahurka Depo. at 51-55 (sworn responses incorrectly stated that nothing was ever done with respect to complaints to union representative, when in fact he received payment for those disputes; and incorrectly stated that he had turned over all documents when in fact he failed to turn over a diary allegedly supporting his claims); Joint Ex. 9, Curtis Depo. at 44-48 (sworn responses incorrectly stated was a general understanding among that certain tasks were required before clocking in and after clocking out, but admitted that he

[1] Written discovery by Defendants was limited to a randomly-selected subsection of the 480 opt-in plaintiffs, consisting of 45 current and former employees. *See* Joint Ex. 16, Davis Declaration, at 1, ¶ 2. GSR served five interrogatories for each of these opt-in plaintiffs, focusing on Plaintiffs' allegations that employees were denied overtime to which they were entitled, forced to work off the clock, subjected to shift jamming, and subjected to charge backs. *See* Joint Ex. 16, Davis Declaration, at 1, ¶ 2, with Exhibit A. Of the 45 opt-in plaintiffs from whom Defendants sought written discovery, 22 of them failed to provide any responses at all, as stated in the attorney-provided responses to "Interrogatory No. 1 *See* Joint Ex. 16, Davis Declaration, at 3-4, ¶ 3. Defendant was permitted to depose only 10 of those 45 opt-in plaintiffs, and due to a scheduling issue with one of them, deposed only 9 of them. *See* Joint Ex. 16, Davis Declaration, at 2, ¶ 4.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

did not know about the understanding of other employees; incorrectly affirmed that he was not overtime for special events, but admitted that he did not know whether or not he was paid for overtime for those events); Joint Ex. 15, Strassner Depo. at 25-27, 43-44 (sworn responses incorrectly stated he was required to change in and out of his uniform, but admitted that he generally was not required to wear a uniform; incorrectly stated activities that he was required to perform after clocking out took 10 to 15 minutes, but testified that time could be less depending on the circumstances).

Accordingly, it appears that depositions of the fifty declarants would likely reveal very different "facts." Under these circumstances, the declarations should be viewed skeptically. *See Amey v. Cinemark USA Inc.*, Case No. 13-CV-05669-WHO, 2015 WL 2251504, at *6 (N.D. Cal. May 13, 2015) (explaining that declarations do little to advance plaintiffs' position . . . where the deposition testimony is at odds with the declaration"); *Brewer v. Gen. Nutrition Corp*., Case No. 11-CV-3587 YGR, 2014 WL 5877695, at *12 (N.D. Cal. Nov. 12, 2014) (holding declarations carry "less weight than spontaneous statements made putative class members' depositions, particularly where the deposition testimony is at odds with the declaration"). *See also Hinojos v. Home Depot*, 2006 WL 37129444 (D. Nev 2006) ("the Court is particularly concerned about contradictions between Plaintiffs' declarations and deposition testimony, which shows the importance of cross-examination of each plaintiff. This suggests the need for separate mini-trials to resolve each claim.")

**B. GSR Policy Specifically Allowed For Overtime and GSR Paid Overtime To Plaintiffs And Other Employees Who Worked Overtime.**

GSR's Employee Handbook states that employees "may be required to work overtime," and confirms that GSR "provides compensation for all overtime hours worked by non-exempt employees in accordance with state and federal law." *See* Plaintiff's Motion for Summary Judgment, Exhibit F, Employee Handbook, at p. 12; Joint Ex. 17, Vaughn Declaration at 2-3, ¶ 6. Rather than a no–overtime policy, GSR has an officially mandated policy to pay compensation for all overtime hours and requires employees to accurately record all hours worked.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Despite this express policy, Plaintiffs allege that GSR has an unofficial no overtime policy requiring employees to work off the clock in order to avoid overtime. The deposition testimony of Plaintiffs and deposed opt-in plaintiffs establishes, however, that GSR pays overtime when workers are required to work overtime. Plaintiff Boggs admitted that she was "asked to work overtime" and that she "was paid for that overtime" and that "GSR paid overtime when they were obligated to do so." *See* Joint Ex. 1, Boggs Depo. at 113-14. Likewise, Plaintiff Wiederholt denied that GSR "instruct[ed] anyone to work off the clock" and affirmed "I put in a lot of overtime." *See* Joint Ex. 6, Wiederholt Depo. at 116, 118-19, 125. Plaintiff Samantha Ignacio flatly answered "No," when she was asked "Were you ever asked or directed to forego overtime?" *See* Joint Ex. 3, Samantha Ignacio Depo. at p. 36, ll. 18-20. She further testified that she "received some" overtime. *See* Joint Ex. 3, Samantha Ignacio Depo. at 125-126. Plaintiff Vincent Ignacio also admitted that he "receive[d] overtime pay." *See* Joint Ex. 4, Vincent Ignacio Depo at p. 35, ll. 9-10. Mr. Ignacio further confirmed that his hour were "manually modified" to allow him to receive overtime pay. *Id*. at p. 84, ll. 18-21. All but one of the deposed putative class members likewise testified that they worked overtime and were paid for overtime. *See* Joint Ex. 14, Roybal Depo. at 25-27 (admitting that she "was asked to work overtime" as a dealer for GSR and she was payed "the appropriate amount of overtime"); Joint Ex. 10, Ducker Depo. at 34, 38 (admitting that she received overtime as slot attendant at GSR and that if she was late clocking out she would be paid for that extra time); Joint Ex. 15, Strassner Depo. at 23-24, 28 (admitting he received overtime pay as a security dispatcher for GSR, that overtime pay showed upon on his check stub, and was paid for overtime, and "actually enjoyed it" because "they pay you overtime when you work for them"); Joint Ex., 8, Benson Depo. at 41-42, 44, 50-51, 63 (affirming that GSR did not have a "no overtime" policy, that when she worked overtime as a housekeeper for GSR she "was paid for overtime, yes"); Joint Ex. 13, Pineda Depo. at p. 48, ll. 8-17 (admitting that when he clocked out late as a bartender because he was busy, GSR would "pay you more for overtime" without any adverse action taken by GSR); Joint Ex. 12, Miller Depo. at 23-24, 31, 43 (admitting that he was paid some overtime, that he was compensated for that overtime, that when he had to work after the end of his shift as

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

a carpenter "we would get overtime," and that on his "time sheet . . . it showed the extra hours and it was like at time and half"); Joint Ex. 11, Held Depo. at 27-29, 32 (admitting that she was asked to work overtime as a dealer for GSR, that she worked overtime, and that when requested or required to work overtime she believed that she was compensated for the overtime work); Joint Ex. 7, Bahurka Depo. at 17, 46 (admitting that "there were many time that [he] did work overtime" and that to "the extent that there was overtime, [he was] paid pursuant to the overtime provisions of the collective bargaining agreement"). While Leroy Curtis, the remaining deposed opt-in plaintiff could not testify that he was paid for overtime worked as lead arcade technician because he had direct deposit, he testified that "[it] is possible" that he was paid for his overtime." *See* Joint Ex. 9, Curtis Depo. at 33.

Even though Plaintiff Sargent maintained that GSR actually had a no overtime policy where employees "would be written up" if they worked overtime, she admitted that she "did work overtime," that she was ***not*** "written up," and she "received some" overtime. *See* Joint Ex. 5, Sargent Depo. at 49-52. In fact, Ms. Sargent's testimony that this no overtime policy applied to all members of the beverage department which included bartenders, who "were going to receive write-ups for getting overtime" (*see* Joint Ex. 5, Sargent Depo. at 51-52, 56-57), was directly contradicted by the only bartender deposed, Auturo Pineda. Mr. Pineda testified if he clocked out late as a bartender because he was busy, GSR would "pay you more for overtime" without any adverse action taken by GSR. *See* Joint Ex. 13, Pineda Depo. at p. 48, ll. 8-17. Notably, though all of the named Plaintiffs and eight of the deposed opt-in Plaintiffs admittedly worked and were paid for overtime, Plaintiffs have failed to produce any evidence at all *any* of them received any write-ups or discipline as a result.

**C. GSR Policy Required That Employees Accurately Report All Time Worked, And Did Not Permit Off-The-Clock Work.**

GSR's Employee Handbook provides that "non-exempt employees are required to use a time clock to record time worked for payroll purposes," prohibits "falsifying any time card," and instructs that: "Any errors on your time attendance records should be reported immediately to your supervisor." *See* Plaintiff's Motion for Summary Judgment, Exhibit F, Employee

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Handbook, at 11, 22; Joint Ex. 17, Vaughn Declaration at 2-3, ¶ 6. It further provides that GSR "will comply with all applicable regulations regarding the payment of wages" and "the reporting of time pay for non-exempt employees." *See* Plaintiff's Motion for Summary Judgment, Exhibit F, Employee Handbook at 10, 12-13; Joint Ex. 17, Vaughn Declaration at 2-3, ¶ 6.

Despite this express policy, Plaintiffs allege that GSR has an alleged unofficial policy requiring employees to work off the clock in order to avoid overtime. The deposition testimony of Plaintiffs and deposed opt-in plaintiffs establishes, however, that this is not the case. Plaintiffs Boggs repeatedly affirmed that GSR did not require its employees to work off the clock. When asked "[d]id anyone ever tell you [that] you now are working off the clock, you won't be paid for it," Ms. Boggs testified: "I don't thinks they would make you work without pay, overtime without pay. I think no." *See* Joint Ex. 1, Boggs Depo. at 112-113. Ms. Boggs affirmed that she "never heard any manager state . . . that they wanted you to work of the clock. . . ." *See* Joint Ex. 1, Boggs Depo. at p. 115, ll. 4 -7. Ms. Boggs acknowledged that if she had to stay after her shift ended because she was in the middle of a task such as paying a jackpot, she was not asked to clock out and she was paid overtime. *See* Joint Ex. 1, Boggs Depo. at 119, 121, 155-156.

Plaintiff Wiederholt similarly confirmed that she was never asked to work off the clock. *See* Joint Ex. 6, Wiederholt Depo. at 116. When asked "[w]ere you ever asked to work off the clock" or to "clock out and come in to work," she testified: "No." Joint Ex. 6, Wiederholt Depo. at 118-119.

Plaintiff Vincent Ignacio testified that while working at GSR's boutique, no supervisor asked him to work off the clock. *See* Joint Ex. 4, Vincent Ignacio Depo at 63-64. While Mr. Ignacio testified that when he worked at GSR's Adventure Park, he sometimes was asked to work during his lunch period when off the clock, and asked to retrieve keys and a bank from the cashier's cage prior to clocking in by his supervisor Connor Fountain, (*see* Joint Ex. 4, Vincent Ignacio Depo. at 21-23; 35-37, 40-41), Mr. Ignacio's wife, Plaintiff Samantha Ignacio, testified that she was ***not*** subject to a similar practice while working at the Adventure Park under the same supervisor. Mrs. Ignacio testified that she was never "asked to work off the clock" and never threatened with disciplinary action for working overtime. *See* Joint Ex. 3, Samantha

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Ignacio Depo. at 30, 36-38, 49-50. She further testified that she retrieved and returned her bank while on the clock, and that Mr. Fountain would "make" employees take their meal break. *See* Joint Ex. 3, Samantha Ignacio Depo. at 17-18, 26-30, 37-38.

While Plaintiff Sargent testified that members of the beverage department, including bartenders, were required to work off the clock, (s*ee* Joint Ex. 5, Sargent Depo. at 52-56), Mr. Pineda, a bartender for GSR, was asked if he had "ever been asked to work off the clock," he emphatically testified: "No, no, sir." *See* Joint Ex. 13, Pineda Depo. at p. 38, ll. 2-3. He further testified that any claim that he could be reprimanded for not performing tasks off the clock was "not accurate." *See* Joint Ex. 13, Pineda Depo. at p. 46, ll. 2-12.

Like Mr. Pineda, six (6) of the eight (8) remaining deposed putative class members confirmed that they were never asked to work off the clock while employed at GSR. *See* Joint Ex. 14, Roybal Depo. at 24-25 (a dealer, testifying "[n]obody ever asked me to [work off the clock]" and as far as she knows other dealers were not asked to work off the clock); Joint Ex. 10, Ducker Depo. at 35, 58, 66 (a dealer, confirming that she was never asked to work off the clock and was still being paid even though the time clocks malfunctioned due to an electrical storm); Joint Ex. 15, Strassner Depo. at 28-30 (a security dispatcher, testifying he was "not asked to work off the clock, no" and GSR has "never asked me to come in and work for free"); Joint Ex. 12, Miller Depo. at 28, 36 (a carpenter, confirming that he was never asked to work off the clock without getting paid); Joint Ex. 11, Held Depo. at 27 (a dealer, confirming that she was never asked to work off the clock); Joint Ex. 7, Bahurka Depo. at 46 (an AV technician, confirming that he was never asked to work off the clock and not be paid and that no one at GSR ever asked him to clock out and to continue to work). While the two remaining sample deposed putative class members allege that they were asked were asked to work off the clock, they both refused to do so. *See* Joint Ex. 9, Curtis Depo. at 26-28, 30-31; Joint Ex. 8, Benson Depo. at 36 – 38, 55-56. Ms. Benson, a guest room attendant, specifically testified that she was only asked once, by someone who was not her supervisor, and that she was never disciplined for her refusal to work off the clock. *See* Joint Ex. 8, Benson Depo. at 36 – 38, 55-56.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

**D. GSR Policv Did Not Require That Employees Perform Specific Tasks Off The Clock.**

Plaintiffs allege that they performed a variety of tasks while off the clock. The deposition testimony, however, establishes no policy requiring that such tasks be performed off the clock, and in fact employees testified in deposition that they performed a number of these tasks while on the clock.

**1. Employees collected and returned banks while on the clock.**

For example, Plaintiffs allege that employees who handled money were required to retrieve their bank prior to clocking in and return it after clocking out. With the exception of Vincent Ignacio while working at the Adventure Park -- whose testimony was contradicted by his own wife -- *all* deposed employees who used a bank confirmed that they obtained and returned their cash banks while on the clock. *See* Joint Ex. 1, Boggs Depo. at 134, 151, 154, 168 (as a slot attendant she retrieved her bank after clocking in and returned the bank to casino before clocking out); Joint Ex. 6, Wiederholt Depo at 109, 117, 151-153 (as a slot attendant she filled her bank and retrieved money after clocking in and then counted and returned her bank prior to clocking out); Joint Ex. 3, Samantha Ignacio Depo. at 17-18, 26-30, 62-63, 70-71 (at Adventure Park and the Bowling Center, she retrieved her bank after clocking in and returned her bank prior to clocking out); Joint Ex. 4, Vincent Ignacio Depo at 54-55 (as a boutique clerk, he clocked in prior to retrieving his bank and clocked out after returning the bank); Joint Ex. 10, Ducker Depo. at 28, 36-38 (as a slot attendant, she clocked in prior to picking up her bank and returned the bank prior to clocking out); Pineda Depo. at 22-23, 34-35, 42-43 (as a bartender, he picked up his bank and returned his bank while on the clock). Plaintiffs have not shown a common policy requiring employees to retrieve and return their bank while off the clock.

**2. Employees attended pre-shift meetings while on the clock.**

Plaintiffs also claim that employees were required to attend pre-shift meetings off the clock. *See* Class Cert. Mot., at 16-18. Employees again repeatedly testified that they attended such pre-shift meeting after clocking in. *See* Joint Ex. 5, Sargent Depo. at p. 71, ll. 10-12 ("I

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

would clock in, I would go back to the beverage department, I would probably first start off having a meeting"); Joint Ex. 8, Benson Depo. at 19-20 (housekeepers would exercise and attend preshift meeting after clock-in); Joint Ex. 10, Ducker Depo. at 64 (after clocking in, employees in housekeeping department meet and do exercises); Joint Ex. 13, Pineda Depo. at 21-22 (pre-shift meetings in the "beverage center" with bartenders occurred when "you're on the clock"); Joint Ex. 15, Strassner Depo. at 6-7, 48-49 (for security dispatchers, pre-shift "briefings are supposed to last from 11:45 [start of shift] to midnight," but "on occasion" supervisors "will show up a little bit early" when everybody is already there, but debriefings, at the end of the shift, are "on the clock"); Joint Ex. 12, Miller Depo. at 14 (meeting with carpenter supervisor occurred after clocking in). While Ms. Held testified that dealers "sometimes" had a preshift meeting before clocking in (*see* Joint Ex. 11, Held Depo. at 15-17), her testimony was directly contradicted by Ms. Roybal, who affirmed that pre-shift meetings for dealers did not occur until after the dealers clocked in. *See* Joint Ex. 14, Roybal Depo. at 15 (pre-shift meeting for dealers after clocking in). This contradiction, along with testimony of other employees that contradicts Plaintiffs' declarations, belies any contention that GSR had a common policy requiring pre-shift meetings while off the clock.

**3. Employees were not required to change into their uniforms at work.**

Plaintiffs also wrongly claim that putting on and taking off uniforms off the clock demonstrates a common policy of requiring employees to work off the clock. The named Plaintiffs and deposed putative class members repeatedly testified that they changed at home, or could change at home, but chose to change their clothes at GSR for their own benefit.[2] *See* Joint Ex. 1, Boggs Depo. at 35-37 (changed clothes at work, but admitted that she was able to take uniform home and wear it to work); Joint Ex. 14, Roybal Depo. at 10-13 (changed clothes at GSR, but could have changed at home); Joint Ex. 10, Ducker Depo. at 19-20 (changed into

[2] Unbelievably, the only employee that claimed he could not change at home was Mr. Curtis, who he was required to change into a generic long sleeve shirt and generic cargo pants at work, even though he purchased the clothes himself, and even though he could wash them at home). *See* Joint Ex. 9, Curtis Depo. at 11-15.

uniform at GSR, but was able to take her uniform home, and could have come to work in her uniform); Joint Ex. 8, Benson Depo. at 15 (wears uniform to work, which is typical of housekeeping staff); Joint Ex. 13, Pineda Depo. at 11-13, 16-17, 41, 43 (sometimes puts on his uniform before clocking in and sometimes after; but admits he could come to work in his uniform and could have returned home in the uniform); Joint Ex. 14, Miller Depo. at 29 (was not required to wear a uniform); Joint Ex. 11, Held Depo. at 14, 37 (came to work wearing required skirt or pants, but changed into shirt she brought from home at GSR before clocking in so the shirt would not be wrinkled; changed clothes after clocked out, but was not required to do so); Joint Ex. 7, Bahurka Depo. at 28, 30-31, 34, 40 (changed into uniform after clocked in, could have changed into uniform on at home, but did so after coming to work because GSR had lockers and he chose to leave uniform there; when leaving changed clothes prior to clocking out).

**4. Employees retrieved and returned radios, keys, and other supplies while on the clock.**

Plaintiffs allege that employees were forced to work off-the-clock when retrieving and returning radios, keys, and other supplies. Employees, however, testified that they performed these task while on the clock. *See* Joint Ex. 6, Wiederholt Depo. at p. 109: 9 - 14 ( "well I would clock in and then go get my keys, iPod, radio and sign in for those things at the office"); Joint Ex. 5, Sargent Depo. at 45-46 (was not required to collect any supplies before work); Joint Ex. 10, Ducker Depo. at 39, 69 (would return keys and radio prior to clocking out); Joint Ex. 8, Benson Depo. at 34-35 (returning keys, caddy, cart, and IPod occurred prior to clocking out and testifying "we cannot clock out until we return our keys"); Joint Ex. 12, Miller Depo. at 27, 32 (put tools away while still clocked in); Strassner Depo. at 53 (no policy requiring employees to get keys before they clocked in); Bahurka Depo. at 19, 30-31, 34 , 47 (clocked in and then retrieved keys, radio, and sheets; after shift put tools away and returned keys and radio while still clocked in). Even though some employees retrieved and returned these items off the clock, they admitted that they were not required to do so, and therefore Plaintiffs cannot stablish a GSR policy common to all employees. *See* Joint Ex. 1, Boggs Depo. at 110-112, 122-23, 151 (while she retrieved radio, keys, computer before clocking in and returned them after clocking out, no

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

one told her to do so off the clock); Joint Ex. 10, Ducker Depo. at 16-17, 27 (as slot attendant picked up radios and keys 15 minutes before shift because she did not like to be rushed, even though no one in particularly told her to do so). Notably, contrary to Boggs' and Duckers' alleged practice of picking up keys, radios and ipods before clocking in, Wiederholt – also a slot attendant – testified that she would clock in before collecting these items. *See* Joint Ex. 6, Wiederholt Depo. at p. 109, ll. 9 – 14. Thus, there was clearly no slot department policy on this issue.

## III. PLAINTIFFS' CLAIMS FOR UNPAID WAGES CANNOT BE CERTIFIED AS A CLASS ACTION.

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011), the United States Supreme Court explained that the "class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." The Court continued that a "party seeking class certification must affirmatively demonstrate [prove] his compliance" with Fed R. Civ. P. 23(a) which requires that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." 131 S. Ct. at 2548-51. Additionally, the "proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Id*. at 2548. Plaintiffs' rely on Fed R. Civ. P. 23(b)(3) which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The *Duke* Court rule that certification may only be granted "after a rigorous analysis" showing the requirements of Rule 23 have been established. *Id*. at 2551. Plaintiffs have not even attempted such a "rigorous analysis," much less established that the requirements of Rule 23 have been met.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

**A. Plaintiffs' Failure To Address Their Minimum Wage Claim And Unlawful Chargeback Claim Bars Certification Of Those Claims.**

Plaintiffs' Second Amended Collective and Class Action Complaint ("Plaintiffs' Complaint") asserts a state law minimum wage claim (Fifth Cause of Action) and a state law unlawful chargeback claim (Eighth Cause of Action) on behalf of putative class members. Plaintiffs, however, completely fail to address these claims when seeking class certification. Accordingly, they have failed to meet their rigorous burden of proof to establish that such claims should be certified as a class action. *See Dukes*, 131 S. Ct. at 2548-51.

**B. Class Members Of State Law Wage Claims Are Not Numerous Because They Are Non-Existent.**

Plaintiffs State law wage claims (the Fourth, Fifth, Sixth, and Seventh Causes of Action) are made pursuant to NRS Chapter 608. The class for Plaintiffs' state law wage claims is *not* "so numerous that joinder of all members is impracticable" because such state law wage claims cannot be asserted at all in a class action lawsuit. As already set forth in GSR partial motion for summary judgment, which motion and its reply are fully incorporated by reference, claims under NRS Chapter 608 cannot be enforced by a private right of action, but may only be enforced administratively with the Nevada Labor Commissioner.[3] *See* GSR's Partial Motion for Summary Judgment, at 14-18; GSR's Reply in Support of Partial Motion for Summary Judgment, at 3-14. In *Wynn Las Vegas, L.L.C. v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179, 1182 (2013), the Nevada Supreme Court held that class actions are not permitted under NRS Chapter 608, reasoning that Nevada labor laws do not require class certification "under any circumstances." *Id*. As Plaintiffs' State law wage claims cannot be enforced by a private right of action, there can be ***no*** class members at all to enforce such claims, much less the numerous class members required for class certification. *See Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989) (holding that only persons with "legitimate claims" may be used to "prove

[3] A private right of action exists to enforce the minimum wage provisions of NRS 608.260. As already set forth, while Plaintiffs' Complaint asserts a minimum wage claim pursuant to NRS 608.260, Plaintiffs apparently are not seeking class certification of such a claim. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification ("Plaintiffs' Class Cert. Mot.") at p. 5, ll. 3 – 19.

numerosity" required by Rule 23(a)(1)); *see also Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1309-10 (9th Cir. 1977) (holding "the numerosity requirement of section (a) of Rule 23" was not met when a "substantial numbers" of the employees to be represented by named plaintiffs were not entitled to the relief requested).

Additionally, even if a private right of action to recover wages were permitted under NRS Chapter 608, Plaintiffs cannot establish by any admissible evidence that GSR employees were not properly paid for all hours worked. Instead, Plaintiffs erroneously assume that because there are 4,748 current and former employees, these employees suffered wrong doing at the hands of GSR. *See* Class Cert. Mot. at p. 31, ll. 3-4. Such assumptions cannot satisfy Plaintiffs' rigorous burden of establishing numerosity. *See Siles v. ILGWU Nat. Ret. Fund*, 783 F.2d 923, 930 (9th Cir. 1986) (holding numerosity was not established when employee's "only evidence of numerosity was that 31,000 employees covered by the plan lost their jobs in 1974 and 1975" and there "is no evidence regarding how many of these employees did not receive a pension, how many worked ten years in covered employment, or how many did not work a year in covered employment after 1976").

For example, Plaintiffs' claim the proposed shift-jamming[4] subclass allegedly consists of 1,161 employees. Plaintiffs offer no admissible evidence of shift jamming. Instead, Plaintiffs offer payments, in the form of a check ("Corrective Compromise Check"), with an accompanying explanatory letter, sent to current and former GSR employees as a compromise to settle any claim due to a glitch in GSR's payroll software which may have resulted in underpayment to certain non-union employees for overtime provisions of NRS 608.018. These Corrective Compromise Checks, along with the accompanying letter, are inadmissible under Fed. R. Evid. 408(a) to prove the validity of a disputed claim. *See* Defendant's Motion for Partial Summary Judgment, at 4-6, 27-28. Out of an abundance of caution, GSR sent Corrective Compromise Checks, to all GSR employees, who might have been affected by the glitch, even

[4] Shift jamming is phrase Plaintiffs' have coined for violating the overtime provisions of NRS 608.018, which provides for overtime when employees work more than eight (8) hours in a 24 hour day beginning when the employee begins his or her shift.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

though almost all were Union employees who are exempt from the overtime provisions of NRS 608.018. *See* Defendant's Motion for Partial Summary Judgment, at 18-21; Defendant's Reply in Support of Motion for Partial Summary Judgment at 14-16. Plaintiffs offer no evidence that the Corrective Compromise Checks failed to fully compensate Plaintiffs for any alleged underpayments. Accordingly, Plaintiffs' claims for overtime are moot. *See Southern California Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co.*, 558 F.3d 1028, 1035-36 (9th Cir. 2009) (holding claims for "back dues" was properly dismissed as moot when the employer paid the amount owed in back dues); *see also* Defendant's Motion for Partial Summary Judgment, at 28-30; Defendant's Reply in Support of Motion for Partial Summary Judgment at 23. As Plaintiffs' overtime claim, including their shift jamming claims are moot, Plaintiffs cannot show that any employee should be included in any wage class, including the shift jamming sub class. Accordingly, the numerosity requirement cannot be met. *See White v. Sundstrand Corp.*, Case No. 98 C 50070, 1999 WL 787455, at *4 (N.D. Ill. Sept. 30, 1999) (holding that "plaintiffs have not established numerosity" when underlying claims are moot).

Plaintiffs' waiting time subclass is also without members because such waiting penalties are unavailable under Plaintiffs' complaint. In *Evans v. Wal-Mart Stores*, Inc., Case No. 2:10-CV-1224 JCM VCF, 2014 WL 3519199, at *4 (D. Nev. July 15, 2014), this Court held that "[a]ccording to the most common interpretation of both N.R.S. § 608.040 and § 608.050, penalties apply only to . . . 'contractually agreed upon' rate of pay, which necessarily excludes overtime as it is a creature of statute." Plaintiffs have not asserted claims for unpaid contractually agreed upon wages, and therefore named plaintiff and putative class members alike are not entitled to a waiting penalty under NRS 608.040 or NRS 608.050. *See* Defendant's Motion for Partial Summary Judgment, at 25-27; Defendant's Reply in Support of Motion for Partial Summary Judgment at 21-23. As Plaintiffs have not asserted a legitimate claim for such waiting time penalties, this subclass has no members and therefore fails to meet the numerosity requirement for class certification. *See Marcial v. Coronet Ins. Co.*, 880 F.2d at 957 (holding that only persons with "legitimate claims" may be used to "prove numerosity" required by Rule 23(a)(1)).

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

**C. Commonality Is Absent Because Plaintiff's Class Definitions Are Overly Broad, Unacceptably Vague, Arbitrary, And Otherwise Flawed.**

In *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 236 (W.D. Pa. 2001), the court held the "requirement of commonality cannot be met" when the class "definition provided by Plaintiffs is overly broad, unacceptably vague and arbitrary." The court found the class period was unacceptably defined when the start of the class "appears to be entirely arbitrary" and the end of the class provided for an indefinite termination date of "up to the present." *Id.* Plaintiffs improperly define the class as "all non-exempt hourly worker employed by defendant at any time from June 21, 2009, until the date of judgment after trial herein." *See* Class Cert. Mot. at p. 5, ll. 3-5. The start date for the class period is arbitrarily defined because GSR did not even acquire the Grand Sierra Resort until April 2011, when it was purchased from JP Morgan Bank. *See* Joint Ex. 17, Vaughn Declaration at 1, ¶ 2.

The end date is equally arbitrary as it includes alleged future unknown plaintiffs. In *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, Case No. 06-02069 SBA, 2008 WL 1990806, at *5 (N.D. Cal. May 5, 2008), the court held that a class period that ran through judgment was improper because it would "render the process of providing adequate notice unmanageable." The Court reasoned that such a class period "would require continuous and ongoing analyses of [the employer's] records," which "presents the possibility of disparate treatment of the future class members resulting in some receiving notice and others not, thereby implicating their due process rights. . . ." *Id.*; *see also Lopez v. Liberty Mut. Ins. Co.*, Case No. CV 14-05576 BRO JCX, 2015 WL 3630570, at *11 (C.D. Cal. Mar. 6, 2015) (holding that [d]efining the class to include class members through judgment will render the process of providing adequate notice unmanageable"). Because "the definition provided by Plaintiffs is overly broad, unacceptably vague and arbitrary . . . , Plaintiffs have failed to meet their burden of showing a common question of law or fact applicable" to their proposed class. *See Mueller v. CBS, Inc.*, 200 F.R.D. at 236.

In *Randleman v. Fid. Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011), the Sixth Circuit held that the class is "flawed" when it only included those who are "entitled to relief"

and "this is an independent ground for denying class certification. . . ." The court reasoned that such a class "is an improper fail-safe class that shields the putative class members from receiving an adverse judgment" because "either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Id.*; *see also Kamar v. RadioShack Corp.*, Case No. 09-55674, 375 F. App'x 734, 736 (9th Cir. 2010) (explaining that fail-safe class exists "when the class itself is defined in a way that precludes membership unless the liability of the defendant is established" and "is palpably unfair to the defendant, and is also unmanageable" because when "the class is so defined, once it is determined that a person, who is a possible class member, cannot prevail against the defendant, that member drops out of the class").

Plaintiffs' shift-jamming sub-class is an improper fail safe class. Plaintiffs define that shift jamming sub-class as: "All members of the Nevada Class who earned less than $12.38 an hour, who did not have at least 16 hours between shifts, and who were not paid overtime for all hours worked in excess of 8 hour in a workday." This sub-class is precisely Plaintiffs' definition of what constitutes shift jamming (*see* Class Cert. Mot. at p. 21, l. 14-15), and therefore the only members of the class are those who can prove that they are subject to shift-jamming. As Plaintiffs shift jamming subclass is flawed, it cannot be certified. Accordingly, Plaintiffs' claims cannot be certified because all of the class definitions are "overly broad, unacceptably vague and arbitrary."

**D. Plaintiffs Cannot Establish Commonality Based On An Alleged No Overtime Policy That Required Employees To Work Off The Clock.**

Commonality, under Fed. R. Civ. P. 23(a)(2), requires Plaintiffs to show that "there are questions of law or fact common to the class." In *Duke*, the United States Supreme Court explained that the "language [of Rule 23(a)(2)] is easy to misread, since any competently crafted class complaint literally raises common questions." 131 S. Ct. at 2551 (quotation omitted). "Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," which "does ***not*** mean merely that they have all suffered a violation of the same provision of law." *Id.* (emphasis added, quotation omitted). Plaintiffs' "claims must depend upon a common contention" which "must be of such a nature that it is capable of classwide

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

resolution" so that the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. The Court in *Dukes* concluded that "[w]hat matters to class certification is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation" because [d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id*. (quotation omitted). Here, Plaintiffs provide the "droves" of questions, but have not and cannot establish common answers which will resolve their alleged claims.

Plaintiffs seek to certify their claims for upaid wages based on the assertion that GSR had a no overtime policy that forced employees to work off the clock without being paid at all. *See* Class Cert. Mot., at p. 5, ll. 3-8. This assertion, however, is directly contradicted by GSR official policies allowing for overtime, stating that GSR pays overtime, and requiring employees to accurately record all time worked. In fact, GSR conducted a review of payroll data and found that all but two (2) of the forty-five (45) opt-in sample putative class members were paid overtime by GSR. *See* Joint Ex. 18, Humason Declaration at 1-2. Further, the alleged "no overtime" policy is contradicted by Named Plaintiffs and all but one of the deposed putatative class members. Accordingly, Plaintiffs certainly have not met their "rigorous" burden of proving that the alleged "no overtime" policy is common among Plaintiffs and putative class members.

Similarly, Plaintiffs have not met their burden of proving that the alleged "off the clock" policy is common among Plaintiffs and putative class members. Plaintiffs cannot show a common off-the-clock policy even within the same department, let alone for a class of more than 4,784 non-exempt GSR employees who worked in different positions in different departments under different managers over a time period exceeding five years. *See Garcia v. Sun Pac. Farming Co-op, Inc*., Case No. 08-16815, 359 F. App'x 724, 726 (9th Cir. 2009) (commonality required for class certification is not present when the evidence "does not establish common wage and hour practices [by the employer], but rather the inconsistent application of the wage and hour laws between and among the various work Crews"). Notably, Plaintiffs have not shown a common policy requiring employees to retrieve and return their bank while off the

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

clock, to attend pre-shift meetings off the clock, or to collect and return various work tools while off the clock. Under these circumstances, there are no common answer as to the scope of the supposed unofficial no-overtime off-the-clock policy.

Given that almost all deposed employees agree that GSR does not prohibit overtime, pays overtime when worked, and does not require employees to work off the clock, assertions to the contrary only creates a dispute as to those alleged polices which as matter of law does not establish common wage and hour practices required for class certification. *See Garcia*, 359 F. App'x at 726. *Coleman v. Jenny Craig, Inc.*, Case No. 11CV1301-MMA DHB, 2013 WL 6500457, at *8 (S.D. Cal. Nov. 27, 2013) perfectly illustrates this point. The court in *Coleman* refused to find commonality when the employer's "only official policy regarding off the clock work requires employees to report all the time worked and expressly prohibits off the clock work" and "putative class members . . . maintain that they were never required to work off the clock or perform off-duty tasks." The court reasoned that "Plaintiff's anecdotal evidence to the contrary is insufficient to demonstrate that a contrary policy or practice existed and was uniformly applied to employees companywide" and therefore required an "individualized assessment necessary to ascertain whether there were in fact any employees who were told to work off the clock [which] would not be susceptible to common proof." *Id.* The court then reached the same conclusion with respect to Plaintiff's claim for "uncompensated overtime." *Id.; see also Howard v. CVS Caremark Corp.*, Case No. CV 13-04748 SJO PJWX, 2014 WL 7877404, at *14 (C.D. Cal. Dec. 9, 2014) (holding where the employer's "only formal policies disavow off-the-clock work, and the parties present "conflicting evidence" as to "whether employees were pressured to work off-the-clock, disciplined for working overtime, or forced to falsify their time records," "proof of off-the-clock liability would have had to continue in an employee-by-employee fashion," and therefore "is not likely to generate a common answer"); *Ginsburg v. Comcast Cable Commc'ns Mgmt. LLC*, Case No. C11-1959RAJ, 2013 WL 5441598, at *2 (W.D. Wash. Sept. 24, 2013) (holding where "there is no policy that Defendant applied uniformly to all class members, and thus no classwide means of proving liability'). As GSR's official policy prohibits off the clock work and requires payment for overtime, Plaintiffs'

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

supposed evidence, contradicting the testimony from Named Plaintiffs, as well as putative class members, that GSR does not require its employees to work off the clock, but pays overtime when required, demonstrates the need for individualize inquiries and does not show common answers to support class certification.

**E. Some Of The Alleged Off-The-Clock Tasks Performed By Some Employees Are Not Compensable, And Therefore Commonality Is Lacking.**

Named Plaintiffs and deposed putative class members repeatedly testified that they changed at home, or could change at home, but chose to change their clothes at GSR for their own benefit. For employees who can change at home, time spent changing in and out of uniforms in not compensable time. In *Bamonte v. City of Mesa*, 598 F.3d 1217, 1225-26 (9th Cir.2010), the Ninth Circuit held that that donning and doffing police uniforms at work was not compensable under the Fair Labor Standards Act because officers could change at home and changing at work was not required for the employer's benefit. *See also Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 958 (2014) (adopting FLSA standards when Legislature has not signaled an intent to "deviate from the federally set course").

Further, based on the deposition testimony, GSR clearly had no uniform policy requiring employees to retrieve and return items off the clock, as necessary for class certification. Even if some employees retrieved and returns items off the clock, Plaintiffs still do not raise a common actionable question because the time spent doing so is de minimis or otherwise non-compensable. For example, in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014), the United States Supreme Court held that waiting in line at the beginning and end of an employee's shift was not compensable because it ***not*** "integral and indispensable to the principal activities that an employee is employed to perform . . . ." Also, in *Balestrieri v. Menlo Park Fire Prot. Dist.*, Case No. 12-15975, 2015 WL 5166732, at *5 (9th Cir. Sept. 4, 2015), the Ninth Circuit held that retrieving gear was non-compensable because that activity was "***not*** integral and indispensable" to the firefighting activity that the firefighter is employed to perform. Additionally, in *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984), the Ninth Circuit held that employees cannot recover for otherwise compensable time if it is de minimis which

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

generally includes "daily periods of approximately 10 minutes." The time to retrieve supplies is almost universally de minimis or otherwise non-compensable.[5] *See* Joint Ex. 1, Boggs Depo. at 111 (retrieving radio, keys, computer takes a "maximum" of "five minutes"); Joint Ex. 6, Wiederholt Depo. at 140, 150-151 (returned keys radio and iPod after clocked out, but only took a "few seconds" to do so); Joint Ex. 10, Ducker Depo. at 61 (as slot attendant, returning keys and radio only took a "minute or two;" as housekeeper, prior to clocking in it would take one minute to get key and plastic bags); Joint Ex. 8, Benson Depo. at 22 (retrieves caddies, keys, and schedules prior to clocking in, which "only takes a few minutes to do that"). Commonality is lacking as each employee would be subject to an individualize determination as to whether the supplies were actually retrieved or returned off the clock, if the supplies retrieved are integral and indispensable to the employees duties, and whether the time taken to retrieve and return the supplies is de minimis.

### F. The Survey By Plaintiffs' Supposed Expert Regarding Off-The-Clock Work Is Fatally Flawed And Cannot Establish Commonality.

To overcome the obvious lack of commonality, Plaintiffs attempt to rely on surveys of GSR employees, conducted by supposed experts, where employees allegedly responded that they were required to work off the clock. *See* Class Cert. Mot., pp. 18-19. These surveys, however, are improperly designed, unreliable, and at best are nothing more than additional conflicting antidotal evidence which cannot establish a common off the clock off the clock policy. The alleged findings of these surveys are in a report by the Employment Research Corporation (the "ERC Report"). Class Cert. Mot., Ex. 1. The ERC Report, dated July 31, 2014, indicates that the survey includes employees from "June 2010 to the present." *See* Class Cert. Mot., Ex. 1, ERC Report at 1. As already, set forth GSR did not acquire the resort from Morgan Stanley until March 31, 2011. The ERC Report, therefore, involves conduct for almost one (1) year of the

[5] To the extent Plaintiffs are asserting claims for wages based on time waiting in line, such claims also fail to present common issues because the "amount of time waiting in line would necessarily vary from person to person" depending on the employees place in line, the time of day, and the length of the line. *See Ceja-Corona v. CVS Pharmacy, Inc.*, Case No. 1:12-CV-01868-AWI-SA, 2014 WL 4472691, at *7 (E.D. Cal. Sept. 11, 2014)

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

four (4) years surveyed, which cannot be attributable to GSR. The ERC Report gives no indication as to when the activities occurred which were surveyed, and therefore all of the supposed findings reported could precede the time GSR acquired the Resort.

Additionally, Plaintiffs claim that 80% of respondents to the survey responded that they worked off the clock while working at GSR and 25% of respondents had been asked to work of the clock. *See* Class Cert. Mot., Ex. 1, ERC Report at 10. The corollary of this is that 20% of respondents surveyed indicated that they did *not* work off the clock, and 75% indicated that they were *not* asked to work off the clock, which shows the lack of a common policy or practice among those surveyed. Notably, only 253 interviews were conducted out of 2,567 interviews attempted -- less than 10%. *Id*. at 3-5. Moreover, the 253 completed interviews represents, a mere 5.3% of the 4,784 total employees sought to be covered by the class. While 80% of the respondents may have claimed to have worked off the clock, less than 8% of the target survey claimed to work off the clock, and less than 4.3% of the total putative class members made such a claim. Similarly, less than 2.5% of the target survey claimed to have been asked to work off the clock, and less than 1.4% of total putative class members made a similar claim. Unless the sample taken is representative of those surveyed, it just as likely that only 4.3% worked off the clock as it is that 80% worked off the clock. *See Pedroza v. PetSmart, Inc*., Case No. ED CV 11-298-GHK, 2013 WL 1490667, at *3 (C.D. Cal. Jan. 28, 2013) (holding survey sample must be "a representative sample" in order to show commonality required for class certification). A cursory review of the ERC Report reveals that its author makes no claims about whether the sample is representative or not, but instead claims that the survey was restricted to the 2567 of 4,749 employees for whom Plaintiffs could obtain phone numbers, and then further limited to 556 persons that answered the phone, and then further limited to the 253 person who responded to the survey (248 by phone, and 5 by web). *See* Class Cert. Mot., Ex. 1, ERC Report, at 3-5; *see also* Office of Management and Budget, *Standards and Guidelines for Statistical Surveys*, September 2006, Guideline 2.1.3, at 10 (requiring that if coverage rates fall below 85 percent, an evaluation of the potential bias must be conducted).

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

The survey form and questions in the ERC Report are also flawed. The survey is not a blind survey, but starts out informing potential respondents that the survey is "on behalf of the Thierman Law Firm about a pending lawsuit against the Grand Sierra Resort for unpaid wages." *See* Class Cert. Mot., Ex. 1, ERC Report, Appdx. B, at 1. If the respondent taking the survey has no claim for unpaid wages, the respondent may not see the need to respond. If the respondent decides that they may want take advantage of the lawsuit, their answers may be further skewed to help the lawsuit. *See* Federal Judicial Center's Reference Guide on Survey Research. Federal Judicial Center, Reference Manual on Scientific Evidence 359 (3rd Ed. 2011), at 410-411 (recommending that surveys designed for introduction in court be administered in a double-blind manner which means that neither the surveyor nor the respondent knows the purpose or sponsor of the survey).

Additionally, the survey asks whether employees "ever" performed work off the clock. *See* Class Cert. Mot., Ex. 1, ERC Report, Appdx. B, at 2-3. Even if employees performed such a task just once, for their own convenience, that would provide a positive response. The survey also asks did "anyone ever tell you" to work off the clock. *See* Class Cert. Mot., Ex. 1, ERC Report, Appdx. B, at 4-5. Again, "ever" could mean just once, which would do nothing to prove common policy of requiring off the clock work. The "anyone" does not mean a manager, but could also include a customer or co-worker, with no authority. Also, the survey does not attempt to determine if the employee actually worked off the clock when allegedly told. While the survey indicates that certain follow up questions were asked, the ERC Report fails to provide this data, presumably because it would not support Plaintiffs' case.

Notably, more than half of the respondents who reported off-the-clock work reported changing into and out of their uniform as the off-the-clock activity that they performed at GSR. *See* Class Cert. Mot., Ex. 1, ERC Report, at 6. The ERC Report does not indicate that respondents were asked if they were allowed to take their uniforms home, which is a critical inquiry since changing is not compensable time when employees are allowed to take their uniforms home and are not required to change at work. *See Bamonte*, 598 F.3d at 1225-26. Thus, the data in the ERC Report does not establish any off-the-clock work as to survey

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

respondents who reported changing into and out of their uniforms as the off-the-clock activity in which they engaged.

Further, nearly 25% of respondents indicated that collecting and returning keys, radios, and other equipment as the off-the-clock activity that they performed at GSR. *See* Class Cert. Mot., Ex. 1, ERC Report at 6. These respondents, however, give no indication that GSR asked them to retrieve such items off the clock, but instead, like the overwhelming number of named plaintiffs and putative class members probably did so for their own convenience, if at all.

None of the survey responses show that there is a common answer to the questions of whether GSR had an unofficial policy of no overtime and requiring off the clock work. *See Purnell v. Sunrise Senior Living Mgmt*., Inc., Case No. SA CV10-00897 JAK, 2012 WL 1951487, at *7-*8 (C.D. Cal. Feb. 27, 2012) (holding that use of a questionnaire which examines whether employees were clocked in and out correctly "essentially devolves into individualized inquiries about different class members' employment history" which precludes class certification because such "adjudication would essentially require mini-trials of [the employer's] various employment practices").

Stephen Schneider, PhD, an economist-statistician, who has testified in over 20 lawsuits brought under the Fair Labor Standards Act, performed a review of the ERC Report. *See* Joint Ex. 19, Expert Report of Stephen Schneider, PhD. (Schneider Report). He concluded that the ERC Report was "irreparably flawed." *See* Joint Ex. 19, Schneider Report, at p. 10, ll. 21-22. Dr. Schneider found that the reported survey did not appropriately approximate the population of the survey; provides no information to show that the survey was representative of the population; provides no evidence that nonresponses did not bias the survey; did not properly frame the questions; failed to include a "don't know" or "no opinion," indicating that the survey had false positives; and failed to show that interviewers were adequately trained, were appropriately supervised; and that data was accurately recorded. *See* Joint Ex. 19, Schneider Report, at 4 – 10.

*In re AutoZone, Inc., Wage & Hour Employment Practices Litig*., 289 F.R.D. 526, 545 (N.D. Cal. 2012), the court held that an expert report and survey offered in support of a motion for class certification should not be considered when "Defendant and the Court have no way of

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

assessing the reliability of [the expert's ] conclusions." The Court reasoned that "if the basis of the expert opinion is so flawed that it would be inadmissible as a matter of law, then it should not be considered." *Id*. (internal quotation omitted); *see also Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 982 (9th Cir.2011) (finding that *Daubert* analysis is appropriate at class certification stage). As set forth above, due to the numerous flaws in the underlying surveys, the conclusions in the ERC Report are merely speculation and cannot be used to support class certification. The report simply represents additional conflicting anecdotal evidence which cannot as a matter of law show a common unofficial policy of requiring employees to work off the clock.

### G. A Comparison Between Employee Timeclock Records And Records Showing When Employees Entered And Exited The Building Cannot Establish Commonality Because Employees Would Come Early And Stay Late For Personal Reasons Unrelated To Work.

To overcome the obvious lack of commonality, Plaintiffs also rely on a report by analyst James R. Toney ("the Toney Report"), which compares timeclock records and records showing when opt-in plaintiffs entered and exited the building. *See* Class Cert. Mot., pp. 19-20, with it attached Ex. 17. Plaintiffs assert that a comparison of "data from GSR's employee entrance tracker and the rounded clock times," "in conjunction with the survey results and class member representative testimony," shows that employees spent, on average, 26.6 minutes performing work without compensation. *Id.*, p. 19, ll. 16-18, p 20, ll. 3-4 and Ex. 17, p. 6. This is without merit.

In *Babineau v. Fed. Exp. Corp*., 576 F.3d 1183, 1192 (11th Cir. 2009), the Eleventh Circuit held that that "punch clock records do not provide common proof of any uncompensated work during gap periods," when employees testified "regarding the various non-work-related activities that took place during the gap periods and the various personal reasons that employees listed for coming in early and staying late." The court reasoned that "[p]ermitting these claims to proceed as a class action would deprive [the employer] of the ability to explore whether an individual employee was engaged in non-work activities during the gap period and would thus limit [the employer's] ability to properly defend the claims." *Id.* at 1191 (quotation omitted).

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Plaintiffs ignore repeated employee testimony that they likewise engaged in various non-work related tasks after entering and before leaving GSR's premises while not officially clocked in. As already set forth, employees repeatedly testified that they arrive early and stayed late in order to change into and out of their uniforms, even though they admittedly could have changed at home. Plaintiff Samantha Ignacio testified that she would voluntarily come to work up to five hours early, to accompany her husband to his shift, and would walk around hotel or go to Starbucks for coffee. *See* Joint Ex. 3, Samantha Ignacio Depo. at 45-47; 52-53. Deposed putative class members similarly testified that they would come to work early for purely personal reasons. *See* Joint Ex. 14, Roybal Depo. at 15-16, 38 (some people would have a snack or eat after coming into the building, and she would sometimes have coffee); Joint Ex. 10, Ducker Depo. at 13-14, 60 (she would voluntarily come an hour early and go to cafeteria to have a cup of coffee and watch the news for more than a half hour); Joint Ex. 15, Strassner Depo. at 8-10, 15-16, 35 (he would come early and get a cup of coffee, and sometimes would play solitaire during work); Joint Ex. 8, Benson Depo. at 12-14 (because she took the bus and did not want to be late for work, she arrived one hour early for work and would then get a cup of coffee). Opt-in plaintiff Bahurka testified that after clocking out, he would sometimes get a beer at the hotel bar or meet people to socialize before leaving the building. *See* Joint Ex. 7, Bahurka Depo. at 49. As employees were free to engage in personal concerns while present at GSR, time records showing employees present, but not on the clock do not establish common answers to whether employees working without compensation.

### H. Plaintiffs Cannot Show Common Answers That Will Resolve Unpaid Wage Claims Based On Rounding.

Plaintiffs also rely on the Toney Report to establish that GSR's facially-neural policy of rounding time to the nearest 15-minutes shows a common policy of underpaying employees, stating: "The data clearly showed that employees were always disadvantaged by Defendants' rounding policy." *See* Class Cert. Mot., p. 20, ll. 6-7. To further support this assertion, Plaintiffs include a chart, which is not found in the Toney Report. *Id.*, p. 20, ll. 13-22 and Ex. 17. Notably, the Toney Report does *not* support Plaintiffs' assertion that "employees were always

disadvantaged by Defendants' rounding policy." The Toney Report states a damages number based on an alleged comparison of actual versus rounded timeclock records, but it does not sufficiently explain how the analysis was conducted to reach the conclusion regard alleged damages. *See* Class Cert. Mot. Ex. 17, pp. 7-8. The Toney Report acknowledges that the data examined showed "favorable" results for some punches, where employees were paid more based on a rounded punch. *See* Class Cert. Mot. Ex. 17, p. 7. Thus, it appears that the Toney Report is combining all punches to come up with an average damages number, while entirely ignoring the reality that some employees are paid for more time than they actually worked based on the rounding policy.

In fact, three of the six named Plaintiffs -- Sargent, Boggs and Wiederholt – were paid for more time than they worked due to rounding. *See* Joint Ex. 20, Candela Declaration at 1-2. Plaintiff Boggs was actually paid 35 hours more based on rounding! *Id.* Under these circumstances, Plaintiffs cannot establish the element of commonality for the unpaid wage claims based on rounding. *See Kelly v. Healthcare Servs. Grp., Inc.*, Case No. 2:13-CV-00441-JRG, 2015 WL 3464131, at *3 (E.D. Tex. June 1, 2015) (holding plaintiffs failed to meet burden showing named plaintiffs are similarly-situated where named plaintiffs benefited from rounding); *Pryor v. Aerotek Scientific*, LLC, 278 F.R.D. 516, 535 (C.D. Cal. 2011) (holding the "need for or individualized determinations [was] evident" on employees rounding claim when the Plaintiff admitted that the employer "rounded their total work time to the nearest 15–minute interval" and therefore the employee might not have been underpaid); *see also* Advisory Opinion of the Nevada Labor Commissioner, AO 2013-02, http://www.laborcommissioner.com/advisory%20opinions.html, (July 21, 2013) (adopting federal law that permits time clock rounding).

Additionally, GSR's rounding policy does not provide common answers because Plaintiffs have not shown that employees were all required to clock in early or late and were actually working during the period rounded. In *Kelly*, the court held rounding did not establish a common policy to underpay employee when employees were not required to "clock in early or clock out late" or when plaintiffs failed to show that employees were working when clocking in

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

early or clocking out late. 2015 WL 3464131, at *4. The court reasoned that "[w]ithout a common policy showing that [employees] were required to clock in early or clock out late," this defense [that employees were not underpaid] is individual to each Plaintiff." *Id*. The court continued that to "be eligible for an hourly wage during that extra seven minutes, the Plaintiffs must have actually been working during that extra seven minutes." *Id*.

Plaintiffs have not and cannot show that employees were required to clock in early or late. Plaintiff Boggs admitted that she "had the option to check in whenever [she] wanted to check in," and she only had to clock in when her shift started, such as 3:00 a.m. *See* Joint Ex. 1, Boggs Depo. at p. 35, 130. Plaintiff Samantha Ignacio, similarly testified that while working at the Adventure Park, she clocked in seven minutes early but did not have to clock in until start time at 3:00. *See* Joint Ex. 3, Samantha Ignacio Depo. at 16. Putative class members offered similar testimony. *See* Joint Ex. 10, Ducker Depo. at 62-63 (even though no rule required her to clock in early, she would usually would clocked in seven minutes before shift, but nothing happened to her when she clocked in later); Joint Ex. 15, Strassner Depo. at 9, 33 (clocked in at seven minutes before shift because he was told he could, but you do not have to clock in early); Joint Ex. 8, Benson Depo. at 21-22, 68 (permitted to clock in at 8:23, but not required to clock-in until 8:30 when shift starts, and if clocked in early he was not required to do any tasks); Joint Ex. 13, Pineda Depo. at 13 ("you have to clock in when you're scheduled [at] 9:45, you can clock in [at] 9:38").

Additionally, Plaintiffs have not and cannot present any evidence that each time an employee clocked in early or clocked out late that employee was actually working during that time period. *See* Joint Ex. 3, Samantha Ignacio Depo. at 67-69 (no notes or diary showing time worked); Joint Ex. 4, Vincent Ignacio Depo at 40-41, 43 (no documentation showing time worked); Joint Ex. 5, Sargent Depo. at 84-86 (no documentation showing time worked); Joint Ex. 2, Cryderman Depo at 33-35 (no records or diary about time worked); Joint Ex. 15, Strassner Depo. at 15 (no records showing time worked); Joint Ex. 11, Held Depo. at 21 (no documentation to show when working). Without such records, questions of compensation for

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

rounding are not subject to common answers, but require individualize determinations prohibiting class certification.

**I. Plaintiffs Cannot Show Common Answers That Will Resolve Unpaid Wage Claims Based On Shift- Jamming.**

Plaintiffs also cannot show common answers with respect their shift jamming claims, for which they request that the Court certify a sub-class. Plaintiffs admit that employees covered by a collective bargaining agreement that provides otherwise for overtime are exempt from Nevada overtime provisions found in NRS 608.018. *See* Class Motion at 31, n. 27; *see* also NRS 608.018(3)(e). Plaintiffs further admit that this Court must "decide that an employee [is] subject to a collective bargaining agreement to determine" before an employee may claim overtime under NRS 608.018. *See* Class Cert. Mot. at p. 31, n. 27. This Court therefore must make an individualize determination that as to whether the employee is covered by a collective bargaining agreement which provides otherwise for overtime. Of the 1,162 employees alleged by Plaintiffs to be part of the shift jamming subclass, 881 of those employees are covered by one of three collective bargain agreement that provides otherwise for overtime. *See* Defendant's Motion for Partial Summary Judgment, at 18-21. There can be no common answer when this Court must determine whether 75% of the proposed class is even entitled to overtime under NRS 608.018.

Additionally, employees are only entitled to overtime pursuant to NRS 608.018, when "their compensation for employment [is] at a rate less than 1 1/2 times the minimum rate." Total compensation would include income, wages, tips, salary, commission or a bonus. *See In re Christensen*, 122 Nev. 1309, 1315, and 149 P.3d 40, 44 (2006) (finding that compensation includes "income, wages, tips, a salary, a commission or a bonus"). For each week that overtime is claimed, this Court would have to examine each employee's wages, tips, commissions, bonuses or other compensation to determine if during that week they earned more than 1 and 1/2 times the minimum rate. As already set forth, such individual mini-trials prevent common answers required for class certification. *Collins v. ITT Educ. Servs., Inc.*, Case No. 12CV1395 DMS BGS, 2013 WL 6925827, at *7 (S.D. Cal. July 30, 2013) (holding an "individualized inquiry into Defendant's liability for overtime" prevents finding commonality).

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

**J. Plaintiffs Cannot Show Common Answers That Will Resolve Unpaid Wage Claims Based On Waiting Time Penalties.**

Finally, Plaintiffs cannot show common answers with respect to their waiting time sub-class, for which they also request that the Court certify a sub-class. The penalties for failing to pay wages under either NRS 608.040 or NRS 608.050, are only available if the employer failed to pay wages in good faith, which as set forth above does not include overtime. *See* Defendant's Motion for Partial Summary Judgment, at 25-27; Defendant's Reply in Support of Motion for Partial Summary Judgment at 21-23. Even if it did, however, the same individualized inquires with respect to Plaintiffs' overtime and off-the-clock claims prevent plaintiff from establishing commonality with respect to their proposed waiting time subclass. *See Kilbourne v. Coca-Cola Co.*, Case No. 14CV984-MMA BGS, 2015 WL 5117080, at *14 (S.D. Cal. July 29, 2015) (holding because "Plaintiff's waiting time penalties . . . claims are derivative of the off-the-clock claim, the Court DENIES certification of those claims as well").

Additionally, Plaintiffs are not entitled to a waiting time penalty, if GSR acted in good faith. *See* Defendant's Motion for Partial Summary Judgment, at 26-27; Defendant's Reply in Support of Motion for Partial Summary Judgment at 22-23. Determining whether GSR acted in good faith each time wages were allegedly withheld precludes the required common answers necessary for class certification. *See Baughman v. Roadrunner Commc'ns*, LLC, Case No. CV-12-565-PHX-SMM, 2014 WL 4259468, at *7 (D. Ariz. Aug. 29, 2014) (holding "whether an employer withheld an employee wage payment because of a good faith dispute . . . does not satisfy the commonality prerequisite and is not amenable to class treatment").

**K. Plaintiffs' Unpaid Wage Claims Are Not Typical of Putative Class Members' Unpaid Wage Claims.**

In *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992), the Ninth Circuit explained that the "test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Named plaintiffs admit that GSR employees are allegedly subject to radically different courses of conduct depending on

the employee and the department in which they work. For example, named plaintiff Vincent Ignacio testified that while working at GSR's boutique, no one ever asked him to work off the clock even though he claims he was asked to do so when working at the Adventure Park. *See* Joint Ex. 4, Vincent Ignacio Depo at 21-23; 36-37, 64. His wife, named plaintiff Samantha Ignacio, however, testified that while working at the Adventure Park, no one ever asked her to forego overtime or work off the clock. *See* Joint Ex. 3, Samantha Ignacio Depo. at 22, 30-33, 36. Similarly, Named Plaintiff Sargent testified that members of the beverage department, including bartenders, were required to work off the clock, or else they would be disciplined. *See* Joint Ex. 5, Sargent Depo. at 52-56. However, when Mr. Pineda, a bartender for GSR, was queried if he had "ever been asked to work off the clock," he emphatically testified: "No, no, sir." *See* Pineda Depo. at p. 38, ll. 2-3. He further testified that any claim that he could be reprimanded for not performing tasks off the clock was "not accurate." *Id.* at p. 46, ll. 2-12. As already set forth, contrary to Plaintiffs' claims, refusing to pay overtime or requiring employees to work off the clock was not typical of GSR's course of conduct. Claims for overtime and working off the clock, are at best an anomaly, and in fact did not likely happen, and can in no way be deemed typical. *See Soto v. Castlerock Farming & Transp., Inc*., Case No. 1:09-CV-00701-AWI, 2013 WL 6844377, at *20 (E.D. Cal. Dec. 23, 2013) (holding that "Plaintiff is unable to demonstrate typicality of claims" when differing or conflicting accounts were provided as to off the clock work").

Additionally, in *Lusby v. Gamestop Inc*., 297 F.R.D. 400, 411 (N.D. Cal. 2013), the court held that typicality can be established "only as to the positions that the plaintiff actual held." Because Named Plaintiff only held six (6) positions and worked in only (3) three department, they cannot possible represent the diverse group of GSR employees which include over 70 different positions and more that 50 departments, all with distinct job duties that cannot possibly be typical of Named Plaintiffs. *See* Joint Ex. 17, Vaughn Declaration at 2, ¶¶ 4-5. In *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 596 (E.D. Cal. 2008), the court reached the same conclusion and held that typicality could not be found when "plaintiffs have virtually no knowledge of what associates in other divisions do." Named Plaintiff Sargent

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

testified she had no knowledge about the overtime policy in other departments, including but not limited to departments involving dealers, cage employees, back of the house employees, maids, porters, or food department employees. *See* Joint Ex. 5, Sargent Depo. at 134-135. When the other named Plaintiffs were asked about overtime or off the clock policies in other departments, they similarly admitted they had no knowledge of what employees do in other departments. *See* Joint Ex. 4, Vincent Ignacio Depo at p. 54, ll. 14 -20 (testifying that he did not have knowledge about working off the clock in other departments); Joint Ex. 1, Boggs Depo. at p. 136, ll. 19-22) (admitting she did not know what happens in other departments); Joint Ex. 2, Cryderman Depo. at p. 80, ll. 20-25 (admitting she did not know the overtime rules for other departments). Because Plaintiffs admit that they have absolutely no knowledge about the overtime and off the clock policies in other Departments, they simply cannot establish that their claims are typical for employees in those other departments, especially when employees, themselves, cannot agree as to what those policies are. Accordingly, Plaintiffs have not and cannot establish typicality with respect to their overtime and off the clock claims.

**L. Plaintiffs Do Not Adequately Represent the Proposed Wage Class.**

Rule 23(a)(4) of the Federal Rules of Civil Procedure permits the certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." Plaintiffs cannot represent putative class members at all, because they moved for summary judgment prior to class certification. See Plaintiffs' Partial Motion for Summary Judgment. In *Peritz v. Liberty Loan Corp*., 523 F.2d 349, 350-55 (7th Cir. 1975), the Seventh Circuit held that when Plaintiffs move for summary judgment prior to any request for class certification, class action status for all counts of the complaint should be disallowed. The court reasoned that "[i]nasmuch as the plaintiffs here did not seek certification, and in fact affirmatively sought resolution on the merits prior to certification in the face of objections by the defendants, they have themselves effectively precluded any class certification in this case." *Id.* at 354; *see also* Defendant's Opposition to Plaintiff's Motion for Summary Judgment, at 8-9, which is incorporated by reference. Plaintiffs cannot dispute that they sought summary judgment

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

on their state law wage claims prior to class certification. Accordingly, they are foreclosed from representing putative class members.

In *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010), the Ninth Circuit held that "[c]lass representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members." The Ninth Circuit found that where the class plaintiff did not share the same claims the class plaintiff "had an insurmountable conflict of interest with those members of the class." *Id*. While Plaintiffs are seeking attorney fees on their state law wage claims, they are absolutely barred from seeking attorney fees on behalf of putative class members because they cannot meet the prerequisite of making a demand for a sum certain on behalf of unknown putative class members. *See* NRS 608.140 (mandating that before attorney fees may be awarded, a demand must have been made, in writing, "at least 5 days before suit was brought, for a sum not to exceed the amount so found due"); *see also Air Serv. Co. v. Sheehan*, 95 Nev. 528, 531, 594 P.2d 1155, 1156 (1979) (holding attorney fees should be denied under NRS 608.140 when the demand letter did not seek recovery for a "sum"). A best, Plaintiffs can only seek attorney fees on behalf of themselves, which creates an unsurmountable conflict of interest with unnamed putative class who, as a matter of law, cannot seek attorney fees in a class action, and therefore will be subject a reduction of their award by the attorney fees sought by Plaintiffs' counsel. Accordingly, Plaintiffs and their counsel cannot adequately represent putative class members.

**M. Common Ouestions Do Not Predominate Over Anv Ouestions Affecting Only Individual Members Of The Proposed Unpaid Wage Class.**

In *Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 638 (N.D. Cal. 2010), the Court explained that "predominance tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, a standard 'far more demanding' than the commonality requirement of Rule 23(a)." This test cannot be met when "the main issues in a case require the separate adjudication of each class member's individual claim or defense," because "the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Pryor v. Aerotek Scientific*, LLC, 278 F.R.D. 516, 531

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

(C.D. Cal. 2011). As this is a far more demanding standard than commonality, the mere fact that Plaintiffs cannot establish commonality also prevents Plaintiffs from meeting their burden to establish predominance. *See* Howard, 2014 WL 7877404, at *18 (explaining "[i]f there are no common questions of law or fact, those questions obviously [cannot] predominate over questions affecting individual members").

In the unlikely event that this Court were to find some meager measure of commonality, Plaintiffs have not and cannot establish the far more demanding standard of predominance. In *Washington*, the Court held that "common questions do not predominate" when "the only way of answering the question regarding the operation of a policy or practice [of the employer] would be through individualized analyses of why, in each instance, a particular employee did or did not take breaks, and if he/she did or did not take breaks, whether [the employer] paid the amount owing; or whether a particular employee did or did not work 'off the clock'" because "the only way of showing the 'practice' that plaintiff claims existed . . . would be to determine how when and how it was applied in each instance." 271 F.R.D. at 629. The Court reasoned that an "individualized assessment" was necessary to establish overtime and off-the-clock claims when employees "stated that they never worked 'off-the-clock,' that they received compensation for all overtime worked, and that no other employee has claimed that any manager told him/her to work 'off-the-clock.'" *Id*. at 642.

As already set forth, Plaintiffs and deposed opt-in class members alike repeatedly testified that they were paid for overtime and that they were ***not*** required to work off the clock. Some of them testified that that they performed tasks allegedly required to be performed off-the-clock -- such as retrieving and returning there banks, keys, radios, etc. – while on the clock. Almost all deposed employees admitted that GSR never told employees to perform these tasks off the clock. In light of this testimony, the only way of answering the question as to whether employees were underpaid is through an individualized analysis of the following: (1) why, in each instance, a particular employee did or did not perform tasks off the clock, and if he/she did or did not, whether the particular task performed constitutes compensable work in light of the particular circumstances alleged by the employee and whether GSR paid the amount owing, if

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

any; (2) why a particular employee clocked in early or clocked out late, and if he/she did or did not whether she was actually working or engaged in some personal business, and then whether clocking in early or clocking out late resulted in underpayment or overpayment for the employee, depending on how the time was rounded; and (3) whether each employee who alleges entitlement to overtime by virtue of shift-jamming under NRS 608.018was actually paid all amounts owed, or was exempt from those provisions because the employee is covered by a union contract or because the employee's compensation, including tips, commission and bonuses, was greater than 1 ½ time the minimum wage. This required individual analysis amply demonstrates that common questions do ***NOT*** predominate, and therefore Plaintiffs' claims for unpaid wages cannot be certified under Rule 23(b). *See Pryor v. Aerotek Scientific*, LLC, 278 F.R.D. 516, 434, 536 (C.D. Cal. 2011) (holding that when "there are significant discrepancies in employees' testimony regarding" regarding the employer's overtime and clock policies, "there is no reliable way to determine if an employee was paid for fewer hours than actually worked without examining each employee's individual time records and considering the employee's individual testimony" and therefore "if a class were certified, hundreds of mini-trials on the issues necessary to determine if [the employer] underpaid employees" would be required which mandates finding that "individual questions predominate over common ones"); *Kilbourne v. Coca-Cola Co.*, Case No. 14CV984-MMA BGS, 2015 WL 5117080, at *13 (S.D. Cal. July 29, 2015) (holding "where no substantial evidence points to a uniform, companywide policy, proof of off-the-clock liability would have had to continue in an employee-by-employee fashion, demonstrating who worked off the clock, how long they worked, and whether the employer knew or should have known of their work"); *Ceja-Corona v. CVS Pharmacy, Inc.*, Case No. 1:12-CV-01868-AWI-SA, 2014 WL 4472691, at *7 (E.D. Cal. Sept. 11, 2014) (holding "off-the-clock work claims and the reporting time pay claims . . . raise different factual issues which would require individualized assessment for each class member," and therefore refused to find that "class issues predominate over the individual issues"); *Coleman*, 2013 WL 6500457, at *12 (holding "in the absence of any common policy, an individualized inquiry will be required as to

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

whether [the employer] failed to pay any putative class member for all hours worked" and therefore plaintiff cannot meet the predominance requirement of Rule 23(b)(3)).

**N. The Class Action Procedure Is Not The Superior Method For Adjudicating Plaintiffs' Unpaid Wage Claims.**

In *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir.1996), the Ninth Circuit held that a "class action is the superior method for managing litigation if no realistic alternative exists." As already set forth, the state law wage claims Plaintiff seeks to certify are within the exclusive jurisdiction of the Nevada Labor Commissioner. *See* GSR's Partial Motion for Summary Judgment, at 14-18; GSR's Reply in Support of Partial Motion for Summary Judgment, at 3-14. Not only is there a realistic alternative, an administrative action before the Nevada Labor Commissioner is the only alternative available and therefore a class action is not the superior method of resolving putative class members' claims. See *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 587 (C.D. Cal. 2012) (finding "it is simply not credible to argue that a class action is the 'superior' method" when plaintiffs "have a viable administrative claims process capable of expeditiously processing [their] claims"); *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 253 (C.D. Cal. 2006) (finding that class action was not the superior method to adjudicate claims when an administrative remedy was a "viable alternative"); *see also Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 211 (9th Cir.1975) (finding it "consistent with [Rule 23's] purpose to determine whether any administrative methods of settling the dispute exist").

Moreover, in *Pryor*, the court held that a class action is not the superior method of adjudicating wage claims when the "issues in the case cannot be resolved on a classwide basis" because the wage claims "will require individual comparison of the time each employee reported and actually worked." 278 F.R.D. at 537. The court reasoned that such individual comparisons prevent certifying a class as superior because "the individual issues to be adjudicated will dominate, result[ing] in an unmanageable series of mini-trials, and consume an extraordinary amount of time." *Id.*

Again, as already set forth, Plaintiffs' wage claims would require a through exploration of each individual employee's employment history, along with extensive testimony of each

employee, to determine each and every time the employee's recorded time was less than the actual hours the employee performed compensable work. Each wage claim would therefore require a separate min-trial to explore these issues making the action entirely unmanageable. As certifying this class action would result in an unmanageable and fragmented series of individual wage claims, Plaintiffs' class action would not be a superior method for litigating these claims. Accordingly, because Plaintiffs have failed to establish numerosity, commonality, typicality, adequacy, predominance and superiority, Plaintiffs' state law wage claims should not be certified.

## IV. PLAINTIFFS' AGE DISCRIMINATION CLAIMS CANNOT BE CERTIFIED AS A CLASS ACTION.

In the Ninth Cause of Action, Plaintiffs Boggs and Wiederholt allege claims for age discrimination in violation of both federal and state law. Plaintiffs ask the Court to certify an "age discrimination" subclass under Rule 23. As discussed below, class certification of Plaintiffs' age discrimination claims is unavailable and inappropriate.

### A. An ADEA Claim Cannot Be Certified As A Class Action Under Rule 23.

In *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir.1977), overruled on other grounds by *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, (1989), the Ninth Circuit explained that the "Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, by virtue of the provision that the ADEA shall be enforced under [29 U.S.C.] § 216(b)." The Court held that "Rule 23 procedures are inappropriate for the prosecution of class actions under § 216(b)" and that "Rule 23 and § 216(b) class actions are 'mutually exclusive' and 'irreconcilable.'" *Kinney Shoe*, 564 F.2d at 862. The court concluded that "216(b) establishes an "opt in" class action" and only those class members who file written consents are permitted to become plaintiffs." *Id*. at 863.

Plaintiffs are inappropriately attempting to certify their ADEA class action under Rule 23. No class member has filed a written consent to become a plaintiff. Accordingly, Plaintiffs motion to certify their ADEA action under Rule 23 has no merit whatsoever and should be denied.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

**B. Plaintiffs' State And Federal Age Discrimination Claims Cannot Be Certified Because Putative Class Member Have Not Filed Notice Of Intent To Sue With The Appropriate State And Federal Agency.**

In *Naton v. Bank of California*, 649 F.2d 691, 696-97 (9th Cir. 1981), the Ninth Circuit held that ADEA claims of putative class members are "barred by their failure to file individual notices of intent to sue with the appropriate state and federal agencies." The court ruled that when "notices to both the state and federal agencies expressed no intention to sue on behalf of anyone other than himself," the class action claims should be dismissed. *Id.* at 697. The court reasoned that when named plaintiffs file "notice that they intended to bring an action on behalf of themselves and others similarly situated" that "notice helped to satisfy the purposes of section 626(d) because it put the Secretary of Labor and the employers on notice that the discrimination charges encompassed a pattern of unlawful conduct transcending an isolated individual claim and that they should act accordingly." *Id.* This same rule applies to state law age discrimination claims. *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1136 (9th Cir. 2012) (holding that a class of "similarly-situated plaintiffs may 'piggyback' on that complaint, thereby satisfying the exhaustion requirement" applies to state law discrimination claims); *Pope v. Motel 6*, 121 Nev. 307, 311, 114 P.3d 277, 280 (2005) (holding "NRS 613.420 requires an employee alleging employment discrimination to exhaust her administrative remedies by filing a complaint with NERC before filing a district court action").

Here, the only charges of discrimination were filed by Plaintiffs Boggs and Wiederholt. *See* Joint Ex. 21, Boggs Charge of Discrimination, Bates Stamped: Plaintiffs 66-68; Joint Ex. 22, Wiederholt Charge of Discrimination, Bates Stamped: Plaintiffs 107-109. In their Charges of discrimination, neither Ms. Boggs nor Ms. Wiederholt give any indication that they are pursing claims of age discrimination for anyone other than themselves. They certainly do not state that they are bringing an action for themselves and other similarly situated employees, and only seek remedies on behalf of themselves. Plaintiff Boggs does not mention any other employees in her charge of discrimination. See Joint Ex. 21, Boggs Charge of Discrimination, Bates Stamped: Plaintiffs 66-68. While Ms. Wiederholt mentions that GSR has discharged two other employees over the age of 40 for being slow, she does attempt to assert a claim of age discrimination on

behalf of those two employees and only seeks remedies for herself. *See* Joint Ex 22, Wiederholt Charge of Discrimination, Bates Stamped: Plaintiffs 107-109. As Plaintiffs only provided notice that they intended to sue on behalf of themselves, and ***not*** other similarly situated employees, they cannot pursue a class action for age discrimination under either state or federal law. S*ee Kresefky v. Panasonic Commc'ns & Sys. Co.*, 169 F.R.D. 54, 60-61 (D.N.J. 1996) (holding plaintiff's "allegation that ten of the fourteen employees terminated from the marketing department in which he worked were within the protected age group does not suffice to place defendants on notice of class claims in the face of his repeated references to his own performance, his own termination and the discrimination he personally suffered" and therefore plaintiff's claims could not "proceed as a collective action on their age discrimination claims"); *Hoffman v. R.I. Enterprises, Inc.*, 50 F. Supp. 2d 393, 400-01 (M.D. Pa. 1999) (holding that "the mere fact that [the employee] indicated that another employee had been discriminated against is insufficient to place [the Employer] on notice of class-based discrimination" and therefore Plaintiff's EEOC charge did not exhaust the administrative remedies of putative class members).

### C. Plaintiffs' State Law Age Discrimination Claims Cannot Be Certified Under Rule 23.

Even if the state law age discrimination claims of putative class members were not absolutely barred for failing to exhaust their administrative remedies, the state law age discrimination claim still does not meet the requirements of Rule 23 for class certification. In *Stockwell v. City & Cnty. of San Francisco*, Case No. C 08-5180 PJH, 2015 WL 2173852, at *3 (N.D. Cal. May 8, 2015), the Court held that the trial court must conduct the same "'rigorous analysis" with respect to state law age discrimination claims when moving to certify a class action, and must therefore must "affirmatively demonstrate that the class meets the [numerosity, commonality, typicality and adequacy of representation] requirements of Rule 23." In addition, a state law age discrimination class action under Rule 23(b)(3) must establish that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

adjudicating the controversy." *Id*. As with their wage claims, Plaintiffs failed to meet these requirements with respect to their state law age discrimination claims.

**1. Plaintiffs have failed to establish numerosity.**

Plaintiffs claim without any admissible evidence that 133 employees who are over the age of 60 have been terminated between June 2010 and March 2012. *See* Class Cert. Mot. at p. 31, ll. 13-15. Plaintiffs cite Exhibit 21 to their Motion for Class Certification as evidence of this claim. Exhibit 21, however, is a list of names, with various employment positions, dates of hire, dates of birth and age, without any indication of that these individuals were terminated or even employed by GSR. Exhibit 21 is referenced in the Declaration of Leah L. Jones in Support of Plaintiffs' Motion for Class Certification (Jones Declaration), where she states that Exhibit 21 is a list that "indicates that 434 total names, 133 of which have been terminated." *See* Class Cert. Mot., Jones Declaration at p. 5, ll. 27-28. This statement is nothing more than hearsay prohibited by Fed. R. Evid. 802, and lacks the foundation required by Fed. R. Evid. 602. Because this statement is inadmissible and Plaintiffs' only evidence of numerosity, Plaintiffs state law age discrimination claim cannot be certified. *See Potter v. Citicorp*., Case No. CIV. 1999/116, 2002 WL 31599974, at *4-5 (D.V.I. Apr. 4, 2002) (holding that attorney affidavit claiming to "have personal knowledge of at least one hundred (100) persons who satisfy the definitions of the class based on documents provided by Citibank" did "not suffice to establish a reasonable estimate of numerosity"); *Narwick v. Wexler*, 901 F. Supp. 1275, 1279 (N.D. Ill. 1995) (holding attorney affidavit indicating 514 potential class members was insufficient "is clearly insufficient to demonstrate the size of the class to any meaningful degree").

Additionally, the time of the alleged termination of these individuals supposedly occurred between June 2010 and March 2012. As already set forth, GSR did not acquire the Resort until April 2011. Accordingly, plaintiffs are merely speculating as to the alleged number of individuals in their state law age discrimination class and therefore cannot establish numerosity.

**2. Plaintiffs have failed to establish commonality or predominance.**

In *Patterson v. Gen. Motors Corp*., 631 F.2d 476, 481 (7th Cir. 1980), the Seventh Circuit held "plaintiff has failed adequately to demonstrate that there are questions of law or fact

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

common to the class" when "plaintiff's claims do not relate to general policies or practices which are allegedly discriminatory, but rather to individualized claims of discrimination which could not possibly present common questions of law or fact sufficient to justify class action treatment." The Court reasoned that "the issue of whether a particular job assignment or promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy, including relative seniority, qualifications, availability for work and desire to perform the job." *Id*.

GSR's Employee Handbook declares that "Company policy prohibits unlawful discrimination based race, color, creed, gender (including gender identity and gender expression), religion, marital status, registered domestic partner status, ***age***, national origin or ancestry, physical or mental disability , medical condition (including cancer and genetic characteristics), genetic information, sexual orientation, pregnancy veterans status or any other consideration made unlawful by federal, state, or local law. *See* Plaintiff's Motion for Summary Judgment, Exhibit F, Employee Handbook, at p. 4; Joint Ex. 17, Vaughn Declaration at 3, ¶ 7. The Handbook encourages employees to contact Human Resources if they need assistance with making a discrimination complaint. *See* Plaintiff's Motion for Summary Judgment, Exhibit F, Employee Handbook, at p. 4; Joint Ex. 17, Vaughn Declaration at 3, ¶ 7. The Handbook vows to "immediately" investigate claims of discrimination and take "effective remedial action" to rectify the discrimination and "to deter any future discrimination." *See* Plaintiff's Motion for Summary Judgment, Exhibit F, Employee Handbook, at p. 4; Joint Ex. 17, Vaughn Declaration at 3, ¶ 7.

No deposed putative class member over the age of forty (40) testified that they were the subject of age discrimination. Mr. Pineda, a bar tender for GSR, testified that he was "70 years old," and that he had "never" been "subject to age discrimination." *See* Joint Ex. 13, Pineda Depo. at p. 7 and p. 40, ll. 3-12. Ms. Roybal, a dealer for GSR, testified she voluntarily retired at age "63" and testified that she was not subject to age discrimination. *See* Joint Ex. 14, Roybal Depo. at p. 31 and p. 37, ll. 16-17. Mr. Miller, a carpenter for GSR, likewise testified he was 61 years old when hired, and affirmed he "was treated like everyone else" and was not

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

discriminated against due to his age." *See* Joint Ex. 12, Miller Depo. at p. 8 and p. 33, ll. 8- 17. Mr. Curtis, an over 40, lead arcade technician, testified he was not subject to discrimination. *See* Joint Ex. 9, Curtis Depo. at p.6 and p.49, ll. 15-18. Additionally, Plaintiffs' Exhibit 21, listing GSR employees, indicates that GSR hired no less than 66 employees over the age of 60, since May 14, 2011, including dealers, bartenders, servers, cashiers, and supervisors -- demonstrating that GSR does not have a uniform policy of discriminating based on age.

Plaintiffs Boggs and Wiederholt's claims of age discrimination, likewise, do not show a uniform policy of age discrimination. Instead, GSR was forced to let these employees go due to individual performance issues. *See* Joint Ex. 23A, Boggs Disciplinary History (indicating that she was repeatedly counseled for violating GSR's policies and failed to otherwise meet performance standards prior to her termination); *See* Joint Ex. 23B, Wiederholt Disciplinary History (indicating that she was repeatedly counseled for violating GSR's policies and failed to otherwise meet performance standards prior to her termination; *See also* Joint Ex. 1, Boggs Depo. at 55-108 (reviewing Boggs disciplinary history, including Ms. Boggs repeatedly admissions that she failed to meet standards, *see* pp. 65, 76, 82-83, 84, 86, 88, 92, 98); Joint Ex. 6, Wiederholt Depo. at 39 – 103 (reviewing Wiederholt's disciplinary history). Even a cursory review of these documents reveal that before a particular termination could be termed discriminatory, the employee's employment history would need to be thoroughly reviewed to determine if the termination was for non-discriminatory reasons. These individualized determinations, which would also be required for each and every putative class member, preclude any common answers to the question of whether Plaintiffs or putative class members were subject to discrimination. *See Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (holding the proposed class did not present common issues when the employer must assert "a different defense to allegations of discrimination" based on the "highly individualized facts and circumstances raised in each employment decision"); *Love v. Johanns*, 439 F.3d 723, 731 (D.C. Cir. 2006) (finding a lack of commonality when plaintiffs and putative class members "would be forced to prove at trial that individual reasons for their [adverse employment actions] were not pretextual"); *Patterson*, 631 F.2d at 481 (holding the issue of whether a particular employment

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

decision was discriminatory would depend the employee's employment record and therefore "could not possibly present common questions of law or fact sufficient to justify class action treatment"); *Allen v. City of Chicago*, 828 F. Supp. 543, 552 (N.D. Ill. 1993) (holding "individualized claims of discrimination . . . do not present common questions of fact or law sufficient to justify class action treatment" when "resolution of the merits of the instant dispute will require independent consideration of each plaintiff's qualifications for his or her position, their previous work performance and duties"); *Morgan v. Metro. Dist. Comm'n*, 222 F.R.D. 220, 234 (D. Conn. 2004) (holding "grouping together many unrelated employment decisions made by many individual supervisors against many individual plaintiffs . . . would raise numerous individualized questions that are not amenable to generalized proof" and therefore would lack the commonality and typicality required for class certification); *Reap v. Cont'l Cas. Co*., 199 F.R.D. 536, 545 (D.N.J. 2001) (same).

This same reasoning can be applied to Rule 23(b)(3) requirement that common issues "predominate over those issues that are subject only to individualized proof" The individualized proof required to establish that employees were terminated for non-discriminatory reasons that were not pretextual will necessarily swallow up any alleged common issues of discrimination. *See Tabor*, 703 F.3d at 1230 (holding "individualized concerns predominate over the common questions" when the employer provides "specific, objective, and individualized reasons" for employment decisions because 'highly individualized' facts and defenses that cannot be effectively resolved in a class suit"); *Morgan v. Metro. Dist. Comm'n*, 222 F.R.D. 220, 237 (D. Conn. 2004) (holding the "predominance requirement of Rule 23(b)(3) . . . is a more demanding criterion than the commonality inquiry under Rule 23(a)" and therefore when "Plaintiffs [are] unable to meet the Rule 23(a) commonality requirement, then a fortiori, they fail to satisfy Rule 23(b)(3)'s predominance requirement"). As Plaintiffs'' and putative class members' claims cannot be resolved by the required "common answers," and the examination of the reasons for their termination will necessarily predominate, Plaintiffs' motion to certify their state law age discrimination claim as a class should be denied.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

**3. Plaintiffs Have Failed To Establish Typicality.**

In *Allen v. City of Chicago*, 828 F. Supp. 543, 553 (N.D. Ill. 1993), the court explained that the "typicality requirement of Rule 23(a)(3) directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." The Court held "differences in each plaintiff's work history and qualifications, and variations in the qualifications and work history of [employees] accorded preferential treatment," precludes finding that plaintiffs' claims "are typical of the claims of the class." *Id.* The court reasoned that proof that an individual employee suffered an adverse employment action, "such a showing would not entitle any other plaintiff to the relief requested." *Id.*

Here, Named Plaintiffs were both slot attendants. *See* Joint Ex. 1, Boggs Depo. at p. 18, ll. 10-12; Joint Ex. 6, Wiederholt Depo. at p. 15, ll. 9 -12. These Plaintiffs, however, wish to represent diverse employees, which include at least 70 different positions and more han 50 different departments, again all with distinct job duties that cannot possibly be typical of these two slot attendants. *See* Joint Ex. 17, Vaughn Declaration at 2, ¶¶ 4-5. Plaintiffs' Exhibit 21 which supposedly lists the employees that Plaintiffs' wish to represent list almost every imaginable job title for employees at GSR. Plaintiff Wiederholt seeks to represent these diverse employees even though she claims that her discrimination was solely due to her supervisor "Darlene Bonds." *See* Joint Ex.6, Wiederholt Depo. at 9-11. Ms. Boggs and Ms. Wiederholt's claims from a single department, based on actions by discrete supervisors, cannot be deemed typical of the diverse group of employees they wish to represent.

**4. Plaintiffs Have Failed To Establish Superiority.**

In *Cooper v. S. Co.*, 205 F.R.D. 596, 629-30 (N.D. Ga. 2001) aff'd, 390 F.3d 695 (11th Cir. 2004), the court held that the class action procedure is ***not*** "superior . . . for the fair and efficient adjudication of the controversy," as required by Fed. R. Civ. P. 23(b)(3), when "individual claims will ultimately turn on the particular facts and circumstances of each prospective class member's claims, including whether the individual was subjected to the alleged disparate treatment or unlawful harassment as well as a calculation of individualized damages with respect to these divergent claims." The court reasoned that "class certification in [such

cases] would lead to an unmanageable and fragmented series of individual claims." *Cooper*, 205 F.R.D. at 630. In *Stockwell v. City & Cnty. of San Francisco*, Case No. C 08-5180 PJH, 2015 WL 2173852, at *13 (N.D. Cal. May 8, 2015), the court held that the difficulty in litigating these individualized claims is further exasperated when ADEA claims are combined with state law discrimination claims which use different procedures (opt-in vs. opt-out) to determine the class size.

As already set forth, Plaintiff's age discrimination claims turn on whether each individual employee can show that they were subject to disparate treatment based on age, and GSR's legitimate non-discriminatory reason for the adverse employment action which involve factors other than age. Each discrimination claim would require a through exploration of the employment history, along with extensive testimony of each employee and his or her supervisor to verify that GSR's actions were justified. Each discrimination claim would therefore require a separate min-trial to explore these issues making the action entirely unmanageable. Further confusion would arise, as most likely, numerous putative class members of the state law age discrimination class will not opt-in to the ADEA class action, requiring the fact finder to differentiate between the two (2) types of age discrimination actions. As the class action would result in unmanageable and fragmented series of individual claims, a class action would ***not*** be a superior method for litigating Plaintiffs' age discrimination action. Accordingly, because Plaintiffs have failed to establish numerosity, commonality, typicality, predominance and superiority, Plaintiffs' state law age discrimination class action should not be certified.

**D. Plaintiffs' ADEA Claims Cannot Be Certified Under 29 U.S.C § 216(B).**

Even if the ADEA collective action claims were not absolutely barred due to the lack of consent of putative class members and their failure to exhaust their administrative remedies, Plaintiffs' ADEA claim could still not meet their requirements for a collective cation under 29 U.S.C § 216(b). Section 216(b) mandates that ADEA claims may only be brought by "other employees similarly situated." In *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D.N.J. 1987), the court found that employees were ***not*** similarly situated for the follow reasons: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

available to [the employer] which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) the apparent absence of filings required by the ADEA prior to instituting suit, the class will be decertified." Each of these justifications is present in the present action.

In *Lusardi*, the court held that employment settings of the individual bar certification when the named plaintiffs only represented "two of eight employment situations" of the putative class members. *Id.* at 379. As already set forth, Named Plaintiffs were both slot attendants, and cannot represent diverse employees from each and every department, based on alleged individual claims of discrimination by a discrete supervisor. Ms. Boggs and Ms. Wiederholt simply cannot be deemed similar to this diverse group of employees.

The *Lusardi* court also held "the fact that [the employer] will defend plaintiffs' claims on an individual basis, asserting any one or more of many defenses in a method consistent with the ADEA, foreclose the possibility of the proposed class claimants going forward as similarly situated." 118 F.R.D. at 372. The court found individualized ADEA defenses include "providing a legitimate, non-discriminatory explanation for the discriminatory result of its actions" or "that the different employee treatment "was based on reasonable factors other than age." *Id*. at 362. As set forth above, these are precisely individual defenses asserted by GSR against Named Plaintiffs and will also be asserted against putative class members which as a matter of law forecloses any finding that Named Plaintiffs are similarly situated.

The *Lusardi* court explained that the "ADEA permits class actions only where employees are similarly situated in order that a defendant be afforded an opportunity to effectively defend." *Id*. at 372. The court held that where the employer asserts "individual defenses" to ADEA claims, a collective action, "is inconsistent with the constitutional right of [the employer] to defend itself . . . well as plainly unworkable and intolerable." *Id.* Certifying a collective action for Plaintiffs ADEA claims would effectively preclude GSR from raising its constitutionally guaranteed defense that employees were terminated for a legitimate non-discriminatory reason which involve factors other than age, again foreclosing certification of Plaintiffs' ADEA claims.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

Finally, the *Lusardi* Court held that when named plaintiffs have not filed on behalf of "others similarly situated" when filing their charge of discrimination with the appropriate governmental agency, "the named plaintiffs are not similarly situated with those members of the proposed class who did not effect timely filings on their own behalf." *Id*. at 378. As already set forth, neither Plaintiffs Boggs nor Wiederholt filed the required charge of discrimination on behalf of "other similarly situated" employees. Accordingly, they are not similarly situated with putative class members who have failed to file the required charges of discrimination. Under the factors set forth by the *Lusardi* Court, either collectively or individually, Plaintiffs are not similarly situated to any putative class members, and therefore Plaintiffs' ADEA claim cannot be certified as a collective action.

## V. CONCLUSION

Pursuant to the foregoing, Plaintiffs' Motion for Class Certification lacks merit and should be denied.

Dated this 5th day of November 2015

COHEN-JOHNSON, LLC

By: */s/ Chris Davis*
H. Stan Johnson, Esq.
Nevada Bar No. 00265
Chris Davis, Esq.
Nevada Bar No. 06616
255 E. Warm Spring Road, Suite 100
Las Vegas, Nevada 89119
Attorneys for Defendants

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

**PROOF OF SERVICE**

CASE NAME: Sargent, et. al vs. HG Staffing, LLC. at el.
Court: USDC Nevada
Case No.: 3:13-cv-453-LRH-WGC

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

**OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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

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

_____ by electronic email addressed to :

_____ by personal or hand/delivery addressed to:

_____ By facsimile (fax) addresses to:

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

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

DATED the 5th day of November, 2015.

*/s/ Chris Davis*
An employee of Cohen|Johnson, LLC.

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

4105
Mark R. Thierman, Nev. Bar No. 8285
mark@thiermanbuck.com
Joshua D. Buck, Nev. Bar No. 12187
josh@thiermanbuck.com
Leah L. Jones, Nev. Bar No. 13161
leah@thiermanbuck.com
THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, Nevada 89511
Tel. (775) 284-1500
Fax. (775) 703-5027

*Attorneys for Plaintiffs*

**IN THE SECOND JUDICIAL DISTRICT FOR 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

**PLAINTIFFS' SUPPLEMENT TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Per the Court's Order Setting Hearing on Defendants' Motion to Dismiss, Plaintiffs EDDY MARTEL (also known as MARTEL-RODRIGUEZ), MARY ANNE CAPILLA, JANICE JACKSON-WILLIAMS, and WHITNEY VAUGHAN ("Plaintiffs"), on behalf of themselves and all others similarly situated hereby submit their Supplement.

/ / /

/ / /

/ / /

/ / /

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The dispositive fact remains, the federal district court *never* reached the merits of Plaintiffs' class claims here, or any of the putative Sargent plaintiffs' Nevada statutory wage and hour claims, when it granted Defendants' motion to dismiss Plaintiffs' NRS 608.016, 608.018, and 608.020-.050 claims. (In fact, the federal district court has still not reached the merits of any of the Sargent plaintiffs' claims—federal or state.) The federal district court granted Defendants' motion to dismiss in the Sargent ***action as to the named-Plaintiffs only*** because that case was not certified as a class action at the time of dismissal. Ultimately, the federal district court's ruling that Nevada employees did not have a private right of action was clearly erroneous. *See* ECF No. 172, Sargent et al, v. HG Staffing, Case No. 3:13-CV-00453-LRH-WGC, attached as Exhibit 1.[1] The Supreme Court of the State of Nevada has unanimously re-affirmed that Nevada employees have a private right of action to bring statutory wage claims pursuant to NRS 608.140, 608.016, 608.018, and 608.020-.050. *See* Neville v. Terrible Herbst, Inc., 133 Nev. Adv. Op. 95, 406 P.3d 499, 504 (Dec. 7, 2017). Defendants cannot escape the fact that the federal district court dismissed the employees' Nevada wage claims ***prior to*** the court ever considering the facts and merits of the Nevada claims. The ***only*** issue the federal district court has actually ruled on is whether or not the opt-in plaintiffs were similarly situated enough to proceed as a collective action on their federal Fair Labor Standards Act ("FLSA") claims. *See* Sargent v. HG Staffing, 171 F. Supp. 3d 1063 (March 22, 2016). The federal district court never analyzed the Nevada wage and hour claims of the Martel

[1] The Court did allow the six named-Sargent plaintiffs to proceed with their FLSA claims as well as their Nevada Constitutional minimum wage claim and those claims are still pending before the federal district court. Likewise, the claims under NRS 608.016, 608.018, and 608.020-.050 for ***the six-named Sargent Plaintiffs*** are now back in front of the federal court following *Neville*. *See* ECF No. 248 attached as Exhibit 2. Defendants' Motions for Summary Judgment on those claims having been fully briefed as of June 11, 2018.

Plaintiffs or any of the claims of the members of the putative class the Martel Plaintiffs seek to represent. It is black-letter law that unnamed members of a proposed class are not bound by any decisions made before a class is certified, *including denial of class certification. See* Smith v. Bayer Corp., 564 U.S. 299, 131 S. Ct. 2368, 2372, 180 L. Ed. 2d 341 (2011); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809–14, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998) ("To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them.")

With these facts in mind, Plaintiffs provide the following requested supplemental briefing:

1) Which statute of limitation the parties contend applies to NRS Chapter 608 wage claims and how any such statute of limitation period would require dismissal or simply a limitation on damages;
2) The impact of the Sargent court's denial of certification on the issue of preclusion and whether such analysis is affected by the fact that the Sargent court granted summary judgment against Plaintiffs' on their statutory wage claims and thus did not address the merits of certification as to those claims;
3) How the aforementioned issue might affect a tolling analysis under American Pipe; and
4) Whether the aforementioned issue preclusion is impacted by the Nevada Supreme Court's decision in Neville.

## II. LEGAL ARGUMENT

### A. The Statute Of Limitation For NRS Chapter 608 Wage Claims

#### 1. NRS 608.016 all hours worked and NRS 608.018 overtime violation claims carry three-year statutes of limitations.

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

Contrary to Defendants' argument, a 3-year statute of limitations under NRS 608 applies to Plaintiffs' NRS Chapter 608 wage claims. Nevada's statute governing the limitations of actions expressly states that the limitations period for asserting a violation of a statute is 3-years ***unless further limited by specific statute***. *See* NRS 11.190 ("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)(a) An action upon a liability create by statute, other than a penalty or forfeiture." (emphasis added)). NRS 608.016, NRS 608.018, and NRS 608.040-.050, do not limit the 3-year statute of limitations. Accordingly, the NRS 11.190(3)(a)'s 3-year limitation period applies.

Here, Plaintiff Martel's last day worked was June 13, 2014; Plaintiff Capilla's last day worked was Sept. 19, 2013; Plaintiff Williams' last day worked was in December 2015; and Plaintiff Vaughn's last day worked was June 18, 2013. All named-Plaintiffs are within the 3-year statute of limitations commencing on June 14, 2013.

Defendants base their argument that Plaintiffs' statutory wage claims should be limited to a two-year SOL on an impermissibly broad reading of the Nevada Supreme Court's Perry v. Terrible Herbst decision. *See* Perry v. Terrible Herbst, Inc. 383 P. 3d 257 (2016). In Perry the Court did hold that a two-year limitations period is applicable to the Minimum Wage Amendment, but it did not extend that holding to NRS 608 claims subject to a private cause of action. The very narrow question the Court answered was whether the two-year limitations period of NRS 608.260 (an example of where the Legislature limited the statute of limitations periods found in NRS 11.190 "by specific statute") applies to the Nevada Constitution Minimum Wage Amendment. Id. at p. 258. Although the Court did reason that a two-year SOL was analogous to NRS 608.260, the Court did not extend its analysis to all Chapter 608 statutory causes of action but found the underpinning for its argument in NRS 608.250 specific to the Labor Commissioner. The Court—as well as the Legislature—very easily could have

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

included claims brought by employees through their private right to bring actions in court pursuant to NRS 608.140, but the Court declined to do so limiting its decision to Constitutional Minimum Wage Amendment claims. Similar to the arguments that defendant-employers made prior to the Neville decision, Defendants here try to pin their narrow reading of the limitation period to the Labor Commissioner's purview[2], an argument soundly rejected by Neville.

Furthermore, NRS 11.190(3)(a)'s three-year statute of limitations must apply because Plaintiffs NRS 608.016 and 608.018 claims are statutory in nature whereby Nevada created employer liability for failure to pay for all hours worked and failure to pay proper overtime premium. In Camino Properties, LLC v. Insurance Co. of the West, in looking at whether the limitations period should be based on NRS 11.190 the court reasoned "the proper inquiry is whether the [] liability arose from statute" or contract. *See* Camino Properties, LLC v. Insurance Co. of the West, 2015 WL 2225945, *3 (D. Nev. 2015). The Camino court held the bond guarantee in question was not statutory but contractual and thus a six-year limitations period applied. Id. Under this reasoning, if the Court is to accept Defendants' argument that "[l]iability for wages under NRS Chapter 608 [are] created by contract not statute" (Reply at p. 5:15-16) a six or four-year limitation period would actually apply. In either scenario, under Defendants' contract argument, all of the Plaintiffs are within the applicable SOL because an action for breach of contract not founded on an instrument in writing is four years (NRS 11.190(2)(c)), whereas a contract for employment based on a written instrument must be brought within six years. *See* NRS 11.190(1)(b).

Even if this Court agrees with Defendants that Plaintiffs NRS 608.016, 608.018, and NRS 608.020-.050 claims are subject to a two-year limitations period and refuses

---

[2] Defendant-employers, including the GSR had argued that the Labor Commissioner had exclusive enforcement authority for actions pursuant to NRS Chapter 608, an argument the Supreme Court of Nevada rejected. Neville, 406 P. 3d at 503-04. Terry provides no indication that the statutory limits specific to the Labor Commissioner should also apply to employee-plaintiffs private right of action through NRS 608.140.

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

to allow *American Pipe* tolling, Plaintiff Williams still has valid claims and could represent a class of individuals who worked during the relevant time period. And, specific to this Court's question of whether the limitations period is two, three, or four years and would require dismissal or simply a limitation on damages, even under the two-year period dismissal is not appropriate because Williams' claims have been timely brought. Should this case be certified as a class action—or proceed on an individual basis—any damage calculation would be based on the relevant time period as determined by the Court, which may include the entire statutory period or a portion thereof specific to the employees' tenure and wage rate.

2. Plaintiffs' NRS 608.020-.050 wages due and owing claims are derivative of Plaintiffs' NRS 608.016 and 608.018 and thus the applicable limitations period from the originating statute applies.

Defendants' seem to purposely misunderstand that Plaintiffs' NRS 608.020-.050 claims are derivative of their NRS 608.016, 608.018, and minimum wage claims. Plaintiffs' underlying claims are for unpaid wages due and owed; these are continuation wages owed for worked performed but not compensated, they are not actually "penalties". Any putative class member who has a valid wage claim under any of these theories and who is no longer employed by GSR is entitled to the continuation ***wages*** imposed by NRS 608.020-.050.

In Nevada, an employer must compensate an employee for all the wages due and owing at a time certain depending on whether an employee quits or is terminated. *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.").

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

Two independent and separate statutes provide for continuation wages (30-days wages under each statute) when a terminated employee does not receive everything that is owed to him or her at the time of termination. *See* NRS 608.040;[3] NRS 608.050;[4] *see also* Evans v. Wal–Mart Stores, Inc., No. 14-16566, 2016 WL 4269904, at *1 (9th Cir. Aug. 15, 2016).

By failing to pay Plaintiffs and any members of a certified class their minimum wages, wages for all hours worked, and/or overtime wages due and owing at the time of separation of employment, Defendants have failed to pay Plaintiffs and all members of the putative Waiting Time Penalty Class their full wages within the time frames

---

[3] **NRS 608.040 Penalty for failure to pay discharged or quitting employee.**

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.

[4] **NRS 608.050 Wages to be paid at termination of service: Penalty; employee's lien.**

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.

established by NRS 608.020-.030. There is no limitations period on these claims other that the applicable limitations period for the employees' underlying wage claims.

Even if this court was to accept Defendants' argument that a two-year statute of limitations applies to Plaintiffs' NRS 608.016 and 608.018 claims, Plaintiff Williams still has valid claims, is a former employee who has not been paid all wages due and owing to her at time of separation from employment, and thus can represent a class of individuals who also are no longer employed by GSR and have not been paid all wages due and owing to them for work done on behalf of and at the direction of their employer. Accordingly, dismissal of Plaintiffs' NRS 608.020-.050 claims would not be appropriate.

**B. Plaintiffs' Claims Are Not Barred By Issue Or Claim Preclusion Because The Sargent Court Never Certified The Sargent Plaintiffs' Claims And The Neville Court Held Employees Can Bring A Private Action Under Chapter 608**

1. The precondition for binding Plaintiffs here is not present because the *Sargent* action was never certified.

Defendants' arguments intentionally fail to acknowledge the distinction between the opt-in mechanism for an FLSA action and the NRCP 23 class certification procedures. As Plaintiffs pointed out in their Opposition at footnote 4—distinctions this Court is undoubtedly cognizant of—FLSA collective actions are distinct from an FRCP or NRCP 23 class action whereby a 29 U.S.C. § 216(b) collective action requires a party to opt-in to the action by filing a consent to sue with the court. *See also,* Jane Roe Dancer I-VII v. Golden Coin, Ltd., 124 Nev. 28, 176 P.3d 271, fn 2 (2008) (describing difference between 216(b) opt-in mechanism under the FLSA and a true class action pursuant to FRCP 23). This "opt-in" requirement differs from the requirements under NRCP 23 whereby under Rule 23(b)(3), each person within the class definition of a ***certified class*** is considered to be a class member.

The court in Sargent decertified the collective action under the FLSA on the basis that the plaintiff employees were not similarly situated to each other. *See* Sargent

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

v. HG Staffing, 171 F. Supp. 3d 1063 (March 22, 2016). The Sargent court never certified the Sargent plaintiffs' Rule 23 claims on two grounds that are dispositive to this Court's inquiry. First, the federal district court never reached 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. Second, it reasoned that the Sargent plaintiffs failed to provide the court with facts sufficient to allow the court to make "a rigorous analysis, that the prerequisites of Rule 23 have been satisfied" for their Nevada Constitution wage claims and the age discrimination claims, only. *See Sargent,* 171 F. Supp. 3d at 1073-74.

Defendants' previous citation to Five Star Capital Corp. v. Ruby, actually supports Plaintiffs' position. In Five Star, the Nevada Supreme Court explained that "…issue preclusion only applies to issues that were actually and necessarily litigated and on which there was a final decision on the merits." The Five Star Court further explained that the distinction between issue preclusion and claim preclusion is "claim preclusion applies to preclude an entire second suit that is based on the same set of facts and circumstances as the first suit, while issue preclusion … applies to prevent relitigation of only a specific issue that was decided in a previous suit between the parties …." *See* Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 713–14 (2008), *holding modifying only the privity requirement for nonmutual claim preclusion by* Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015) (internal citations omitted). After proving a detailed history of the doctrines of issue and claim preclusion in Nevada, the court affirmed the Tarkanian test for issue preclusion adding a fourth factor. Five Star, 124 Nev. at 1051. And the Five Star Court set forth the test for claim preclusion in Nevada. Five Star at 1054.

*a. Issue preclusion does not apply because the Sargent court has not decided the Nevada wage claims, there has been no ruling on the merits, and the Plaintiffs and putative class members are not parties or in privity.*

The Tarkanian issue preclusion test as amended by Five Star sets forth the following four factors: (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. Id. at 1055. All factors must be met. Defendants cannot even meet one single factor.

Here, specific to the first, second, and fourth factors, class certification was never addressed in Sargent for the Nevada wage claims[5] and the Court in Sargent has since reversed the grant of summary judgment in light of Neville. There is no issue 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 issue has not actually and necessarily been litigated. Indeed, even the claims of the six-named Plaintiffs in Sargent are still pending before the federal court. *See* ECF No. 248 attached as Exhibit 2.

Specific to the third factor, the Supreme Court of the United States has held, unnamed members of a proposed class are not bound by any decisions made before a class is certified, *including denial of class certification.* See Smith v. Bayer Corp., 564 U.S. 299, 131 S. Ct. 2368, 2372, 180 L. Ed. 2d 341 (2011). Additionally, the Ninth Circuit explained that privity is present when "[t]he representative of a class of persons

[5] Defendants are likely to argue that the FLSA claims are identical to the Nevada wage claims, however they are incorrect. Nevada wage hour law is distinct from the FLSA in many respects and exceeds the FLSA in numerous respects. Specific to the off-the-clock claims alleged in the instant action under Nevada law, (1) Nevada has not adopted the Portal-to-Portal Act which is part of the FLSA; (2) Nevada law requires employees to be paid for each hour worked and the Nevada Administrative Code defines hours worked as "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee" *see* NAC 608.115(1); and (3) Nevada provides for daily overtime where the FLSA only requires overtime for hours worked over forty (40) in a workweek. Thus, the difference between federal and Nevada law, as it applies to the facts of the case present different issues, none of which have been ruled on by the Sargent court.

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

similarly situated, ***designated as such with the approval of the court***, of which the person is a member." Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005), *citing* Restatement (Second) of Judgments § 41(1) (emphasis supplied). The Headwaters court explained that privity is not present when a party has not had his "interests adequately represented by someone with the same interests who is a party, including class or representative suits." Headwaters Inc., 399 F.3d at 1053 (internal quotations and citation omitted). Defendant contends that Plaintiffs here, including Plaintiff Williams are trying to represent all of the plaintiffs in the Sargent action even though the Sargent court dismissed Plaintiffs' Nevada wage and hour claims prior to ever undertaking an FRCP 23 analysis. Defendants contention is just plain incorrect and by no stretch of the law can the Plaintiffs here be considered a party or in privity with the Sargent named-Plaintiff or any putative Sargent class member.

Moreover, Defendants admit that Plaintiff Williams never filed a consent to join form in the Sargent action and thus cannot be precluded from bringing the instant litigation on those grounds as well. None of the cases Defendants cite to in its Reply in support of the Motion to Dismiss are on point or analogous because the cases are specific to claims brought pursuant to the FLSA, ***only*** and do not include state law claims. First, in Prickett v. DeKalb Cty., the claims in question were all brought under the FLSA. *See* Prickett v. DeKalb Cty., 349 F.3d 1294, 1297 (11th Cir. 2003) (The consent given was for the named plaintiffs to represent the interests of the employee in adjudicating all claims that employee had **under the FLSA**.) (emphasis added).

Defendants' argument that the opt-ins plaintiffs in a decertified FLSA action have the same status as both the named and putative plaintiffs' alleging state law claims has been rejected by courts. Courts must look to the language of the consent to join form in making a determination of whether or not the putative plaintiff consented to such claims. *See* Albritton v. Cagle's, Inc., 508 F.3d 1012, 1018 (11th Cir. 2007) (*citing* Prickett at 1297-98 and noting the lesson from Prickett is that we must interpret consent forms according to the plain meaning of their language.). The court in Hicks v.

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

T.L. Cannon Corp. agreed explaining Prickett "involved only FLSA claims." Hicks v. T.L. Cannon Corp., 35 F. Supp. 3d 329, 338–39 (W.D.N.Y. 2014). The Hicks court however explained, the FLSA opt-in plaintiffs and the state law putative plaintiffs could have all their related claims adjudicated in the same forum, but that "the issue is not whether the Moving Opt–In Plaintiffs may pursue both FLSA and [state law] claims in the same action, but rather whether in this case they have consented to pursuing state law claims." Id. The Hicks court then looked to the actual language of the consents signed by the opt–in plaintiffs and noted that the "consents do not expressly reference an agreement to pursue claims under the NYLL [New York Labor Law]." Id. In holding that the consents did cover the state law claims, the Hicks court looked to the "broad language" used in the consents determining it "would seem to encompass the state claims" because the consents express that the opt–in plaintiffs "wish to preserve and pursue any claim that I may have to the greatest extent possible" and that they "expressly consent to the use of this consent form for purposes of making me a party plaintiff in any lawsuit and/or lawsuits that plaintiffs' attorneys have brought and/or may bring on behalf of myself and other employees alleged to be similarly situated." Id.

In the instant case, the consent forms in Sargent specifically state: "I CONSENT TO JOIN THIS LAWSUIT. By signing this Consent to Join, I am agreeing to have Plaintiffs TIFFANY SARGENT …, act as my agents to make decisions on my behalf concerning litigation and resolution of my FLSA claims." *See* Exhibit 3, "Martel Consent to Join." And, the last sentence of the Consent to Join, directly above the opt-ins' signature, states: "This provision does not apply to other federal and to state law claims." Id. This language is specifically narrow and unequivocally precludes claims brought under state law. Thus, even the Plaintiffs who have signed consents to join in the Sargent action cannot be deemed to be a party or in privity for claims based on Nevada wage and hour law in the instant case.

Accordingly, all four factors for issue preclusion cannot be met in the instant action and issue preclusion does not apply.

*b. Claim preclusion does not apply because there has been no decision on any of the employees' Nevada wage claims, the Neville decision reversed the Sargent court's reasoning for granting the motion to dismiss, and there is no privity among parties*.

The Five Star claim preclusion test sets out the following three factors: (1) the parties or their privities 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. Five Star at 1055.

For the same reasons set forth directly above regarding the first factor that the parties or their privities be the same, none of the Plaintiffs here were parties to the Sargent action because the Sargent FRCP 23 class certification was never independently decided—there has never been a certified Nevada wage claim class. See Smith v. Bayer Corp., 564 U.S. 299, 131 S. Ct. 2368, 2372, 180 L. Ed. 2d 341 (2011) (unnamed members of a proposed class are not bound by any decisions made before a class is certified, *including denial of class certification*). Nor can they be held in privity with the Sargent plaintiffs because simply opting-in to the FLSA portion of the Sargent action does not create privity where the consent specifically rejects state law claims and the Sargent court never certified a FRCP 23 class.

The second factor of final judgment is also not present. Although the Restatement sets forth that summary judgment for the defendant may satisfy the final judgment rule, an exception to that general rule is found in §26, whereby an "erroneous decision in the first action does not preclude the plaintiff from maintaining a second action." Restatement (Second) of Judgments § 26 (1982). This is exactly the situation here, where the Sargent court's grant of summary judgment was based on the erroneous reasoning the plaintiff-employees do not enjoy a private right of action for NRS 608.016, 608.018, and 608.020-.050 claims.

The third factor favors Plaintiffs as well. As explained in footnote 5 above, Nevada wage hour law is distinct from the FLSA in many respects and exceeds the

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

FLSA in numerous respects, particularly in relation to these Plaintiffs' unpaid wage, daily overtime, and continuation wage claims. The FLSA claims and the Nevada wage claims are not the same. Furthermore, the Sargent court has still not ruled on the merits of the FLSA claims.

Accordingly, all three factors for issue preclusion cannot be met in the instant action and issue preclusion does not apply. Thus, all of Defendants' preclusion arguments must fail.

2. The impact of the Neville decision further provides Plaintiffs with a forum in this Court.

The Supreme Court of the State of Nevada has unanimously determined that Nevada employees do have a private right of action to bring statutory wage claims pursuant to NRS 608.140, 608.016, 608.018, 608.020-.050. See Neville v. Terrible Herbst, Inc., 133 Nev. Adv. Op. 95, 406 P.3d 499, 504 (Dec. 7, 2017). There can be no issue or claim preclusion when the reasoning for the Sargent court's grant of summary judgment has since been resoundingly rejected, in a 7-0 decision, by the Nevada Supreme Court. This action was filed following the Sargent Court's decision to deny certification (March 22, 2016) in Sargent as moot, which occurred after the grant of summary judgment against those named-Plaintiffs (January 12, 2016).

Both the grant and denial of class action certification are interlocutory in nature because they are *subject to revision* in the district court (FRCP 23(c)(1)); involve considerations that are *enmeshed in factual and legal issues* comprising plaintiff's cause of action; and are subject to *effective review* after final judgment. *See* Coopers & Lybrand v. Livesay, 437 US 463, 468-469, 98 S.Ct. at 2458 (1978) ; Weil v. Investment Indicators, Research & Management, Inc., 647 F2d 18, 26-27 (9th Cir. 1981). Additionally, the Ninth Circuit has explained that pursuant to FRCP 23(f) an appeal is discretionary. Chamberlan v. Ford Motor Co., 402 F.3d 952, 957 (2005). Defendants argument that the Ninth Circuit's denial of the Sargent appeal meets the requirement under the Restatement (Second) of Judgments must also be rejected because the

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

Sargent court did not provide any analysis on the Nevada claims certification issue for which the appeal was denied. Contrary to Defendants' assertion, specific to the Sargent plaintiffs' Nevada wage claims, the court gave no reasoning what-so-ever, let alone "well-reasoned" analysis of Plaintiffs' Nevada wage claims because the federal court dismissed the NRS 608.016, 608.018, and 608.020-.050 claims in a previous summary judgment order.

Specific to Defendants' argument that Plaintiffs here are "forum shopping" the Ninth Circuit has rejected such arguments, in *Smith v. Lenches* explained that even if the Sargent court dismissed Plaintiffs' federal claims with prejudice (which it did not), "the dismissal of the federal claims was ***without prejudice to any assertion of state law claims in state court***." *Smith v. Lenches,* 263 F.3d 972, 975 (9th Cir. 2001) at p. 4:14-18 and fn. 1 (emphasis supplied).

### C. The Recent Supreme Court Of The United States' Decision In China Agritech Has Not Been Accepted By The Nevada Supreme Court

#### 1. Plaintiffs and all putative class members are entitled to tolling under Nevada law.

Defendants are likely to argue that the Supreme Court of the United States very recent ruling in China Agritech will foreclose Plaintiffs' argument that they should be entitled to an American Pipe tolling. However, Nevada state courts have not imported federal court doctrine into state law matters where it did not previously exist. Defendants' argument that a state's interest in managing its own judicial system counsel courts not to import the doctrine of cross-jurisdictional tolling into state law based on the reasoning in Clemens v. DaimlerChrysler Corp. *See* Reply at p. 8, §4. In that case the court held that "the rule of *American Pipe*—which allows tolling within the federal court system in federal question class actions—does not mandate cross-jurisdictional tolling as a matter of state procedure." Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008). The flip side of this ruling is that cross-jurisdictional tolling is a matter of state procedural law that must be settled by the state

court system. State law is expressly preempted only when federal law explicitly sets forth the degree to which it preempts state law. *See* Jane Roe Dancer I-VII v. Golden Coin, Ltd., 124 Nev. 28, 176 P.3d 271 (2008).

The Nevada Supreme Court clearly grants equitable tolling for all putative class members. Golden Coin, Ltd., 124 Nev. at 34, 176 P.3d at 275 ("[C]lass actions brought under NRCP 23 toll the statute of limitations on all potential unnamed plaintiffs' claims[.]"); *see also* Allen v. KB Home Nevada, Inc., 2013 WL 8609775 (Nev. Dist. Ct. July 25, 2013) (It is determined that pursuant to *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 176 P.3d 271 (2008), that based on the complaint filed on December 2, 2008, which alleges class action status as a remedy, the statute of limitations and/or repose is tolled for all putative class members." (citations omitted)). Accordingly, pursuant to Golden Coin tolling, Plaintiffs and putative class members' wage claims go back to June 21, 2010, three years prior to the original filing of the Sargent action.

Nevertheless, Plaintiffs NRS 608.016 and 608.018 claims carry a three-year statute of limitations and because all of the named-Plaintiffs here are within the 3-year statute of limitations, Defendants' Motion to Dismiss must fail. And even if the Court is inclined to agree with Defendants' that a two-year limitations period is correct, Plaintiff Williams still has timely claims and thus Defendants' motion to dismiss must be still be denied.

## III. CONCLUSION

For the reasons previously expressed in Plaintiffs' Opposition to Defendants' motion to dismiss and for the reasons further set forth above, Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied in its entirety. Alternatively, to the extent this Court grants Defendants' motion in whole or any part thereof, Plaintiffs should be granted leave to file an amended complaint to cure any deficiencies noted by the Court.

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

**AFFIRMATION**

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

DATED: June 29, 2018

Respectfully Submitted,

**THIERMAN BUCK LLP**

Mark R. Thierman
Joshua D. Buck
Leah L. Jones

*Attorneys for Plaintiffs*

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

**CERTIFICATE OF SERVICE BY E-FILING**

I certify that I am an employee of the Thierman Buck Law Firm and that, on this date, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

**COHEN|JOHNSON|PARKER|EDWARDS**
H. Stan Johnson, Nev. Bar No. 00265
sjohnson@cohenjohnson.com
Chris Davis, Nev. Bar No. 6616
cdavis@cohenjohnson.com
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
Tel: (702) 823-3500
Fax: (702) 823-3400

**MERUELO GROUP, LLC**
Susan Heaney Hilden, Nev. Bar No. 5358
shilden@meruelogroup.com
2500 East Second Street
Reno, Nevada 89595
Tel: (775) 789-5362

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. Executed on June 29, 2018, at Reno, Nevada.

Jasmin Williams

**Index of Exhibits**

| | |
|---|---|
| Exhibit 1 | Order, ECF No. 172 in Sargent et al, v. HG Staffing, Case No. 3:13-CV-00453-LRH-WGC (6 pages) |
| Exhibit 2 | Order, ECF No. 248 in Sargent et al, v. HG Staffing, Case No. 3:13-CV-00453-LRH-WGC (6 pages) |
| Exhibit 3 | Martel Consent to Join (3 pages) |

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500 Fax (775) 703-5027
Email: info@thiermanbuck.com; www.thiermanbuck.comt

# EXHIBIT 1

Order, ECF No. 172 in Sargent et al, v. HG Staffing,
Case No. 3:13-CV-00453-LRH-WGC

# EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

| | |
|---|---|
| TIFFANY SARGENT, BAILEY CRYDERMAN, SAMANTHA L. IGNACIO (formerly SCHNEIDER), VINCENT M. IGNACIO, HUONG ("ROSIE") BOGGS, and JACQULYN WIEDERHOLT on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>HG STAFFING, LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT; and DOES 1 through 50, inclusive,<br><br>Defendants. | 3:13-CV-00453-LRH-WGC<br><br>ORDER |

Before the court is Defendant MEI-GSR Holding LLC's (GSR) Motion for Partial Summary Judgment. Doc. #135.[1] Plaintiffs filed an Opposition (Doc. #140), to which Defendants' replied (Doc. #148). Plaintiffs also filed a Motion for Leave to File Excess Pages for their Response to Defendant's Motion for Summary Judgement. Doc. #141. Additionally, Plaintiffs filed an Objection to Working Drafts of Unsigned Collective Bargaining Agreements not Produced in Discovery. Doc. #139. Defendants filed a Response (Doc. #149), to which Plaintiffs' replied (Doc. #154).

///

///

[1] Refers to the Court's docket number.

**I. Facts and Procedural History**

On June 21, 2013, Plaintiffs Tiffany Sargant ("Sargant") and Bailey Cryderman ("Cryderman") filed their original collective and class action Complaint against Defendants in the Second Judicial District Court for the State of Nevada in and for the County of Washoe. Doc. #1, Ex. A. On August 22, 2013, Defendants filed a Petition for Removal. Doc. #1. On June 13, 2014, Plaintiffs filed the operative Second Amended Complaint ("SAC") before the Court. Doc. #47.

On August 14, 2015, GSR filed a motion for partial summary judgment on Plaintiff's Fourth (Failure to Compensate for All Hours Worked in Violation of NRS 608.140 and 608.016), Sixth (Failure to Pay Overtime in Violation of NRS 608.140 and 608.018), Seventh (Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050), and Eighth (Unlawful Chargebacks in Violation of NRS 608.140 and 608.100) causes of action. Doc. #135. On August 28, 2015, Plaintiffs filed an objection to working drafts of unsigned collective bargaining agreements ("CBA") not produced in discovery, a response, and a motion for leave to file excess pages for their response. Doc. #140, 141, and 142. On September 21, 2015, GSR filed its reply and its response to the CBA objection. Doc. #148 and 149. On September 30, 2015, Plaintiffs filed a reply for the CBA objection. Doc. #154.

**II. Legal Standard**

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, affidavits or declarations, stipulations, admissions, and other materials in the record show that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Cnty. of Tuolumne v. Sonora Cmty. Hosp*., 236 F.3d 1148, 1154 (9th Cir. 2001). A motion for summary judgment can be complete or partial, and must identify "each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a).

The party moving for summary judgment bears the initial burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that no "reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On an issue as to which the nonmoving party has the burden of proof, however, the moving party can prevail merely by demonstrating that there is an absence of evidence to support an essential element of the non-moving party's case. *Celotex*, 477 U.S. at 323.

To successfully rebut a motion for summary judgment, the nonmoving party must point to facts supported by the record that demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). A "material fact" is a fact "that might affect the outcome of the suit under the governing law." *Liberty Lobby*, 477 U.S. at 248. Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material fact is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of evidence in support of the party's position is insufficient to establish a genuine dispute; there must be evidence on which a jury could reasonably find for the party. *See id*. at 252. "[S]peculative and conclusory arguments do not constitute the significantly probative evidence required to create a genuine issue of material fact." *Nolan v. Cleland*, 686 F.2d 806, 812 (9th Cir. 1982).

**III. Discussion**

Plaintiffs' Fourth, Sixth, Seventh, and Eighth causes of action are premised on violations of Nevada Revised Statutes NRS 608.140, 608.016, 608.018, 608.020, 608.030, 608.040, 608.050, and 608.100. GSR argues that Nevada employees do not have a private right of action to assert Nevada state wage claims in court because no private right of action was created by the statutes at issue in this case. Plaintiffs argue that a private right of action does exist. However, recent case law from this district has held that no private right of action exists to enforce labor

statutes arising from any of the statutes at issue here. *See Johnson v. Pink Spot Vapors Inc.*, No. 2:14-CV-1960-JCM-GWF, 2015 WL 433503, at *5 (D. Nev. Feb. 3, 2015) (holding that no private right of action exists under NRS 608.018 and NRS 608.020 without a contractual claim); *Miranda v. O'Reilly Auto. Stores, Inc*., No. 2:14-CV-00878-RCJ, 2014 WL 4231372, at *2 (D. Nev. Aug. 26, 2014) (holding that there is no private right of action under NRS 608.100 and dismissing claims under NRS 608.106, 608.018, and 608.020-.050 because the private right of action that can be implied under NRS 608.140 only reasonably includes pre-wage-and-overtime-law contractual claims); *McDonagh v. Harrah's Las Vegas, Inc.*, No. 2:13-CV-1744-JCM-CWH, 2014 WL 2742874, at *3 (D. Nev. June 17, 2014) (holding that no private right of action exists to enforce labor statutes arising from NRS 608.010 et. seq. and 608.020 et. seq and that NRS 608.140 only provides private rights of action for contractual claims); *Dannenbring v. Wynn Las Vegas*, LLC, 907 F.Supp.2d 1214, 1219 (D.Nev.2013) (finding that NRS 608.140 implies a private right of action to recover in contract only and dismissing NRS 608.140, 608.018, 608.020, and 608.040 claims); *Descutner v. Newmont USA Ltd*., 3:13–cv–00371–RCJ–VPC, 2012 WL 5387703, *2 (D.Nev.2012) (finding no private right of action under NRS 608.018 or NRS 608.100); *Garcia v. Interstate Plumbing & Air Conditioning*, LLC, No. 2:10-CV-410-RCJ-RJJ, 2011 WL 468439, at *6 (D. Nev. Feb. 4, 2011) (holding that NRS 608.018 does not provide for a private right of action because it is enforced by the Nevada Labor Commissioner); *Lucas v. Bell Trans*, No. 2:08-CV-01792-RCJ-RJJ, 2009 WL 2424557, at *4 (D. Nev. June 24, 2009) (holding that there is no private right of action in NRS 608.100). Further, it is settled law that NRS 608.140 "does not imply a private remedy to enforce labor statutes, which impose external standards for wages and hours," but only provides private rights of action for contractual claims. *Gamble v. Boyd Gaming Corp*., No. 2:13–CV–1009-JCM-PAL, 2014 WL 2573899, at *4 (D. Nev. June 6, 2014) (citing *Descutner v. Newmont* USA Ltd., 3:12–cv–00371–RCJ–VPC, 2012 WL 5387703, *2 (D.Nev.2012)) (emphasis added). Other courts in this district have thoroughly explained the rationales for these conclusions, and the Court cites the decisions of Judge Mahan and Judge Jones with approval. E.g., *Descutner*, 2012 WL 5387703, at *3. This Court

particularly agrees with the decisions of Judges Mahan and Jones and rules accordingly in this case in favor of GSR.

Here, plaintiffs do not seek wages and overtime pursuant to an employment contract, therefore the Court grants summary judgment on the Plaintiffs' Fourth, Sixth, Seventh, and Eighth causes of action. Moreover, because the Court has based its decision on statutory grounds, the Court does not need to examine Plaintiffs' objections to the CBA.

**IV. Conclusion**

IT IS THEREFORE ORDERED that GSR's Motion for Partial Summary Judgment (Doc. #135) is GRANTED in accordance with this order.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of Defendants and against Plaintiffs on Plaintiff's Fourth, Sixth, Seventh, and Eighth causes of action.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Excess Pages (Doc. # 141) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Objection to Working Drafts of Unsigned Collective Bargaining Agreements not Produced in Discovery (Doc. #139) is denied as moot.

IT IS SO ORDERED.

DATED this 11th day of January, 2016.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

# EXHIBIT 2

Order, ECF No. 248 in Sargent et al, v. HG Staffing,
Case No. 3:13-CV-00453-LRH-WGC

# EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

| | |
|---|---|
| TIFFANY SARGENT, BAILEY CRYDERMAN, SAMANTHA L. IGNACIO (formerly SCHNEIDER), VINCENT M. IGNACIO, HUONG ("ROSIE") BOGGS, and JACQULYN WIEDERHOLT on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>HG STAFFING, LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT; and DOES 1 through 50, inclusive,<br><br>Defendants. | Case No. 3:13-cv-00453-LRH-WGC<br><br>ORDER |

The plaintiffs in this matter move the court to reconsider two of its previous orders. ECF No. 245. The first order resulted in, and the second order confirmed, the dismissal of the plaintiffs' claims brought under Chapter 608 of the Nevada Revised Statutes ("N.R.S"). ECF Nos. 172, 204. The defendants opposed the motion for reconsideration, and the plaintiffs filed a reply. ECF Nos. 246, 247. Based on the Nevada Supreme Court's ruling in *Neville v. Eighth Judicial District Court in & for County of Clark*, 406 P.3d 499 (Nev. 2017) (holding N.R.S. § 608.140 recognizes a private right of action for unpaid wages), the court now reverses its two previous orders and reinstates plaintiffs' fourth, sixth, and seventh claims. But the plaintiffs' eighth claim remains dismissed. Also, because the court reinstates three claims for each plaintiff, the court denies the defendants' six pending summary judgment motions without prejudice.

## I. BACKGROUND

The plaintiffs sue the defendants under the Fair Labor Standards Act, the Nevada Constitution, and provisions of the Nevada Revised Statutes. ECF No. 47. Four of the plaintiffs' claims are relevant to this order: (1) failure to pay wages for all hours worked in violation of N.R.S. § 608.140 and § 608.016 (fourth claim); (2) failure to pay minimum wages in violation of N.R.S. § 608.140 and § 608.018 (sixth claim); (3) failure to pay all wages due and owing upon termination in violation of N.R.S. § 608.140 and § 608.020 to § 608.050 (seventh claim); and (4) unlawful chargebacks in violation of N.R.S. § 608.100 (eighth claim). *See id.*; ECF Nos. 245, 246, 247.

The court dismissed the four relevant claims in its January 11, 2016 Order ("ECF No. 172"), holding that Chapter 608 does not provide for a private right of action. ECF No. 172. The court based its decision solely on statutory grounds. *Id.* In making its decision, the court agreed with the majority of case law from the District of Nevada. *Id.* (citing multiple District of Nevada cases holding no private right of action exists under Chapter 608). The court later reaffirmed its decision, denying the plaintiffs' earlier motion to reconsider. ECF No. 204.

Since the court's previous orders were issued, the Nevada Supreme Court considered if Chapter 608 allows for a private right of action. *See Neville*, 406 P.3d 499. It concluded that N.R.S. § 608.140 demonstrates the legislature's intent to create a private right of action for unpaid wages. *Id.* at 504. It then reversed the dismissal of the plaintiff's claims that were tied to N.R.S. § 608.140 and were brought under Chapter 608—specifically N.R.S. § 608.016, § 608.018, and § 608.020 to 608.050. *Id.* Based on the Nevada Supreme Court's decision in *Neville*, the plaintiffs move the court to reconsider ECF No. 172 and ECF No. 204. ECF No. 245.

Additionally, since the court's previous orders were issued, the defendants filed six motions for summary judgment. ECF Nos. 218, 220, 222–225. The plaintiffs opposed the motions for summary judgment, and the defendants filed replies. ECF Nos. 228–233, 236–241. Each motion argues for the dismissal of a single plaintiff's remaining claims, but the motions do not discuss the plaintiffs' previously dismissed claims. *See* ECF Nos. 218, 220, 222–225. The summary judgment motions remain pending at the time of this order.

## II. LEGAL STANDARD

A party may move for relief from a final judgment or order under Federal Rule of Civil Procedure 60(b). A motion under Rule 60(b) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 887, 890 (9th Cir. 2000). The Ninth Circuit allows for reconsideration "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); Fed. R. Civ. P. 60(b)(1)-(6).

## III. DISCUSSION

The plaintiffs move the court to reconsider the dismissal of their claims brought under Chapter 608 based on the Nevada Supreme Court's decision in *Neville v. Eighth Judicial District Court in & for County of Clark*, 406 P.3d 499 (Nev. 2017). ECF No. 245. The defendants argue that the *Neville* decision does not require reconsideration of the court's earlier orders, but even if it did, *Neville* would not change the outcome of the court's earlier orders. ECF No. 246. The court disagrees; the *Neville* decision alters the court's decision on the issue on which summary judgment was granted.

At the time of its order, the court found that Chapter 608 did not provide for a private right of action, agreeing with case law from the District of Nevada. But the court limited its decision to determining if Chapter 608 allowed for a private suit to recover earned wages; the court declined to reach any factual issues. Since issuing its order on the statutory question, the Nevada Supreme Court ruled contrarily in *Neville*, finding that N.R.S. § 608.140 "explicitly recognizes a private cause of action for recovery of unpaid wages." 406 P.3d at 500. Thus, the Nevada Supreme Court "conclude[d] that NRS Chapter 608 provides a private right of action for unpaid wages." *Id.* The Nevada Supreme Court therefore instructed the district court to vacate its order dismissing the plaintiff's claims brought under Chapter 608 and tied to N.R.S. § 608.140. *Id.* at 504. These claims included causes of action brought under N.R.S. § 608.016, § 608.018, and § 608.020 to § 608.050. *Id.* at 504.

The plaintiffs seek reconsideration of the order dismissing claims brought under the same provisions of Chapter 608 as the plaintiff's claims in *Neville*. ECF No. 247. The plaintiffs' fourth claim falls under N.R.S. § 608.016; the plaintiffs' sixth claim falls under N.R.S. § 608.018; the plaintiffs' seventh claim falls under N.R.S. § 608.020 to § 608.050. Further, the plaintiffs tied their fourth, sixth, and seventh claims to N.R.S. § 608.140. Because the claims are brought under Chapter 608 and tied to N.R.S. § 608.140, the *Neville* holding requires the court to find that a private right of action exists for the claims. The court therefore vacates its earlier orders in part and reinstates the plaintiffs' fourth, sixth, and seventh claims.

Additionally, the court dismissed the plaintiffs' eighth claim in ECF No. 172. The plaintiffs brought their eighth claim under N.R.S. § 608.100. Unlike the rest of the claims at issue, the plaintiffs did not tie the claim to N.R.S. § 608.140. But the plaintiffs contend that their complaint properly states a claim for unpaid wages under N.R.S. § 608.100 nevertheless. ECF No. 247 at fn. 2. The court disagrees. The Nevada Supreme Court held that no private right of action exists to enforce N.R.S. § 608.100. *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 100 (Nev. 2008) (stating the discussion holding no private right of action exists under N.R.S. § 608.160 applies equally to N.R.S. § 608.100). Accordingly, the court neither vacates its previous orders in regards to the plaintiffs' eighth claim nor reinstates the plaintiffs' eighth claim.

Based on the foregoing, the court denies the pending motions for summary judgment without prejudice to allow the parties to file motions for summary judgment that address all remaining claims—including those claims reinstated herein.

## IV. CONCLUSION

IT IS THEREFORE ORDERED that plaintiffs' motion to reconsider the court's previous orders (ECF No. 245) is **GRANTED.** The court reinstates the plaintiffs' fourth, sixth, and seventh claims. But the court does not reinstate the plaintiffs' eighth claim.

IT IS FURTHER ORDERED that defendants HG Staffing, LLC and MEI-GSR Holdings, LLC dba Grand Sierra Resort's motion for summary judgment on all remaining claims asserted by plaintiff Jacqulyn Wiederholt (ECF No. 218) is **DENIED without prejudice**.

IT IS FURTHER ORDERED that defendants HG Staffing, LLC and MEI-GSR Holdings, LLC dba Grand Sierra Resort's motion for summary judgment on all remaining claims asserted by plaintiff Huong ("Rosie") Boggs (ECF No. 220) is **DENIED without prejudice**.

IT IS FURTHER ORDERED that defendants HG Staffing, LLC and MEI-GSR Holdings, LLC dba Grand Sierra Resort's motion for summary judgment on all remaining claims asserted by plaintiff Tiffany Sargent (ECF No. 222) is **DENIED without prejudice**.

IT IS FURTHER ORDERED that defendants HG Staffing, LLC and MEI-GSR Holdings, LLC dba Grand Sierra Resort's motion for summary judgment on all remaining claims asserted by plaintiff Samantha Ignacio (ECF No. 223) is **DENIED without prejudice**.

IT IS FURTHER ORDERED that defendants HG Staffing, LLC and MEI-GSR Holdings, LLC dba Grand Sierra Resort's motion for summary judgment on all remaining claims asserted by plaintiff Vincent Ignacio (ECF No. 224) is **DENIED without prejudice**.

IT IS FURTHER ORDERED that defendants HG Staffing, LLC and MEI-GSR Holdings, LLC dba Grand Sierra Resort's motion for summary judgment on all remaining claims asserted by plaintiff Bailey Cryderman (ECF No. 225) is **DENIED without prejudice**.

IT IS FURTHER ORDERED that the defendants shall file complete motions for summary judgment that include briefing on the reinstated claims, if any, within 30 days of the entry of this order.

IT IS SO ORDERED.

DATED this 10th day of January, 2018.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

# EXHIBIT 3

Martel Consent to Join

# EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | |
|---|---|
| TIFFANY SARGANT, BAILEY CRYDERMAN, HUONG ("ROSIE") BOGGS, and JACQULYN WIEDERHOLT, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>HG STAFFING, LLC, MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT, and DOES 1 through 50, inclusive,<br><br>Defendant(s). | Case No.: 3:13-CV-453-LRH-WGC<br><br>**CONSENT TO JOIN** |

I understand that this lawsuit has been brought under the Fair Labor Standards Act ("FLSA") and that it seeks unpaid wages from GRAND SIERRA RESORT ("GSR"). I have read the Notice accompanying this Consent to Join. I work, or have worked, for GSR at some point from June 21, 2010, to the present.

**I CONSENT TO JOIN THIS LAWSUIT.** By signing this Consent to Join, I am agreeing to have Plaintiffs TIFFANY SARGANT, BAILEY CRYDERMAN, HUONG ("ROSIE") BOGGS, and JACQULYN WIEDERHOLT, act as my agents to make decisions on my behalf concerning the litigation and resolution of my FLSA claims. I am also agreeing to be represented by Plaintiffs' attorneys, (Thierman Law Firm, 7287 Lakeside Drive, Reno, NV 89511), and any other attorneys with whom they may associate, unless I hire my own attorney.

Pursuant to 29 U.S.C. 216(b) "No employee shall be a party plaintiff to any such action [under the Fair Labor Standards Act] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought" and that unless the Court provides otherwise, the statute of limitations is tolled on the federal Fair Labor Standards

Act claims only when the consent to suit is filed with the court. This provision does not apply to other federal and to state law claims.

Signature: Eddy Martel

Date signed: 6/4/14

Print Name: Eddy Martel #2810

4185

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

EDDY MARTEL, et al., :
Plaintiffs, : Case No. CV16-01264
v. : Dept. No. 6
HG STAFFING, LLC, et al.,:
Defendants. :
_____:

ORAL ARGUMENTS
Thursday, July 19, 2018
Reno, Nevada

Reported by: Carol Hummel, CCR #340

A P P E A R A N C E S

FOR THE DEFENDANTS:

THIERMAN BUCK LAW FIRM
Attorneys at Law
By: LEAH JONES, ESQ.
7287 Lakeside Drive
Reno, Nevada

FOR THE PLAINTIFFS:

MERUELO GROUP, LLC
Attorneys at Law
By: CHRIS DAVIS, ESQ.
SUSAN HEANEY HILDEN, ESQ.
2500 East Second Street
Reno, Nevada 89595

-oOo-

RENO, NEVADA; THURSDAY, JULY 19, 2018

-oOo-

THE COURT: This is the time set in case number CV16-01264, Eddy Martel, et al. versus HG Staffing, LLC, et al. This is the time set for oral argument, court order and a motion to dismiss. Would you please state your appearances.

MS. JONES: Leah Jones for plaintiff Eddy Martel, et al.

MR. DAVIS: Chris Davis on behalf of defendants.

MS. HILDEN: Susan Heaney Hilden on behalf of defendants.

THE COURT: Thank you. I have reviewed, and thank you very much for your supplement. I have reviewed everything, and I would like you to add any argument that you would like, Counsel.

MR. DAVIS: Thank you, your Honor. And I appreciate the opportunity to address the Court. As you're well aware, one of the principal issues in this case is what statute of limitations applies in this case, your Honor. One of them is addressed in supplemental

briefs.

THE COURT: Yes.

MR. DAVIS: This case is clearly controlled by Perry v. Terrible Herbst. First of all, the Perry case held that the minimum wage claim, whether statutory or constitutional are subject to a two-year statute of limitation. That's absolute process, absolutely binding on this Court. Therefore there's a two-year statute of limitations for a minimum wage claim.

Equally binding is the reasoning behind that which also holds that a statute of limitations, that last express limitation, courts must look to the mot analogous limitation either by statute or by case law.

Clearly in this case the most analogous statute of limitation are wage claims limitation. All wage claim limitations are two-year limitations. All of them. There's nothing pointing to a single wage claim. That statutory wage claim, that is subject to a two-year statute of limitations.

THE REPORTER: Wait a minute Excuse me. Would you repeat the number again for me.

MR. DAVIS: NRS 608.260 which the Perry court applied even though it expressly applied only to statutory claims, it applied to the constitutional minimum wage

claim because it found it to be the most analogous.

Similarly, it's also the most analogous to all other claims under NRS Chapter 608. There's no other statute that's even close to analogues. Let me tell you the reason why this is.

First of all, the labor commissioner under NAC 607.105 similarly found that a two-year limitation period is the appropriate limitation for wage claims, all wage claims. And this Court knows that the Nevada Supreme Court has held that you're supposed to give deference to the labor commissioner's findings with that respect because he has the expertise. And he's determined that that is the statute of limitations that should be applied.

And there's lots of reasons for that. One, under NRS 608.115 it only requires employers to hold two years of records. I mean, if the employer doesn't have any more than two years of records, going back more than two years would just be unfair. And that's what the court relied on wholly in Perry when deciding that 608.260 was most analogous when referring to constitutional claims too.

Additionally, you might ask yourself, why isn't there an express statute of limitations? I think the answer is clear, because there's also no express cause

of action. The Court's well aware, because we had a motion to dismiss based on previous rulings of the Nevada court system.

The only causes of action here available are implied causes of action. And so it's because it's implied cause of action, we also should be applying the statute of limitations that applies, which should be the two-year statute of limitations because of all the things that I have mentioned before.

Plaintiffs claim a three-year statute of limitations. And their claim is only valid by ignoring the Nevada Supreme Court decision in Perry, by ignoring the labor commissioner's rulings on the matter, by ignoring that employers only had two years' worth of records in order to be able to litigate these claims.

And then by deleting language from the statute they even want to apply NRS 11.193A. But it expressly says it doesn't apply to statutes that have a penalty involved.

Well, this statute clearly has a penalty. In fact, they are seeking it in this case. NRS 608.040, 608.050, both are penalty statutes. They both identify themselves as penalty statutes. Now plaintiffs want to get around this because they desperately want a three-year

statute of limitations, your Honor.

THE COURT: Does it have to be a three-year statute of limitations, or if it's a two-year statute, doesn't there need to be cross tolling?

MR. DAVIS: Well, I will get to that, your Honor, about cross tolling. But there are cases that talk about cross jurisdictional tolling. But the Nevada Supreme Court has never adopted cross jurisdictional tolling. Ever.

THE COURT: But they haven't precluded it.

MR. DAVIS: That's true, they haven't precluded it. But the Nevada Supreme Court follows, usually generally follows the reasoning of the majority of the jurisdictions. And the majority of jurisdictions have expressly rejected cross jurisdictional tolling.

THE COURT: But hasn't federal precedent adopted it?

MR. DAVIS: No, that's wrong, your Honor. For example, in the Clemmons case, which is a Ninth Circuit case ruling on California State law expressly held that under California law, even though they didn't have any precedent to go by, they held that California would not recognize cross jurisdictional tolling.

Illinois in a case doesn't recognize cross

jurisdictional tolling. In Lakey, a Nevada case, doesn't recognize cross jurisdictional tolling. Tennessee in the Highesta case doesn't recognize cross jurisdictional tolling. Virginia in the Casey case, doesn't recognize cross jurisdictional tolling. Bell in the Texas case, doesn't recognize cross jurisdictional tolling.

And that's because that's the majority of the jurisdictions. And the reasoning for rejecting it is that this case is a prime example of that. The courts are trying to avoid forum shopping.

We're here, this is a prime example of that. Plaintiffs here has intentionally split their cause of action. They have taken their federal cause of action, filed in the federal court -- well, actually filed in the State court, but knew they will be removed to federal court. Then they clumped them in the State court action so that they could be in this court. And they did it because they wanted to be able to choose between two forums. Virtually identical causes of action, just under two different statutory schemes.

Your Honor, you can see that this can be avoided if you don't have cross jurisdictional tolling. If you have just tolling in the same jurisdiction, then it has to go back to the same court that they had the

decision for in the beginning, and they can't just forum shop and go from one forum to another, and go on ad infinitum. Forever.

Because if they didn't like this, they have some residents who are in California. They may file in California a cause of action and claim there. And they could go from jurisdiction to jurisdiction, to jurisdiction. If they all just toll forever, we'll never finish this litigation, your Honor.

So that's why the court rejected cross jurisdictional tolling. Because the idea of tolling is to promote judicial efficiency. We don't want everybody filling their cause of action at the same time if there's a possibly there is going to be a class action.

But what we don't want is to keep having successes and successes until you lose in one jurisdiction, okay, we'll then file a class action in another jurisdiction, and we'll just keep doing it because we have lots of people who might want to represent the class. But because -- but if we do that, your Honor, litigation never ends.

So the whole purpose of having tolling, the reason for tolling is to provide efficiency. If you allow cross jurisdictional tolling, you get rid of all that

efficiency because then they can move from jurisdiction to jurisdiction until they find one favorable to them.

And that's the same thing. Maybe we might as well go on to that. I will, hopefully, be able to come back to the place I was. But we can also talk about tolling with respect to class action lawsuits themselves.

There recently is the aggregate China case. This case was decided very recently, on June 11th, 2018, so a little over a month ago. And that's 138 Supreme Court 180. And in the China aggregate case the supreme court in a unanimous decision, your Honor's probably very well aware that for the Supreme Court to have a unanimous decision it has to be an overwhelmingly agreed upon decision. But it is a unanimous decision.

They held that class action lawsuits are not subject to tolling. While the individual claims are subject to tolling under American Pipe, they are not subject to tolling under -- for the class action itself.

And the court's reason to allow such tolling would subvert the bold judicious forum which was the reason for tolling in the first place. Because it's the same principle I was talking about with cross jurisdictional tolling. What happens if you allow class action lawsuits to toll along with the other claim, with

the individual claim?

Well, I have a class action lawsuit, okay. And instead of joining your class action lawsuit, I'm just going to wait and see how your class action lawsuit goes. And if I can't get a class action, I'm going off to another jurisdiction, and I'm going to file for a class action on my own. Because if we have tolling, I can keep doing that, and I can keep doing it forever and ever and ever and ever.

And the supreme court said, you know, that's not the purpose of tolling. The purpose of tolling is to provide economy. We toll the lawsuit so everybody can join the initial class action, or if you want to be a class action you have to file yours at the same time the other people do, and then we'll decide out of all the people that filed the class action who is going to be the best representative for that class. And then we're going to move forward with one class action.

So we don't want people filing individual claims in order to protect their lawsuits, because if we do, then the whole purpose of having class action is defeated. And you don't have any judicial economy, you're trying to get to a class action. But if you let the class actions themselves be tolled, you lose all the judicial

economy, because the claims then go on forever.

And the supreme court said that to allow such duplication would subvert the Rule 23, which it's trying to prevent.

Now plaintiff says, well, you don't have to follow the United States Supreme Court decision because it's a matter of State law. And, your Honor, that's right. You're not bound yet by it, because the Nevada Supreme Court hasn't ruled on it yet.

But, your Honor, just like every other judge understands that the Nevada Supreme Court generally follows in wage issues, they follow the FLSA, they set it in numerous cases when they say, we follow the precedent of FLSA as long as it doesn't conflict with our Nevada wage law or with our Nevada class action law, because the idea of class action is not just limited to wage cases.

And they have all said Rule 23 follows after the federal statutes, and they want to have a uniform system since they have adopted the Federal Rule 23. And there's absolutely no reason why the supreme court would follow it. And especially when you have a unanimous supreme court decision.

I cannot even imagine a scenario where the Nevada Supreme Court would say, hey, Supreme Court, United

States Supreme Court is unanimous on this issue, but we're deciding we're not to follow it because in almost every instance, even when they are not unanimous they'll follow the precedent going along with the interpretation of our rules of civil procedure.

Let's see if I can get back to where I was. So their Chapter 11 statute of limitations can't work, 11.193A doesn't work because it doesn't apply to statutes that have penalty, and this has penalty. We have the penalty with respect to two statutes which expressly title themselves penalties.

And then we also have an attorney fee statute, which is also a penalty because it's not an equal 30(b) statute, it only grants employees attorney fees. And that's a penalty from the supreme court itself that such statutes are a penalty.

So if this Court would apply any statute of limitations in NRS Chapter 11, it would be NRS 11.194 which provides again for a two-year statute of limitations, your Honor. But it applies to an action upon a statute for penalty of forfeiture. Which is what we have, we have a statutory scheme for penalty for forfeiture, what they are actually seeking now, so it can be applied.

Your Honor, I don't think there is any doubt that the statute of limitations is in place. Every single plausible scenario lends itself to a two-year statute of limitations.

Also undeniable is that the Nevada Supreme Court, they have kind of argued that you can't move to dismiss based on a statute of limitations. Well, that's nonsense, your Honor. Because the Humboldt case the Nevada Supreme Court expressly said that the statute of limitations lends itself to a motion to dismiss.

That's what we did, your Honor, we moved to dismiss based on the statute of limitations, based on the facts alleged in their complaint.

If you go to the facts of their complaint, they filed their complaint on June 14th, 2016. Accordingly, all claims prior to June 14th, 2016, are barred. Two-year statute of limitations. That means all bonding claims are barred. All but one prong of the Martel claims are barred, and all but 18 months of Williams claims are barred.

Now, this Court has responded with respect to the statute of limitations that there might be an ongoing violation. And there is no ongoing violation here because plaintiffs currently -- do not currently work for GSR, so

it can't be ongoing. And also, for the courts to use FLSA it has to be unanimously held that wage claims should be dismissed to the extent that any pay periods are outside the two-year limitation period.

So the Nevada Supreme Court, as I said, your Honor, has constantly contributed to federal law when interpreting chapter, NRS Chapter 608, and now is facing a unanimous decision of the Federal Courts of Appeal on the FLSA. I think it's highly doubtful that the Nevada Supreme Court would come to any other conclusion that each wage claim is a separate wage claim.

In other words, it's actually a separate cause of action. I fail to pay you in this pay period, then that's one cause of action. I fail to pay you in the next pay period, it's another cause of action. So each pay period has its own statute of limitations, your Honor.

So that's why only one month of Martel, and only 18 months of Williams are still available, because those are the pay periods within the statute of limitations.

But in addition, Plaintiff Williams' case claims have to also all be dismissed. And that's because she is a union employee. And plaintiffs don't dispute that union employees must exhaust the grievance provision

in procedures involving a valid CBA or face dismissal. Plaintiff, however, argues that the CBA is not valid. However, they do not allege any facts in their complaint showing that the CBA is not valid. In fact, they cannot allege such facts.

They do claim, which is true, your Honor, that the CBA is not signed. But, your Honor, there is not a court in this country that has held that just because a CBA is not signed does not mean it's not valid.

What's important, your Honor, is whether or not the parties themselves have treated the CBA as valid. And that's because of the issue of labor law. Once they start treating the CBA as valid, and if they don't, they can be hit for an unfair labor practice. That's the truth.

But here plaintiff doesn't dispute that GSR and the union have consistently treated the CBA as valid. In fact, we have provided evidence that they have actually processed grievances under the CBA.

But guess what, your Honor, we have no evidence that Plaintiff Williams ever processed in good faith.

Now they will say that they're not required to exhaust administrative remedies, that they are pursuing

statutory wage claims, not contractual wage claims. But if the contractural wage claim, if the statutory wage claims require proof of a violation of the contract, then they have to exhaust their grievances. And that's repeatedly held throughout the case law cited in our brief.

First of all, the CBA provides otherwise for overtime. Plaintiffs don't dispute that. And so the only way they can get overtime is through the CBA. And so Plaintiff Williams' overtime claims are gone because she didn't exhaust her grievance procedures.

Second of all, the method, timing and payment of wages is expressly governed by the CBA. I point your Honor to Page 9 and Page 15 of the CBA which shows how that's governed. Okay. They can't possibly get an out of work wage claim without showing that we didn't pay the proper wages under the CBA. Therefore she had to exhaust her administrative remedies.

Same thing with the minimum wage claim, your Honor. Without -- if we didn't pay, if we didn't pay her the proper wage, okay, which is the wage we offer our employees above the minimum wage, if we did not pay them that wage, the minimum wage claim would be gone too because we're paying them at least as much as the minimum

wage. Therefore, it's governed by the CBA.

Because it's governed by the CBA, she is required to exhaust, and that's a matter of federal statutory law, your Honor. Federal law requires such exhaust.

Because they don't want people to bypass these procedures. They have gone to great extent to have the collective bargaining system in place, and they want people to follow it. Our whole system of collective bargaining depends on it.

Also, your Honor, all the claims must be dismissed because they clearly in reality have failed to state any claims for wages. They must allege fact, not conclusion, even under Nevada's liberal pleading standard. But they don't. They just say, we haven't been paid a proper amount of wages. It's a conclusion, your Honor.

What they need to say is, in this particular week I was owed this much money, but I was only paid this much, and that's how much I'm owed. And I worked this many hours -- I worked this many hours, was paid this much in wages, was owed this much, and didn't get paid that much.

And they need to list that because otherwise what have they left us to do, your Honor? They want the

Court and the defendant just to literally guess and pull a number out of the air and say, oh. How can we possibly settle these claims when we have no idea if they had no idea? And that's the reason why they don't allege a specific week, because they have no idea about how much they really think they're owed.

We've been doing this litigation now for, I don't know, how many years, Miss Holden?

MS. HILDEN: 2013.

MR. DAVIS: And we find case after case after case when we go through and do depositions that they literally don't have claims. And that's the reason why their complaints are so sparse. This Court should not let people get by with that. They should submit alleged facts. It doesn't have to be a lot. I'm not asking for a detailed, you know, exact amount of how much money you're owed, but you at least need to have a ballpark figure in there. And they don't.

Also, your Honor, class action claims must all be dismissed based on the grounds of issue. It has to have an identical issue. A ruling on the merits is final. A party or a parity with the party, and actually litigated.

The claims at issue, identical issue may be a

little bit misleading. Nevada Supreme Court in the Alcontra case says, issues of pleadings cannot be avoided by raising new legal or factual arguments that involve the same ultimate issue.

Well, here, your Honor, we have an exact same ultimate issue that was litigated in the Sergeant matter.

THE COURT: But wasn't it actually because the class was not certified that there was no actual decision on the merits?

MR. DAVIS: No. Because that is the decision on the merits, that there was no class to be certified. That there were no -- because the issue in that case was, one of the two major issues in that case, commonality and predominance. And the Court found there was no commonality, and there was no predominance.

And, in fact, they even found a substantially easier standard, similarly situated. Courts had previously held a similar situated standard for FLSA claims is much easier to meet than the commonality predominance requirements of Rule 23. And they couldn't even meet that standard.

And that's the same issue, your Honor, that there are no common issues. There are no predominance issues overall in this case. There are none.

Why, your Honor, for the reasons why, the good reasons the federal court found that there are just too many individual defenses. You have to look at each individual person. How many hours did they work? How did they go about doing specific tasks? Which tasks are compensable? Which tasks are noncompensable?

And there are a myriad of affirmative defenses that we argued, and that the supreme court found prevented the case from being certified as a class action or under the substantial lesser standard of a collective action under the FLSA.

And that's the same issue that's here in this Court, your Honor. So the identical issue is decided. Now the fact that plaintiffs may not have argued something in the prior case, well that does not prevent you from saying that's the identical issue. You can't get up and say okay, I'm going to argue this part, and then I'm going to say, okay, I'll save the argument for later, and I'm going to come up and file another class action, and say I have new argument that I'm going to insert. Your Honor knows that's nonsense.

THE REPORTER: Sir, you need to slow down, please.

MR. DAVIS: You can't just say I'm going to

save arguments for later. We prevent people from doing that. You have to bring all your arguments in the beginning. So we have the identical issue, your Honor.

Ruling on the merits. A ruling on the merits is, this means that it's sufficiently affirmed to be conclusive effect. And there are three factors in that. One, the parties were hurt. Your Honor, we provided a briefing. You're well aware the Court cited the arguments of the parties. There needs to be a reasonable opinion. I think Judge Hicks had a very well-reasoned opinion in this matter. I'm sure plaintiffs would disagree with that, but it was a well reasoned opinion.

And it must be subject to appeal and review. Well this one was subject to appeal and review. They wanted to exercise an appeal. They wanted to exercise an appeal, the Ninth Circuit summarily rejected it. So we have a final decision, your Honor.

Next we have the parties or privy to the party. Well, your Honor, all but Williams was a party to the prior action. They all opted into that case and became parties. That's clear case law. Federal case law says if you opt into a case, you are a party. There are no part parties. Are you a party.

Now they say well, we didn't actually, we only

opted into the federal part of it. And they read selective parts from a consent to join. And I would argue if you go to Exhibit 3 of their supplemental brief and read the actual consent, because some of it's a little bit misleading.

First of all, in bold caps, typed big letters it says, I consent to join this lawsuit. It doesn't say I consent to join parts of this lawsuit. I consent to join this lawsuit. So they consent to join the lawsuit.

And then it says, by signing this consent I am agreeing to have Sergeant, Bailey, Priorman, Honor, Roll, Bog, and Jacklyn Cleanabolt (all phonetic) act as my agent to make decisions on my behalf concerning the litigation and resolution of my --

THE REPORTER: I'm sorry. I didn't understand the last --

MR. DAVIS: -- the litigation and resolution of my FLSA litigation.

Now they read the last sentence of the thing also in their brief. But that doesn't make any sense unless you read the whole paragraph, your Honor.

The last paragraph says, "Pursuant to 29 U.S. 216B, no employee shall be a party to any such action pursuant to the Federal Labor Standards Act unless he

gives his consent in writing to become such a party, and such consent is filed in the court where such action is brought. Unless the court provides otherwise, the statute of limitations is tolled on the Federal Fair Labor Standards Act claim only when the consent is filed with the court. This provision does not apply to other federal and State law claims."

Okay. So the thing is, what does it mean this provision? What provision, your Honor? Well, it's the provision just read beforehand which is that no employee shall be a party in a case in a FLSA claim. So unless you file a consent, you're not a party to that claim. This provision does not mean that this provision, this opt-in consent to join only applies, doesn't apply to federal and State law claims, which is what plaintiffs want to make it out to be. It doesn't say that.

It says this provision of the law. It has nothing about that it doesn't apply to State law claims, so they consent to join the whole thing. So they were parties.

Second of all, even if the consent only applies to the FLSA portion, it would make no difference, really, your Honor, because they were still part of the FLSA portion. And your Honor will recollect that proving

a collective action under the FLSA is easier to do than proving predominance and commonality in an action.

So even if they were only party to the FLSA action, they still were parties to the FLSA decision saying that there was no substantially similar, which means that they couldn't prove commonality and predominance. It's the same issue, your Honor except for on an easier standard.

And therefore, they're parties to the litigation, and they're parties to the decision that they couldn't establish what's necessary to have a class action.

Now let's go on with Plaintiff Williams. Plaintiff Williams, we admit, was not a party to that action. She didn't file a consent, she wasn't a party. But she was privy, your Honor. And how was she privy? She is privy because she is trying to represent parties to the class action, to the collective action. She's trying to represent those people. That's who they are trying to represent. And the case law is clear. When you try to do that, you're in privity with those people.

Why does it make you in privity, especially in this instance? It overwhelmingly should be obvious why you are in privity with them. Because they tried to file

the same type of action you're trying to file now, and you you're trying to represent those same people who tried to file that action before.

If you are trying to do that, you should be bound by their decision. You shouldn't be able to go out and try to represent people in a class action when they have already denied collective action status or class action status. Your Honor can see that.

They cite a case, a Ninth Circuit case that talks about this. But this case is substantially different. In that case they talk about being represented by the same attorney. And, your Honor, we're perfectly willing to concede that because they represented a plaintiff, that doesn't make Plaintiff Williams. We concede that, your Honor, right away.

But we're not arguing that either, your Honor. We're arguing that because he's trying to represent the people in the Sergeant action, that she is in privity with those people, and therefore is bound by that decision. So one, your Honor, we have a third thing, a part of privity.

And the last issue, your Honor, actually litigated. Well, your Honor, there is no doubt, and they don't even argue that we didn't actually litigate it, because we were there arguing both our sides. We filed

with the court our briefs, both parties, indicating that we vigorously disputed the issue of class certification and collective action certification. And that, your Honor, the decision came down in our favor.

And because it came down in our favor, we're entitled to rely on that. We're entitled to not be subjected to repeated, again your Honor, repeated, repeated, repeated actions, one after another, until ad infinitum.

So, your Honor, it should be denied based on privity. Based on issue preclusion. Finally -- almost finally.

There is also another reason to prevent the class action, that's commonality in the first to file a case which bars a class action as well. And those are the three. First the Sergeant action was filed, nobody disputes that, fully briefed again. All the parties in this action are parties in the Sergeant action of privity. We have already gone through all that.

Plaintiffs are seeking a class certification on identical class -- on similar class. Sorry, similar class. It's an easier standard to meet because it's more discretionary with the court.

But the supreme court surprisingly recommended

in the Smith case that courts apply principles of commonality to each of the class certifications in order to avoid this. The Smith case was a case that said if two people who are entirely not in privity, not parties, could not be bound by another class action decision.

But, your Honor, we don't have that here, your Honor, we have actual parties. And we cited numerous cases where somebody was a party to a collective class action, and they were precluded from bringing a subsequent action that we have here or the privity.

The court should file -- and the first rule to mitigate the substantial cost of repeated similar litigation. That's the whole purpose of the rule. We're going to have the first people do it, let them go through all the things, let them finish their case, and once it's all finished we're going to see what happens with them. We're not going to let them just keep filing on and on and on.

Again, finally, your Honor, this is the last point. And this point is easy because they concede it. They don't argue contrary that these plaintiffs cannot represent our union members in a class action. That's plain and simple. Union members already have a designated representative. Plaintiffs are seeking to usurp the

union's rule, and plaintiffs do not dispute that pursuant to 29 USC 159A may not usurp that rule of the union and act as representatives for the union employees. So therefore this Court should dismiss all class action claims seeking to represent union employees, your Honor.

And that's all I have to say. And, your Honor, I respectfully request that you grant our motion to dismiss in its entirety. Thank you for your time.

THE COURT: Thank you very much, Counsel.

Counsel.

MS. JONES: Good afternoon.

THE COURT: Good afternoon.

MS. JONES: I tend to speak quietly, so please if you can't hear me, just wave your hands and I'll try to speak up.

I'll try to follow Mr. Davis's chronology of the issues. The first issue he talked about was the statute of limitations issue, and arguing under Perry v. Terrible Herbst that the statute of limitations should be limited to two years.

That is an overly broad reading of the Perry v. Terrible Herbst holding. The Perry v. Terrible Herbst question presented to the Nevada Supreme Court was specific to the minimum wage amendment only. The court

did not speak about NRS 608.016, 018 or the so-called penalty claims in 608.020 through 050.

They are certainly incorrect in alleging that a wage claim is limited to two years. Defendant, and most employers, have been making the same argument that was soundly rejected by the Neville court saying that if an employee doesn't have a private -- personal employees don't have a private right of action to sue their employers.

The Neville court found that that was not correct. And the reasoning that defendant always used was, well, it came from the labor commissioner, the labor commissioner has original jurisdiction. He has exclusive jurisdiction under the same form of argument.

The minimum wage amendment is separate from the statutory wage requirements and NRS 609.016 and 608.018.

As far as defendant also argued that under NRS 11.190(3)(a) that the three-year statute of limitations period should not apply, which plaintiffs say that it should apply. He argued that -- first, defendant admits that there is a statutory duty to pay wages for all hours worked. There is also a statutory duty to pay overtime.

The statutory duty to pay all hours worked is

016. The statutory duty to pay overtime is 018. These are not penalties, they're statutory requirements to pay employees for the work that they have done at the request, and at the direction of their employer.

I think defendant is trying to confuse the issue with the penalties that come with 608.020 through 050. Those are continuation wages that are seen as penalties for an employer's failure to pay the statutory wage requirement. Yes, those are penalties. The reason why that particular statute doesn't have a statute of limitations attached is because they are derivative of the NRS 608.016 and 608.018 claims.

If, for instance, plaintiffs cannot prove that defendant did not pay them for all hours worked under 016 or did not pay the proper overtime under 018, then we don't have a penalty claim under 020 through .050. If you did not actually pay the actual wages too, then you don't get the penalty of the 30 to 60 day wages. That's why that particular statute does not have a statute of limitations on it.

Again, defendant is trying to impermissibly limit the limitations period based on the Perry minimum wage amendment decision.

In Camino Properties v. Insurance Company of

the West, and that's 2015 WL 2225945 from the District of Nevada, the court explained -- and this is a federal court. In looking to the limitations period, based on NRS 11.190 the proper inquiry says whether the liability arose from statute or contract.

Here the liability is statutory in nature, which means we need to look to 11.1903A for the three-year statute of limitations. Defendant made the argument that the employees actually have a contract with their employers, a contract of employment. Well, if that's the case, then the statutory period should either be four or six years. Because under a contract, NRS 11.190(2)(c) six years for contractual claims under a written term or four years for a claim under unwritten terms.

So again, the statute of limitations period should be three years as opposed to two. And even if the Court was to decide that the limitation period should only be limited to two years, defendant has conceded that at least three of the plaintiffs are still within the statutory period.

Now granted, some of those periods is maybe a month or a couple months or even a year, but that is not an issue that would preclude plaintiffs from proceeding with their case. That goes to damages.

If an employee during -- between 2014 if the Court decides that 2014 is the correct date to now, has only been there for six months, then they are only entitled to six months' damages. If the employee has been there for all four years, then the employee would be entitled to the four years of damage.

That's a simple math calculation. That has little to do with whether this Court finds on the merits of the decision of whether the employees were actually paid for all hours worked or if they were paid for their overtime. And I do think that we did provide that in our supplemental briefing.

Next, the Court actually asked about tolling. And defendant brought up the AgriTech decision which plaintiffs did provide analysis on AgriTech in their supplemental decision. Again, defendant concedes that the Nevada Supreme Court has not adopted the AgriTech decision, that remains to be seen.

One of the cases that defendant does cite to regarding tolling, they admit that tolling is a matter of State, not federal law. And that's the Clemmons v. Daimler Chrysler Corporation case, 534 F3D 1017 at 1025, that's a Ninth circuit case. Defendant put that in their brief at Page 7, line 4. That does not mandate a cross

jurisdictional toll, but it does not preclude cross jurisdictional tolling.

For instance, in the Clemmons v. Daimler Chrysler case the flip side is if they don't preclude it, that should be a matter of State law, and is. The Nevada Supreme Court has not issued any decision on that as of yet. But again, even if this Court was to agree to a two-year limitation period, that would not preclude all the plaintiffs' claims, and that would not support defendants' motion to dismiss.

The third thing that defendants' counsel argued is that Nevada law follows FLSA. Nevada law absolutely does not follow the FLSA. The FLSA limits employees' ability to seek overtime to issues of whether they work over 40 hours in a workweek. Nevada statutory law says anybody that worked over eight hours in a day is entitled to overtime or 40 hours in a week.

This leads us to a confluence with why the FLSA claims are separate from the Nevada law claims, and why there has been no final decision on the merits.

The FLSA claims, no matter what the defendant says, were decertified because the Court said the broad class that you put forth in the FLSA claims, the employees were not similarly situated enough to proceed as a

collective action.

And one of those reasons is because we had, the broad class included all employees. Here the plaintiffs are claiming under NRS 608.018 for daily overtime and overtime if it was over 40 hours in a week based on their job categories. The cash bank category, whether they carried a cash bank or not. The dance class category, whether they had to go to dance class. The room attendance class, whether they were required to do preshift work requirements before they start cleaning rooms.

In the FLSA case under Sergeant those classes weren't narrowed in that way, and the court found that they weren't similarly situated. So that is just one glaring difference in the FLSA and Nevada law that is dispositive of this case.

And the reason why we're here in front of you is because two months before the court decided the decertification of the FLSA case only, the court dismissed plaintiffs' NRS 016, 018 and penalty claims on the unsound argument that plaintiffs did not have a private right of action.

Judge Hicks never reached the commonality issue, never reached the numerosity issue, never reached

any of the class certification issues under NRCP 23 or FRCP 23 for those claims.

Granted, Judge Hicks did deny certification of the minimum wage claim based on their erroneous argument that we did not put forth enough evidence to certify our class.

Which brings us to one of defendants' arguments about issue and claim preclusions. For issue preclusion, and plaintiffs provided supplemental briefing on the difference between issuance and claim preclusion in our supplemental. Because they are, although some courts think complacent, they are different doctrines, and they do have different tests, specifically for issue preclusion.

In La Forge, which is a case that defendants cited to the Court, explained issue preclusion turns on whether, "The common issue was actually litigated and determined by a valid and final judgment. The determination is conclusive in a subsequent action -- the determination is conclusive in subsequent action between the parties."

So let's break that apart. What's actually litigated. The issues of the NRS 608.010 and the penalty claims have never actually been litigated. They were

dismissed on summary judgment prior to the certification, and that's why the judge never reached any of those arguments in his certification orders, because he dismissed those claims.

Neville came along and proved that what plaintiffs were alleging all along is that plaintiffs do have a private right of action. So the issues were not actually litigated.

The next part of that statement, it has to be a valid and final judgment. Certification motions are interlocutory in nature. That is very clear. In the Walmart wage and hour litigation, and that's 2008 WL-317-9315, District of Nevada Federal Court, 2008 states, "There is no law delineating the preclusive effect of an order from one of Nevada's courts denying certification. The restatement second of judgments agrees. It limits the situation to preclusive event for courts when they approve a class as a certified class. Preclusion is not conservative with an interlocutory ruling because class certificates a nonfinal interlocutory decision NRCP 23(c)(1) states that a class certification motion may be conditional and may be altered or amended before a decision on the merits.

There was no decision on the merits for

plaintiffs' NRS claims. The fair housing for children and coal fee, which is P-O-R-N-C-A-H-I, and that's 890 F2D-420, and it's a Ninth Circuit. A Rule 23 motion or ruling is tentative as a determination of class-wide liability, because no final judgment has been made, no injunction has issued, and no damages have been awarded.

The Sergeant case is ongoing. Once the Neville decision came down, the federal court, district court judge, took the NRS claims back, and those claims are still pending before Judge Hicks for the six named plaintiffs in that class. There is no issue preclusion here because the court decertified indicating that the plaintiffs were not similarly situated and necessarily precludes defendants' argument that the claims are identical.

One of the other arguments defendants make is that, I think, I'm not sure if he's confused or defendant's confused or not, regarding the ongoing claims of plaintiffs. What ongoing means, I touched on that previous. Ongoing means that as far as we are known, as far as we have been told by our plaintiffs, is that GSR is still making people come in early. From what we understand they no longer do the dance classes, they no longer have those retainers.

So although statutory claims aren't ongoing, the fact that that happened just because they changed the policy does not mean they have gone away. That cut off their liability to the date that whenever the policy changed, but they still have liability. That liability is ongoing until the court rules on the merits whether the issues of preshift meetings, preshift work for room attendants, cash bank policies, whether those are actually legal or illegal. That's what we mean by ongoing.

One of the other issues defendant brought up is regarding union representation. Plaintiffs absolutely dispute that there is a valid collective bargaining unit -- or collective bargaining agreement. If there is no valid collective bargaining agreement, then there is no union.

That actually was -- and even if this Court was to determine after full briefing on that issue that the collective bargaining agreement does cover some of the employees here, it doesn't cover all of them. So again, even if defendant is correct that some of the employee class members are part of a collective bargaining agreement, that doesn't mean all of them are, and some of plaintiffs' claims would still be able to proceed.

The other issue is that on remand --

THE COURT: Have the plaintiffs taken any benefit from the present plaintiffs being limited from the collective bargaining agreement?

MS. JONES: From what we understand, the collective bargaining unit is a sham, and does not actually pay attention to the plaintiffs' claims except on very limited, for very limited reasons. And that's what we would like to brief the Court with.

Again, defendant has provided, I think now, three collective bargaining agreements. All of them are unsigned. All of them are red lined. And it's kind of funny that defendant says that after seven years of litigation, that they have been doing this for so long that they can't get their collective bargaining agreement signed, that they can't put out one that is not red lined. So that just goes to plaintiffs' argument that the collective bargaining agreement is not enforceable, has not been enforced. And that's something that I think, if the Court decides, that we should be able to brief that issue.

Nevertheless, regarding plaintiffs' NRS claims. Defendant tried to get -- when we first filed with this Court, defendant remanded to the federal court based on the Labor Relations Management Act of federal

jurisdiction question. The court below in the federal jurisdiction declined to determine whether the collective bargaining agreement was valid or not based on plaintiffs' claims.

However, the court decided that it could decide whether to remand back to this Court, based on other grounds. Specifically the court looked at the Labor Relations Management Act and said that if there's two issues, that the court should look at whether the rights at issue were created by Nevada law, not the collective bargaining agreement, and whether it was -- excuse me.

Whether the asserted cause of action involves a right conferred on an employee by the veracity of State law, not a collective bargaining agreement. If the right exists solely as a result of a collective bargaining agreement, the claim is preempted, and the analysis ends there.

However, it's not whether the right exists independently of the collective bargaining agreement, then it must be determined whether that right is substantially dependent on the analysis of the CBA, whether the court is required to interpret the collective bargaining agreement. If it is, then it's preemptive versus only need to look to the CBA to resolve the State law claims, and it's not

preemptive.

Defendant is alleging that the CBA provides otherwise for overtime wages. We're alleging that they provide exactly the same thing. In the CBA it says if you work over eight hours in a day, you get overtime. If you work over 40 hours in a week, you get overtime. That is the same thing that NRS 608.018 says.

Again, that issue, I think, needs to be further briefed and is not grounds for a motion to dismiss. Again, because Plaintiff Williams, even if she is part of a collective bargaining agreement, other plaintiffs' claims not necessarily succeed, but other plaintiffs' claims would still be viable.

THE COURT: So then if the other claims are viable, then that keeps the case from being dismissed or the case can be dismissed against the person whose claims are not viable?

MS. JONES: That would be up to the judge. If you decide that you wanted to look at the CBA to see if you had to interpret it, or if you can just look to the terms. And if that, if you decide, well, I really need to interpret this, then I would assume that that would be your ruling, that you would perhaps grant the motion to dismiss with leave to amend regarding the collective

bargaining agreement or whether the union members are still viable plaintiffs, fugitive plaintiffs.

THE COURT: All right. Thank you.

MS. JONES: I just want to make sure I got through all of Mr. Davis's points.

One of the other -- we talked about the issue of preclusion. One of the other arguments that Mr. Davis made is that plaintiffs have not provided enough information in the four corners of the complaint. That wasn't something that you asked for supplemental briefing on.

THE COURT: Right.

MS. JONES: The Lander standard, which is the Ninth Circuit, is actually a standard under the FLSA. However, many courts have used that standard. What Landers v. Quality Communications says, and that's 771 F3D 638 Ninth Circuit, 2014, is that we decline to impose a requirement that plaintiffs must approximate the number of hours worked. At a minimum a plaintiff must allege at least one work week worked in excess of 40 hours.

And again, this is the difference between the FLSA and the Nevada State law. Under the FLSA you have to work over 40 hours a week to get overtime. Under Nevada State law it's only eight hours in the day.

Here plaintiffs have alleged 10 to 20 minutes of off-the-clock time for full-time schedules, especially for if they were a housekeeper every day, if they were a cash bank every day. And especially during special events such as Burning Man and Hot August Nights.

Plaintiffs actually did provide enough information so that, again, under the standards of the Ninth Circuit, not for FLSA cases. Ninth Circuit Court Star v. Baca 652 F3D 1202 Ninth Circuit, 2007. All that is required to get past the pleading standard is the allegations in the complaint may not simply recite elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable defendant to defend itself effectively.

Factual allegations must plausibly suggest an entitlement to relief such as it is not unfair to require the opposing party to be subjected to the expense of discovery and continue litigation.

Furthermore, a Nevada Supreme Court case, Johnson v. Travelers Insurance, 515 P2D 68, 1973. The facts sufficient to establish the necessary elements of a claim for relief are present there, we're not using just labels.

We have alleged the 10 to 20 minutes per day,

especially during special events. We have alleged shift, especially during special events. And as to Mr. Davis's argument that we need to provide a computation or a number, it's very easy for all of us to do that computation based on plaintiffs' argument that if they were paid 7.25 an hour, and they were required to work 15 minutes off the clock a day, 15 goes into 60 four times. 7.25 divided by four is $1.81.25 cents; $1.81 cents times fives days a week is $9.06 a week, times 50 weeks a year is $453.13.

So it's very easy for the Court and for defendant to figure out what they have been being sued for. That's all the pleadings require.

Furthermore, defendant argues that plaintiffs are engaged in forum shopping. That argument has been soundly rejected by the courts. Specifically --

THE COURT: I thought you said it could lead to forum shopping.

MS. JONES: Could lead. Well, that's what the federal court said, Judge Hicks said. But as far as forum shopping goes, I think it was the Bear case that plaintiffs cited in Smith v. Bear, that's a U.S. Supreme Court case, 564 US 299, 2011. It's really the exact same fact pattern. It's very analogous. And it says, absent a

certification under FRCP23 the precondition for binding nonnamed plaintiffs has not been meet. Neither a proposed class action nor a rejected class action may bind nonparties.

Forum shopping. This is not a case where two different cases involving the same parties and issues have been filed in two different districts, the actual first to file rule by a case nearly identical to Smith v. Bear. Here the named plaintiffs are not the same as in Sergeant. The Sergeant action was never certified, and that's the named plaintiffs here have never had their NRS claims adjudicated.

Specifically the Ninth Circuit and Smith v. Lynches, 263 F3D 972, a 2001 case, the court said the dismissal of federal claims was without prejudice to any assertion of the State law claims in State court. And that goes back to the party and privity arguments.

I think that the Court can read that consent to join for themselves. I think the consent to join speaks for itself. It is very clear that it does not include anything else with the FLSA claim, and it does not exclude State law claims. And that is something that plaintiffs also briefed in their supplement regarding the privity issue.

So first, we haven't had a ruling on the merits because the Court never reached 608.016 and 018 claims. And second, there is no privity because the people who opted into the Sergeant case, first the court said that they are weren't similarly situated enough to be able to proceed, therefore they're not identical and they cannot be held in privity.

And secondly, the consent absolutely says it's not part of any other claims besides the FLSA claims, FLSA claims for the State law claims.

Unless your Honor has any specific questions for me, I believe that's all I have for you.

THE COURT: I think you answered most of my questions before I could discern, particularly that would be the defense maintains is that the determinations that there is no class is equal is a decision on the merits. And you made very clear what your position is.

I was going along making sure of a couple of things I need to follow up on, but my questions were answered. Thank you.

MS. JONES: Thank you, your Honor.

THE COURT: Counsel.

MR. DAVIS: Thank you, your Honor. I would also like to thank opposition counsel for her continuity.

We obviously got along pretty well over the course of this litigation, and I appreciate her hard work.

But I'm thinking that counsel misconstrued the purpose of a motion to dismiss. A motion to dismiss, while it would be nice to dismiss all claims, of course defendants argue and that's, of course, one of our goals. But that's not the main purpose of a motion to dismiss.

The main purpose of a motion to dismiss is to limit the issues that are faced by the Court, to weed out those issues that aren't valid issues. And so when you're filing a motion to dismiss, well that's what you're trying to do. You're trying to weed out the issues that do not have any merit, shouldn't be litigated, shouldn't be subject to discovery.

And because -- and that's the whole purpose of a motion to dismiss. I think that's what your Honor would like to see. I'm sure your Honor would like to see this case weeded down to its appropriate size.

Talking about -- so that's why we filed our motion to dismiss. While we still strenuously argue that the whole action should be dismissed. Even if your Honor didn't reach that decision, that doesn't foreclose your Honor from saying, well, you can't dismiss the whole thing, we'll just move forward with the whole thing no

matter how absurd the rest of it is.

First of all, all she talked about the Perry decision that we have made. We have created that it's overbroad, an overbroad case just because our factual scenario is not exactly on all fours with a factual scenario in Perry.

First of all, it is, because they are asserting minimum wage claims, constitutional minimum wage claims subject to a two-year statute of limitations. That is on all four.

Second of all though, we all know, because we went to law school and had this hammered into our heads over and over again, where I don't know if -- in my law school classes anyway, they had, the law professor was bringing up pages. And we'd have to read them beforehand, and he provided a fact pattern that wasn't exactly like the cases that we read and say, well, how should the court decide that case?

So that's the whole basis of law is that we take the reason behind the decision, even if our facts aren't exactly analogous and say, does that reasoning apply in our particular situation.

Well, your Honor, it clearly does. The reasoning behind Perry was clear. The court made certain

what its reasoning was. If you don't have an express statute of limitations, and they admitted that, then you go to more analogous. And those are the wage ones.

Your Honor, telling -- they did not dispute if you go by that standard, which is a standard Perry set forth, that you have to find a two-year statute of limitations. That's all the wage claims are.

The Neville case she cited, and she says Neville was based on overturning the decisions of the -- that you just don't follow the decisions of the labor commissioner. Well, your Honor, that's pure nonsense. Neville does not say that. Neville can't stand for that because the Nevada Supreme Court repeatedly said, we're going to follow the labor commission unless there's good reason.

First of all, Neville wasn't even based on that. Neville was based on this argument that we've been going over for years, for six years now with respect to the Baldanado information, for whether or not there is no implied cause of action. And there's lots of factors, whereas one of those very small factors concern dealt with the reasoning of the labor commissioner. And the labor commissioner found implied cause of action in those statutes when it did it, and that's what the supreme court

found in Neville. Because the labor commissioner did find an implied cause of action, there might be an implied cause of action for people also in the courts.

That's what they found. And so there's nothing in the Neville decision that says we're no longer following the labor commissioner's reasoning. And they're telling your Honor that she didn't give any justification for not following the labor commissioner's reasoning other than they want a three-year statute of limitations.

Now they talk about federal cases. Our claims don't involve a penalty. First of all, your Honor, you know that's not true because they are seeking penalties.

Secondly, and they do rightly say, your Honor, that they are seeking also claims for all hours worked, and claims for overtime, and those particular provisions don't have a penalty in them specifically.

But, your Honor, let's be realistic with one another, okay. If you find, your Honor, that we have not appropriately paid, if you were to find that allegation was true that we did not appropriately pay our employees, and found that we did not pay all wages worked, is the client or plaintiff saying that you have -- would not award a penny?

I cannot imagine an instance. If you can, I

will be happy to hear it, about where the employer is not paying the appropriate amount of wages that the penalty wouldn't always be attached onto it. It it's all part of the cause of action, your Honor.

It's a cause of action for a penalty. There's a penalty involved. And, in fact, if you look at the case I cite, it dealt with the same thing where a chapter had various claims in it, and then -- but also in the chapter had penalties along with it. But the court still found that there were penalties, and therefore that it didn't apply.

So what you have left is if you want to go with counsel's reasoning, then you have a statute with penalties, two-year statute of limitations.

Now, they made some allegation about, and it's just a red herring, your Honor, if they were asserting a breach of contract claim it would be a four-year or six-year statute of limitations. But, your Honor, the reason why it's a red herring is they are not asserting a breach of contract claim. It's not an issue before this Court. So your Honor can just dismiss that argument out of hand.

Your Honor, they say that there are, that somehow you don't have to dismiss claims, the wage claims,

for pay periods outside the statute of limitations. They don't cite a single case that supports that theory. I don't think there are any.

Because you can partially dismiss. In fact, courts do it all the time, it's something that happens every month.

And while they also talked about that we cite a lot of federal precedent. As your Honor is well aware, unfortunately with the State of Nevada, maybe with the new Court of Appeals we're going to get more, but we have very little precedent to go by.

So what do courts do in Nevada when they have very little precedent to go by, they look to analogous decisions from -- they look to FLSA claims because it's there. And the Nevada Supreme Court has repeatedly done so.

If your Honor went back and did a research and put in a Nevada search for FLSA, the search for the term FLSA, a Nevada search, you would find the Nevada Supreme Court repeatedly relying on decisions based on the FLSA to support their decisions on Nevada wage law. And they do so, your Honor, when there's no conflict.

Counsel is absolutely correct that our statute is a little bit different, it has an eight hour and 24

hours. You can't work more than eight hours in a 24-hour time period. Your Honor, we're not dealing with an issue, we're not arguing that you need to say that because the FLSA does not say -- we're not arguing that that statute does apply because it's not in the FLSA.

That's an exact instance where there is some reason why not to follow the FLSA in that issue. But that is not an issue before the Court right now. We're not talking about that particular issue. We're talking about statute of limitations. We're talking about class certification issues which are issues that are similar in nature, are Rule 23, the same as Federal Rule 23.

The collective action for -- collective action -- certification for collective action is very similar to ours, except for the fact that it's easier to get. That's why it's so important in this case.

Then they say, well, you shouldn't apply the collective action. You are precluded because we assert a broad class action in the State court case. And therefore because we're not asserting a broad State court case here, you shouldn't be precluded.

Well, that's a should-have-could-have argument, your Honor. I should-have-could-have argued. I mean, what they mean to say is, well, it precluded them

from dividing the classes up in the prior classes. Well, there's nothing that precluded them from doing that. There is no -- the only thing is they didn't do it.

And the cases we cited, your Honor, that they can't say, well, we could have argued that, and therefore it's not precluded. We could have made that additional argument, we could have split up the classes, we could have done these things, we should have done it. But that doesn't get you out of issue preclusion simply because you could-have-should-have-would-have.

What they are saying is, and they also say, well, the lower court said with respect to the class certification issue that there was not enough evidence there. Again, that's a would-have-should-have-could-have argument, your Honor. We would-have-should-have-could-have put on more evidence. But you know. That doesn't get you out of the issue preclusion. If you should have put on it, you should have done it. And if you didn't do it, you're precluded. That's a plain fact.

Then they talked about that they didn't have with their wage claim -- that it's true, your Honor, that their overtime claim and their all hours worked claim under Nevada law were dismissed at times as class

insufficient. That's true, your Honor. But the minimum wage claim was still there.

And it's the same issue whether or not they work. That means their minimum wage claim dealt with the exact same issues about whether or not they were required to work more time.

For example, here she said they worked 20 minutes more. If we didn't pay them for the 20 minutes, and they weren't paid the minimum wage for 20 minutes, right, your Honor? If we had defenses for that, if they were actually paid their 20 minutes that they were entitled to, but that's an individualized defense, it's an individualized defense whether or not they were actually working during that 20 minutes.

It's an individualized defense whether or not they were -- whether the work they were doing was compensable work. It's an individualized defense about whether or not that particular employee was actually working 20 minutes.

Because, your Honor, I'm sure, as you probably are well aware, the odds that each employee who is controlling their own time card, swiping their own time card, deciding when to swipe their time card, when to put it in. Whether they do it before a bank, whether they do

it after a bank. Whether they do it -- their time is founded. Whether they found it in their favor. Whether it's not founded in their favor. Whether -- all of a myriad of issues that can possibly be raised here. All apply equally to minimum wage claims as they do to the regular wage claim.

And as we have found, your Honor, that nobody says the same thing. If you go through the pleadings, you'll see some people say, I got a cash bank beforehand, before clocking in. Some people say, I got a cash bank after I clocked in. Some people said, I went ten minutes earlier and rounded it out wrongly. Some people though admitted that they actually did their time afterwards, so it was rounded in their favor. Some people did a myriad of other facts that were on the clock, and some people said, oh, I did those tasks on the clock, some people say I did those tasks off the clock.

So that's why they were all different individualized accounts. That's why they couldn't establish commonality. That's why they couldn't establish predominance is because none of those things predominated, and none of them are common. Each individual person would have to figure out what did they actually do in order to be over or underpaid.

THE COURT: But don't you have to figure the actual task or is it just that a task -- let's say X task caused the person to work more and be warranted to receive overtime. Does it have to be a person that everybody identifies with, everyone? Or is it just simply that whatever the task was that caused the fundamental that there was additional time incurred?

MR. DAVIS: But that's the problem, your Honor. It's not if you read the briefing. Read that very carefully then. Because I think this is going to be critical to your decision.

If you go back and read the briefing about why the different factual scenario, why the judge ruled the way he did was is one employee would say that she was paid for working in a dance class, another said she wasn't. One employee said that she would be on the clock for some dance classes, but not for other dance classes. One employee would say, but I always got my bank on the clock, but returned my bank off the clock. Another employee said, I always returned my bank on the clock -- I mean, I always got my bank on the clock but returned my bank off the clock. And the employee would say they did it just the opposite.

One employee would say I always clocked in at

15 minutes beforehand, and then -- but in actuality you find out you have to go through the thing, and they actually clock-in at all different time frames. They clock in sometimes five minutes beforehand, sometimes ten minutes after. These are all individualized defenses, your Honor. So you have to go through each individual employee, each individual time in order to do it.

And that's exactly what we briefed. And that's exactly what Judge Hicks ruled on. He ruled that there was no similarly situated employees. There was no commonality, no predominant. Contrary to plaintiffs' claim, the judge said there was no evidence for it.

Well, your Honor, if there's no evidence for it, then there is no commonality, there is no predominant, they didn't meet a single factor if they didn't put on the evidence for it.

They will say that there's no final decision, a decision on the merits. Well, your Honor, they ignore the fact that this is different from other class certification decisions. The Ninth Circuit has a rule that allows you to provide an immediate appeal of a denied classification.

And that's the thing that's so funny, your Honor, I think. They say they didn't argue class

certification, and yet that rule only applies to Rule 23, it doesn't apply to the federal, so they couldn't immediately appeal the federal part. But it does apply to the class action part, and they could immediately appeal it. And they did. And why would they immediately appeal it unless they actually argued the issue? I mean, that would be literally absurd. I didn't argue it, but I'm going to appeal it anyway.

I don't think plaintiff would just do it to turn legal fees. Because they believe that Judge Hicks' decision was wrong. The Ninth Circuit even affirmed that, Judge Hicks's decision, because he was right. And that precludes them from doing it. And that's why there is a final decision on the merits.

Also, I want to make sure, because I think plaintiff is changing and trying to change up the game. Plaintiff mixes up the issue of preclusion of the individual claims, the individual causes of action with preclusion of the class action, your Honor. I want to make absolutely clear our preclusion issue, okay, only deals with the class action at this point.

We're not saying any other individual actions are precluded based on --

THE COURT: I understand.

MR. DAVIS: -- decision. But they think, they think if they keep arguing and saying well, we still have our claim. That's true. The Sergeant claims still have their individual action, but they don't have a class action. There is no class action going forward.

Even though Judge Hicks, right, you heard plaintiff tell you, and we agree, once the Neville decision came out he gave them back their State law cause of action. There isn't a class action in that case at all. Because that's done with. That's a final decision. It's sufficiently firm to provide preclusion.

Now they talk about what they believe to be ongoing, that there are other plaintiffs out there. But that's not what we're dealing with today, your Honor.

That specifically says specific individuals. We're dealing with the plaintiffs that are before you right now. And those plaintiffs don't have any ongoing claims because plaintiff admits they no longer work for GSR.

And there's no facts, we want to reiterate that, that there are no facts showing the collective bargaining agreement is not in force. All facts show that it is because their one fact that it's unsigned does not prevent an enforceable collective bargaining agreement.

Again, I don't think there's a Court in this country that would disagree with that. Unsigned collective bargaining agreements don't -- federal law says you can't, doesn't need to be signed.

MS. HILDEN: May I interject? I know this is unusual, but I just have to say I have been at GSR as in-house counsel for three years. I've dealt extensively with the collective bargaining agreement. We deal with the culinary union on a daily, if not weekly, basis. We're in negotiations with them on a continuing basis. I've defended arbitrations brought by the culinary union, and they constantly bring grievances. So there is a contract.

I know that's not, secondly that issue is not before the Court. I just really want to put that to rest because there is a contract, we have a culinary union.

MS. JONES: I would assert otherwise.

THE COURT: I understand.

MR. DAVIS: But they have no factors for the theory --

THE COURT: I'll take a look at that. I very clearly understand both sides' positions.

MR. DAVIS: I guess you do.

MS. HILDEN: I'm sorry for my outburst.

THE COURT: That's all right.

MR. DAVIS: And they talk about our exhaustion argument, that Plaintiff Williams has to exhaust her grievance.

But they miss, once again they are misdirecting the Court to the wrong cases. The case they are talking about and what happened was is there is an issue with respect to federal preemption. That if you can cite cases without interpreting the collective bargaining agreement, then it's federally preempted, and therefore we could be in federal court instead of State court.

And the State court found that -- I mean the federal court, sorry, found that there was no federal preemption. What we're talking about is different. We're not arguing federal preemption, because again we've had that battle, and that battle we lost.

But what we're talking about is the requirement to exhaust grievances. And they haven't cited a single case. In fact, all the cases we cite are all dealing with exhausting grievances, and they all deal with the same thing. That is, you have to exhaust your grievance if they come from the contract.

Now, your Honor, with respect to the contract, they're not the same. Just the mere fact that you have an

old time provision, even if it was identical in word to the statute, it provides otherwise for overtime. Because you have to look to the language of the contract to get what the overtime decision is. And you don't look to the statute any longer. So it provides otherwise for overtime.

But ours, if you look at our contract, is not the same. First of all, it talks about a day. In other words, you have to work eight hours in a day. We all know, and the cases say, a day is not defined in the contract. But when a day is not defined it means a 24-hour regular day.

In the overtime provision of Nevada law, it's not a day. It's not eight hours in a day, it's eight hours in a workday. And workday is a specially defined term in NRS. And a workday mean 24 hours from the time you start your shift until 24 hours later. So that one provision just shows you there is a difference.

There is also other differences if you look closely at the two different statutes that provide who gets overtime, when they get overtime, how they do it. It's not the same provision. It doesn't use the same language at all, and therefore provides otherwise for overtime. And therefore the only overtime Williams is

entitled to is the overtime under the contract.

Additionally, they don't dispute that it provides -- I cannot see possibly how you can have an all hours worked claim if the contract does not provide that you have to be paid for the hours you work. I mean, it does.

The contract, there is nothing in that contract that says you're only entitled to pay for one hour of the work that you do. You have to have, you have to work the whole hours, you have to be paid on the time when it says you have to be paid, on the payday it requires you to be paid. It sets forth all these procedures. And therefore in order to make an hour's work you have to look to the contract, you have -- it comes from the contract.

And therefore it would be entirely anomalous if Nevada could, by having this applied all hours worked, not specific all hours worked claim, not even specific but just by implication say, I have an all hours work claim and get overturned all the federal law that requires you to exhaust your grievance. That's not going to happen, your Honor.

The federal courts have repeatedly ruled that -- they set up the system of collective bargaining

agreements and grievance procedures specifically because that's how they want these things to be handled. And so plaintiffs was required to do it. She didn't do it, and therefore all her claims are barred.

They now talk about the motion to dismiss the whole theory about they have alleged enough things for a motion to dismiss. It's just 20 minutes a day. All you have to do is just say every single plaintiff was entitled to the same 20 minutes a day, and that's enough.

Well, your Honor, if that was enough then there's no reason to have any pleading standard at all. Because what we want to do is we want to know a little bit more about what she did, why you particularly are claiming that 20 minutes a day. What did you have to do during that 20 minutes? What did you do during that 20 minutes?

THE COURT: Isn't the standard though that you have to establish beyond a doubt that the plaintiff is entitled to no relief under any set of facts that could be proved in a court claim?

MR. DAVIS: Your Honor, that's the old Twombly decision.

THE COURT: No, it's --

MR. DAVIS: -- but slowly the Nevada Supreme Court, I believe, has been inching away from that

decision. Actually, although they have not done so yet, they will soon, I think, adopt the Twombly, because we use the same standard. But they haven't adopted Twombly. I will admit that, your Honor, they have not adopted that.

I will even concede that they have specifically said we have not yet adopted Twombly.

THE COURT: Exactly.

MR. JONES: But the thing is, what they have said is you still have to allege facts. They have said that in their decisions, you have to allege facts. And you have to allege enough.

So, for example, you can't just say, because to say I was working 20 minutes a day, well, that's a conclusion, right, your Honor? I was working 20 minutes a day extra. Well, what were you doing? A lot of these claims --

THE COURT: So your position is you would have to say I was sweeping the floor for 20 minutes?

MR. DAVIS: Right. As opposed to saying, I was changing my clothes for 20 minutes. Because changing clothes, that's not compensable work. We have found that's what a lot of these plaintiffs are saying, I was changing my clothes for 20 minutes.

So that tells us what they were doing, and it

actually gives them so they have to do -- and that's not a hard standard, your Honor. You'd have to go to the plaintiffs and say, what were you doing during the 20 minutes? Let's allege those facts so we have a plausible claim. As plaintiffs said with the standard, you offer the case of plausibility.

You have to have a plausible claim. That's all we want, your Honor. We want to know what they are alleging.

Now, your Honor, I want to say that I think plaintiffs were right in the other positions. We are claiming that they are forum shopping. Your Honor said that we are claiming specifically that they are forum shopping. They have federal causes of action for overtime, three of the four plaintiffs in this action, your Honor, are actually from the federal cause of action asserting the federal overtime claim, and asserting overtime claims based on State law based on the same thing.

Because Nevada, while the federal doesn't have the eight hour, they are the 40 hours, both have the over 40 hour workweek claim. And they are alleging the same 40 hour workweek claim in both cases. They split their claim. And they're forum shopping here because they are

trying to get it certified in federal court. Well, actually not now. They are moving to dismiss in federal court now. Although after litigating for -- how many years were they litigating that?

MS. HILDEN: Two years.

MR. DAVIS: Two years. Lots of that has been changed, I will concede that based on Neville and coming up trying to do things. Still, two years of litigation in that claim where they are dismissing now the federal because -- and the reason why they are dismissing the federal is because we said we were going to bring summary judgment, and they were afraid this would be precluded in this court.

Then they filed in this court too so they could have two forums to go for. Your Honor, they are forum shopping. And that's why there is no cross jurisdictional tolling. That's why there is no successive class action tolling. They want to prevent this loss of judicial economy that the class action proceeding is supposed to be provided in it. That's the reason why there's not a decision.

And what's telling, your Honor, while they say there is no process at the Nevada Supreme Court, that's not cross jurisdictional tolling. They do not dispute

that the majority of courts have rejected it for that very reason, to prevent what's going on in this court.

Your Honor, I think I've dealt with everything.

THE COURT: All my issues that I was following along, and items that I wanted to ask have been answered. I want to go back and review a couple of the cases based on your argument, and therefore I will take this under submission, and I will issue a decision.

MR. DAVIS: Thank you, your Honor.

THE COURT: Thank you very much.

MS. JONES: Thank you.

-oOo-

STATE OF NEVADA )
COUNTY OF WASHOE )

I, CAROL HUMMEL, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That I was present in Department No. 6 of the within-entitled Court on July 19, 2018, and took stenotype notes of the proceedings entitled herein and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said hearing.

Dated this 17th day of August 2018.

s/s Carol Hummel
_____
Carol Hummel,CCR #340

FILED
Electronically
CV16-01264
2018-07-20 02:10:40 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6788380

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 RE MOTION TO DISMISS**

On July 19, 2018, this Court heard oral arguments on Defendants HG STAFFING, LLC and MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT (collectively, "GSR" unless individually referenced), Motion to Dismiss.

Counsel is directed within twenty (20) days from the date of this Order to prepare proposed orders supporting their position, e-mail the proposed orders to heidi.boe@washoecourts.us and emilee.sutton@washoecourts.us, and file requests for submission of the proposed orders.

Accordingly, and good cause appearing therefor,

**IT IS HEREBY ORDERED.**

Dated this 20th day of July, 2017.

DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 20th day of July, 2018, 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.

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: