IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

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

Respondents.

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Case No. 82161

District Court Case No. CV16-01264

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURES

The undersigned counsel of record hereby certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

HG Staffing, LLC is wholly owned subsidiary of MEI-GSR Holdings LLC d/b/a Grand Sierra Resort. MEI-GSR Holdings LLC d/b/a Grand Sierra Resort has no parent corporation and no publicly held company owns 10% or more of its stock.

H. Stan Johnson of Cohen, Johnson, Parker, Edwards and Susan Heaney Hilden and Chris Davis of Meruelo Group, LLC represented Respondents in the district court.

Montgomery Y. Paek and Diana G. Dickinson of Littler Mendelson, P.C. represent Respondents in this Court.

Dated: October 11, 2021

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I. INTRODUCTION

This is a case brought by four former employees of Respondents HG Staffing LLC and MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort (collectively "GSR" or "Respondents") seeking state law wages after Appellants' attempts to pursue a class action were rejected by the federal court and then the Ninth Circuit. *See Sargent v. HG Staffing, LLC*, 171 F. Supp. 3d 1063 (D. Nev. 2016) (decertifying class action under the Fair Labor Standards Act); Volume 5, Joint Appendix, pages 1089-112 ("**5 App. 1089-1122**"); *See Sargent v. HG Staffing, LLC*, Case No. 16-80044 (June 13, 2016 order denying petition for permission to appeal the district court's March 22, 2016 order denying class action certification); **5 App. 1114.** Despite these rejections, Appellants initiated the present action one day after the Ninth Circuit denied the request for permission to appeal the federal district court's order denying class action certification. **1 App. 1-109** (Class Action Complaint filed June 14, 2016). Indeed, Appellants' counsel has simply repacked the same bogus class action claims with new named Plaintiffs, three (3) of whom were opt-in Plaintiffs and parties in the earlier federal court action.[1] Appellants' recasting of their already rejected claims should not be allowed, and this Court should affirm.

[1] Appellant Eddy Martel and Mary Ann Capilla filed a Notice of Consent to Joinder on July 1, 2014. *Sargent v. HG Staffing, LLC*, No. 3:13-cv-00453-LRH-WGC (D. Nev. July 1, 2014) (ECF No. 53); **6 App. 1151, 1251.** Whitney Vaughn filed a Notice of Consent to Joinder on July 7, 2014. *Id.* at ECF No. 54; **6 App. 1344.**

II. JURISDICTIONAL STATEMENT

Respondents agree with Appellants' statement of jurisdiction.

III. ROUTING STATEMENT

Respondents agree with Appellants that the Supreme Court may retain this case as an appeal "raising as a principal issue a question of statewide public importance." NRAP 17(a)(12).

IV. STATEMENT OF THE ISSUES PRESENTED

1. **NRS 608.018(3)(e) Overtime Exemption**: Whether the district court correctly held that the Culinary Collective Bargaining Agreement entered into between Respondents and the Culinary Union exempted Appellant Jackson-Williams from seeking overtime pursuant to the NRS 608.018(3)(e) CBA exemption where the Union acknowledged the CBA was in effect during the relevant time period and the CBA provided otherwise for overtime.

2. **Jackson-Williams' Non-Overtime Claims**: Whether the district court properly dismissed Appellant Jackson-Williams' non-overtime claims where the Culinary Collective Bargaining Agreement falls within the exception in the Minimum Wage Amendment, NRS 608.016 is not properly applied, and the derivative claims for continuation wages fail.[2]

3. **Standing to Represent Union Employees**: Whether the district court properly held that Appellants cannot represent a putative class of union employees where both Jackson-Williams and Martel's claims fail and the Culinary Collective Bargaining Agreement provides the exclusive remedy for alleged overtime and minimum wage violations.

4. **Statute of Limitations**: Whether the district court correctly interpreted *Perry v. Terrible Herbst, Inc.* in holding that a two-year statute of limitations applies to analogous wage claims under NRS 608.016, 608.018, and 608.020 through 608.050.

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[2] Respondents will address "Issue 3" in Appellants' Opening Brief before addressing Appellants' "Issue 2." The other issues are addressed in the same order as the Opening Brief.

5. **Accrual of Final Paycheck Penalties**: Whether the district court erred in holding that a derivative claim for penalties under NRS 608.040 begins to run on an employee's last day of employment, and thus cannot be maintained when the statute of limitation on the underlying wage claim has expired.

6. **Final Paycheck Penalties Apply to Final Pay Period**: Whether the district court correctly interpreted NRS 608.040 in holding that Martel could only seek continuation wages for alleged wage violations that occur during the last pay period before an employee separates from an employer where the statute references wages due for the pay period before the employee is discharged or quits.

7. **No Violation of Unpaid Wages in Martel's Final Pay Period**: Whether the district court erred in holding there was no violation for unpaid wages in Martel's last pay period where Respondents submitted undisputed evidence and Martel only relies on allegations from the First Amended Complaint.

V. STATEMENT OF THE CASE

Appellants Eddy Martel and Janice Jackson-Williams are two of four named Plaintiffs who were employed by GSR. **1 App. 3.** Appellants filed their Class Action Complaint on June 14, 2016 – only one day after their attempts at a federal class action were blocked by the Ninth Circuit. **1 App. 1-109** (Complaint); **5 App. 1114** (June 13, 2016 order denying petition for permission to appeal the district court's March 22, 2016 order denying class action certification).

Appellants filed a First Amended Complaint on January 1, 2019, asserting claims for (1) failure to compensate for all hours worked in violation of NRS 608.140 and NRS 608.016; (2) failure to pay minimum wage in violation of the Nevada Constitution; (3) failure to pay overtime in violation of NRS 608.140 and NRS 608.018; and (4) failure to timely pay all wages due and owing in violation of NRS

608.140 and NRS 608.020-050.[3] **5 App. 90-1060.** According to the First Amended Complaint, Martel's last day working at GSR was June 12, 2014 (**5 App. 922**) and Jackson-Williams' last day was December 31, 2015 (**5 App. 915**).[4] Respondents filed a Motion to Dismiss First Amended Complaint on February 15, 2019. **5 App. 1061 – 7 App. 1475.** After full briefing, the district court held that a two-year statute of limitations applies to all of Appellants' causes of action. **10 App. 2019.** The district court therefore dismissed "all of Ms. Capilla and Ms. Vaughan's claims, all but one (1) month of Mr. Martel's claims, and all but eighteen (18) months of Ms. Jackson-Williams' claims." **10 App. 2026.**

On June 9, 2020, Respondents filed a motion for summary judgment. **12 App. 2377 – 13 App. 2830.** Appellants opposed the motion, and Respondents replied. **14 App. 2680-2830**; **15 App. 2831-2944.** The district court granted summary judgment in favor of GSR. **15 App. 2966.** On May 5, 2021, Appellants sought clarification of the district court's order granting summary judgment. **16 App. 3038-3124.** The district court granted the motion for clarification. **16 App. 3125-3131.**

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[3] Appellants pled NRS 608.140 with each of their four causes of action in order to assert attorneys' fees. However, NRS 608.140 is not is not an independent cause of action in and of itself. *See Neville v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 133 Nev. 777, 778, 406 P.3d 499, 500 (2017) ("NRS 608.140 allows for assessment of attorney fees in a private cause of action for recovery of unpaid wages.").

[4] According to the First Amended Complaint, the other two named Plaintiffs Mary Anne Capilla and Whitney Vaughn's last days working at GSR were September 9, 2013 and June 13, 2013 respectively. **5 App. 913, 917.**

VI. SUMMARY OF ARGUMENT

GSR is a party to three collective bargaining agreements, including one with the Culinary Workers Union Local 226 (the "Culinary CBA").[5] Appellant Jackson-Williams worked for GSR pursuant to the Culinary CBA, which provides otherwise for overtime and thus NRS 608.018(3)(e)'s collective bargaining agreement ("CBA") overtime exemption applies.

Jackson-Williams additionally cannot seek a minimum wage claim because of the Nevada Constitution's CBA exception to the Nevada Minimum Wage Amendment, and her claims under NRS 608.018 therefore necessarily fail because it the statute does not apply and, even if it were, it would cover overtime that is already exempt by the NRS 608.018(3)(e)'s CBA exemption. Because Jackson-Williams' underlying wage claims fail, so does the derivative claims for money under the Final Paycheck Statutes.

Additionally, Appellants cannot represent putative class of union employees because Appellants' underlying claims fail and the CBA exemption to Minimum Wage Amendment applies.

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[5] GSR is also a party to the International Union of Operating Engineers Stationary Local No. 39 AFL-CIO (the "Operating Engineers CBA" (**12 App. 2519-42**) and another with the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC LOCAL Union No. 362 ("the ISTSA CBA") (**12 App. 2544-13 App. 2589**).

Regarding Appellant Martel, the district court correctly held that under *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 768, 383 P.3d 257, 258 (2016), his claims for Nevada statutory wages have a two-year statute of limitations. Additionally, even if *Perry* were not to apply, NRS 11.190(4)(b)'s two-year statute of limitations applies to claims "upon a statute for a penalty or forfeiture, where the action is given to a person or the State, or both." (emphasis added).

The district court also properly found that employees can only seek continuation wages for alleged wage violations that occur during the last pay period before an employee's separation of employment based on the text of NRS 608.040, which is further supported by case law holding that derivative claims are barred when the statute of limitation on the underlying claim has expired.

Finally, the district court did not err in finding that Martel did not assert a claim for unpaid wages during his last pay period where Respondents submitted undisputed evidence that there was no shift-jamming and off-the-clock banking in Martel's final pay period. Appellants have failed to present any evidence whatsoever that there exists a material issue of fact sufficient to overturn the district court's decision. Accordingly, the district court should be affirmed.

VII. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews *de novo* a dismissal under NRCP 12(b)(5), *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018), and an order granting summary judgment, *Stalk v. Mushkin*, 125 Nev. 21, 24, 199 P.3d 838, 840 (2009).

B. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON JACKSON-WILLIAMS' OVERTIME CLAIM BECAUSE THE CULINARY CBA FALLS WITHIN NRS 608.018(3)(E)'S EXEMPTION BY PROVIDING OTHERWISE FOR OVERTIME

Jackson-Williams' claim for failure to pay overtime in accordance with the overtime provisions in NRS 608.018 fails as a matter of law. As Appellants acknowledge in their Opening Brief, NRS 608.018(3)(e)'s CBA overtime exemption applies where (1) the employees are covered by a valid and operative CBA and (2) the CBA "provides otherwise for overtime." Opening Brief at 33. The district court correctly held that the Culinary CBA was valid and operable, and that it provided for a different overtime scheme than what is prescribed in NRS 608.018. **15 App. 2959-2963.**

1. Both the Culinary Union and GSR Agree the CBA Is Valid and Operable

Appellants incorrectly argue that the Culinary CBA is unenforceable based on an unsupported contention that an unsigned CBA is not valid. Opening Brief at 36-38. Appellants cite no authority to support this contention and simply ignore the

overwhelming authority to the contrary. *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), on reh'g, 641 F.2d 351 (5th Cir. 1981) ("It is well settled 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 Loc. No. 206 v. Cont'l Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987) ("Union acceptance of an employer's final offer is all that is necessary to create a contract, 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 that "acceptance of a final offer of a complete bargaining agreement manifests mutual assent, creating a binding bargaining agreement").[6]

Here, Respondents and the Culinary Union recognize that the unsigned Culinary CBA is a valid and enforceable agreement, and Appellants presented no evidence to the contrary.[7] Larry Montrose, Human Resources Director for GSR,

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[6] This Court can look to persuasive authority from other jurisdictions. *See Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 216 P.3d 793 (2009) (considering persuasive authority from the Delaware Supreme Court, California Court of Appeals, and West Virginia Supreme Court).

[7] Appellants are not challenging the district court's denial of their request for additional discovery to ascertain whether the CBA is valid and therefore this issue has been waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3,

affirmed that the Culinary CBA covered Jackson-Williams, as well as the other Appellants, throughout their entire terms of employment and that the CBA had been in effect from 2010 to the present. **13 App. 2591** (declaration), **13 App. 2594-2667** (CBA). Additionally, Culinary Union representatives testified under oath in August 2016 that the Culinary Union CBA was ratified by the Union on November 17, 2011 and was in effect from that time forward. **15 App. 2860-61.** Indeed, the Union repeatedly affirmed in grievances and arbitration that the Culinary CBA was binding. **15 App. 2669-71** (grievances filed by Union from dated May 28, 2015, June 3, 2015, and June 23, 2015); **12 App. 2490-91** (transcript of August 25, 2016 arbitration with Union showing CBA entered into evidence); **12 App. 2492-95** (August 25, 2016 arbitration testimony of Nicole de la Puente who testified that she has been the Culinary Union representative for 14 years, was present for the negotiations, and that the CBA was ratified on November 17, 2011); **12 App. 2496** (August 25, 2016 arbitration testimony of Director of Legal Affairs for the Union J.T. Thomas who testified he was the Union's chief negotiator for the Culinary CBA and referred to as the "current contract"). Moreover, in an October 24, 2016 Post-Hearing Arbitration Brief the Culinary CBA Union stated:

> ***Local 226 has been party to three successive collective-bargaining agreements at the hotel and casino that is now known as the Grand Sierra Resort.*** The first was in effect from 2001 until 2006, when the

252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in an appellant's opening brief are waived).

> hotel was known as the Reno Hilton. . . . The second CBA reflected a change in ownership and in the name of the property and ran from 2009 to 2010. . . . ***The third and current CBA was ratified on November 17, 2011.***

12 App. 2500-01 (emphasis added).

Both GSR and the Culinary Union clearly intended to be bound by the CBAs as evidenced by their conduct manifesting such agreement. Both GSR and the Culinary Union have also specifically affirmed that the CBA was in effect for the entire time of Jackson-Williams' employment. Appellants' unsupported argument to the contrary has no merit.

2. The CBA Provides Otherwise For Overtime Through An Alternative Overtime Scheme

The Nevada Supreme Court has repeatedly stated, "[i]n construing a statute, our primary goal is to ascertain the legislature's intent in enacting it, and we presume that the statute's language reflects the legislature's intent." *Savage v. Third Jud. Dist. Ct.*, 125 Nev. 9, 16, 200 P.3d 77, 82 (2009) (citing *Moore v. State*, 117 Nev. 659, 661, 27 P.3d 447, 449 (2001)). The Supreme Court has further explained, "[w]e interpret statutes in accordance with their plain meaning and generally do not look beyond the plain language of the statute absent ambiguity." *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008) (citing *Seput v. Lacayo*, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006)).

Rather, a court should "only look beyond the plain language if it is ambiguous or silent on the issue in question." *AllState Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (citing *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513-514 (2000)). However, when the words of a statute have a definite and ordinary meaning, the Court should not look beyond "the plain language of the statute, unless it is clear that this meaning was not intended." *Harris Associates v. Clark Co. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003) (citing *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)). Here, there is no ambiguity or silence in the statute. Therefore, the plain language controls and in this case, reflects that Appellant Jackson-Williams is not entitled to statutory overtime under NRS 608.018.

NRS 608.018(3)(e)'s CBA overtime exemption states that Nevada's overtime requirements "do not apply to . . . [e]mployees covered by collective bargaining agreements *which provide otherwise for overtime*." (emphasis added). Appellants argue, without any support, that the term "otherwise" means something above and beyond the statutory floor. Opening Brief at 41. However, Black's Law Dictionary defines "otherwise" as meaning "in a different way; in another manner." Black's Law Dictionary (11th ed. 2019). Webster's dictionary defines "otherwise" in the same terms. *See* https://www.merriam-webster.com/dictionary/otherwise (last visited Oct. 11, 2021) (defining "otherwise" as meaning "in a different way or

manner"). The plain meaning of the word "otherwise" only requires that the CBA provide overtime in a different manner without imposing any conditions that the overtime provided be above what is provided in the statute. Therefore, in enacting this express statutory exemption, the Nevada Legislature specifically intended for the employer and union to be able to bargain for an alternative overtime scheme. In other words, the CBA need not provide the premium rates specified in NRS 608.018(1)-(2) overtime provisions – because those sections are *rendered inapplicable* by NRS 608.018(3)(e)'s CBA overtime exemption.

Here, the Culinary Union CBA clearly "provides otherwise for overtime." Article 9.01 "Shift Weekly Overtime" states:

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

> **provisions of existing federal and state law**, and Union employees shall not have the right to overtime pay above and beyond the applicable federal and state law requirements.

13 App. 2609 (emphasis added).

The Culinary Union CBA clearly provides for a different overtime scheme than what is prescribed in NRS 608.018.[8] First, the CBA provides for daily overtime regardless of whether the employee makes more than 1 ½ times the minimum wage. NRS 608.018(1)(b), on the other hand, only mandates daily overtime "whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate set forth in NRS 608.250[9] works . . . [m]ore than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work." (emphasis added). In other words, employees earning more than $8.25/hour at GSR, such as "Bakers"

[8] NRS 608.018(2) provides that "[a]n employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate at not less than 1 1/2 times the minimum rate set forth in NRS 608.250 works more than 40 hours in any scheduled week of work."
NRS 608.018(1) provides that "[a]n employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate set forth in NRS 608.250:

(a) More than 40 hours in any scheduled week of work; or

(b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work." (emphasis added).

[9] NRS 608.250 sets forth the requirements for minimum wage.

earning $11.25 to $15.95hour (**13 App. 2632**) can earn daily overtime pursuant to the CBA which is not required under NRS 608.018(1)(b).

Second, the CBA's overtime provision provides that employees are entitled to daily overtime *only if* they are "scheduled to work five (5) days in one workweek." **13 App. 2609** (emphasis added). NRS 608.018 provides for daily overtime regardless of how many days the employee is scheduled to work in a week.

Third, the CBA outlines rules for when an employee is absent for personal reasons on one (1) or more of their first five (5) scheduled days of work in their workweek and work an alternate day. Specifically, the CBA provides that in this instance the employee "shall work at the Employer's request on a scheduled day off in the same workweek at straight time." **13 App. 2609** (emphasis added). NRS 608.018 has no similar limitation.

Fourth, the CBA provides for daily overtime when the employee works "any hours in excess of eight (8) hours in a day." **13 App. 2609** (emphasis added). By contrast, NRS 608.018 measures daily overtime in the specifically uses the term "workday." NRS 608.0126 defines "workday" as "a period of 24 consecutive hours which begins when the employee begins work." The Culinary CBA does not define the term "day." In such cases, words in the CBA are given their ordinary meaning. *See Garcia v. Dep't of Homeland Sec.*, 780 F.3d 1145, 1147 (Fed. Cir. 2015) (holding that when interpreting a collective-bargaining agreement, the "words in the agreement" are

given "their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning"). The ordinary meaning of the word "day" is a twenty-four hour period beginning at midnight. *See In re Walkup*, 122 S.W.3d 215, 217 (Tex. App. 2003) (holding the "ordinary meaning of 'day' is a calendar day, which means the 24–hour period of time beginning immediately after midnight of the previous day and ending at the next midnight"); (emphasis added) *Husebye v. Jaeger*, 534 N.W.2d 811, 814 (N.D. 1995) ("a day extends over the 24 hours from one midnight to the next midnight"); *State v. Sheets*, 338 N.W.2d 886, 886 (Iowa 1983) (the "general rule is that when the word 'day' is used it means calendar day which includes the entire day from midnight to midnight); *Moag v. State*, 31 N.E.2d 629, 632 (Ind. 1941) ("when the word 'day' is used in a statute or in a contract, it means the twenty-four hours," "running from midnight to midnight"). Accordingly, when an employee covered by the Culinary CBA works on Monday from 9AM to 5PM, then on Tuesday from 8AM to 4PM, the employee is not due daily overtime under the CBA, while the employee may have been due daily overtime under NRS 608.018 through the 24 hour workday period beginning at 9AM under NRS 608.0126 and a subsequent 8AM start time incurring 1 hour of overtime by dipping into the previous day's 9AM end time, if the employee had not been covered by the CBA and its "calendar day" that resets every midnight regardless of start time.

Moreover, the Culinary CBA expressly recognizes that it provides otherwise for overtime in noting that "at the expiration of the Agreement, the Employer shall have the right to compute and pay overtime in accordance with the provisions of existing federal and state law." **13 App. 2609** (emphasis added). There would be no need to revert to overtime under existing federal and state law unless the overtime provisions in the Culinary CBA were different from those in NRS 608.018. Accordingly, the Culinary CBA does provide otherwise for overtime, and therefore Williams-Jackson cannot maintain a claim for overtime under NRS 608.018. *See Wuest v. California Healthcare W.*, 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 payments—that is, when the CBA contains a negotiated provision on the same subject but different from the statutory provision"); *Jacobs v. Mandalay Corp.*, 378 F. App'x 685, 687 (9th Cir. 2010) (ruling that "section 608.018 exempts from coverage those employees 'covered by collective bargaining agreements which provide otherwise for overtime'").

C. JACKSON-WILLIAMS' NON-OVERTIME CLAIMS WERE PROPERLY DISMISSED AS THE CBA EXCEPTION IN THE MINIMUM WAGE AMENDMENT APPLIES AND NRS 608.016 EITHER DOES NOT APPLY OR MERELY COVERS OVERTIME

The district court's dismissal of Jackson-Williams' non-overtime claims was not in error. While the district court found that 8 months of Jackson-Williams' claims were not time-barred, the district court ultimately held that she did not have standing to bring her claims. **16 App. 3130.** As discussed more fully below, the claims under the Nevada Minimum Wage Amendment were waived under the Culinary CBA and claims under NRS 608.016 are not meant to cover these types of off the clock claims that are not during a trial or break-in period. As a result, Jackson-Williams' derivative waiting time penalties claims also fail.

1. CBA Exception for MWA Applies Because the Culinary CBA Agreed to a Lower Wage than the Minimum Wage

Appellants incorrectly assert that there "is no union contract exception to the [Nevada Minimum Wage Amendment]." Opening Brief at 44. The Nevada Minimum Wage Amendment ("MWA") to the Constitution of the State of Nevada, Article 15, Section 16, clearly provides that it "may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms." Nev. Const. art. 15, § 16(B). The Nevada Supreme Court recognized this exception in the MWA in *W. Cab Co. v. Eighth Jud. Dist. Ct. of State in & for Cty. of Clark*, 133 Nev. 65, 66, 390 P.3d 662, 666 (2017) where it held that "[t]he MWA allows for an exception to both of these requirements, however, if the employer and employees agree to a lower wage in clear and unambiguous terms through collective bargaining." *See also Perry v.*

Terrible Herbst, Inc., 132 Nev. 767, 769, 383 P.3d 257, 259 (2016) ("[T]he right to a minimum wage cannot be waived contractually except in a bona fide collective bargaining agreement.").

Here, the Culinary CBA addresses minimum wage and therefore falls within the exception in the MWA. Exhibit 1 to the Culinary CBA sets forth wage scales for employees covered by the CBA, with some below the effective minimum wage of $7.25 per hour – the lower tier minimum wage in Nevada from 2014 to 2015, which Jackson-Williams was employed at GSR. Specifically, "Banquet Bartender" started at $6.64/hour (**13 App. 2632**), "Bell Person" started at $5.90/hour (**13 App. 2633**), "Cocktail Server" started at $5.90 (**13 App. 2634**), and Food Server started at $5.90/hour (**13 App. 2636**). Exhibit 1 to the Culinary CBA specifically states: "Where these standard rates fall below the applicable minimum wage, the rates have been adjusted accordingly to satisfy Nevada's minimum wage requirements." **13 App. 2632-39.** Through the CBA, the employer and employees agreed to "standard rates" that were clearly below the applicable minimum wage. Although those rates were subject to an adjustment to gross-up to the minimum wage, this is a different scheme than what is required by the MWA. The MWA does not allow a noncompliant base rate that is modified by adjustment and instead sets a floor for base minimum wage that cannot even be "offset" by other compensation such as "tips or gratuities". Nev. Const. art. 15, § 16(A). Had these same noncompliant

"standard rates" been a part of a non-collectively bargained employment contract between an individual employer and employee, those terms would clearly run afoul of the MWA's prohibition against such agreement outside of CBAs. *Id.* As such, the Culinary CBA demonstrates an underlying intent to deviate for the Nevada minimum wage rate and falls within the exception in the MWA. Jackson-Williams cannot maintain this claim.

2. Any Off the Clock Time Would Be Overtime and Thus Fail Because the Culinary CBA Provides Otherwise for Overtime

Jackson-Williams' second non-overtime claim is for each hour of work under NRS 608.016. Appellants make clear that this claim based on the theory that "Respondents maintained policies, practices, and procedures which required employees to perform work activities without compensation—*i.e.*, off-the-clock work." Opening Brief at 11. Jackson-Williams' allegations of not being paid for each hour of work under NRS 608.016 is essentially a claim for overtime. In the First Amended Complaint, Appellants allege "Jackson-Williams was scheduled for, and regularly worked, five (5) shifts per week, at least eight (8) hours per shift, and forty (40) hours per workweek." **5 App. 909.** Therefore, any alleged off-the-clock work would clearly be weekly overtime as it would be additional work on top of the 40 hours per week that Jackson-Williams was already working. As addressed more fully in Section V(B) above, the Culinary CBA falls into the NRS 608.018(3)(e)'s overtime exemption. Therefore, to the extent this Court finds that claims for NRS

608.016 can be asserted beyond trial or break-in periods, it nonetheless fails because such off the clock work would count as overtime and be exempt pursuant to NRS 608.018(3)(e).

3. By Its Terms, NRS 608.016 Only Applies to Trials or Break-In Periods and Thus Does Not Apply to Jackson-Williams

NRS 608.016 applies only to trials or break-in periods and should not be read in a vacuum:

> **NRS 608.016 Payment for each hour of work; trial or break-in period not excepted.**
> Except as otherwise provided in NRS 608.0195 and 608.215, an employer shall pay to the employee wages for each hour the employee works. An employer shall not require an employee to work without wages during a trial or break-in period.

The text of the statute makes clear that it is intended to prevent employers from forcing employees to work without getting paid during a trial or break-in period. Jackson-Williams was not in a trial or break-in period during her last 8 months of employment at GSR. As such, by its terms NRS 608.016 does not apply to Jackson-Williams.

There is no indication in the language of NRS 608.016 that it was ever meant to be some type of gap-filler for pay in addition to the minimum wage and overtime. NRS 608.016 was passed in 1985 as a curb against unpaid trials or break-in periods which by their very nature would not involve any agreed-upon wages to begin with. To the extent that Jackson-Williams has some argument that NRS 608.016 was

meant to cover agreed-upon wages or straight time, it is absurd that the vehicle for such a claim would be NRS 608.016 and that it did not exist for any employees until 1985. This, of course, is nonsensical because an employee, at common law, always had a cause of action – breach of contract or quasi-contract – for unpaid agreed-upon wages outside of minimum wage or overtime. Thus, the application of NRS 608.016 as a 1985 gap-filler cause of action for something other than trial or break-in periods is not supported by the language of the statute or in application.

The legislative history of NRS 608.016 further supports that the statute was meant to only apply to trials or break-in periods. Assembly Committee minutes demonstrate that "Section 9" of AB 127 was proposed in 1985 as a new statute that would become NRS 608.016. *See* Legislative History of Assembly Bill 127 of the 63rd Session of the Nevada Legislature 1985 ("AB 127 Record") at 2, available at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1985/AB127,1985.pdf. The language of proposed AB 127, Section 9 reads:

> **Sec. 9.** An employer shall pay to the employee wages for each hour the employee works, An employer shall not require an employee to work without wages during a trial or break-in period.

Id.

In the minutes from the Nevada Assembly Committee on Labor and Management's hearing on the bill, Nevada Labor Commissioner Frank MacDonald spoke in favor of AB 127 and presented the Committee with two Attorney General

Opinions: (1) Attorney General Opinion No. 566, attached to the minutes as Exhibit A; and (2) an Attorney General's Opinion dated June 8, 1976, attached to the minutes as Exhibit B. *Id.* The Committee explained that Commissioner MacDonald stated that "Sections 6, 7, 8 and 9 of the bill called for additional definitions under NRS 608.010, definitions for work day, work week and wages. He stated that these additional explanations will clarify questions which continually arise during the course of investigations into alleged violations of wage and hour provisions of Chapter 608." *Id*. (emphasis added). Thus, in passing NRS 608.016 [AB 127, Section 9], the Nevada Legislature was directly addressing the Nevada Labor Commissioner's request for "additional definitions" to "clarify questions" regarding "alleged violations of. . . wage and hour provisions of Chapter 608."

In the cited and incorporated Attorney General Opinion No. 566 dated March 3, 1969, the Nevada Attorney General restated the previous Nevada Labor Commissioner's inquiry as to break-in periods without pay: "You have advised this office that certain employers in Nevada are requiring new employees to break in on the job by working for a certain indefinite period without pay. Your question is whether such procedure contravenes the provisions of NRS 608.250 and 609.030." (emphasis added).

After analyzing the language of the then-existing minimum wage statute in NRS 608.250 and the previous female workers' hours statute in NRS 608.030, the Nevada Attorney General opined:

> These sections cover minimum wages to both sexes. An employer is obligated to pay not less than the minimum statutory wages for all hours that he knowingly suffers or permits an employee to work. The agreement of the employee, as a condition of securing the job, that he will work without compensation for a break in period is not voluntary, but coercive, and thus runs afoul of Nevada statutes.
>
> The insecurity of such an arrangement is emphasized by the fact that an employer does not guarantee the employee a gainful employment after the break in period. The employer may, and often does, release the employee at the end of the break in period, thus opening the door to securing another employee on the same terms. It may readily be seen that such procedure could lead to free service by employees ad infinitum.

(emphasis added)

The legislative history clearly shows that NRS 608.016 [AB 127, Section 9] was the Nevada Legislature's codification of the Nevada Attorney General's Opinion that employers should not be able to require "new employees to break in on the job by working for a certain indefinite period without pay." Thus, consistent with the opinion of the Nevada Attorney General, the Nevada Legislature enacted NRS 608.016 to prevent employers from using unpaid break-in periods and releases of unpaid employees to get "free service. . . ad infinitum."

The legislative history indicates that NRS 608.016 was never meant to be a catchall gap filler for straight time. In fact, the only wage mentioned by the Nevada Attorney General is the statutory minimum wage, which evinces that a claim for unpaid break-in period is really a claim for uncompensated minimum wage during that trial or break-in. There is nothing in the legislative history supporting that NRS 608.016 was ever meant to address anything other than unpaid break-in periods, let alone off-the-clock straight time gap claims for violations other than minimum wage and overtime that are duplicative of a breach of contract common law claim. Any such interpretation would require complete rejection of the legislative history and extensive modification to rework the statute with existing minimum wage, overtime, and breach of contract laws.

Accordingly, while the district court found Jackson-Williams did not have standing because she did not prove the union breached its duty of fair representation, Jackson-Williams' claims are nonetheless barred because alleged violations of the MWA and NRS 608.016 are addressed by the CBA exceptions and thus covered by the grievance process. Additionally, NRS 608.016 does not apply to unpaid work outside a trial or break-in period.

4. Claim for Final Paycheck Penalties Is Derivative and Therefore Fails Because Jackson-Williams Has No Surviving Wage Claim

Appellants concede that claims pursuant to NRS 608.020 through 608.050 are derivative penalties for alleged unpaid wages once an employee quits, resigns, or is

discharged, and are not actionable in themselves.[10] Opening Brief at 32 ("derivative claim for continuation wages under NRS 608.020-.050"); Opening Brief at 45 (referring to the Fourth Cause of Action as "the derivative failure to pay all wages due and owing in violation of NRS 608.020-050"); Opening Brief at 55 ("[I]f Appellants are successful on any of their underlying wage claims, Appellant Martel will have a derivative NRS 608.020-.050 continuation wage claim."). In *Turner v. Mandalay Sports Ent., LLC*, this Court explained that when a derivative claim is dependent on the success of an underlying claim and the underlying claim has not been established, the derivative claim "must fail as well." 124 Nev. 213, 222, 180 P.3d 1172, 1178 n.31 (2008) (quoting *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185 n. 1, 370 P.2d 682, 684 n. 1 (1962)).

Therefore, because Jackson-Williams' underlying claims for minimum wage and all hours worked fail, so does the derivative claim under NRS 608.020 through 608.050.

[10] NRS 608.020 governs wages due upon termination and provides that "[w]henever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately." NRS 608.030 applies to payment upon resignation, and prescribes a timeframe under which an employer must provide wages and compensation earned and unpaid. NRS 608.040 and NRS 608.050 provide distinct penalties for an employer's failure to pay wages due once an employee quits, resigns, or is discharged.

D. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS LACK STANDING TO REPRESENT UNION EMPLOYEES WHERE BOTH JACKSON-WILLIAMS AND MARTEL'S WAGE CLAIMS FAIL AND THE CBA EXCEPTION TO THE MINIMUM WAGE AMENDMENT APPLIES AND THE EXCLUSIVE REMEDY IS UNDER THE CBA

The district court correctly held that Jackson-Williams and Martel cannot represent other union members. First, Jackson-Williams and Martel cannot represent a putative class of union employees after their claims have been properly disposed of by the district court.[11] Alternatively, if this Court were to find that Appellants have a viable non-overtime and minimum wage claim, they would still lack standing as the current union employees' exclusive remedy would be through the collective bargaining process. Because Appellants cannot allege that the union has breached its duty of fair representation as to the putative class of employees, Appellants lacks standing to represent them. *See* 29 U.S.C. 159(a).

Courts have repeatedly held that in certain circumstances, an employee's right to pursue statutory claims in a judicial forum can be waived by CBA if the waiver is "clear and unmistakable." For example, in *Montgomery v. Compass Airlines, LLC*, 98 F. Supp. 3d 1012 (D. Minn. 2015), the plaintiff employee brought, among other claims, a claim for violation of the Family and Medical Leave Act ("FMLA") against her former employer. *Id.* at 1014. Similar to this case, the employer sought to

[11] Sections V(E)-(H) below address Martel's claims.

dismiss the statutory FMLA claim arguing that the employee's claim was subject to mandatory arbitration under the relevant CBA, as the "CBA included a broad arbitration provision for claims arising under the CBA," *see id.* at 1020, and the CBA contained a separate provision incorporating a statute stating that the employer "will comply with the provisions of the Family and Medical Leave Act (FMLA)." *Id.* at 1016. The District of Minnesota granted the employer's motion to dismiss. As part of its reasoning, the court rejected the plaintiff's argument that the CBA did not contain a clear and unmistakable waiver of judicial forum because the "reference to the FMLA is not contained within the same provision as the agreement to arbitrate." *Id.* at 1019. Rather, the court, in quoting the Fourth Circuit, stated that "[f]or a waiver of an employee's right to a judicial forum for statutory . . . claims to be clear and unmistakable, the CBA must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims. **It need not do both**." *Id.* at 1018-20 (quoting *Carson v. Giant Food, Inc.*, 175 F.3d 325, 359-60 (4th Cir.1999)) (emphasis added). In so following, the *Montgomery* court held that the CBA clearly and unmistakably mandated arbitration of plaintiff's FMLA claims because the company's CBA included a broad arbitration provision for claims arising under the CBA, and the CBA incorporated the FMLA into one of its other sections. *Id.*; *see also Carson*, 175 F.3d at 332 (acknowledging that if another provision of a CBA makes it

unmistakably clear that the statutes at issue are part of the agreement, employees will be bound to arbitrate their federal claims even if the arbitration clause is broad and non-specific). While not binding authority on this Court, *Montgomery* is persuasive authority demonstrating why current employees (in addition to Jackson-Williams) are bound by the grievance and arbitration provisions in the CBA and therefore, have waived their right to bring a minimum wage claim in this judicial forum.

Here, as noted above, the Culinary CBA expressly exempted itself from overtime by providing an alternative overtime structure that provided more than what Nevada overtime required. **3 App. 2609.** Further, the CBA excepted out of minimum wage by providing an alternative rate scheme lower than the minimum wage. **13 App. 2632-39.** The CBA also directly addresses issues of "straight time" pay. **13 App. 2609.** The grievance and arbitration provision here makes the CBA grievance the exclusive remedy for violations of these pay provisions. Thus, like in *Montgomery*, the CBA is the exclusive remedy for wage claims.

Furthermore, the cases cited in support of Appellants' contention that they have standing to represent union employees are readily distinguishable. First, Appellants rely on *Lucas v. Bechtel Corp.*, 633 F.2d 757, 758 (9th Cir. 1980) for the proposition that union and non-union members can sue for and on behalf of each other. Opening Brief at 41-42. Preliminarily, in *Lucas* the union and some of its

members filed the complaint, whereas in this case the Union is not a party. *Lucas* was also dealing with a dismissal of a complaint, not a motion for summary judgment where the district court found the CBA's provisions fell within statutory exemption to Nevada's overtime provisions. Indeed, the cases cited in support of the *Lucas* holding deal with whether employees can sue under section 301 of the Labor Management Relations Act, but here Appellants initiated the action in state court and not under the Labor Management Relations Act.

Appellants' reliance on *Clark Cty. Sch. Dist. v. Riley*, 116 Nev. 1143, 1147, 14 P.3d 22, 24 (2000) similarly fails. Opening Brief at 42. In *Riley*, the CBA at issue stated "A grievance shall not include any matter or action taken by the School Trustees, or any of its agents, for which relief is granted by the statutes of Nevada. 116 Nev. 1143, 1148 n.5, 14 P.3d 22, 25 (2000) (emphasis added). Because the plaintiff brought a claim based on his statutory rights as a probationary teacher, his action for declaratory relief was judicially reviewable as it was a matter "for which relief is granted by the statutes of Nevada." As such, the plaintiff's action fell within the exclusion provision of the CBA's definition of a grievance. Notably, the Culinary CBA's grievance produced does not have any such limiting language. To the contrary, the Culinary CBA includes language exempting it from the overtime under NRS 608.018 and the MWA.

Finally, Appellants' citation *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 489 (N.D. Cal. 1978) is misapplied and taken out of context. Opening Brief at 43. In *Wofford*, the plaintiffs originally moved for a determination that the actions may be maintained on behalf of a class against both Safeway and the union defendants. *Id.* at 471. Critically, the plaintiffs conceded three years after the initiation of the litigation that "the relevant collective bargaining agreements ha[d] little or no impact on the challenged policies." *Id.* at 471. As discussed at length in this Answering Brief, the Culinary CBA specifies amount, method, and timing of payment of wages and overtime. Whether the *Wofford* court found that in the context of a Title VII case "A rule disqualifying discharged employees from representing current employees as a matter of law would be intolerable" is immaterial to this Court's analysis of statutory wage claims that have been waived under a CBA that addresses amount, method, and timing of payment of wages and overtime. Accordingly, Appellants have not (and cannot) provide any persuasive reasons why this Court should adopt the reasoning of a 1978 United States District Court for the District of Northern California case that concerned alleged Title VII violations, where the plaintiffs conceded the CBA had little or no impact on the challenged policies, to the present matter.

E. STATUTORY WAGE CLAIMS ARE SUBEJCT TO A TWO-YEAR LIMITATIONS PERIOD

1. This Court's En Banc Decision In *Perry v. Terrible Herbst, Inc.* Mandates The Court Apply The "Most Analogous Statute" In Evaluating A State Wage And Hour Claim With No Express Statute Of Limitations

Appellants' contention that claims arising under NRS 608.016, 608.018, and 608.020 through 608.050 are governed by the three-year limitations period set forth in NRS 11.190(3)(a) completely ignores the binding holding in *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 768, 383 P.3d 257, 258 (2016). In *Perry*, this Court held that claims for unpaid minimum wages arising under the MWA are subject to a two-year limitations period and also outlined a procedure for identifying the appropriate limitations period for wage and hour actions where the claim is not subject to an express statute of limitations, such as claims arising under NRS 608.016, 608.018, and 608.020 through 608.050.

Under *Perry*, courts presented with a state-law wage and hour claim with no express limitations statute apply the "most closely analogous" statute, so as to "promote[ ] uniformity" and "consistency" within the state's existing wage-and-hour system. 132 Nev. at 773–74, 383 P.3d at 261–62. The plaintiff in *Perry* argued that the MWA impliedly repealed the existing two-year statute of limitations for minimum wage claims, and so he invited the court to apply the four-year "catchall" limitations period codified at NRS 11.220. 132 Nev. at 771–71, 383 P.3d at 260.

This Court declined the invitation, however, because allowing an employee to bring a minimum wage claim more than two years after it accrues would be inconsistent with other wage-and-hour laws in the state such as the record-keeping statute of NRS 608.115. The Court observed that "NRS 608.115 requires employers to maintain an employee's record of wages for two years. If the four-year limitations period in NRS 11.220 applied to MWA claims, an employee could bring a claim after the employer is no longer legally obligated to keep the record of wages for the employee." 132 Nev. at 773, 383 P.3d at 262. Accordingly, the Court concluded that the two-year limitations period codified at NRS 608.260 remains applicable to claims for unpaid minimum wages.[12] 132 Nev. at 773–74, 383 P.3d at 262.[13]

The Nevada Supreme Court's reasoning in *Perry* applies with equal force to actions for the recovery of wages and related penalties under NRS 608.016, 608.018, and 608.020 through 608.050. If claims for these types of wages were subject to the three-year limitations period that Appellants seek here, then "an employee could

[12] The adoption of a two-year limitations period for unpaid minimum wages is similarly found in the Nevada's Labor Commissioner's refusal to 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 with the Commissioner." NAC 607.105 (emphasis added).

[13] The Legislature subsequently ratified the Nevada Supreme Court's decision in *Perry* when it amended NRS 608.260 in 2019 to add the MWA's express remedies and attorney fees provisions in NRS 608.260(a) and (b), but left the express 2-year statute of limitations in NRS 608.260(1) that the *Perry* Court had analogized to, thus, affirming the Legislature's view of analogous wage claims and the *Perry* decision.

bring a claim after the employer is no longer legally obligated to keep the record of wages for the employee." *See Perry*, 132 Nev. at 773, 383 P.3d at 262.[14] The Nevada Supreme Court made clear in *Perry* that this is an unacceptable result. *See id.* Moreover, if these types of wage claims were subject to a longer limitations period than claims for unpaid minimum wages, then employees could bring claims for their trial and break-in period and overtime wages and related penalties *after their claims for unpaid minimum wages had already become time-barred*. Accordingly, to "promote[ ] uniformity" and "consistency" within the state's wage-and-hour regime, claims arising under NRS 608.016, 608.018, and 608.020 through 608.050 are subject to the two-year limitations statute applicable to minimum wage claims under the MWA.

Despite clear framework in *Perry*, which Appellants concede was relied upon by the district court, Appellants failed to address, let alone distinguish, this seminal case. *See* Opening Brief at 20-21 ("The District Court extrapolated this Court's recent decision in *Perry v. Terrible Herbst, Inc.*, to limit all wage claims brought pursuant to NRS Chapter [608].").

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[14] *See also S3. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (observing that courts in Nevada "interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results") (internal citations and quotation marks omitted).

2. Appellant's Argument About the Legislature's Failure to Include an Express Limitations Period Pre-Supposes A Private Right of Action

Additionally, Appellants' argument that the Legislature's decision to not include an express limitations periods similar to NRS 608.260 "indicates its intent that, other than claims specifically arising out of NRS 608.250[15], all other statutory wage and hour claims are subject to the more general three-year limitations period set forth in NRS 11.190" misses the mark. Opening Brief at 47. Specifically, Appellants' argument presupposes that the Legislature intended a private right of action in statutory wage and hour claims, yet failed to include a specific limitations periods in each statute. This assumption fails, and so does Appellants' reliance on the interpretive cannon of *expressio unius est exclusio alterius*.[16]

It is hardly unsurprising that the Legislature did not expressly provide any relief for non-minimum wage claims under Chapter 608 because the Legislature did

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[15] NRS 608.260 sets forth a two-year statute of limitations when an employer pays less than the minimum wage set forth in NRS 608.250.

[16] The United States Supreme Court has warned that this canon does not apply to every statutory listing or grouping, but only applies where the items are an associated group or series. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) ("The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.").

not expressly provide for a private right of action for non-minimum wage claims. Indeed, in *Neville v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, the Nevada Supreme Court held that "[b]ecause NRS 608.016, NRS 608.018, and NRS 608.020 through NRS 608.050 do not expressly state whether an employee could privately enforce their terms, Neville may only pursue his claims under the statutes if a private cause of action for unpaid wages is *implied*." 133 Nev. 777, 782–83, 406 P.3d 499, 504 (2017) (emphasis added). As such, the *Neville* Court specifically implied a private right of action for unpaid wages under NRS 608. It would be nonsensical for the Legislature to include specific limitations periods where there is no clear statutory language authorizing a private right of action, such as in NRS 608.016, NRS 608.018, and NRS 608.020 through NRS 608.050. Accordingly, Appellants have failed to show any reason why the Legislature would have considered express statutory limitations periods for statutes that did not include express private rights of action. Appellants' reliance on the lack of express statutory limitations periods does nothing more than demonstrate why the *Neville* Court had to "imply" a private right of action for unpaid wages.

3. If The Court Were To Deviate From *Perry*, NRS 11.190(3)(a) Does Not Apply to The Final Paycheck Penalties in NRS 608.020-050

NRS 11.190(3)(a) – Periods of limitations—states in relevant part: "Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only

be commenced as follows:

(3) Within 3 years:

(a) An action upon a liability created by statute, **other than a penalty or forfeiture**."

(Emphasis added).

As such, by its own terms NRS 11.190(3)(a) does not apply to waiting time penalties in NRS 608.020-050. Indeed, the NRS 608.040 is entitled "Penalty for failure to pay discharged or quitting employee." (emphasis added). Similarly, NRS 608.050 is entitled "Wages to be paid at termination of service: Penalty; employee's lien." (emphasis added). Appellants even acknowledge that NRS 608.020-050 are penalties and reference them as such in their Opening Brief. Opening Brief at 50 FN 17 (citing NRS 608.030 and referring to the money an employee may be entitled to under it as "**waiting time penalties**/continuation wages." (emphasis added); Opening Brief at 52-53 (arguing that the failure to pay wages for the work an employee performed in the years prior to the last pay period "without any **penalty** whatsoever" would be "an absurd result and not what the Legislature had in mind in adopting NRS 608.020-.050.") (emphasis added).

Accordingly, to the extent this Court were to deviate from the precedent in *Perry* of applying the most closely analogous statute, Appellants' claims for waiting time penalties are nonetheless subject to NRS 11.190(4)(b)'s two-year statute of

limitations applicable to claims "upon a statute for a penalty or forfeiture, where the action is given to a person or the State, or both" *See* NRS 11.190(4)(b) (emphasis added).

F. FINAL PAYCHECK STATUTE NRS 608.040 BEGINS TO ACCRUE ON THE LAST DAY OF EMPLOYMENT

Appellants assert claims for waiting time penalties under the penalty provisions of the statutory scheme regulating the payment of final paychecks, which is codified at NRS 608.020 through 608.050. Appellants' contention that a claim for waiting time penalties under NRS 608.020 through 608.050 does not accrue until 30 days following the employee's last day of work is not only contrary to the text of the statute and legislative history, but also to existing Nevada Supreme Court precedent on accrual of claims.

A cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought. *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). As Appellants concede, Nevada law is clear that an employer must compensate an employee all wages due and owing at a certain time depending on whether the employee resigns or is discharged. NRS 608.040 provides in pertinent part: "If an employer ***fails to pay . . . [o]n the day the wages or compensation is due*** to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was

discharged until paid or for 30 days, whichever is less" (emphasis added).[17] Based on the statutory language, the wrong occurs, and the employee sustains injury, when an employer fails to pay "on the day the wages or compensation is due," as that is what triggers the penalty. Thus, the claim accrues at that time – the last day of employment – the same limitations period as the underlying claims for overtime and minimum wage.

Additionally, courts have consistently held that derivative claims are barred when the statute of limitation on the underlying claim has expired. It is well established that employees are barred from establishing a failure to pay wages necessary for waiting time penalties if there is no violation when the statute of limitations for the underlying wage or compensation claim has expired. In *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 222 & n.31, 180 P.3d 1172, 1178 & n.31, (2008), the Nevada Supreme Court explained that when a derivative claim is dependent on the success of a underlying claim and the underlying "claim having

[17] Notably, NRS 608.050 does not apply to Martel because he voluntarily resigned his employment. **15 App. 2853.** The statute -- entitled "Wages to be paid at termination of service: Penalty; employee's lien" -- provides for up to 30 days of wages when an employer "***shall discharge or lay off employees***" without either (1) first paying them the amount of any wages or salary then due them. . . or. . . (2) fail[ing], or refus[ing]on demand, to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment . . . " NRS 608.050 (emphasis added). Further, like NRS 608.040, it is triggered by an employer refusing to pay the amount of wages "then due" or "at the time the same becomes due and owing."

not been established," then the derivative claim "must fail as well." *See also Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 738–39 (Tex. 1980) (explaining that a claim "was derivative" when underlying liability must be shown "as a prerequisite to recovery" and holding "a defense that tends to constrict or exclude the [underlying liability] will have the same effect on the [derivative] action").

In Maes v. El Paso Orthopaedic Surgery Grp., P.A., 385 S.W.3d 694, 699 (Tex. App. 2012), the Texas Court of Appeals held that when "the two-year statute of limitations ran on [the] underlying claim," then the "right to sue for [the derivative claim] was "extinguished" as well. The court reasoned that when a claim "is derivative in nature and owes its existence to" an underlying claim, then the derivative claim "is subject to the same defenses the [underlying] action would have been subject to." *Id.*; *see also* 51 Am.Jur.2d Limitation of Actions § 14 (2011) ("A derivative claim is ordinarily time-barred, where the original claim is barred by the statute of limitations, since derivation claims are governed by the statute of limitations for the source claims"). Accordingly, NRS 608.040 should share the same accrual and limitations period as the underlying wage claims for overtime and minimum wage.[18]

[18] *See Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142-44 (Tex. 2019) (agreeing with the "courts of last resort in Maryland, Nebraska, Virginia, and West Virginia" that a "derivative . . . claim should share both accrual and the limitations period of the underlying wrong"); *Franklin v. Little Co. of Mary Hosp.*, 2017 IL App (1st) 161858-U, ¶ 45, 2017 WL 4173523, at *12 (September 19, 2017)

Moreover, NRS 608.040 allow an employer to honor a meritorious demand for payment and thereby shorten or avoid the full 30-day penalty, or else face a full 30-day penalty for a willful refusal to pay a known sum due. The cure period for the employer has **no relation** to the accrual period for an employee to assert a claim under NSR 608.040. Indeed, when setting out to regulate the pay and timekeeping practices of private employers, the purpose, far from holding well-intentioned employers strictly liable for penalties, was instead to penalize "unscrupulous employers"—that is, the employers who abandon their employees "without compensation" at the end of the employment relationship. *See* Legislative History of Senate Bill 3 of the 29th Session of the Nevada Legislature 1919 ("SB 3 Record") at 50, available at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/pre1965/SB003,1919.pdf. The final paycheck statutes thus allow an employer to cut off waiting time penalties by curing any outstanding wage debt,

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(holding that "if a plaintiff's underlying cause of action is not filed within the applicable statute of limitations, his [derivative] claim is also time-barred"); *Sterenbuch v. Goss*, 266 P.3d 428, 436 (Colo. App. 2011) (holding where the "underlying . . . claim is time-barred, so too is his [derivative] claim"); *Campbell v. Brown & Williamson Tobacco Corp.*, Case No. CV 02-0184- KD-C, 2006 WL 8437669, at *2 (S.D. Ala. May 17, 2006) (holding when an underlying "claim is barred by applicable statute of limitations" then the derivative claim "would be barred"); *Doe v. Archdiocese of Milwaukee*, 565 N.W.2d 94, 115 (Wis. 1997) (holding "derivative causes of action . . . accrued at the same time that the underlying . . . claims accrued, and similarly would be barred by the statute of limitations"); *Patterson v. Am. Bosch Corp.*, 914 F.2d 384, 387 n.4 (3d Cir. 1990) (holding "derivative claims [are] governed by the statutes of limitations of the source claims").

while also releasing an employer of liability where the employee purposefully secrets himself to avoid the final payment. Under both NRS 608.040 and 608.050, an employee may only assess penalties for a full 30-day period if the employer fails to cure the debt within that period. *See* NRS 608.040 ("[T]he wages or compensation of the employee continues. . . until paid or for 30 days, *whichever is less*.") (emphasis added); NRS 608.050 (providing that an employee "may charge and collect wages in the sum agreed upon in the contract of employment *for each day the employer is in default* . . . ; but the employee shall cease to draw such wages or salary 30 days after such default") (emphasis added). It is nonsensical that the statute allows an employer to cut off waiting time penalties, yet would begin to accrue 30 days after the employment relationship has ended and 30 days after the underlying wage claims have started to accrue. Far from expanding the time for employees to assert claims for penalties, the 30-day language in NRS 608.040 is in the statue to set a flexible rate by which a penalty can be measured.

G. PENALTIES UNDER NRS 608.040 ONLY APPLY TO WAGE VIOLATIONS DURING THE LAST PAY PERIOD

The district court correctly interpreted NRS 608.040 when it held that Martel could only seek continuation wages for alleged wage violations that occur during the last pay period before an employee separates from an employer.

NRS 608.040 entitled "Payment of employee who resigns or quits employment" clearly references wages due for the pay period before the employee is discharged or quits:

> 1. If an employer fails to pay:
> (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or
> (b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less.

(Emphasis added).

This makes sense, as the statute is intended to promote timely payment of final wages to employees whose employment has ended, when the usual motivation of employers to timely pay employees so that they continue working is gone. Appellants' contention that the statute applies to any failure to pay ever during an employee's employment ignores the purpose of a statute of limitation, and would produce an absurd result. The purpose of a statute of limitations is to protect defendants "from stale claims and the attendant uncertainty they cause." *Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d 631, 635 (2011). If NRS 608.040 applied to any wages other than final wages, an employee would be entitled to a penalty of up to thirty (30) days wages even of the employer had mistakenly failed to pay the wage for a single hour, ten (10) years prior to his separation. This is nonsensical and flatly contrary to the purpose of a statute of limitations. The only logical construction is

that statute applies to final wages and compensation – meaning those in the last pay period.

A 1994 Nevada Attorney General opinion of NRS 608.040 is also instructive as it analyzed the history of this statute in a determination of whether or not the provisions in NRS 608.040 and 608.050 applied to employees who set up and tear down convention displays pursuant to a CBA. Opinion No. 94-25, 1994 Nev. AG LEXIS 25 at 1 (Dec. 31, 1994). The Nevada Attorney General examined if employees could be "paid their final paycheck in accordance with the terms of the CBA" which allowed final payment as late as 12 days after lay off. *Id*. The employees argued that these CBA terms for 12-days payment conflicted with the three-day payment requirement under NRS 608.040(1)(a). *Id*. In analyzing this claim, the Nevada Attorney General delved into the history of both NRS 608.040 and 608.050 along with the 1932 ruling in *Doolittle v. District Court*, 54 Nev. 319, 322 (1932). *Id*.

In *Doolittle*, Pat Burns was indebted to Theresa Doolittle for $200. 54 Nev. at 320. To pay this debt back, Burns entered into a contract with *Doolittle* to complete a three-room house owned by *Doolittle*. *Id*. Unknown to *Doolittle*, Burns hired a third party, F.M. Gaylord, who worked 63 1/2 hours on the house for which Gaylord brought suit after demanding payment for which he was unpaid. *Id*. at 320. Gaylord brought claim for (1) the value of the work performed and (2) a NRS

608.040 claim. *Id*. The Court found, however, that the language of Gaylord's NRS 608.040 claim was actually a NRS 608.050 claim. *Id*. at 321. In distinguishing the two statutes, the Court noted that NRS 608.050, passed in 1925, did not amend or repeal NRS 608.040, passed in 1919. Additionally, under NRS 608.050, the *Doolittle* Court stated:

> 3. Counsel urges that the act of 1925 [NRS § 608.050] works great hardships. We cannot see that it does. When a person employs another, if he is honest, he expects to pay for the service, and should be ready to do so upon the completion of the work, *or have an understanding to the contrary before the employment is entered into*. The statute itself contemplates payment when the same becomes due *under the contract of employment*. But if the act does work a hardship, that is something to be considered by the legislature and not by the courts.

Id. at 322 (emphasis added).

Using the analysis in *Doolittle*, the Nevada Attorney General distinguished NRS 608.050 as applying to employees who were "laid off" and where "timing of payment is controlled by a *contract*." Opinion No. 94-25, 1994 Nev. AG LEXIS 25 at 6-7. (emphasis added). Thus, an employer could pay employees as far as 12 days out as long as the employees were subject to contractual "payment timing rules contained in the CBAs." *Id*. at 8. NRS 608.040, on the other hand, had to be "read in conjunction with NRS 608.020 and NRS 608.030, since all three statutes were passed together in 1919." *Id*. at 5. Unlike NRS 608.050 situations where payment timing is included in the terms of a contract of employment, NRS 608.040 was more of a "set of general rules" regarding the payment of wages upon an employee being

"fired" or "after he quits." *Id*. at 5-6. Thus, under the "structure" of NRS 608.020, 608.030 and 608.040, an employee without payment timing terms should generally be paid no later than three days after he is fired or seven days after he quits. *Id*. at 5-6.

These analyses of NRS 608.020 through 608.050 by the Nevada Attorney General and the court in *Doolittle* are telling for several reasons. First, it shows that the history and structure of NRS 608.020 - NRS 608.050 indicate that they are to be read together as a set of rules for the distribution of a final paycheck to fired or quitting employees and not for after-the-fact allegations of off-the-clock work which are brought after the time of termination, for claims outside of the final pay period, and after the expiration of the 30-day period in which an employer can cure nonpayment. Second, the *Doolittle* holding shows that even in 1932, seven years after the passage of NRS 608.050 and thirteen years after the passage of NRS 608.040, the Court analyzed both statutes strictly under the terms of a contractual employment situation, which is also consistent with this Court's later application in *Descutner v. Newmont USA Ltd.*, because contractual or quasi-contractual employment allows the parties to assess amounts "due" based on the agreed upon hours or payment for work. *Descutner v. Newmont USA Ltd.*, No. 3:12-cv-00371-RCJ-VPC, 2012 WL 5387703, at *1 (D. Nev. Nov. 1, 2012).[19] Third, the *Doolittle*

[19] In *Descutner* the court analyzed whether there was a private right of action under

Court stated that NRS 608.050 (referred to as the 1925 act) did not amend nor repeal any portion of NRS 608.040 (referred to as the 1919 act) showing that even in 1932, the Court noted that the statutes in NRS Chapter 608 could be amended to interact with each other – which of course, was not done to apply the Final Paycheck statutes to each hour of work under NRS 608.016 or overtime under NRS 608.018 which were passed many decades later in 1985 and 1975 respectively. Thus, it was historically impossible for the Nevada Legislature to have contemplated the application of the 1919-1925 NRS 608.020-608.050 Final Paycheck penalties to wage statutes such as 1985's NRS 608.016 each hour of work and 1975's NRS 608.018 overtime, especially those claims not brought in the final pay period and that have become due.

H. THE DISTRICT COURT CORRECTLY DISMISSED MARTEL'S NRS 608.040 CLAIM BECAUSE MARTEL SUFFERED NO WAGE LOSS DURING HIS LAST PAY PERIOD

The district court properly granted summary judgment in favor of Respondents as to Martel's claims under NRS 608.020-050 because the undisputed

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NRS 608.140. The court provided an analysis of the definition of "terms of employment," finding that "terms" indicated "negotiated terms, as per a contract, not externally imposed standards, as per a statute." *Id*. at *11. The court supported its holding by performing a similar analysis to one performed by the Attorney General's office, explaining that NRS 608.140 predated NRS 608.018 overtime statute by 50 years, and neither overtime nor minimum wage standards were in place at that time. *Id*. at *11-12. Thus, the court explained that "[o]vertime laws--and in fact virtually any kind of wage laws--were still a matter of fiction when section 608.140 was adopted." *Id*. at *12.

evidence established that Martel had no shift jamming, off-the-clock banking, or pre-shift meetings during his final pay period. **15 App. 2958.** Preliminarily, as discussed above in Section V(D)(3), Appellants concede that claims pursuant to NRS 608.020 through 608.050 are derivative penalties for alleged unpaid wages once an employee quits, resigns, or is discharged, and are not actionable in themselves.[20]

Here, Martel's derivative claim for continuation wages under NRS 608.020-050 necessarily fails because there was no violation of NRS 608.018 or 608.019 during his final pay period. Martel's time records demonstrate his last day of employment was June 13, 2014[21], and that his final payment on June 16, 2014 for the time period from May 31 through his last day of work. **15 App. 2853.** The undisputed evidence before the district court demonstrated that Martel cannot maintain a claim for failure to pay for all hours worked under NRS 608.016 or failure to pay overtime under NRS 608.018 for the time covered by his final paycheck.

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[20] NRS 608.020 governs wages due upon termination and provides that "[w]henever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately." NRS 608.030 applies to payment upon resignation, and prescribes a timeframe under which an employer must provide wages and compensation earned and unpaid. NRS 608.040 and NRS 608.050 provide distinct penalties for an employer's failure to pay wages due once an employee quits, resigns, or is discharged.

[21] Under NRS 608.030 compensation is due to an employee who resigns is either on the day which the employee would have regularly been paid, or seven days after the employee resigns, whichever is earlier. Martel's next regular pay date would have been June 19, 2014. **15 App. 2853.** Seven days from Martel's last day was June 20, 2014, so his final wages were due by June 19, 2014 – the earlier date.

Martel bases his claims on the following allegations in the First Amended Complaint: (1) Martel "worked shifts over eight (8) hours per shift one or more times a week on a regular basis and worked jammed shifts" (**5 App. 909**); (2) Martel was "required to collect his bank of money at the dispatch cage prior to proceeding to his workstation without compensation" (**5 App. 910**); and (3) Martel "estimate[d] it took him approximately 15 minutes to perform banking activities for which he was not paid the minimum, regular rate, or overtime wages required by law." **15 App. 911**. *See* Opening Brief at 54-55.[22]

As to the first allegation of daily overtime based on shift-jamming, Respondents submitted a declaration from Programmer Analyst for Respondent MEI-GSR Holdings, LLC, Eric Candela, along with a spreadsheet showing the actual time clock punches during Martel's employment. **12 App. 2389** (declaration), **2390-2405** (time clock punches). From these undisputed records, Respondents demonstrated that Martel never worked more than 8 hours within a 24-hour period during his final pay period – meaning Martel was ***not*** entitled to any daily overtime. **15 App. 2836-37** (summarizing in and out times from 5/30/14 to 6/12/14).

[22] Notably, Appellants did not identify the allegation regarding pre-shift meetings in support of its argument that the district court erred in concluding Martel did not assert a claim for unpaid wages during his last pay period worked. Opening Brief at 54-55; **5 App. 917-18** (alleging pre-shift meetings). This omission is likely because allegations regarding attending pre-shift meetings without pay was flatly contradicted by Martel's deposition testimony. **15 App. 2861, 2868-75.**

As to the second and third allegations of off-the-clock banking, Respondents submitted a supplemental declaration of Candela with a spreadsheet comparing the times Martel actually clocked in and out and when he got and returned his bank, as reflected in cage dispatch records. **15 App. 2855** (declaration), **15 App. 2857-58** (spreadsheet). As explained in Candela's declaration, "when employees at GSR obtained a bank from the cage they were required to swipe their badge, which indicated the time they obtained their bank." **15 App. 2855.** The undisputed evidence shows that in his final pay period Martel always got his bank after he clocked in and returned it before he clocked out. **5 App. 2855-58.**

In the face of undisputed time and swipe data plainly disproving any claim for unpaid wages during the final pay period, Appellants rely on mere allegations from the First Amended Complaint to assert the district court "erred in dismissing Appellants' claim for continuation wages under NRS 608.020-.050." Opening Brief at 54-55. The district court granted summary judgment in favor of Respondents and found that "No shift jamming, no off-the-clock banking, and no pre-shift meetings occurred during Mr. Martel's final pay period." **15 App. 2958.** Appellants cannot rest upon mere allegations where a motion for summary judgment has been supported by declarations or other evidentiary material. *See* NRCP 56(e) (failing to properly support or address a fact on summary judgment allows court to "consider the fact undisputed for purposes of the motion"); *see Adamson v. Bowker*, 85 Nev.

115, 120, 450 P.2d 796, 799–800 (1969) (holding "the adverse party may not rest upon the allegations of his pleading but he must by affidavit or other evidentiary matter set forth specific facts showing that there is a genuine issue for trial.").

By not producing any probative evidence on the issue of shift-jamming and off-the-clock banking, Appellants have failed to demonstrate a material dispute of fact such that the district court erred in granting summary judgment on Martel's NRS 608.040 claim. *Riley v. OPP IX, L.P.*, 112 Nev. 826, 830–31, 919 P.2d 1071, 1074 (1996) (holding the party opposing motion for summary judgment must show that he can produce evidence at trial to support his allegations, and "may not rest upon mere allegations contained in his pleading to satisfy this burden.").

VIII. CONCLUSION

The district court appropriately granted summary judgment in favor of Respondents. Accordingly, this Court should affirm the June 7, 2019, November 3, 2020, and June 21, 2021 orders.

Dated: October 11, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) because this brief has been prepared in a proportionally spaced typeface suing Times New Roman in 14-point size font. I further certify that the brief complies with the type-volume limitations as stated in N.R.A.P. 32(a)(7)(a), because it does not exceed the 14,000-word limit is 12,897 words, as measured by the Microsoft Office 365 word count program, including footnotes, but excluding the disclosure statement, table of contents, table of authorities, certificate of service, and certificate of compliance. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number of the appendix where the matter relied on is to be found.

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

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On October 11, 2021, I served the within document(s):

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2021, in Las Vegas, Nevada.

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