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, Appellants, vs. HG STAFFING LLC; AND MEI-GSR HOLDINGS LLC, Respondents.	Docket Number: 82161 District Court Case No.: A-19-01264

JOINT APPENDIX VOLUME 9 OF 16

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IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

II. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 961, 194 P.3d 96, 102 (2008), the Nevada Supreme Court explained that the "Legislature has entrusted the labor laws' enforcement to the Labor Commissioner" and "is charged with knowing and enforcing the labor laws" and "these responsibilities acknowledge a special expertise as to those law." *Id*. at 963, 194 P.3d at 104. The Court expressly held that "the Labor Commissioner's duty to hear and resolve enforcement complaints ***is not discretionary***," but provides "access to an adequate administrative enforcement mechanism," for claims under NRS 608.005 to 608.195. *Id*. at 963–64, 194 P.3d at 104 (emphasis added). Contrary to Plaintiffs' implied argument, the Labor Commissioners authority to hear claims is ***not*** limited to instances where the employee "cannot afford a private attorney to take his or her wage case." *See* Op. at 8:13-16 & n.4. While the Labor Commissioner is certainly free to prosecute claims on behalf of those without financial resources, the Nevada Supreme Court expressly ***rejected*** any argument that "the Labor Commissioner may choose not to decide a complaint" because "the labor statutes, including NRS 607.205 and NRS 607.207, ***require*** the Labor Commissioner to hear and decide complaints seeking enforcement of the labor laws." *Baldonado*, 124 Nev. at 962–63, 194 P.3d at 103–04

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

Plaintiffs are apparently under the mistaken impression that the original jurisdiction which mandates exhaustion is synonymous with exclusive jurisdiction. *See* Op. at 7:8-12, 8:9-13, 9:3-7. In *Brown v. Pitchess*, 531 P.2d 772, 774 (Cal. 1975), however, the California Supreme Court explained that "the phrase 'original jurisdiction' means the power to entertain cases in the first instance" and "does not mean exclusive jurisdiction." As the Nevada Supreme Court has held that the Labor Commissioner has original jurisdiction to adjudicate all claims brought under NRS 608.005 to 608.195 in the first instance, and that the "exhaustion doctrine applies" when the agency "statutorily maintains original jurisdiction," then Plaintiffs failure to exhaust their administrative remedies before the Labor Commissioner is fatal to any claim she asserts under NRS 608.005 to 608.195.

Plaintiffs misconstrue *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499 (Nev. 2017), to contend that the Nevada Supreme Court rejected the argument that the administrative remedies expressly provide by the legislature need not be exhausted prior to seeking judicial relief. *See* Op. at 7:3 – 9:10. The issue of exhaustion of administrative was not even mention by the Court in *Neville v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 406 P.3d 499 (Nev. 2017). The Court, in *Neville*, however, did reaffirm the holding in *Baldonado*, which provides: "'The Nevada Labor Commissioner, who is entrusted with the responsibility of enforcing Nevada's labor laws, generally must administratively hear and decide complaints that arise under those laws.'" *See Neville*, 406 P.3d at 502 quoting *Baldonado*, 124 Nev. at 954, 194 P.3d at 98. While the Nevada Supreme Court did recognize an implied private right of action in *Neville*, the Court did not address the perquisites required before filing such an action.

Courts have uniformly held that even when a statute implies a private right of action, exhaustion of administrative remedies is required when an administrative remedy is provided by

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the statute.[5] In *Stein v. Forest Pres. Dist. of Cook Cty., Ill.*, 829 F. Supp. 251, 255 (N.D. Ill. 1993), the court found an implied private cause of action for violation of the Cook County Civil Service Act. The court, however, held that the county employee was still required to "exhaust his administrative remedies." *Id*. at 256. The court reasoned that the "failure to exhaust

[5] *See Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 142 (3d Cir. 2017) (explaining that even though a statute "can be read to support an implied private cause of action," the "exhaustion of administrative remedies may be required in the first instance"); *Allen v. W. Airlines, Inc*., 168 Cal. Rptr. 86, 88 (Cal. App. 1980) ("implying a private cause of action for back pay" under the California age discrimination statute, but holding that such an action could only be brought "after exhausting administrative remedies"); *Trujillo v. Santa Clara Cty*., 775 F.2d 1359, 1362 (9th Cir. 1985) (explaining that even when California courts have "implied a private cause of action," the complainant must still have "exhausted his administrative remedies"); *Maxwell v. New York Univ*., 407 F. App'x 524, 526 n.1 (2d Cir. 2010) (refusing to consider whether the Military Selective Service Act "implies a private right of action" because the "failure to exhaust his administrative remedies preclude[d] suit in federal court"); *McCarthy v. Bark Peking*, 676 F.2d 42, 46–47 (2d Cir.1982) (affirming grant of summary judgment in favor of defendant based on plaintiff's "fail[ure] to exhaust his administrative remedies," even if an "implied private right of action . . . existed" because "it could be invoked only after the filing of a timely [administrative] complaint"), judgment vacated on other grounds and case remanded, 459 U.S. 1166 (1983), 716 F.2d 130, 132 (2d Cir.1983) (prior judgment on exhaustion left "undisturbed"); *Segalman v. S.W. Airlines Co.*, Case No. 2:11-CV-01800-MCE-CKD, 2016 WL 146196, at *3 (E.D. Cal. Jan. 13, 2016) (dismissing claims for "fail[ing] to plead exhaustion of administrative remedies" because "even if [statute] provided a private right of action, Plaintiff has again failed to plead exhaustion of administrative remedies"); *Chaney v. Wal-mart Stores Inc*., Case No. CIV-15-592-R, 2015 WL 6692108, at *10 (W. D. Okla. Nov. 3, 2015) (holding that "even assuming there was a private cause of action [mandated by statute], Plaintiff's claim would nevertheless fail for failure to exhaust his administrative remedies"); *Wagher v. Guy's Foods, Inc*., 885 P.2d 1197, 1202, 1205 (Kan. 1994) (holding that even though an employee had an implied cause of action against the employer, "she was precluded from filing it until the administrative remedies were exhausted"); *Miller v. Union Pac. R. Co.*, 539 F. Supp. 134, 137 (D. Neb. 1982) (explaining that "even assuming that a private right of action may be implied, undoubtedly the question would arise whether plaintiff would first be required to exhaust his administrative remedies"); *Stiles v. Delta Airlines, Inc*., 29 Fed. R. Serv. 2d 573, 1980 WL 347 (N.D. Ga. 1980) (holding that even if a private right of action could be implied "under Executive Order No. 11246, the court would still deny relief on the ground that the plaintiff has not first exhausted available administrative remedies" because the "Secretary of Labor and the OFCCP are authorized to initiate enforcement actions against federal contractors upon receipt of a complaint of discrimination from the alleged victim"); *Wagner v. Sheltz*, 471 F. Supp. 903, 910–11 (D. Conn. 1979) (even "assuming Arguendo the existence of [an implied] cause of action," plaintiffs claim failed "because of the plaintiff's failure to exhaust her administrative remedies" when the State had "recently enacted an elaborate administrative scheme for handling disputes like the present one" and therefore plaintiff's unexhausted claims run afoul of the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

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administrative remedies prior to filing a lawsuit can bar that action." *Id*.

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

Likewise, even though the Nevada Supreme Court found an implied private right of action for wage claims under NRS Chapter 608, the Court has also indisputably held that the Labor Commissioner has original jurisdiction to "hear and resolve labor law complaints," the Legislature has provided the Labor Commissioner with an "adequate administrative enforcement mechanism" to resolve such claims, and the Legislature has "require[d] the Labor Commissioner to hear and decide complaints seeking enforcement of the labor laws." *Baldonado,* 124 Nev. at 960-64, 194 P.3d at 102-04. Plaintiffs do not dispute that enforcement mechanism set forth in NRS 607.160 – 607.215, along with the regulations adopted by the Labor Commissioner at NAC 607.075 – 607.525, enable the Labor Commissioner to resolve all of their wage claims asserted under NRS 608.005 to 608.195. Plaintiffs' contention that they need not exhaust the administrative remedies establish by the Legislature before pursuing their implied cause of action therefore "contravene[s] the well-established rule that administrative remedies must be exhausted prior to seeking judicial relief." *First American Title Co. of Nevada v. State,* 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975).

Plaintiffs' failure to exhaust their administrative remedies is also at odds with NRS 607.215, which provides that after the Labor Commissioner "issue[s] a written decision, setting

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forth findings of fact and conclusions of law developed at the hearing," and "[u]pon a petition for judicial review, the court may order trial de novo." Plaintiffs do not dispute that under the express terms of NRS 607.215, the court may only order a "trial de novo" after the Labor Commissioner conducts a hearing, issues a written decision, and a petition for judicial review is filed by a party. *See In re Steven Daniel P.*, 129 Nev. 692, 696-97, 309 P.3d 1041, 1044 (2013) (holding that where a statute "includes preconditions" before the "court may" act, this "plain language" mandates that the court may act "only upon the [lower] court's determination that the requirements of [the statute] have been met").

Contrary to Plaintiffs' argument, the Nevada Supreme Court's rationale for finding an implied right of action in *Neville* is fully consistent with the well-established rule that administrative remedies must be exhausted. The Court's first justification for implying a private right of action was that "NRS 608.160 allows for the assessment of attorney fees in a private cause of action for recovery of unpaid wages." *Neville*, 406 P.3d at 503. As NRS 607.215 provides for a "trial de novo" after review by the Labor Commissioner, the assessment of attorney fees under NRS 608.160 insures that an aggrieved employee had the ability to be made whole if, after a trial de novo, the court determined that the employer failed to pay the wages required by NRS Chapter 608. The only other justification for implying a private right of action was that the Labor Commissioner has authority to bring a private action for wages on behalf of employees who have "a valid and enforceable claim for wages." *Neville*, 406 P.3d at 503-04. Accordingly, even the Labor Commissioner cannot bring a private action for wages until he has administratively ruled that the employee has a valid and enforceable claim. It would be absurd to believe that an employee could seek such a remedy without first presenting his or her claim to the Labor Commissioner so he could similarly pass on the validity of that claim. In fact, Plaintiffs do not dispute that the entire administrative mechanism provided by NRS Chapter 607 would be mere surplus if claimants could bypass those procedures and simply skip to the last step, "trial de novo." *See Rural Telephone Co. v. Pub. Utilities Comm'n*, 398 P.3d 909, 911 (Nev. 2017) (explaining that "statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory").

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Plaintiffs wrongly assume, without any supporting legal authority, that the Labor Commissioner and the courts have concurrent jurisdiction over wage claims under NRS Chapter 608.[6] Plaintiffs' assumption, however, is entirely belied by NRS 607.215, which as set forth above, mandates that the Labor Commissioner issue a final determination before the court may act. *In Wright v. Woodard*, 518 P.2d 718, 720 (Wash. 1974), the Washington Supreme Court affirmed, *en banc*, that it "is the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene." The Court held that where a claimant has an "adequate remedy through administrative channels, provided by statute," and no facts have been advanced which would question the agency's "fairness or impartiality," then the "court erred in entertaining the action" when the claimant has "not denied that no attempt has been made to pursue that remedy." *Id*. The court then dismissed the action for the failure to exhaust administrative remedies because judicial review could only be sought under RCW 82.03.180 which, like NRS 607.215, provides that "judicial review of a decision of the [agency] shall be *de novo*" upon filing a timely petition. *See Wright*, 518 P.2d at 720; compare RCW 82.03.180 with NRS 607.215; *see also Cost Management Servs., Inc. v. City of Lakewood*, 310 P.3d 804, 810-13 (Wash. 2013) (holding *en banc*, that "even if original jurisdiction in a case lies with the [lower] court, exhaustion of administrative remedies is still required" because "the exhaustion requirement is not vitiated by the fact that the [lower] court has original jurisdiction over a claim").

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

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Contrary to Plaintiffs' assumption, the default rule is ***not*** "concurrent jurisdiction," but instead the well-established default rule mandates exhaustion of administrative remedies that are "provided by statute" before a court may exercise jurisdiction. This general rule has been upheld by the Nevada Supreme Court, the United States Supreme Court, and courts throughout the country.[7] Plaintiffs have not and cannot dispute that they had an adequate remedy through

[7] *See Benson v. State Eng'r*, 131 Nev. Adv. Op. 78, 358 P.3d 221, 224 (2015) ("Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies"); *Masco Builder*, 129 Nev. at 779, 312 P.3d at 478 (holding the "exhaustion doctrine applies in this matter because the Department statutorily maintains original jurisdiction" and the "doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies"); *Lopez v. Nevada Dep't of Corr*., 127 Nev. 1156, 373 P.3d 937 (2011) ("The exhaustion doctrine requires that a person exhaust administrative remedies before proceeding in the district court and failure to do so renders the controversy nonjusticiable); *see also F.C.C. v. Schreiber*, 381 U.S. 279, 296–97 (1965) (affirming the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"); *Blanton v. Canyon Cty.*, 170 P.3d 383, 386 (Idaho 2007) (holding the "doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered"); *City of Billings Police Dep't v. Owen*, 127 P.3d 1044, 1047 (Mont. 2006) (holding the "well-settled principle undergirding the exhaustion doctrine is that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"); *Campbell v. Regents of Univ. of California*, 106 P.3d 976, 982 (Cal. 2005) (holding "the rule of exhaustion of administrative remedies" "is not a matter of judicial discretion, but is a fundamental rule of procedure binding upon all courts" and requires "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act"); *Hoflund v. Airport Golf Club*, 105 P.3d 1079, 1086 (Wyo. 2005) (holding that "the exhaustion of available administrative remedies must occur before judicial relief may be available"); *Trujillo v. Pac. Safety Supply*, 84 P.3d 119, 129 (Or. 2004) (holding the "doctrine of exhaustion applies when a party, without conforming to the applicable statutes or rules, seeks judicial determination of a matter that was or should have been submitted to the administrative agency for decision"); *Nebeker v. Utah State Tax Comm'n*, 34 P.3d 180, 184 (Utah 2001) (holding as "a general rule, parties must exhaust applicable administrative remedies as a prerequisite to seeking judicial review"); *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998) (holding "the doctrine of exhaustion of administrative remedies . . . serves as a threshold to judicial review that requires parties in a civil action to pursue available statutory administrative remedies before filing suit in district court"); *Minor v. Cochise Cty.*, 608 P.2d 309, 311 (Ariz. 1980) (holding, *en banc*: "It is a well recognized principle of law that a party must exhaust his administrative remedies before appealing to the courts") *Gzaskow v. Pub. Employees Ret. Bd*., 403 P.3d 694, 701 (N.M. App. 2017) (holding under "the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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AFFIRMATION

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

Dated this 11th day of March 2019

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By: */s/ H. Stan Johnson*
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PROOF OF SERVICE

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

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

REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

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

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Attorney for Plaintiffs

DATED the 11th day of March 2019.

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

EXHIBIT INDEX

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

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EXHIBIT 1

EXHIBIT 1

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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

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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

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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.

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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

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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.)

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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.

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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

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[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

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

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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").

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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.").

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.

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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.

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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]

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[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.

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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

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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]

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[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]

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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).

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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).

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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

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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

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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.

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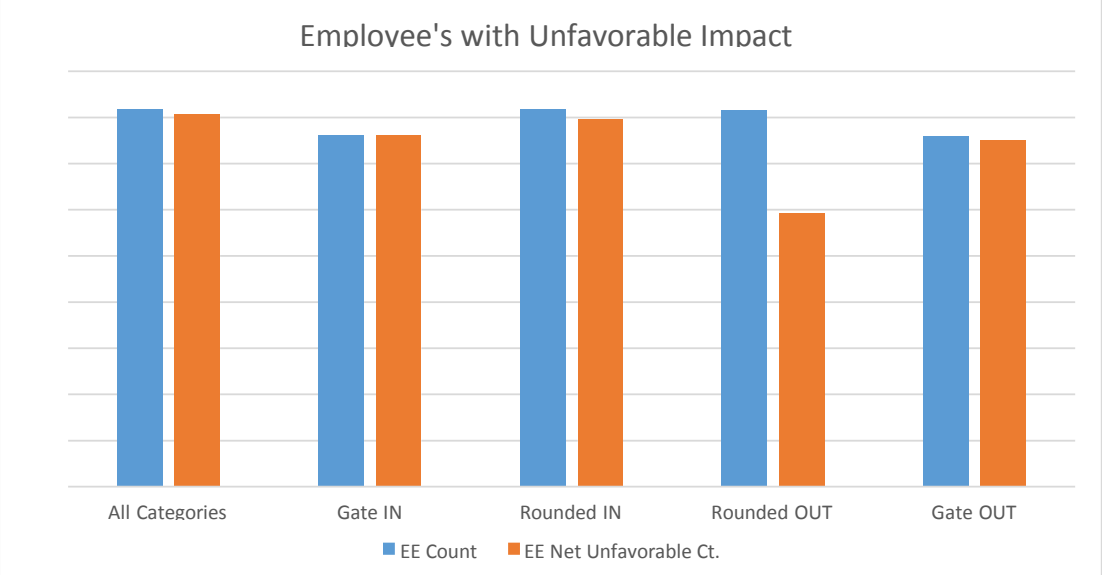
minutes pre and 5 minutes post) from the time spent on property. *See* Toney Report, at p. 5. Taking in conjunction with the survey results and class member representative testimony, Mr. Toney found that employees spend, on average, 26.6 minutes performing work without compensation. *See* Toney Report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

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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.")

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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.').

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?

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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

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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

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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

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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.

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- **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.

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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*

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.

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[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.

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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).

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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*

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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

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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.)

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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

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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]

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[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.

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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

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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).

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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.").

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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

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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

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> 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

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EXHIBIT 2

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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

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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

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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.

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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.

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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

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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

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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

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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.

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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

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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

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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.

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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.

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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)).

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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

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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

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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'

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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

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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)

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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).

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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

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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

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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).

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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

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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

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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).

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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

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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

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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

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(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

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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

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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.

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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

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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

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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

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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

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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.

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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

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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.

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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

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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:

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DATED the 5th day of November, 2015.

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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' SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff 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"), hereby submit as Supplemental Authority the March 13 2019, March 27, 2019, and April 1, 2019 decisions of the Honorable Larry R. Hicks, Judge of the United States District Court, District of Nevada; true and correct copies of which are attached hereto as Exhibits 1

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thru 15.[1]

Plaintiffs submit Judge Hicks' Orders in further support of Plaintiffs' position that there is no preclusive effect as to Plaintiffs' Nevada wage claims pursuant to NRS 608.140, 608.016, 608.018, the derivative wages due and owing claims pursuant to NRS 608.020-.050, and Plaintiffs' Nevada Constitution Minimum Wage claims because the Nevada law claims have not been actually and necessarily litigated and no final decision on the merits has been made. Indeed, Judge Hicks clarified that in dismissing the plaintiffs' federal Fair Labor Standards Act ("FLSA") claims with prejudice, the Order "is without prejudice as to plaintiffs' state law causes of action in state court, even though the court acknowledges that the alleged conduct is the same. This ruling is in accordance with Smith v. Lenches, 263 F.3d 972, 976, n. 6 (9th Cir. 2001)." See Orders at p. 2:1-5.

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[1] Judge Hicks granted Plaintiffs' Motion to Voluntary Dismiss the FLSA claims in the following five (5) cases:

(1) *Ramirez et al v. HG Staffing, LLC, MEI-GSR Holdings LLC d/b/a/ Grand Sierra Resort,* Case No. 3:16-cv-00318-LRH-WGC;
(2) *Corral et al, v. HG Staffing, LLC, MEI-GSR Holdings LLC d/b/a/ Grand Sierra Resort,* Case No. 3:16-cv-00386-LRH-WGC;
(3) *Benson, et al v. HG Staffing, LLC, MEI-GSR Holdings LLC d/b/a/ Grand Sierra Resort,* Case No. 3:13-cv-00388-LRH-WGC;
(4) *S. Reader et al, v. HG Staffing, LLC, MEI-GSR Holdings LLC d/b/a/ Grand Sierra Resort,* Case No. 3:16-cv-00387-LRH-WGC; and
(5) *T. Reader et al, v. HG Staffing, LLC, MEI-GSR Holdings LLC d/b/a/ Grand Sierra Resort,* Case No. 3:16-cv-00392-LRH-WGC.

Both plaintiffs and defendants in these cases requested clarification on the Court's Order specific to the state law claims at issue in the instant case. The Court's original Order granting voluntary dismissal and the Court's Orders on clarification are each attached as exhibits hereto.

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: April 3, 2019

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ *Mark R. Thierman*
Mark R. Thierman
Joshua D. Buck
Leah L. Jones

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Index of Exhibits

1. Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Ramirez et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00318-LRH-WGC, ECF No. 97.

2. Order Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Ramirez et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00318-LRH-WGC, ECF No. 99.

3. Order further Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Ramirez et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00318-LRH-WGC, ECF No. 101.

4. Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Corral et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00386-LRH-WGC, ECF No. 75.

5. Order Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Corral et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00386-LRH-WGC, ECF No. 77.

6. Order further Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Corral et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00386-LRH-WGC, ECF No. 79.

7. Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Benson et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00388-LRH-WGC, ECF No. 86.

8. Order Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Benson et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00388-LRH-WGC, ECF No. 88.

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9. Order further Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *Benson et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00388-LRH-WGC, ECF No. 90.

10. Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *S. Reader et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00387-LRH-WGC, ECF No. 94.

11. Order Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *S. Reader et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00387-LRH-WGC, ECF No. 96.

12. Order further Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *S. Reader et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00387-LRH-WGC, ECF No. 98.

13. Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *T. Reader et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00392-LRH-WGC, ECF No. 94.

14. Order Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *T. Reader et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00392-LRH-WGC, ECF No. 96.

15. Order further Clarifying Court's Prior Order granting Plaintiffs' Motion to Voluntary Dismiss FLSA claims in *T. Reader et al, v. HG STAFFING LLC; MEI-GSR HOLDINGS, LLC d/b/a GRAND SIERRA RESORT*, Case No. 3:16-cv-00392-LRH-WGC, ECF No. 98.

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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:

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. Executed on April 3, 2019, at Reno, Nevada.

/s/Tamara Toles
Tamara Toles

EXHIBIT 1

Ramierz Order re Motion to Dismiss

EXHIBIT 1

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO RAMIREZ, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00318-LRH-WGC ORDER

Before the court is plaintiffs' motion to dismiss. ECF No. 82. HG Staffing, LLC and MEI-GSR Holdings LLC d/b/a Grand Sierra Resort, (collectively "defendants") filed a response (ECF No. 87), to which plaintiffs replied (ECF No. 89). Because dismissal will not cause defendants to suffer plain legal prejudice and for the reasons set forth in this Order, the court grants plaintiffs' motion; however, does so on the condition that it be with prejudice.

Also before the court is defendants' motion for partial summary judgment. ECF No. 83. Plaintiffs filed a response (ECF No. 90), to which defendants replied (ECF No. 91). In light of the court's order on plaintiffs' motion to dismiss (ECF No. 82), the court conditionally denies defendants' motion as moot.

I. BACKGROUND

This dispute centers on defendants' alleged failure to pay plaintiffs overtime wages. *See* ECF No. 15. The dispute began in a separate and now independent matter: *Sargent et al. v. HG Staffing et al.*, 3:13-cv-00453-LRH-WGC. *Sargent* was removed to this court in August 2013,

and its proposed classes were conditionally certified in May 2014. *Sargent*, 3:13-cv-00453-LRH-WGC at ECF Nos. 1, 40. But the court later decertified the proposed classes in March 2016 for not being "similarly situated" as required by the FLSA. *Id.* at ECF No. 174. By this time, the parties had conducted extensive discovery and had filed multiple motions. *See id.* at ECF Nos. 82–83, 85, 94, 97–108, 112–21.

After the court ordered decertification in *Sargent*, this matter was filed on June 10, 2016. ECF No. 1.[1] The complaint was later amended. See ECF Nos. 3, 15. The second amended complaint asserted one FLSA violation for the narrow-proposed class of employees "who were required to carry a cash bank in completing their job duties." ECF No. 15. It did not allege any state-law claims. *See id.* The amended complaint was filed by numerous named plaintiffs on behalf of themselves and all others similarly situated.[2] ECF No. 15. The parties have agreed to use the discovery from *Sargent* in this matter. ECF No. 37. The parties have also conducted additional discovery particularly for this matter. ECF Nos. 72, Ex. 2; 88.

Four days after this matter was filed, a state-court class action was also filed. ECF No. 67, Ex. A. The state-court action does not assert any FLSA claims; it instead asserts state-law claims for lost wages under Chapter 608 of the Nevada Revised Statutes ("NRS") on behalf of four named plaintiffs and all others similarly situated. *Id.* In early 2017 and before any motions were decided in the state-court action, the state court stayed the state-court action pending an anticipated decision from the Nevada Supreme Court. ECF No. 72, Ex. 1. The stay was not lifted until December 20, 2017. *Id.* This parallel state-court action is currently pending.

In January 2018, plaintiffs filed a motion to stay or in the alternative, dismiss this matter without prejudice based on the similarly natured claims in this action and the state-court action.

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[1] Following the decertification in *Sargent*, four additional related cases with different narrow-proposed classes were filed as well. *See Corral et al. v. HG Staffing, LLC et al.*, 3:16-cv-00386-LRH-WGC; *S. Reader et al. v. HG Staffing, LLC et al.*, 3:16-cv-00387-LRH-WGC; *Benson et al. v. HG Staffing et al., LLC*, 3:16-cv-00388-LRH-WGC; *T. Reader et al. v. HG Staffing et al., LLC*, 3:16-cv-00392-LRH-WGC.

[2] Four of the named plaintiffs have since been terminated or removed from this action. ECF Nos. 15, 21.

ECF No. 67. After finding that a majority of the *Colorado River* Doctrine factors weighed against a stay, the court denied plaintiffs' motion to stay with prejudice. ECF No. 81.

Plaintiffs now move to voluntarily dismiss this matter without prejudice, this time 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). ECF No. 82. Simultaneously, defendants move for partial summary judgment, arguing that 65 plaintiffs are barred by a two-year statute of limitations, 8 of whom are also barred because they never worked more than 40 hours per week as required to receive overtime under the FLSA, and 9 plaintiffs are barred because they didn't use a cash bank. ECF No. 83. The court's Order as to these pending motions now follows.

II. DISCUSSION

The Court dismisses plaintiffs' action with prejudice pursuant to Federal Civil Procedure Rule 41.

Subject to certain exceptions, a plaintiff has the right to dismiss his or her action by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i). After the opposing party serves either an answer or a motion for summary judgment, the plaintiff loses this right. As defendants filed their answer to plaintiffs' second amended complaint on March 17, 2017, (ECF No. 24), dismissal is only permitted by court order. *See* Fed. R. Civ. P. 41(a)(2).

The decision of whether to grant voluntary dismissal rests in the court's discretion. *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). "When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). "Although case law does not articulate a precise definition of 'legal prejudice,' the cases focus on rights and defenses available to a defendant in future litigation," concluding legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Id.* at 97. Courts have specifically concluded that plain legal prejudice is more than "the prospect of a second lawsuit, . . . when plaintiff merely gains some tactical advantage," or "the mere inconvenience of defending another lawsuit." *Hamilton*, 679

F.2d at 145; *see also Westlands*, 100 F.3d at 96 ("[T]he threat of future litigation which causes uncertainty is insufficient to establish plain legal prejudice."); *Veina v. Sutter Hotel Assocs. L.P.*, No. C 98-0980 SI, 1998 WL 822773, at *3 (N.D. Cal. Nov. 9, 1998) ("[E]ven if plaintiff escapes some limits on discovery by refiling this action in state court, the fact that a plaintiff gains a tactical advantage by dismissing the action is not enough to show plain legal prejudice."). Further, the Court has held that neither incurring significant expenses defending the suit nor the fact that trial preparations have begun amount to plain legal prejudice. *See Hamilton*, 679 F.2d at 145-46. Courts have held that when dismissal would strip a defendant of an absolute defense, that does amount to plain legal prejudice. *See Tibbetts by and through Tibbets v. Syntex Corp.*, 996 F.2d 1227, 1993 WL 241567, at *1-2 (9th Cir. July 2, 1993) (unpublished) (citing *Phillips v. Illinois Central Gulf Railroad*, 874 F.2d 984 (5th Cir. 1989)).

Plaintiffs have filed this motion to voluntarily dismiss the pending action without prejudice following the Nevada Supreme Court's decision in *Neville*. Because *Neville* held that employees have a private right of action for NRS Chapter 608 wage claims, *see Neville*, 406 P.3d at 504, plaintiffs seek to forego litigation of their federal wage claims in federal court for their more encompassing state law wage claims currently pending in state court. Defendants argue that if the court were to grant plaintiffs' motion, they would suffer plain legal prejudice because they would be deprived of the applicable statute of limitations defense. As articulated fully in their motion for partial summary judgment, defendants argue that because plaintiffs failed to file consent to opt-in to the collective action their claims are barred by the FLSA's two-year statute of limitation.

The court disagrees with defendants that dismissal would cause them plain legal prejudice. Defendants' cited case law is readily distinguishable from the facts at hand. Courts have held that when a plaintiff seeks dismissal in order to refile their case in a more favorable jurisdiction, one where the statute of limitations has not expired, defendants are legally prejudiced. *See Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318-19 (5th Cir. 2002) (after plaintiffs failed to provide the jurisdiction in which they wished to refile if the voluntary dismissal was granted, the Court determined that defendants would be legally prejudiced

"because such dismissal would potentially strip it of a viable statute of limitations defense."); *Phillips*, 874 F.2d at 987 (affirming the lower court's denial of voluntary dismissal reasoning that while "the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial, . . . the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit."). The Ninth Circuit, relying on the Fifth Circuit's reasoning, came to a similar conclusion. *See Tibbets*, 1993 WL 241567, at *2 ("Similarly [to *Phillips*], the district court here concluded that [the defendant] would be prejudiced by having to defend the suit in another state where the statute of limitations had not run," and therefore, it "was not an abuse of discretion," for the district court to deny plaintiff's motion for voluntary dismissal.).

This case law is readily distinguishable from the case at hand. Here, plaintiffs have brought a single claim, violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Claims for violations of the FLSA must be brought within 2 years of the violation. 29 U.S.C. § 255(a). However, a "cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *Id.* This statute of limitations does not change regardless of which court, state or federal, hears the claim. *Cf. Manshack v. Southwestern Electric Power Co.*, 915 F.2d 172, 174-75 (5th Cir. 1990) (in distinguishing itself from *Phillips*, the Court held that because both the federal court and the Texas state court are governed by the same choice of law principals defendants would not be stripped of an absolute defense; and therefore, it was not an abuse of discretion to grant the voluntary dismissal). Similarly to *Manshack*, dismissal would not strip defendants of an absolute defense: even if plaintiffs were to assert a FLSA claim in the parallel state-court action, the claim is bound by the same statute of limitations in both state and federal court.

Further, unlike in *Phillips* where the plaintiffs sought voluntary dismissal so that they could refile in a jurisdiction where the statute of limitations was not a bar to the action, that is not the case here. Rather, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims. That does not amount to plain legal prejudice. *See Smith v. Lenches*, 263 F.3d 972, 975-76 (9th Cir. 2001) (After the California Supreme Court ruled on an

issue of state law, the federal district court granted plaintiff's motion to voluntarily dismiss their federal claims in favor of pursuing their parallel state claims based on the same facts. The Ninth Circuit affirmed, finding that the district court's dismissal with prejudice "only strengthens [their] conclusion that the dismissal caused no legal prejudice and was not an abuse of discretion."); *Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (reversing the lower court's denial of plaintiff's motion for voluntary dismissal, reasoning that "in cases involving the scope of state law, courts should readily approve dismissal when a plaintiff wishes to pursue a claim in state court.").

However, after deciding to grant voluntary dismissal, the court must determine whether such dismissal operates with or without prejudice. The Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held that Rule 41(a)(2) provides the district court with authority to grant dismissal *on the condition* that it be with prejudice. *See Gravatt v. Columbia University*, 845 F.2d 54, 55-56 (2d Cir. 1988); *Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986); *Elbaor*, 279 F.3d at 320; *U.S. v. One Tract of Real Property*, 95 F.3d 422, 425 (6th Cir. 1996); *Marlow v. Winston & Strawn*, 19 F.3d 300, 304 (7th Cir. 1994); *Jaramillo v. Burkhart*, 59 F.3d 78, 79 (8th Cir. 1995). Because allowing plaintiffs to refile this case, which has been pending for over 5 years, would be inequitable, the court finds that granting plaintiffs' motion on the condition that it be with prejudice is appropriate.

First, defendants have spent considerable time and money engaging in discovery and generally litigating this already 5-year-old case. *See* ECF No. 88. Additionally, this condition is not overly broad for the situation at hand: there is only one pending claim and therefore, dismissal with prejudice will only affect the claim under which defendants have also asserted a statute of limitations defense. *Contra Elbaor*, 279 F.3d at 320 (finding that dismissal with prejudice was overly broad because the statute of limitations defense did not apply to all of the claims). Further, plaintiffs have made the choice to split their claims between federal and state court. However, that does not mean that the court should allow them to fully litigate their claims in state court, and then, should they be unsuccessful, permit them to return to federal court and take another bite at the apple. If plaintiffs truly wish to abandon their federal law claims in favor

of their state law claims, the court will allow them to do so, but they will not be permitted to return to federal court and attempt to relitigate this action at a later date.

III. CONCLUSION

IT IS THEREFORE ORDERED that plaintiffs' motion to voluntarily dismiss the action (ECF No. 82) is **GRANTED** on the condition that it be **with prejudice**. Plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. *See Lau v. Glendora Unified School Dist.*, 792 F.2d 929, 931 (9th Cir. 1986) (holding that a plaintiff be given a "reasonable period of time within which to refuse the conditional voluntary dismissal by withdrawing her motion for dismissal or to accept the dismissal despite the imposition of conditions."). A failure to respond within the 30 day window shall constitute a consent to dismissal with prejudice.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment (ECF No. 83) is conditionally **DENIED** as moot.

IT IS SO ORDERED.

DATED this 13th day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

Ramirez Order re Motion for Clarification

EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO RAMIREZ, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00318-LRH-WGC ORDER

Before the court is plaintiffs' motion for clarification of the court's prior order granting plaintiffs' motion for voluntary dismissal on the condition that it be with prejudice (ECF No. 97). ECF No. 98. Plaintiffs also motion this court for an extension of time to consent to the prior order. *Id.*

As the court previously stated, and as plaintiffs represented to this court, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims currently pending in Nevada State Court. The court sees no reason to deny plaintiffs that request or to force them to litigate in federal court. However, given the considerable time and money defendants have spent engaging in discovery and generally litigating this case over the past 5 years, it would be improper to allow plaintiffs to fully litigate their claims in state court, and then if unsuccessful, return to federal court and attempt to relitigate their federal claims. It is for that reason the court ruled that plaintiffs' motion for voluntary dismissal be with prejudice—plaintiffs will be precluded from again raising the Fair Labor Standards Act claim in this court.

As the term "with prejudice" can have various meanings, the court clarifies that its prior Order is with prejudice in that it precludes plaintiffs from subsequently reasserting this cause of action in federal court. However, it is without prejudice as to plaintiffs' state law causes of action in state court, even though the court acknowledges that the alleged conduct is the same. This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001).

IT IS FURTHER ORDERED that plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. A failure to respond within the 30-day window shall constitute a consent to dismissal with prejudice.

IT IS SO ORDERED.

DATED this 27 day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

Ramirez Order re Further Clarification

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO RAMIREZ, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00318-LRH-WGC ORDER

Defendants motion this court to clarify further that its prior order (ECF No. 99) "does not dictate to the state court the preclusive effect of this Court's order dismissing Plaintiffs' federal claims with prejudice." ECF No. 100.

In the court's prior order, it stated, "This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001)." ECF No. 99. This footnote, in its entirety, states:

> EFI also argues that the district court erred in reciting in its order that the dismissal of the federal claims was "without prejudice to plaintiffs' asserting their state law causes of action in the state court case, even though based upon the same conduct alleged in this federal action." On the basis of this language, EFI argues that this was error because the district court had no jurisdiction to rule on Smith's state law causes of action. However, we do not read the district court's order as making any decision of state law. The district court's order simply dismissed these claims without prejudice to show that the federal district court was not adjudicating anything regarding the state claims. **Whether or not the dismissal of the federal claims here has any implications for assertion of state law claims pending in state court is a question to be decided by the state court.**

Smith, 263 F.3d at 976 n.6 (emphasis added).

///

THEREFORE, it is clear that whether or not the dismissal of the federal claim here has any implications for the state law claims based upon similar alleged conduct is for the state court to decide. The intention of this court is to limit its order specifically to the plaintiffs' federal claims. The Court sees no reason to further clarify its prior order.

IT IS SO ORDERED.

DATED this 1st day of April, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 4

Corral Order re Motion to Dismiss

EXHIBIT 4

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

SHENNA CORRAL, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00386-LRH-WGC ORDER

Before the court is plaintiffs' motion to dismiss. ECF No. 60. HG Staffing, LLC and MEI-GSR Holdings LLC d/b/a Grand Sierra Resort, (collectively "defendants") filed a response (ECF No. 65), to which plaintiffs replied (ECF No. 67). Because dismissal will not cause defendants to suffer plain legal prejudice and for the reasons set forth in this Order, the court grants plaintiffs' motion; however, does so on the condition that it be with prejudice.

Also before the court is defendants' motion for partial summary judgment. ECF No. 61. Plaintiffs filed a response (ECF No. 68), to which defendants replied (ECF No. 69). In light of the court's order on plaintiffs' motion to dismiss (ECF No. 60), the court conditionally denies defendants' motion as moot.

I. BACKGROUND

This dispute centers on defendants' alleged failure to pay plaintiffs overtime wages. *See* ECF No. 14. The dispute began in a separate and now independent matter: *Sargent et al. v. HG Staffing et al.*, 3:13-cv-00453-LRH-WGC. *Sargent* was removed to this court in August 2013,

and its proposed classes were conditionally certified in May 2014. *Sargent*, 3:13-cv-00453-LRH-WGC at ECF Nos. 1, 40. But the court later decertified the proposed classes in March 2016 for not being "similarly situated" as required by the FLSA. *Id.* at ECF No. 174. By this time, the parties had conducted extensive discovery and had filed multiple motions. *See id.* at ECF Nos. 82–83, 85, 94, 97–108, 112–21.

After the court ordered decertification in *Sargent*, this matter was filed on June 28, 2016. ECF No. 1.[1] The complaint was later amended. ECF No. 14. The amended complaint asserted one FLSA violation for the narrow-proposed class of employees who were ServerTainers and dancing dealers, allegedly "required to attend dance classes of an hour or more, two to four times a week," without compensation. *Id.* It does not allege any state-law claims. *See id.* The amended complaint was filed by six plaintiffs on behalf of themselves and all others similarly situated.[2] *Id.* The parties have agreed to use the discovery from *Sargent* in this matter. ECF No. 31. The parties have also conducted additional discovery particularly for this matter. ECF Nos. 22, 25–31, 55, 58; *see also* ECF No. 51 at 3; and *Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC at ECF Nos. 72, Ex. 2; 88.

On June 14, 2016, a state-court action was also filed after the decertification order in *Sargent*. ECF No. 47, Ex. A. The state-court action does not assert any FLSA claims; it instead asserts state-law claims for lost wages under Chapter 608 of the Nevada Revised Statutes ("NRS") on behalf of four named plaintiffs—one of which is a plaintiff in this matter. *Id.* In early 2017 and before any motions were decided in the state-court action, the state court stayed the state-court action pending an anticipated decision from the Nevada Supreme Court. *See Ramirez*, 3:16-cv-00318-LRH-WGC at ECF No. 72, Ex. 1. The stay was not lifted until December 20, 2017. *Id.* This parallel state-court action is currently pending.

[1] Four other related cases with narrower proposed classes were filed as well. *See Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC; *S. Reader et al. v. HG Staffing, LLC et al.*, 3:16-cv-00387-LRH-WGC; *Benson et al. v. HG Staffing et al., LLC*, 3:16-cv-00388-LRH-WGC; *T. Reader et al. v. HG Staffing et al., LLC*, 3:16-cv-00392-LRH-WGC.

[2] One of the named plaintiffs has since been terminated from this action. ECF No. 20.

In January 2018, plaintiffs filed a motion to stay or in the alternative, dismiss this matter without prejudice based on the similarly natured claims in this action and the state-court action. ECF No. 47. After finding that a majority of the *Colorado River* Doctrine factors weighed against a stay, the court denied plaintiffs' motion to stay with prejudice. ECF No. 59.

Plaintiffs now move to voluntarily dismiss this matter without prejudice, this time 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). ECF No. 60. Simultaneously, defendants move for partial summary judgment, arguing that the plaintiffs are barred by a two-year statute of limitations, 3 of whom are also barred because they never worked more than 40 hours per week as required to receive overtime under the FLSA. ECF No. 61. Defendants also allege that plaintiff Carrera should be dismissed "because she did not appear for deposition and her counsel stated on the record that she requested to withdraw from this action." *Id.* The court's Order as to these pending motions now follows.

II. DISCUSSION

The Court dismisses plaintiffs' action with prejudice pursuant to Federal Civil Procedure Rule 41.

Subject to certain exceptions, a plaintiff has the right to dismiss his or her action by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i). After the opposing party serves either an answer or a motion for summary judgment, the plaintiff loses this right. As defendants filed their answer to plaintiffs' amended complaint on March 17, 2017, (ECF No. 23), dismissal is only permitted by court order. *See* Fed. R. Civ. P. 41(a)(2).

The decision of whether to grant voluntary dismissal rests in the court's discretion. *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). "When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). "Although case law does not articulate a precise definition of 'legal prejudice,' the cases focus on rights and defenses available to a defendant in

future litigation," concluding legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Id.* at 97. Courts have specifically concluded that plain legal prejudice is more than "the prospect of a second lawsuit, . . . when plaintiff merely gains some tactical advantage," or "the mere inconvenience of defending another lawsuit." *Hamilton*, 679 F.2d at 145; *see also Westlands*, 100 F.3d at 96 ("[T]he threat of future litigation which causes uncertainty is insufficient to establish plain legal prejudice."); *Veina v. Sutter Hotel Assocs. L.P.*, No. C 98-0980 SI, 1998 WL 822773, at *3 (N.D. Cal. Nov. 9, 1998) ("[E]ven if plaintiff escapes some limits on discovery by refiling this action in state court, the fact that a plaintiff gains a tactical advantage by dismissing the action is not enough to show plain legal prejudice."). Further, the Court has held that neither incurring significant expenses defending the suit nor the fact that trial preparations have begun amount to plain legal prejudice. *See Hamilton*, 679 F.2d at 145-46. Courts have held that when dismissal would strip a defendant of an absolute defense, that does amount to plain legal prejudice. *See Tibbetts by and through Tibbets v. Syntex Corp.*, 996 F.2d 1227, 1993 WL 241567, at *1-2 (9th Cir. July 2, 1993) (unpublished) (citing *Phillips v. Illinois Central Gulf Railroad*, 874 F.2d 984 (5th Cir. 1989)).

Plaintiffs have filed this motion to voluntarily dismiss the pending action without prejudice following the Nevada Supreme Court's decision in *Neville*. Because *Neville* held that employees have a private right of action for NRS Chapter 608 wage claims, *see Neville*, 406 P.3d at 504, plaintiffs seek to forego litigation of their federal wage claims in federal court for their more encompassing state law wage claims currently pending in state court. Defendants argue that if the court were to grant plaintiffs' motion, they would suffer plain legal prejudice because they would be deprived of the applicable statute of limitations defense. As articulated fully in their motion for partial summary judgment, defendants argue that because plaintiffs failed to file consent to opt-in to the collective action their claims are barred by the FLSA's two-year statute of limitation.

The court disagrees with defendants that dismissal would cause them plain legal prejudice. Defendants' cited case law is readily distinguishable from the facts at hand. Courts have held that when a plaintiff seeks dismissal in order to refile their case in a more favorable

jurisdiction, one where the statute of limitations has not expired, defendants are legally prejudiced. *See Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318-19 (5th Cir. 2002) (after plaintiffs failed to provide the jurisdiction in which they wished to refile if the voluntary dismissal was granted, the Court determined that defendants would be legally prejudiced "because such dismissal would potentially strip it of a viable statute of limitations defense."); *Phillips*, 874 F.2d at 987 (affirming the lower court's denial of voluntary dismissal reasoning that while "the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial, . . . the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit."). The Ninth Circuit, relying on the Fifth Circuit's reasoning, came to a similar conclusion. *See Tibbets*, 1993 WL 241567, at *2 ("Similarly [to *Phillips*], the district court here concluded that [the defendant] would be prejudiced by having to defend the suit in another state where the statute of limitations had not run," and therefore, it "was not an abuse of discretion," for the district court to deny plaintiff's motion for voluntary dismissal.).

This case law is readily distinguishable from the case at hand. Here, plaintiffs have brought a single claim, violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Claims for violations of the FLSA must be brought within 2 years of the violation. 29 U.S.C. § 255(a). However, a "cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *Id.* This statute of limitations does not change regardless of which court, state or federal, hears the claim. *Cf. Manshack v. Southwestern Electric Power Co.*, 915 F.2d 172, 174-75 (5th Cir. 1990) (in distinguishing itself from *Phillips*, the Court held that because both the federal court and the Texas state court are governed by the same choice of law principals defendants would not be stripped of an absolute defense; and therefore, it was not an abuse of discretion to grant the voluntary dismissal). Similarly to *Manshack*, dismissal would not strip defendants of an absolute defense: even if plaintiffs were to assert a FLSA claim in the parallel state-court action, the claim is bound by the same statute of limitations in both state and federal court.

Further, unlike in *Phillips* where the plaintiffs sought voluntary dismissal so that they could refile in a jurisdiction where the statute of limitations was not a bar to the action, that is not the case here. Rather, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims. That does not amount to plain legal prejudice. *See Smith v. Lenches*, 263 F.3d 972, 975-76 (9th Cir. 2001) (After the California Supreme Court ruled on an issue of state law, the federal district court granted plaintiff's motion to voluntarily dismiss their federal claims in favor of pursuing their parallel state claims based on the same facts. The Ninth Circuit affirmed, finding that the district court's dismissal with prejudice "only strengthens [their] conclusion that the dismissal caused no legal prejudice and was not an abuse of discretion."); *Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (reversing the lower court's denial of plaintiff's motion for voluntary dismissal, reasoning that "in cases involving the scope of state law, courts should readily approve dismissal when a plaintiff wishes to pursue a claim in state court.").

However, after deciding to grant voluntary dismissal, the court must determine whether such dismissal operates with or without prejudice. The Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held that Rule 41(a)(2) provides the district court with authority to grant dismissal *on the condition* that it be with prejudice. *See Gravatt v. Columbia University*, 845 F.2d 54, 55-56 (2d Cir. 1988); *Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986); *Elbaor*, 279 F.3d at 320; *U.S. v. One Tract of Real Property*, 95 F.3d 422, 425 (6th Cir. 1996); *Marlow v. Winston & Strawn*, 19 F.3d 300, 304 (7th Cir. 1994); *Jaramillo v. Burkhart*, 59 F.3d 78, 79 (8th Cir. 1995). Because allowing plaintiffs to refile this case, which has been pending for over 5 years, would be inequitable, the court finds that granting plaintiffs' motion on the condition that it be with prejudice is appropriate.

First, defendants have spent considerable time and money engaging in discovery and generally litigating this already 5-year-old case. *See* ECF No. 66. Additionally, this condition is not overly broad for the situation at hand: there is only one pending claim and therefore, dismissal with prejudice will only affect the claim under which defendants have also asserted a statute of limitations defense. *Contra Elbaor*, 279 F.3d at 320 (finding that dismissal with

prejudice was overly broad because the statute of limitations defense did not apply to all of the claims). Further, plaintiffs have made the choice to split their claims between federal and state court. However, that does not mean that the court should allow them to fully litigate their claims in state court, and then, should they be unsuccessful, permit them to return to federal court and take another bite at the apple. If plaintiffs truly wish to abandon their federal law claims in favor of their state law claims, the court will allow them to do so, but they will not be permitted to return to federal court and attempt to relitigate this action at a later date.

III. CONCLUSION

IT IS THEREFORE ORDERED that plaintiffs' motion to voluntarily dismiss the action (ECF No. 60) is **GRANTED** on the condition that it be **with prejudice**. Plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. *See Lau v. Glendora Unified School Dist.*, 792 F.2d 929, 931 (9th Cir. 1986) (holding that a plaintiff be given a "reasonable period of time within which to refuse the conditional voluntary dismissal by withdrawing her motion for dismissal or to accept the dismissal despite the imposition of conditions."). A failure to respond within the 30 day window shall constitute a consent to dismissal with prejudice.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment (ECF No. 61) is conditionally **DENIED** as moot.

IT IS SO ORDERED.

DATED this 13th day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 5

Corral Order re Motion for Clarification

EXHIBIT 5

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

SHENNA CORRAL, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00386-LRH-WGC ORDER

Before the court is plaintiffs' motion for clarification of the court's prior order granting plaintiffs' motion for voluntary dismissal on the condition that it be with prejudice (ECF No. 75). ECF No. 76. Plaintiffs also motion this court for an extension of time to consent to the prior order. *Id.*

As the court previously stated, and as plaintiffs represented to this court, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims currently pending in Nevada State Court. The court sees no reason to deny plaintiffs that request or to force them to litigate in federal court. However, given the considerable time and money defendants have spent engaging in discovery and generally litigating this case over the past 5 years, it would be improper to allow plaintiffs to fully litigate their claims in state court, and then if unsuccessful, return to federal court and attempt to relitigate their federal claims. It is for that reason the court ruled that plaintiffs' motion for voluntary dismissal be with prejudice—plaintiffs will be precluded from again raising the Fair Labor Standards Act claim in this court.

As the term "with prejudice" can have various meanings, the court clarifies that its prior Order is with prejudice in that it precludes plaintiffs from subsequently reasserting this cause of action in federal court. However, it is without prejudice as to plaintiffs' state law causes of action in state court, even though the court acknowledges that the alleged conduct is the same. This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001).

IT IS FURTHER ORDERED that plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. A failure to respond within the 30-day window shall constitute a consent to dismissal with prejudice.

IT IS SO ORDERED.

DATED this 27th day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 6

Corral Order re Further Clarification

EXHIBIT 6

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

SHENNA CORRAL, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00386-LRH-WGC ORDER

Defendants motion this court to clarify further that its prior order (ECF No. 77) "does not dictate to the state court the preclusive effect of this Court's order dismissing Plaintiffs' federal claims with prejudice." ECF No. 78.

In the court's prior order, it stated, "This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001)." ECF No. 77. This footnote, in its entirety, states:

> EFI also argues that the district court erred in reciting in its order that the dismissal of the federal claims was "without prejudice to plaintiffs' asserting their state law causes of action in the state court case, even though based upon the same conduct alleged in this federal action." On the basis of this language, EFI argues that this was error because the district court had no jurisdiction to rule on Smith's state law causes of action. However, we do not read the district court's order as making any decision of state law. The district court's order simply dismissed these claims without prejudice to show that the federal district court was not adjudicating anything regarding the state claims. **Whether or not the dismissal of the federal claims here has any implications for assertion of state law claims pending in state court is a question to be decided by the state court.**

Smith, 263 F.3d at 976 n.6 (emphasis added).

///

THEREFORE, it is clear that whether or not the dismissal of the federal claim here has any implications for the state law claims based upon similar alleged conduct is for the state court to decide. The intention of this court is to limit its order specifically to the plaintiffs' federal claims. The Court sees no reason to further clarify its prior order.

IT IS SO ORDERED.

DATED this 1st day of April, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 7

Benson Order re Motion to Dismiss

EXHIBIT 7

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CATHY BENSON, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00388-LRH-WGC ORDER

Before the court is plaintiffs' motion to dismiss. ECF No. 73. HG Staffing, LLC and MEI-GSR Holdings LLC d/b/a Grand Sierra Resort, (collectively "defendants") filed a response (ECF No. 76), to which plaintiffs replied (ECF No. 78). Because dismissal will not cause defendants to suffer plain legal prejudice and for the reasons set forth in this Order, the court grants plaintiffs' motion; however, does so on the condition that it be with prejudice.

Also before the court is defendants' motion for partial summary judgment. ECF No. 74. Plaintiffs filed a response (ECF No. 79), to which defendants replied (ECF No. 80). In light of the court's order on plaintiffs' motion to dismiss (ECF No. 73), the court conditionally denies defendants' motion as moot.

I. BACKGROUND

This dispute centers on defendants' alleged failure to pay plaintiffs overtime wages. *See* ECF No. 14. The dispute began in a separate and now independent matter: *Sargent et al. v. HG Staffing et al.*, 3:13-cv-00453-LRH-WGC. *Sargent* was removed to this court in August 2013,

and its proposed classes were conditionally certified in May 2014. *Sargent*, 3:13-cv-00453-LRH-WGC at ECF Nos. 1, 40. But the court later decertified the proposed classes in March 2016 for not being "similarly situated" as required by the FLSA. *Id.* at ECF No. 174. By this time, the parties had conducted extensive discovery and had filed multiple motions. *See id.* at ECF Nos. 82–83, 85, 94, 97–108, 112–21.

After the court ordered decertification in *Sargent*, this matter was filed on June 28, 2016. ECF No. 1.[1] The complaint was later amended. ECF No. 14. The amended complaint asserted one FLSA violation for the narrow-proposed class of employees who were room attendants, allegedly required to arrive 20 minutes prior to shift to complete pre-shift activities for which they were not compensated. *Id.* It does not allege any state-law claims. *See id.* The amended complaint was filed by numerous plaintiffs on behalf of themselves and all others similarly situated.[2] *Id.* The parties have agreed to use the discovery from *Sargent* in this matter. ECF No. 35. The parties have also conducted additional discovery particularly for this matter. *See* ECF No. 63 at 3; *see also Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC at ECF Nos. 72, Ex. 2; 88.

On June 14, 2016, a state-court action was also filed after the decertification order in *Sargent*. ECF No. 60, Ex. A. The state-court action does not assert any FLSA claims; it instead asserts state-law claims for lost wages under Chapter 608 of the Nevada Revised Statutes ("NRS") on behalf of four named plaintiffs. *Id.* In early 2017 and before any motions were decided in the state-court action, the state court stayed the state-court action pending an anticipated decision from the Nevada Supreme Court. *See Ramirez*, 3:16-cv-00318-LRH-WGC at ECF No. 72, Ex. 1. The stay was not lifted until December 20, 2017. *Id.* This parallel state-court action is currently pending.

[1] Four other related cases with narrower-proposed classes were filed as well. *See Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC; *Corral et al. v. HG Staffing, LLC et al.*, 3:16-cv-00386-LRH-WGC; *S. Reader et al. v. HG Staffing et al., LLC*, 3:16-cv-00387-LRH-WGC; *T. Reader et al. v. HG Staffing et al., LLC*, 3:16-cv-00392-LRH-WGC.

[2] One of the named plaintiffs has since been terminated from this action. ECF No. 20.

In January 2018, plaintiffs filed a motion to stay or in the alternative, dismiss this matter without prejudice based on the similarly natured claims in this action and the state-court action. ECF No. 60. After finding that a majority of the *Colorado River* Doctrine factors weighed against a stay, the court denied plaintiffs' motion to stay with prejudice. ECF No. 72.

Plaintiffs now move to voluntarily dismiss this matter without prejudice, this time 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). ECF No. 73. Simultaneously, defendants move for partial summary judgment, arguing that 41 plaintiffs are barred by a two-year statute of limitations. ECF No. 74. The court's Order as to these pending motions now follows.

II. DISCUSSION

The Court dismisses plaintiffs' action with prejudice pursuant to Federal Civil Procedure Rule 41.

Subject to certain exceptions, a plaintiff has the right to dismiss his or her action by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i). After the opposing party serves either an answer or a motion for summary judgment, the plaintiff loses this right. As defendants filed their answer to plaintiffs' amended complaint on March 17, 2017, (ECF No. 23), dismissal is only permitted by court order. *See* Fed. R. Civ. P. 41(a)(2).

The decision of whether to grant voluntary dismissal rests in the court's discretion. *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). "When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). "Although case law does not articulate a precise definition of 'legal prejudice,' the cases focus on rights and defenses available to a defendant in future litigation," concluding legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Id.* at 97. Courts have specifically concluded that plain legal prejudice is more than "the prospect of a second lawsuit, . . . when plaintiff merely gains some tactical advantage," or "the mere inconvenience of defending another lawsuit." *Hamilton*, 679

F.2d at 145; *see also Westlands*, 100 F.3d at 96 ("[T]he threat of future litigation which causes uncertainty is insufficient to establish plain legal prejudice."); *Veina v. Sutter Hotel Assocs. L.P.*, No. C 98-0980 SI, 1998 WL 822773, at *3 (N.D. Cal. Nov. 9, 1998) ("[E]ven if plaintiff escapes some limits on discovery by refiling this action in state court, the fact that a plaintiff gains a tactical advantage by dismissing the action is not enough to show plain legal prejudice."). Further, the Court has held that neither incurring significant expenses defending the suit nor the fact that trial preparations have begun amount to plain legal prejudice. *See Hamilton*, 679 F.2d at 145-46. Courts have held that when dismissal would strip a defendant of an absolute defense, that does amount to plain legal prejudice. *See Tibbetts by and through Tibbets v. Syntex Corp.*, 996 F.2d 1227, 1993 WL 241567, at *1-2 (9th Cir. July 2, 1993) (unpublished) (citing *Phillips v. Illinois Central Gulf Railroad*, 874 F.2d 984 (5th Cir. 1989)).

Plaintiffs have filed this motion to voluntarily dismiss the pending action without prejudice following the Nevada Supreme Court's decision in *Neville*. Because *Neville* held that employees have a private right of action for NRS Chapter 608 wage claims, *see Neville*, 406 P.3d at 504, plaintiffs seek to forego litigation of their federal wage claims in federal court for their more encompassing state law wage claims currently pending in state court. Defendants argue that if the court were to grant plaintiffs' motion, they would suffer plain legal prejudice because they would be deprived of the applicable statute of limitations defense. As articulated fully in their motion for partial summary judgment, defendants argue that because plaintiffs failed to file consent to opt-in to the collective action their claims are barred by the FLSA's two-year statute of limitation.

The court disagrees with defendants that dismissal would cause them plain legal prejudice. Defendants' cited case law is readily distinguishable from the facts at hand. Courts have held that when a plaintiff seeks dismissal in order to refile their case in a more favorable jurisdiction, one where the statute of limitations has not expired, defendants are legally prejudiced. *See Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318-19 (5th Cir. 2002) (after plaintiffs failed to provide the jurisdiction in which they wished to refile if the voluntary dismissal was granted, the Court determined that defendants would be legally prejudiced

"because such dismissal would potentially strip it of a viable statute of limitations defense."); *Phillips*, 874 F.2d at 987 (affirming the lower court's denial of voluntary dismissal reasoning that while "the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial, . . . the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit."). The Ninth Circuit, relying on the Fifth Circuit's reasoning, came to a similar conclusion. *See Tibbets*, 1993 WL 241567, at *2 ("Similarly [to *Phillips*], the district court here concluded that [the defendant] would be prejudiced by having to defend the suit in another state where the statute of limitations had not run," and therefore, it "was not an abuse of discretion," for the district court to deny plaintiff's motion for voluntary dismissal.).

This case law is readily distinguishable from the case at hand. Here, plaintiffs have brought a single claim, violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Claims for violations of the FLSA must be brought within 2 years of the violation. 29 U.S.C. § 255(a). However, a "cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *Id.* This statute of limitations does not change regardless of which court, state or federal, hears the claim. *Cf. Manshack v. Southwestern Electric Power Co.*, 915 F.2d 172, 174-75 (5th Cir. 1990) (in distinguishing itself from *Phillips*, the Court held that because both the federal court and the Texas state court are governed by the same choice of law principals defendants would not be stripped of an absolute defense; and therefore, it was not an abuse of discretion to grant the voluntary dismissal). Similarly to *Manshack*, dismissal would not strip defendants of an absolute defense: even if plaintiffs were to assert a FLSA claim in the parallel state-court action, the claim is bound by the same statute of limitations in both state and federal court.

Further, unlike in *Phillips* where the plaintiffs sought voluntary dismissal so that they could refile in a jurisdiction where the statute of limitations was not a bar to the action, that is not the case here. Rather, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims. That does not amount to plain legal prejudice. *See Smith v. Lenches*, 263 F.3d 972, 975-76 (9th Cir. 2001) (After the California Supreme Court ruled on an

issue of state law, the federal district court granted plaintiff's motion to voluntarily dismiss their federal claims in favor of pursuing their parallel state claims based on the same facts. The Ninth Circuit affirmed, finding that the district court's dismissal with prejudice "only strengthens [their] conclusion that the dismissal caused no legal prejudice and was not an abuse of discretion."); *Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (reversing the lower court's denial of plaintiff's motion for voluntary dismissal, reasoning that "in cases involving the scope of state law, courts should readily approve dismissal when a plaintiff wishes to pursue a claim in state court.").

However, after deciding to grant voluntary dismissal, the court must determine whether such dismissal operates with or without prejudice. The Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held that Rule 41(a)(2) provides the district court with authority to grant dismissal *on the condition* that it be with prejudice. *See Gravatt v. Columbia University*, 845 F.2d 54, 55-56 (2d Cir. 1988); *Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986); *Elbaor*, 279 F.3d at 320; *U.S. v. One Tract of Real Property*, 95 F.3d 422, 425 (6th Cir. 1996); *Marlow v. Winston & Strawn*, 19 F.3d 300, 304 (7th Cir. 1994); *Jaramillo v. Burkhart*, 59 F.3d 78, 79 (8th Cir. 1995). Because allowing plaintiffs to refile this case, which has been pending for over 5 years, would be inequitable, the court finds that granting plaintiffs' motion on the condition that it be with prejudice is appropriate.

First, defendants have spent considerable time and money engaging in discovery and generally litigating this already 5-year-old case. *See* ECF No. 77. Additionally, this condition is not overly broad for the situation at hand: there is only one pending claim and therefore, dismissal with prejudice will only affect the claim under which defendants have also asserted a statute of limitations defense. *Contra Elbaor*, 279 F.3d at 320 (finding that dismissal with prejudice was overly broad because the statute of limitations defense did not apply to all of the claims). Further, plaintiffs have made the choice to split their claims between federal and state court. However, that does not mean that the court should allow them to fully litigate their claims in state court, and then, should they be unsuccessful, permit them to return to federal court and take another bite at the apple. If plaintiffs truly wish to abandon their federal law claims in favor

of their state law claims, the court will allow them to do so, but they will not be permitted to return to federal court and attempt to relitigate this action at a later date.

III. CONCLUSION

IT IS THEREFORE ORDERED that plaintiffs' motion to voluntarily dismiss the action (ECF No. 73) is **GRANTED** on the condition that it be **with prejudice**. Plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. *See Lau v. Glendora Unified School Dist.*, 792 F.2d 929, 931 (9th Cir. 1986) (holding that a plaintiff be given a "reasonable period of time within which to refuse the conditional voluntary dismissal by withdrawing her motion for dismissal or to accept the dismissal despite the imposition of conditions."). A failure to respond within the 30 day window shall constitute a consent to dismissal with prejudice.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment (ECF No. 74) is conditionally **DENIED** as moot.

IT IS SO ORDERED.

DATED this 13th day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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EXHIBIT 8

Benson Order re Motion for Clarification

EXHIBIT 8

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CATHY BENSON, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00388-LRH-WGC ORDER

Before the court is plaintiffs' motion for clarification of the court's prior order granting plaintiffs' motion for voluntary dismissal on the condition that it be with prejudice (ECF No. 86). ECF No. 87. Plaintiffs also motion this court for an extension of time to consent to the prior order. *Id.*

As the court previously stated, and as plaintiffs represented to this court, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims currently pending in Nevada State Court. The court sees no reason to deny plaintiffs that request or to force them to litigate in federal court. However, given the considerable time and money defendants have spent engaging in discovery and generally litigating this case over the past 5 years, it would be improper to allow plaintiffs to fully litigate their claims in state court, and then if unsuccessful, return to federal court and attempt to relitigate their federal claims. It is for that reason the court ruled that plaintiffs' motion for voluntary dismissal be with prejudice—plaintiffs will be precluded from again raising the Fair Labor Standards Act claim in this court.

As the term "with prejudice" can have various meanings, the court clarifies that its prior Order is with prejudice in that it precludes plaintiffs from subsequently reasserting this cause of action in federal court. However, it is without prejudice as to plaintiffs' state law causes of action in state court, even though the court acknowledges that the alleged conduct is the same. This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001).

IT IS FURTHER ORDERED that plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. A failure to respond within the 30-day window shall constitute a consent to dismissal with prejudice.

IT IS SO ORDERED.

DATED this 27 day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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EXHIBIT 9

Benson Order re Further Clarification

EXHIBIT 9

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CATHY BENSON, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00388-LRH-WGC ORDER

Defendants motion this court to clarify further that its prior order (ECF No. 88) "does not dictate to the state court the preclusive effect of this Court's order dismissing Plaintiffs' federal claims with prejudice." ECF No. 89.

In the court's prior order, it stated, "This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001)." ECF No. 88. This footnote, in its entirety, states:

> EFI also argues that the district court erred in reciting in its order that the dismissal of the federal claims was "without prejudice to plaintiffs' asserting their state law causes of action in the state court case, even though based upon the same conduct alleged in this federal action." On the basis of this language, EFI argues that this was error because the district court had no jurisdiction to rule on Smith's state law causes of action. However, we do not read the district court's order as making any decision of state law. The district court's order simply dismissed these claims without prejudice to show that the federal district court was not adjudicating anything regarding the state claims. **Whether or not the dismissal of the federal claims here has any implications for assertion of state law claims pending in state court is a question to be decided by the state court.**

Smith, 263 F.3d at 976 n.6 (emphasis added).

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THEREFORE, it is clear that whether or not the dismissal of the federal claim here has any implications for the state law claims based upon similar alleged conduct is for the state court to decide. The intention of this court is to limit its order specifically to the plaintiffs' federal claims. The Court sees no reason to further clarify its prior order.

IT IS SO ORDERED.

DATED this 1st day of April, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 10

S. Reader Order re Motion to Dismiss

EXHIBIT 10

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

SARA READER, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00387-LRH-WGC ORDER

Before the court is plaintiffs' motion to dismiss. ECF No. 78. HG Staffing, LLC and MEI-GSR Holdings LLC d/b/a Grand Sierra Resort, (collectively "defendants") filed a response (ECF Nos. 83, 85), to which plaintiffs replied (ECF No. 86). Because dismissal will not cause defendants to suffer plain legal prejudice and for the reasons set forth in this Order, the court grants plaintiffs' motion; however, does so on the condition that it be with prejudice.

Also before the court is defendants' motion for partial summary judgment. ECF No. 79. Plaintiffs filed a response (ECF No. 87), to which defendants replied (ECF No. 88). In light of the court's order on plaintiffs' motion to dismiss (ECF No. 78), the court conditionally denies defendants' motion as moot.

I. BACKGROUND

This dispute centers on defendants' alleged failure to pay plaintiffs overtime wages. *See* ECF No. 14. The dispute began in a separate and now independent matter: *Sargent et al. v. HG Staffing et al.*, 3:13-cv-00453-LRH-WGC. *Sargent* was removed to this court in August 2013,

and its proposed classes were conditionally certified in May 2014. *Sargent*, 3:13-cv-00453-LRH-WGC at ECF Nos. 1, 40. But the court later decertified the proposed classes in March 2016 for not being "similarly situated" as required by the FLSA. *Id.* at ECF No. 174. By this time, the parties had conducted extensive discovery and had filed multiple motions. *See id.* at ECF Nos. 82–83, 85, 94, 97–108, 112–21.

After the court ordered decertification in *Sargent*, this matter was filed on June 28, 2016. ECF No. 1.[1] The complaint was later amended. ECF No. 14. The amended complaint asserted one FLSA violation for the narrow-proposed class of employees who were required to "change into and out of their uniforms on the GSR premises," without compensation for the activity. *Id.* It does not allege any state-law claims. *See id.* The amended complaint was filed by numerous named plaintiffs on behalf of themselves and all others similarly situated.[2] *Id.* The parties have agreed to use the discovery from *Sargent* in this matter. ECF No. 36. The parties have also conducted additional discovery particularly for this matter. ECF Nos. 21, 25–26, 30–36, 73; *see also* ECF No. 67 at 3; and *Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC at ECF Nos. 72, Ex. 2; 88.

On June 14, 2016, a state-court action was also filed after the decertification order in *Sargent*. ECF No. 64, Ex. A. The state-court action does not assert any FLSA claims; it instead asserts state-law claims for lost wages under Chapter 608 of the Nevada Revised Statutes ("NRS") on behalf of four named plaintiffs and all others similarly situated. *Id.* In early 2017 and before any motions were decided in the state-court action, the state court stayed the state-court action pending an anticipated decision from the Nevada Supreme Court. *See Ramirez,* 3:16-cv-00318-LRH-WGC at ECF No. 72, Ex. 1. The stay was not lifted until December 20, 2017. *Id.* This parallel state-court action is currently pending.

[1] Four other related cases with narrower-proposed classes were filed as well. *See Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC; *Corral et al. v. HG Staffing, LLC et al.*, 3:16-cv-00386-LRH-WGC; *Benson et al. v. HG Staffing et al., LLC*, 3:16-cv-00388-LRH-WGC; *T. Reader et al. v. HG Staffing et al., LLC*, 3:16-cv-00392-LRH-WGC.

[2] Three of the named plaintiffs have since been terminated from this action. ECF No. 20.

In January 2018, plaintiffs filed a motion to stay or in the alternative, dismiss this matter without prejudice based on the similarly natured claims in this action and the state-court action. ECF No. 64. After finding that a majority of the *Colorado River* Doctrine factors weighed against a stay, the court denied plaintiffs' motion to stay with prejudice. ECF No. 77.

Plaintiffs now move to voluntarily dismiss this matter without prejudice, this time 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). ECF No. 78. Simultaneously, defendants move for partial summary judgment, arguing that 31 plaintiffs are barred by a two-year statute of limitations, 7 of whom are also barred because they never worked more than 40 hours per week as required to receive overtime under the FLSA. ECF No. 79. The court's Order as to these pending motions now follows.

II. DISCUSSION

The Court dismisses plaintiffs' action with prejudice pursuant to Federal Civil Procedure Rule 41.

Subject to certain exceptions, a plaintiff has the right to dismiss his or her action by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i). After the opposing party serves either an answer or a motion for summary judgment, the plaintiff loses this right. As defendants filed their answer to plaintiffs' amended complaint on March 17, 2017, (ECF No. 23), dismissal is only permitted by court order. *See* Fed. R. Civ. P. 41(a)(2).

The decision of whether to grant voluntary dismissal rests in the court's discretion. *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). "When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). "Although case law does not articulate a precise definition of 'legal prejudice,' the cases focus on rights and defenses available to a defendant in future litigation," concluding legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Id.* at 97. Courts have specifically concluded that plain legal

prejudice is more than "the prospect of a second lawsuit, . . . when plaintiff merely gains some tactical advantage," or "the mere inconvenience of defending another lawsuit." *Hamilton*, 679 F.2d at 145; *see also Westlands*, 100 F.3d at 96 ("[T]he threat of future litigation which causes uncertainty is insufficient to establish plain legal prejudice."); *Veina v. Sutter Hotel Assocs. L.P.*, No. C 98-0980 SI, 1998 WL 822773, at *3 (N.D. Cal. Nov. 9, 1998) ("[E]ven if plaintiff escapes some limits on discovery by refiling this action in state court, the fact that a plaintiff gains a tactical advantage by dismissing the action is not enough to show plain legal prejudice."). Further, the Court has held that neither incurring significant expenses defending the suit nor the fact that trial preparations have begun amount to plain legal prejudice. *See Hamilton*, 679 F.2d at 145-46. Courts have held that when dismissal would strip a defendant of an absolute defense, that does amount to plain legal prejudice. *See Tibbetts by and through Tibbets v. Syntex Corp.*, 996 F.2d 1227, 1993 WL 241567, at *1-2 (9th Cir. July 2, 1993) (unpublished) (citing *Phillips v. Illinois Central Gulf Railroad*, 874 F.2d 984 (5th Cir. 1989)).

Plaintiffs have filed this motion to voluntarily dismiss the pending action without prejudice following the Nevada Supreme Court's decision in *Neville*. Because *Neville* held that employees have a private right of action for NRS Chapter 608 wage claims, *see Neville*, 406 P.3d at 504, plaintiffs seek to forego litigation of their federal wage claims in federal court for their more encompassing state law wage claims currently pending in state court. Defendants argue that if the court were to grant plaintiffs' motion, they would suffer plain legal prejudice because they would be deprived of the applicable statute of limitations defense. As articulated fully in their motion for partial summary judgment, defendants argue that because plaintiffs failed to file consent to opt-in to the collective action their claims are barred by the FLSA's two-year statute of limitation.

The court disagrees with defendants that dismissal would cause them plain legal prejudice. Defendants' cited case law is readily distinguishable from the facts at hand. Courts have held that when a plaintiff seeks dismissal in order to refile their case in a more favorable jurisdiction, one where the statute of limitations has not expired, defendants are legally prejudiced. *See Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318-19 (5th Cir. 2002) (after

plaintiffs failed to provide the jurisdiction in which they wished to refile if the voluntary dismissal was granted, the Court determined that defendants would be legally prejudiced "because such dismissal would potentially strip it of a viable statute of limitations defense."); *Phillips*, 874 F.2d at 987 (affirming the lower court's denial of voluntary dismissal reasoning that while "the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial, . . . the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit."). The Ninth Circuit, relying on the Fifth Circuit's reasoning, came to a similar conclusion. *See Tibbets*, 1993 WL 241567, at *2 ("Similarly [to *Phillips*], the district court here concluded that [the defendant] would be prejudiced by having to defend the suit in another state where the statute of limitations had not run," and therefore, it "was not an abuse of discretion," for the district court to deny plaintiff's motion for voluntary dismissal.).

This case law is readily distinguishable from the case at hand. Here, plaintiffs have brought a single claim, violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Claims for violations of the FLSA must be brought within 2 years of the violation. 29 U.S.C. § 255(a). However, a "cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *Id.* This statute of limitations does not change regardless of which court, state or federal, hears the claim. *Cf. Manshack v. Southwestern Electric Power Co.*, 915 F.2d 172, 174-75 (5th Cir. 1990) (in distinguishing itself from *Phillips*, the Court held that because both the federal court and the Texas state court are governed by the same choice of law principals defendants would not be stripped of an absolute defense; and therefore, it was not an abuse of discretion to grant the voluntary dismissal). Similarly to *Manshack*, dismissal would not strip defendants of an absolute defense: even if plaintiffs were to assert a FLSA claim in the parallel state-court action, the claim is bound by the same statute of limitations in both state and federal court.

Further, unlike in *Phillips* where the plaintiffs sought voluntary dismissal so that they could refile in a jurisdiction where the statute of limitations was not a bar to the action, that is not the case here. Rather, plaintiffs wish to abandon their federal claims in favor of the more

encompassing state law claims. That does not amount to plain legal prejudice. *See Smith v. Lenches*, 263 F.3d 972, 975-76 (9th Cir. 2001) (After the California Supreme Court ruled on an issue of state law, the federal district court granted plaintiff's motion to voluntarily dismiss their federal claims in favor of pursuing their parallel state claims based on the same facts. The Ninth Circuit affirmed, finding that the district court's dismissal with prejudice "only strengthens [their] conclusion that the dismissal caused no legal prejudice and was not an abuse of discretion."); *Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (reversing the lower court's denial of plaintiff's motion for voluntary dismissal, reasoning that "in cases involving the scope of state law, courts should readily approve dismissal when a plaintiff wishes to pursue a claim in state court.").

However, after deciding to grant voluntary dismissal, the court must determine whether such dismissal operates with or without prejudice. The Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held that Rule 41(a)(2) provides the district court with authority to grant dismissal *on the condition* that it be with prejudice. *See Gravatt v. Columbia University*, 845 F.2d 54, 55-56 (2d Cir. 1988); *Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986); *Elbaor*, 279 F.3d at 320; *U.S. v. One Tract of Real Property*, 95 F.3d 422, 425 (6th Cir. 1996); *Marlow v. Winston & Strawn*, 19 F.3d 300, 304 (7th Cir. 1994); *Jaramillo v. Burkhart*, 59 F.3d 78, 79 (8th Cir. 1995). Because allowing plaintiffs to refile this case, which has been pending for over 5 years, would be inequitable, the court finds that granting plaintiffs' motion on the condition that it be with prejudice is appropriate.

First, defendants have spent considerable time and money engaging in discovery and generally litigating this already 5-year-old case. *See* ECF Nos. 83, 84. Additionally, this condition is not overly broad for the situation at hand: there is only one pending claim and therefore, dismissal with prejudice will only affect the claim under which defendants have also asserted a statute of limitations defense. *Contra Elbaor*, 279 F.3d at 320 (finding that dismissal with prejudice was overly broad because the statute of limitations defense did not apply to all of the claims). Further, plaintiffs have made the choice to split their claims between federal and state court. However, that does not mean that the court should allow them to fully litigate their

claims in state court, and then, should they be unsuccessful, permit them to return to federal court and take another bite at the apple. If plaintiffs truly wish to abandon their federal law claims in favor of their state law claims, the court will allow them to do so, but they will not be permitted to return to federal court and attempt to relitigate this action at a later date.

III. CONCLUSION

IT IS THEREFORE ORDERED that plaintiffs' motion to voluntarily dismiss the action (ECF No. 78) is **GRANTED** on the condition that it be **with prejudice**. Plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. *See Lau v. Glendora Unified School Dist.*, 792 F.2d 929, 931 (9th Cir. 1986) (holding that a plaintiff be given a "reasonable period of time within which to refuse the conditional voluntary dismissal by withdrawing her motion for dismissal or to accept the dismissal despite the imposition of conditions."). A failure to respond within the 30 day window shall constitute a consent to dismissal with prejudice.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment (ECF No. 79) is conditionally **DENIED** as moot.

IT IS SO ORDERED.

DATED this 13th day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 11

S. Reader Order re Motion for Clarification

EXHIBIT 11

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

SARA READER, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00387-LRH-WGC ORDER

Before the court is plaintiffs' motion for clarification of the court's prior order granting plaintiffs' motion for voluntary dismissal on the condition that it be with prejudice (ECF No. 94). ECF No. 95. Plaintiffs also motion this court for an extension of time to consent to the prior order. *Id.*

As the court previously stated, and as plaintiffs represented to this court, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims currently pending in Nevada State Court. The court sees no reason to deny plaintiffs that request or to force them to litigate in federal court. However, given the considerable time and money defendants have spent engaging in discovery and generally litigating this case over the past 5 years, it would be improper to allow plaintiffs to fully litigate their claims in state court, and then if unsuccessful, return to federal court and attempt to relitigate their federal claims. It is for that reason the court ruled that plaintiffs' motion for voluntary dismissal be with prejudice—plaintiffs will be precluded from again raising the Fair Labor Standards Act claim in this court.

As the term "with prejudice" can have various meanings, the court clarifies that its prior Order is with prejudice in that it precludes plaintiffs from subsequently reasserting this cause of action in federal court. However, it is without prejudice as to plaintiffs' state law causes of action in state court, even though the court acknowledges that the alleged conduct is the same. This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001).

IT IS FURTHER ORDERED that plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. A failure to respond within the 30-day window shall constitute a consent to dismissal with prejudice.

IT IS SO ORDERED.

DATED this 27 day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 12

S. Reader Order re Further Clarification

EXHIBIT 12

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

SARA READER, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00387-LRH-WGC ORDER

Defendants motion this court to clarify further that its prior order (ECF No. 96) "does not dictate to the state court the preclusive effect of this Court's order dismissing Plaintiffs' federal claims with prejudice." ECF No. 97.

In the court's prior order, it stated, "This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001)." ECF No. 96. This footnote, in its entirety, states:

> EFI also argues that the district court erred in reciting in its order that the dismissal of the federal claims was "without prejudice to plaintiffs' asserting their state law causes of action in the state court case, even though based upon the same conduct alleged in this federal action." On the basis of this language, EFI argues that this was error because the district court had no jurisdiction to rule on Smith's state law causes of action. However, we do not read the district court's order as making any decision of state law. The district court's order simply dismissed these claims without prejudice to show that the federal district court was not adjudicating anything regarding the state claims. **Whether or not the dismissal of the federal claims here has any implications for assertion of state law claims pending in state court is a question to be decided by the state court.**

Smith, 263 F.3d at 976 n.6 (emphasis added).

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THEREFORE, it is clear that whether or not the dismissal of the federal claim here has any implications for the state law claims based upon similar alleged conduct is for the state court to decide. The intention of this court is to limit its order specifically to the plaintiffs' federal claims. The Court sees no reason to further clarify its prior order.

IT IS SO ORDERED.

DATED this 1st day of April, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 13

T. Reader Order re Motion to Dismiss

EXHIBIT 13

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

THOMAS READER, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00392-LRH-WGC ORDER

Before the court is plaintiffs' motion to dismiss. ECF No. 79. HG Staffing, LLC and MEI-GSR Holdings LLC d/b/a Grand Sierra Resort, (collectively "defendants") filed a response (ECF No. 83), to which plaintiffs replied (ECF No. 86). Because dismissal will not cause defendants to suffer plain legal prejudice and for the reasons set forth in this Order, the court grants plaintiffs' motion; however, does so on the condition that it be with prejudice.

Also before the court is defendants' motion for partial summary judgment. ECF No. 80. Plaintiffs filed a response (ECF No. 87), to which defendants replied (ECF No. 88). In light of the court's order on plaintiffs' motion to dismiss (ECF No. 79), the court conditionally denies defendants' motion as moot.

I. BACKGROUND

This dispute centers on Defendants' alleged failure to pay plaintiffs overtime wages. *See* ECF No. 12. The dispute began in a separate and now independent matter: *Sargent et al. v. HG Staffing et al.*, 3:13-cv-00453-LRH-WGC. *Sargent* was removed to this court in August 2013,

and its proposed classes were conditionally certified in May 2014. *Sargent*, 3:13-cv-00453-LRH-WGC at ECF Nos. 1, 40. But the court later decertified the proposed classes in March 2016 for not being "similarly situated" as required by the FLSA. *Id.* at ECF No. 174. By this time, the parties had conducted extensive discovery and had filed multiple motions. *See id.* at ECF Nos. 82–83, 85, 94, 97–108, 112–21.

After the court ordered decertification in *Sargent*, this matter was filed on June 29, 2016. ECF No. 1.[1] The complaint was later amended. ECF No. 12. The amended complaint asserted one FLSA violation for the narrow-proposed class of employees who were required to attend pre-shift meetings without compensation. *Id.* It does not allege any state-law claims. *See id.* The amended complaint was filed by numerous named plaintiffs on behalf of themselves and all others similarly situated.[2] *Id.* The parties have agreed to use the discovery from *Sargent* in this matter. ECF No. 37. The parties have also conducted additional discovery particularly for this matter. *See* ECF No. 69 at 3; *see also Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC at ECF Nos. 72, Ex. 2; 88.

On June 14, 2016, a state-court action was also filed after the decertification order in *Sargent*. ECF No. 66, Ex. A. The state-court action does not assert any FLSA claims; it instead asserts state-law claims for lost wages under Chapter 608 of the Nevada Revised Statutes ("NRS") on behalf of four named plaintiffs and all others similarly situated. *Id.* In early 2017 and before any motions were decided in the state-court action, the state court stayed the state-court action pending an anticipated decision from the Nevada Supreme Court. *See Ramirez*, 3:16-cv-00318-LRH-WGC at ECF No. 72, Ex. 1. The stay was not lifted until December 20, 2017. *Id.* This parallel state-court action is currently pending.

In January 2018, plaintiffs filed a motion to stay or in the alternative, dismiss this matter without prejudice based on the similarly natured claims in this action and the state-court action.

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[1] Four other related cases with narrower-proposed classes were filed as well. *See Ramirez et al. v. HG Staffing, LLC et al.*, 3:16-cv-00318-LRH-WGC; *Corral et al. v. HG Staffing, LLC et al.*, 3:16-cv-00386-LRH-WGC; *S. Reader et al. v. HG Staffing et al., LLC*, 3:16-cv-00387-LRH-WGC; *Benson et al. v. HG Staffing et al., LLC*, 3:16-cv-00388-LRH-WGC.

[2] Two of the named plaintiffs have since been terminated from this action. ECF No. 21.

ECF No. 66. After finding that a majority of the *Colorado River* Doctrine factors weighed against a stay, the court denied plaintiffs' motion to stay with prejudice. ECF No. 78.

Plaintiffs now move to voluntarily dismiss this matter without prejudice, this time 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). ECF No. 79. Simultaneously, defendants move for partial summary judgment, arguing that 76 plaintiffs are barred by a two-year statute of limitations, 22 of whom are also barred because they never worked more than 40 hours per week as required to receive overtime under the FLSA. ECF No. 80. The court's Order as to these pending motions now follows.

II. DISCUSSION

The Court dismisses plaintiffs' action with prejudice pursuant to Federal Civil Procedure Rule 41.

Subject to certain exceptions, a plaintiff has the right to dismiss his or her action by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i). After the opposing party serves either an answer or a motion for summary judgment, the plaintiff loses this right. As defendants filed their answer to plaintiffs' amended complaint on March 17, 2017, (ECF No. 24), dismissal is only permitted by court order. *See* Fed. R. Civ. P. 41(a)(2).

The decision of whether to grant voluntary dismissal rests in the court's discretion. *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). "When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). "Although case law does not articulate a precise definition of 'legal prejudice,' the cases focus on rights and defenses available to a defendant in future litigation," concluding legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Id.* at 97. Courts have specifically concluded that plain legal prejudice is more than "the prospect of a second lawsuit, . . . when plaintiff merely gains some tactical advantage," or "the mere inconvenience of defending another lawsuit." *Hamilton*, 679

F.2d at 145; *see also Westlands*, 100 F.3d at 96 ("[T]he threat of future litigation which causes uncertainty is insufficient to establish plain legal prejudice."); *Veina v. Sutter Hotel Assocs. L.P.*, No. C 98-0980 SI, 1998 WL 822773, at *3 (N.D. Cal. Nov. 9, 1998) ("[E]ven if plaintiff escapes some limits on discovery by refiling this action in state court, the fact that a plaintiff gains a tactical advantage by dismissing the action is not enough to show plain legal prejudice."). Further, the Court has held that neither incurring significant expenses defending the suit nor the fact that trial preparations have begun amount to plain legal prejudice. *See Hamilton*, 679 F.2d at 145-46. Courts have held that when dismissal would strip a defendant of an absolute defense, that does amount to plain legal prejudice. *See Tibbetts by and through Tibbets v. Syntex Corp.*, 996 F.2d 1227, 1993 WL 241567, at *1-2 (9th Cir. July 2, 1993) (unpublished) (citing *Phillips v. Illinois Central Gulf Railroad*, 874 F.2d 984 (5th Cir. 1989)).

Plaintiffs have filed this motion to voluntarily dismiss the pending action without prejudice following the Nevada Supreme Court's decision in *Neville*. Because *Neville* held that employees have a private right of action for NRS Chapter 608 wage claims, *see Neville*, 406 P.3d at 504, plaintiffs seek to forego litigation of their federal wage claims in federal court for their more encompassing state law wage claims currently pending in state court. Defendants argue that if the court were to grant plaintiffs' motion, they would suffer plain legal prejudice because they would be deprived of the applicable statute of limitations defense. As articulated fully in their motion for partial summary judgment, defendants argue that because plaintiffs failed to file consent to opt-in to the collective action their claims are barred by the FLSA's two-year statute of limitation.

The court disagrees with defendants that dismissal would cause them plain legal prejudice. Defendants' cited case law is readily distinguishable from the facts at hand. Courts have held that when a plaintiff seeks dismissal in order to refile their case in a more favorable jurisdiction, one where the statute of limitations has not expired, defendants are legally prejudiced. *See Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318-19 (5th Cir. 2002) (after plaintiffs failed to provide the jurisdiction in which they wished to refile if the voluntary dismissal was granted, the Court determined that defendants would be legally prejudiced

"because such dismissal would potentially strip it of a viable statute of limitations defense."); *Phillips*, 874 F.2d at 987 (affirming the lower court's denial of voluntary dismissal reasoning that while "the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial, . . . the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit."). The Ninth Circuit, relying on the Fifth Circuit's reasoning, came to a similar conclusion. *See Tibbets*, 1993 WL 241567, at *2 ("Similarly [to *Phillips*], the district court here concluded that [the defendant] would be prejudiced by having to defend the suit in another state where the statute of limitations had not run," and therefore, it "was not an abuse of discretion," for the district court to deny plaintiff's motion for voluntary dismissal.).

This case law is readily distinguishable from the case at hand. Here, plaintiffs have brought a single claim, violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Claims for violations of the FLSA must be brought within 2 years of the violation. 29 U.S.C. § 255(a). However, a "cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *Id.* This statute of limitations does not change regardless of which court, state or federal, hears the claim. *Cf. Manshack v. Southwestern Electric Power Co.*, 915 F.2d 172, 174-75 (5th Cir. 1990) (in distinguishing itself from *Phillips*, the Court held that because both the federal court and the Texas state court are governed by the same choice of law principals defendants would not be stripped of an absolute defense; and therefore, it was not an abuse of discretion to grant the voluntary dismissal). Similarly to *Manshack*, dismissal would not strip defendants of an absolute defense: even if plaintiffs were to assert a FLSA claim in the parallel state-court action, the claim is bound by the same statute of limitations in both state and federal court.

Further, unlike in *Phillips* where the plaintiffs sought voluntary dismissal so that they could refile in a jurisdiction where the statute of limitations was not a bar to the action, that is not the case here. Rather, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims. That does not amount to plain legal prejudice. *See Smith v. Lenches*, 263 F.3d 972, 975-76 (9th Cir. 2001) (After the California Supreme Court ruled on an

issue of state law, the federal district court granted plaintiff's motion to voluntarily dismiss their federal claims in favor of pursuing their parallel state claims based on the same facts. The Ninth Circuit affirmed, finding that the district court's dismissal with prejudice "only strengthens [their] conclusion that the dismissal caused no legal prejudice and was not an abuse of discretion."); *Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (reversing the lower court's denial of plaintiff's motion for voluntary dismissal, reasoning that "in cases involving the scope of state law, courts should readily approve dismissal when a plaintiff wishes to pursue a claim in state court.").

However, after deciding to grant voluntary dismissal, the court must determine whether such dismissal operates with or without prejudice. The Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held that Rule 41(a)(2) provides the district court with authority to grant dismissal *on the condition* that it be with prejudice. *See Gravatt v. Columbia University*, 845 F.2d 54, 55-56 (2d Cir. 1988); *Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986); *Elbaor*, 279 F.3d at 320; *U.S. v. One Tract of Real Property*, 95 F.3d 422, 425 (6th Cir. 1996); *Marlow v. Winston & Strawn*, 19 F.3d 300, 304 (7th Cir. 1994); *Jaramillo v. Burkhart*, 59 F.3d 78, 79 (8th Cir. 1995). Because allowing plaintiffs to refile this case, which has been pending for over 5 years, would be inequitable, the court finds that granting plaintiffs' motion on the condition that it be with prejudice is appropriate.

First, defendants have spent considerable time and money engaging in discovery and generally litigating this already 5-year-old case. *See* ECF No. 84. Additionally, this condition is not overly broad for the situation at hand: there is only one pending claim and therefore, dismissal with prejudice will only affect the claim under which defendants have also asserted a statute of limitations defense. *Contra Elbaor*, 279 F.3d at 320 (finding that dismissal with prejudice was overly broad because the statute of limitations defense did not apply to all of the claims). Further, plaintiffs have made the choice to split their claims between federal and state court. However, that does not mean that the court should allow them to fully litigate their claims in state court, and then, should they be unsuccessful, permit them to return to federal court and take another bite at the apple. If plaintiffs truly wish to abandon their federal law claims in favor

of their state law claims, the court will allow them to do so, but they will not be permitted to return to federal court and attempt to relitigate this action at a later date.

III. CONCLUSION

IT IS THEREFORE ORDERED that plaintiffs' motion to voluntarily dismiss the action (ECF No. 79) is **GRANTED** on the condition that it be **with prejudice**. Plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. *See Lau v. Glendora Unified School Dist.*, 792 F.2d 929, 931 (9th Cir. 1986) (holding that a plaintiff be given a "reasonable period of time within which to refuse the conditional voluntary dismissal by withdrawing her motion for dismissal or to accept the dismissal despite the imposition of conditions."). A failure to respond within the 30 day window shall constitute a consent to dismissal with prejudice.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment (ECF No. 80) is conditionally **DENIED** as moot.

IT IS SO ORDERED.

DATED this 13th day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 14

T. Reader Oder re Motion for Clarification

EXHIBIT 14

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

THOMAS READER, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00392-LRH-WGC ORDER

Before the court is plaintiffs' motion for clarification of the court's prior order granting plaintiffs' motion for voluntary dismissal on the condition that it be with prejudice (ECF No. 94). ECF No. 95. Plaintiffs also motion this court for an extension of time to consent to the prior order. *Id.*

As the court previously stated, and as plaintiffs represented to this court, plaintiffs wish to abandon their federal claims in favor of the more encompassing state law claims currently pending in Nevada State Court. The court sees no reason to deny plaintiffs that request or to force them to litigate in federal court. However, given the considerable time and money defendants have spent engaging in discovery and generally litigating this case over the past 5 years, it would be improper to allow plaintiffs to fully litigate their claims in state court, and then if unsuccessful, return to federal court and attempt to relitigate their federal claims. It is for that reason the court ruled that plaintiffs' motion for voluntary dismissal be with prejudice—plaintiffs will be precluded from again raising the Fair Labor Standards Act claim in this court.

As the term "with prejudice" can have various meanings, the court clarifies that its prior Order is with prejudice in that it precludes plaintiffs from subsequently reasserting this cause of action in federal court. However, it is without prejudice as to plaintiffs' state law causes of action in state court, even though the court acknowledges that the alleged conduct is the same. This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001).

IT IS FURTHER ORDERED that plaintiffs have 30 days from the date of this Order to withdraw their motion or consent to the dismissal despite the condition. A failure to respond within the 30-day window shall constitute a consent to dismissal with prejudice.

IT IS SO ORDERED.

DATED this 27th day of March, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

EXHIBIT 15

T. Reader Order re Further Clarification

EXHIBIT 15

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

THOMAS READER, *et al.*, Plaintiffs, v. HG STAFFING, LLC; MEI-GSR HOLDINGS LLC d/b/a GRAND SIERRA RESORT; and Does 1 through 50, inclusive, Defendants.	Case No. 3:16-cv-00392-LRH-WGC ORDER

Defendants motion this court to clarify further that its prior order (ECF No. 96) "does not dictate to the state court the preclusive effect of this Court's order dismissing Plaintiffs' federal claims with prejudice." ECF No. 97.

In the court's prior order, it stated, "This ruling is in accordance with *Smith v. Lenches*, 263 F.3d 972, 976 n.6 (9th Cir. 2001)." ECF No. 96. This footnote, in its entirety, states:

> EFI also argues that the district court erred in reciting in its order that the dismissal of the federal claims was "without prejudice to plaintiffs' asserting their state law causes of action in the state court case, even though based upon the same conduct alleged in this federal action." On the basis of this language, EFI argues that this was error because the district court had no jurisdiction to rule on Smith's state law causes of action. However, we do not read the district court's order as making any decision of state law. The district court's order simply dismissed these claims without prejudice to show that the federal district court was not adjudicating anything regarding the state claims. **Whether or not the dismissal of the federal claims here has any implications for assertion of state law claims pending in state court is a question to be decided by the state court.**

Smith, 263 F.3d at 976 n.6 (emphasis added).

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THEREFORE, it is clear that whether or not the dismissal of the federal claim here has any implications for the state law claims based upon similar alleged conduct is for the state court to decide. The intention of this court is to limit its order specifically to the plaintiffs' federal claims. The Court sees no reason to further clarify its prior order.

IT IS SO ORDERED.

DATED this 1st day of April, 2019.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE