IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Plaintiffs-Appellants,

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

Defendants-Respondents.

Case No. 82161

District Court Case No.: CV16-01264

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents' Answering Brief (RAB) does little to save the District Court's Orders that disposed of all of Appellants' claims. In fact, on at least one issue—whether the District Court erred by disposing of Appellant Jackson-Williams' non-overtime wage claims—Respondents abandon the District Court's summary judgment decision and argue new legal theories for the first time on appeal in attempt to uphold the end result. The District Court's decision on this one issue is emblematic of its handling of all the remaining issues on appeal—the District Court consistently ruled in favor of the moving party when factual disputes remained and made highly suspect legal conclusions that ultimately prevent Appellants from pursuing their claims. For all the reasons set forth herein and in their Opening Brief, Appellants respectfully submit that the District Court's Orders granting summary judgment in favor of Respondents be reversed and this case be remanded for further proceedings.[1]

[1] This appeal presents various options for the Court should Appellants prevail on certain arguments. For instance, should this Court hold that the District Court erred by resolving a disputed fact as to whether the unsigned and undated redlined draft CBA was valid and operable during the time period in question, it need not address whether the overtime provision contained within that document "provided otherwise" for overtime so as to meet the collective bargaining exception under NRS 608.018(3)(e). Similarly, should this Court hold that the District Court erred by concluding that Appellants' wage claims under NRS 608.016 and/or NRS 608.018 are governed by a 3-year limitations period, it need not address the statute of limitations and accrual of continuation wages under NRS 608.020-.050 because

II. THE DISTRICT COURT ERRED BY RESOLVING GENUINE ISSUES OF DISPUTED FACTS AND CONCLUDING THAT THE UNSIGNED AND UNDATED REDLINED DRAFT CBA FOR WHICH RESPONDENTS ARE NOT EVEN LISTED AS PARTIES OF INTEREST WAS VALID AND EFFECTIVE

In its Answering Brief, Respondents defend the District Court's holding that the unsigned and undated redlined draft CBA, for which Respondents are not listed as parties, was both valid and effective during the relevant time period at issue here by highlighting specific facts that Respondents submitted in support of its motion for summary judgment below. RAB at pp. 7-10.[2] Herein lies the problem of Respondents' position and the District Court's order granting Respondents' motion for summary judgment—the District Court usurped the role of the fact finder by resolving genuine issues of material fact in favor of the moving party (i.e., Respondents).[3]

This Court is well versed in the summary judgment standard. *See Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 121 Nev. 724, 729 (Nev., 2005) ("This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."). Summary judgment can only be entered in favor

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those claims are admittedly derivative of the underlying unpaid wage claims and those issues can be resolved at a later proceeding if Appellants are successful on their underlying wage claims.

[2] For ease of reference, the undated and unsigned redlined draft CBA for which Respondents are not listed as parties can be located at JA Vol. 13, 2594-2667.

[3] Here, the trier of fact is the jury. (JA Vol. 5, 906-1060) (First Amended Complaint: Jury Trial Demanded).

of the moving party if the "pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* "The evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.*

In its Order, the District Court resolved the factual dispute that the redlined draft CBA was indeed a valid and operable CBA by concluding as follows: "Plaintiffs contend the CBA expired in May of 2011 but provide[d] the Court with no evidence to dispute that the union and the **GSR continued to treat the CBA as binding.** Undisputed evidence confirms the CBA was valid and operative." (JA Vol. 15, 2960-61 (emphasis added).) The District Court's conclusion here completely ignores the evidence that the CBA was an unsigned, undated, redlined draft that did not even contain the names of the Respondents as parties to the agreement. Indeed, in reviewing the same evidence, the Nevada federal court had previously recognized that the redlined draft CBA was "extremely problematic":

> [T]he Redlined Draft CBA is extremely problematic. Defendants submit the declarations of Larry Montrose, Human Resources Director of MEI–GSR Holdings, and Kent Vaughan, Senior VP of Hotel Operations of MEI–GSR Holdings, wherein both declarants assert that the Redlined Draft CBA has been in effect "from 2010 to present." (Montrose Decl. ¶ 3, ECF No. 10 at 17; Vaughan Decl. ¶ 2, ECF No. 10 at 107.) **However, the Redlined Draft CBA is unsigned and undated.** (Redlined Draft CBA, ECF No. 10 at 20–93.) **It is also clearly a preliminary draft, not in final form.** (*Id.*) **Moreover, Defendants' names do not appear anywhere on the face**

> **of the Redlined Draft CBA; rather, the document indicates that the "Employer" is Worklife Financial, Inc. d/b/a Grand Sierra Resort and Casino ("Worklife"), which was the Employer under the June 2009 CBA and Defendants' apparent predecessor-in-interest.** (*Id.*)

(JA Vol. 8, 1530; *Martel v. MEI–GSR Holdings, LLC*, 2016 WL 7116013, at *3–4 (D. Nev., 2016) (emphasis added).

Rather than address the elephant in the room—that a purportedly valid CBA is nothing more than an undated and unsigned redlined draft document for which Respondents are not even listed as parties—the District Court relied on evidence from the GSR HR Director Larry Montrose stating that the union and the company have continued to adjust grievances as support for the conclusion that the CBA is in effect. JA Vol. 15, 2960. This was in error.

A. The District Court's Reliance On Evidence That Respondents Continued To Adjust Grievances, At The Exclusion Of The "Extremely Problematic" Evidence Of The Redlined Draft CBA, Was In Error Because Such Evidence Has No Probative Value As To Whether A CBA Is Valid And Effective

The District Court's primary reason for concluding that the unsigned and undated redlined draft CBA was valid and effective was because of evidence that the company and union continued to adjust grievances after the expiration of the 2009-2010 CBA. This evidence has no probative value in answering the question of whether a CBA is valid and effective because the continued adjustment of grievances, after the expiration of a CBA, is required by federal law.

When a CBA terminates, it is no longer enforceable as a contract (except where there are still unfulfilled rights and obligations under certain provisions, e.g., unpaid wages). However, under the National Labor Relations Act (NLRA), the employer is required to maintain the status quo with respect to all mandatory terms and conditions of employment, until the parties reach a new collective-bargaining agreement or a legitimate impasse is reached. After a contract expires, "terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them." *Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. N.L.R.B.*, 111 S.Ct. 2215, 2225, 501 U.S. 190, 206 (U.S. 1991).

Collective-bargaining agreements are interpreted "according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015). One such principle is that "'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement."' *Id.* at 441-442 (quoting *Litton*, 501 U.S. at 207). Thus, "an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied." *Litton*, 501 U.S. at 206. Although the parties may agree that a particular provision survives the

contract's expiration, any such agreement must be stated "in explicit terms." *Id.* at 207; *accord Tackett*, 574 U.S. at 442.

After a CBA expires, different principles govern the obligations of parties to a bargaining relationship. In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that an employer violates Section 8(a)(5) of the Act if, without first bargaining to impasse, it unilaterally changes a term or condition of employment constituting a mandatory subject of bargaining. *Id.* at 743. *Katz* involved parties that were bargaining for an initial CBA, but the Court subsequently made clear that the rule of *Katz* also applies after an agreement has expired while the parties are bargaining for a successor agreement. *See Litton*, 501 U.S. at 198. Thus, after a labor contract expires, an employer has a duty to maintain the status quo. Although the status quo is ascertained by looking to the substantive terms of the expired contract, *see, e.g.*, *PG Publ'g Co., Inc.*, 368 NLRB No. 41, slip op. at 3-4 (Aug. 22, 2019), the obligation to maintain the status quo arises out of the Act, not the parties' contract.

Based on this legal framework, the District Court's reliance on the fact that Respondents and the Culinary union continue to adjust grievances as its primary basis for concluding that the purported CBA is operable must be rejected. Once a CBA expires, federal labor law takes over and contract principles subside. Under federal labor law, an employer must continue the status quo as if the CBA remained in effect, unless there is a specific delegation contained in the expired contract

allowing a party to make a unilateral change. This includes the requirement that the employer and union adjust grievances and arbitrate claims. Therefore, the District Court's reliance on HR Director Larry Montrose's declaration that Respondents continued to adjust grievances with the union was misplaced. This evidence has no probative value as to whether a CBA is valid and effective.

B. The District Court Simply Ignored Appellants' Evidence That The Last Valid And Operable CBA Expired By Its Own Terms In May 2011

Appellants put forth evidence that the last valid and operable CBA between the Culinary union and employer entity at the time, Worklife Financial, Inc., expired by its own terms in May 2011. JA Vol. 14, 2680-2702 (Plaintiffs' Opposition to Summary Judgment); 2760-2830 (2010 Culinary CBA). Article 24 of the 2010 Culinary CBA, together with a subsequent Memorandum of Agreement (Extension of the CBA Executed on November 19, 2010), states that the 2010 Culinary CBA would expire 30 days after the sale of the property:

> Article 24: Termination – 24.01. The Agreement shall be in full force and effect for eighteen (18) months from June 10, 2009, which is the date when the Union ratified the Agreement. Accordingly, the Agreement shall expire on December 10, 2010.
> …
> Memorandum of Understanding.
>
> 1. By its own terms, the CBA is set to expire on December 10, 2020. The Employer and the Union mutually agree and desire to extend the CBA for ninety (90) days from December 10, 2010 or until March 10, 2011.

> …
> 5. Notwithstanding the foregoing paragraphs, if the Employer sells the property located at 2500 East Second Street, Reno, Nevada 89595 (i.e. the Grand Sierra Resort and Casino) to a third party during the ninety-day (90) initial extension period or any month-to-month renewal period thereafter, the CBA will remain in effect for thirty (30) days after the property sales closes, unless either party has already given Notice, and the Union or the buyer may seek to immediately confer with respect to when where, and how new negotiations will begin.

JA Vol. 14, 2793 (Article 24); 2829 (Memorandum of Agreement). Respondents do not deny that the GSR property was bought in February 2011 and the sale closed on or about March 31, 2011. Respondents never put forth any evidence that they gave notice to the Culinary union of its intent to negotiate a new contract pursuant to the Memorandum of Agreement.

Instead, the only evidence that Respondents submitted in support for their claim that they have indeed entered into a new CBA with the Culinary union is an undated and unsigned redlined draft agreement that lists the old employing entity, Worklife Financial Inc., as the party to the contract, and evidence that the Culinary union has continued to adjust grievances. As stated above, the fact that the Culinary union has continued to function at the GSR property, and the fact that Respondents have maintained benefits and contract terms that existed under the last operable CBA, does not mean that a current CBA is in effect. Rather, Respondents are obligated under federal labor law to continue the benefits and continue to adjust

grievances unless they bargain with the union on new terms and/or they move to decertify the Culinary union as the bargaining representative. In sum, there is significant competing evidence at this stage of the litigation to suggest that a jury could understandably weigh the evidence in favor of Appellant Jackson-Williams and conclude that there was no CBA in effect during her employment at GSR. Therefore, the District Court improperly resolved these disputed facts in favor of Respondents and, therefore, its decision to grant Respondents' motion for summary judgment on this issue must be reversed.

III. EVEN IF THE PURPORTED CBA IS DEEMED TO BE VALID AND OPERABLE, RESPONDENTS CANNOT MEET THEIR BURDEN THAT APPELLANT JACKSON-WILLIAMS WAS COVERED BY A CBA OVERTIME EXEMPTION

As an initial matter, this Court need not address this issue should it conclude that the District Court improperly resolved a disputed fact as to whether there was a valid and operable CBA during Appellant Jackson-Williams' employment. If the Court concludes that the District Court erred in granting summary judgment on that ground, then the issue of whether any purported CBA "provides otherwise" should similarly be remanded back to the District Court to be revisited only if a jury first determines that there was a valid CBA in existence during Appellant Jackson-

Williams' employment.[4] However, should this Court affirm the District Court's decision to grant summary judgment with respect to the validity of the unsigned and undated redlined draft CBA, then the issue of whether that CBA "provides otherwise" for overtime beyond the statutory conditions provided in NRS 608.018 must be addressed.

A. The Relevant Purported CBA Here Would Be The Undated And Unsigned CBA Supposedly In Effect From May 2011 To October 31, 2016

Respondents put forth three (3) CBAs that they believed covered Appellant Jackson-Williams' claims.[5] Since Appellant Jackson-Williams was only employed by Respondents from April 2014 to December 2015 (*see* JA Vol. 5, 908; Vol. 15,

[4] Indeed, this would be the most prudent approach. Only after a full trial on the merits can the parties be assured as to: (1) whether there was a CBA in effect during the relevant time period, and (2) the terms contained in the overtime provision contained in the CBA (if the jury determines that there was a CBA in effect). Given the fact that Respondents have been unable to produce any coherent signed and dated CBA that lists themselves as parties to the agreement, they have failed to meet their burden at the summary judgment stage.

[5] The three (3) alleged Culinary CBAs are as follows: (1) 2009-2010 CBA that was signed and dated and extended on a month to month basis until it expired in May 2011 after the sale of the property (JA Vol. 14, 2761-2830); (2) 2010-20__ was the undated and unsigned redlined draft CBA that did not list Respondents as parties (JA Vol. 13, 2594-2667), and (3) 2016-2023 CBA that was signed but undated (JA Vol. 15, 2877-2943).

2980), the only relevant purported CBA would be the "extremely problematic" undated and unsigned CBA that did not list Respondents as parties.[6]

B. The District Court Erred By Concluding That The Undated And Unsigned Redlined Draft CBA "Provided Otherwise" For Overtime

The undated and unsigned redlined draft CBA contained the exact same overtime clause that was in existence until the expiration of the prior operable CBA that expired in May 2011. *See* JA Vol. 13, 2609; Appellants' Opening Brief (AOB) at 38-39. First, as discussed directly above, the "2009-2010" CBA expired by its own terms in May 2011 and thus employees are entitled to overtime as guaranteed to them by NRS 608.018 as alleged in Appellants' First Amended Complaint. *See id.* ("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."). Merely parroting the statutory requirements cannot satisfy NRS 608.018(3)(e)'s condition that a CBA "provide otherwise" for overtime.

[6] Although the District Court did not expressly state that it was analyzing the CBA that was supposedly in effect from May 2011 to October 31, 2016, it nevertheless did specify that it was analyzing a document that was unsigned. (JA Vol 15, 2985-2987).

Second, even if the District Court was correct in holding that the "2009-2010" expired CBA was subsequently ratified by the union and in effect during the relevant time period, the overtime provision in the undated and unsigned draft redlined CBA does not provide overtime above and beyond NRS 608.018's requirements. To "provides otherwise" for overtime means something above and beyond the statutory floor, when viewed in consideration of the legislative history of that statute's enactment.

NRS 608.018's overtime requirements were first enacted by the Nevada Legislature in 1975. "[T]he goal of this piece of legislation is to humanize working conditions for all and to provide a minimum standard of decency particularly for those who are not represented by collective bargaining." https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1975/AB219,1975.pdf, at pp. 7, 13. Based on this legislative statement, the legislative intent behind the overtime legislation was not to permit employers and unions to bargain for less than what is provided under statute but to provide a base minimum standard. As a result, to "provide otherwise" for overtime could not have meant that an employer and union could bargain for standards that were less than what was required by Nevada statute.

Based on this understanding, the unsigned and undated redlined CBA did not "provide otherwise" for overtime, beyond the rights conferred by NRS 608.018,

because the overtime clause contained in the purported CBA was less protective than the Nevada statute. Indeed, Respondents admit as much in their Answering Brief, gleefully pointing out that the union workers at GSR were only entitled to daily overtime if they were scheduled to work for at least five (5) days in one workweek; they were ineligible for overtime pay if they were absent for personal reasons; and they would not get daily overtime if they worked more than 8 hours in a 24-hour period of time.[7] *See* RAB at 13-15. Since the undated and unsigned redlined draft CBA did not provide overtime beyond what was conferred under Nevada statutory authority, Respondents are not exempt from complying with NRS 608.018. The District Court therefore erred in holding that the purported undated and unsigned redlined draft CBA provides otherwise for overtime and thus erred in dismissing Appellant Jackson-Williams' NRS 608.018 claims.

IV. RESPONDENTS' NEW NOVEL LEGAL ARGUMENTS TO BOLSTER THE DISTRICT COURT'S ERRONEOUS RULING DISMISSING APPELLANTS' NON-OVERTIME WAGE CLAIMS WERE NEVER VETTED BY THE DISTRICT COURT BUT ARE AS EQUALLY UNAVAILING AS THE DISTRICT COURT'S REASONING

In an attempt to save the District Court from itself, Respondents abandon their

[7] Respondents also argue that certain union employees would be eligible for daily overtime under the CBA but this argument is irrelevant because Appellant Jackson-Williams was a minimum wage worker who made only $8.25 per hour, well less than 1.5 times the minimum wage and thus would have been eligible for overtime under NRS 608.018. *See* RAB at pp. 13-14.

arguments in the lower court (arguments that the District Court found persuasive) and sets out an entirely new novel and complex legal basis for affirming the District Court's ultimate conclusion that Appellant Jackson-Williams' non-overtime wage claims cannot proceed. While this Court maintains the discretion to affirm a district court order for any reason supported by the record and law (*see, e.g.*, *Ford v. Showboat Operating Co.*, 877 P.2d 546, 549, 110 Nev. 752, 756–57 (Nev. 1994)), it should firmly reject Respondents' attempt to radically alter the trajectory of this case by raising new legal argument with new factual considerations for the first time in their Answering Brief.

The District Court dismissed Appellant Jackson-Williams' non-overtime wage claims on the grounds that she did not have standing because she did not prove that the union breached its duty of fair representation. JA Vol. 15, 2990-91; Vol. 16, 3141 ("While the Court did find Ms. Jackson-Williams' could proceed without undertaking the grievance procedure of the CBA, the Court nevertheless found Ms. Jackson-Williams did not have standing to bring her claims because Plaintiffs did not prove the union as the bargaining agent breached its duty of fair representation in its representation of employees, barring her claims."). Respondents essentially concede that the District Court erred by concluding as such by instead focusing on completely new arguments to support the District Court's ultimate grant of summary judgment in favor of Respondents. *See* RAB at 24 ("[W]hile 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 Nevada Constitutional Minimum Wage Amendment (MWA) and NRS 608.016 are addressed by the CBA exceptions and thus covered by the grievance process."). It would be inappropriate for this Court to entertain completely new, and admittedly novel, questions of law and fact at this stage of the litigation. Instead, this Court must focus on the District Court's reasoning supporting its grant of summary judgment in favor of Respondents and whether the District Court committed a reversible error. As Respondents concede by refusing to defend the District Court's order in this respect, the District Court had no legal basis to conclude that Appellant Jackson-Williams could not pursue her non-overtime wage claims because she was a union employee. There is no requirement that she sue her union for a failure of the union's duty of fair representation when she is asserting a statutory claim for unpaid wages as an individual on behalf of herself and all other similarly situated individuals. Appellant Jackson-Williams is not asserting a claim guaranteed by any purported CBA and is not asserting a claim on behalf of the union. Therefore, as Respondents appear to acknowledge by failing to argue to the contrary, the District Court's reasoning here cannot be defended and its order dismissing Appellants' non-overtime wage claims must be reversed.

Nevertheless, since Respondents raised these new novel issues of law and fact in their Answering Brief, Appellant Jackson-Williams is obliged to respond to each of them in turn.

A. There Is No Minimum Wage Exception Applicable Here

With respect to all issues relating to Appellant Jackson-Williams, the analysis must start with the unsigned and undated redlined draft CBA. Respondents contend that this purported agreement excepts them from the payment of minimum wages. The MWA admittedly contains a collective bargaining exception provided that there is an explicit waiver of the provisions of the MWA. *See* Nev. Const. Art. 15 Sec. 16 (B) ("All of the provisions of this section, or any part hereof, 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***. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section.") (emphasis added); *see also W. Cab Co. v. Eight Jud. Dist. Ct. of State in & for Cty. of Clark*, 133 Nev. 65, 66, 390 P.3d 662, 666 (2017) (recognizing that the explicit minimum wage waiver must be clear and unambiguous).

Respondents contend that the undated and unsigned redlined draft CBA contains a waiver of the provisions of the MWA because the purported CBA

contained wage rates that were less than the applicable minimum wage for the years from 2014 to 2015. RAB at pp. 17-19. Respondents highlight certain pay rates that fall below the minimum wage and the following statement in a footnote on Exhibit 1 to the undated and unsigned redlined draft CBA as support for its argument: "Where these standard rates fall below the applicable minimum wage, the rates have been adjusted accordingly to satisfy Nevada's minimum wage requirements." JA Vol. 13, 2632-39. Respondents' contentions in support of their minimum wage waiver argument do not support their position and, in fact, highlight yet again the fact that the undated and unsigned redlined draft CBA is an "extremely problematic" document.

Far from being an "explicit" waiver of Nevada's MWA requirements, the statement contained in the footnote of Exhibit 1 of the undated and unsigned redlined draft CBA statement actually demonstrates that the draft CBA required Respondents to provide at least the Nevada minimum wage rate to all persons employed at the GSR. This is not a "clear and unambiguous" waiver.[8] Indeed, it is not a waiver at all. It is a requirement that Respondents pay at least the minimum wage.

Moreover, what is particularly interesting about Respondents' reliance on Exhibit 1 of the undated and unsigned redlined draft CBA is that it further

[8] A clear and unambiguous waiver of the Nevada minimum wage rate would require something to the effect that "the Parties hereby waive the minimum wage requirements set forth in Article 15 Section 16 of the Nevada Constitution."

demonstrates that the draft CBA that has been trotted out by Respondents is nothing more than a relic draft document without any legal importance. Respondents point to the fact that certain pay rates set forth in Exhibit 1 of the undated and unsigned redlined draft CBA fell below Nevada's minimum wage requirements that were in effect in 2014 and 2015. *See* RAB at p. 18 (Exhibit 1 of the draft CBA states that "Banquet Bartender" started at $6.64/hour, "Bell Person" started at $5.90/hour, "Cocktail Server" started at $5.90/hour, and "Food Server" started at $5.90/hour). But in comparing the pay rates that were in effect when the 2009-2010 CBA expired by its own terms in May 2011, it becomes apparent that the undated and unsigned redlined draft CBA was a draft of a CBA that even pre-dated the 2009-2010 agreement. In examining the 2009-2010 CBA, Exhibit 1 set forth the pay rates for the job titles cited by Respondents in the Answering Brief as follows: "Banquet Bartender" started at $7.25/hour, "Bell Person" started at $8.25/hour, "Cocktail Server" started at $7.25/hour, and "Food Server" started at $7.25/hour. JA Vol. 14, 2797-2801.[9] Therefore, Respondents would have this Court believe that they decided to lower the pay rates for its employees after the 2009-2010 CBA to a rate substantially lower than the Nevada minimum wage rate yet specifically clarify in a

[9] The Nevada minimum wage rate in 2010 was $7.25 (with qualifying health benefits)/$8.25 (without qualifying health benefits). https://www.littler.com/publication-press/publication/nevada-illinois-increase-minimum-wage-july-1-2010 (last visited Nov. 11, 2021).

footnote that none of the rates should fall below the state minimum wage requirements. This is hogwash. Unlike the District Court, this Court can recognize when something does not add up. The parties to the 2009-2010 CBA set forth the pay rates to comply with the Nevada minimum wage requirements. There was no waiver to pay below the Nevada minimum wage. Furthermore, the undated and unsigned redlined draft CBA was never a CBA that was in effect. It was a draft document that was pulled from someone's computer that was a relic of a pre-2009-2010 CBA.

Upon close examination of Exhibit 1 of the Respondents' reliance on the fact that the undated and unsigned redlined draft CBA contained rates that fell below Nevada's minimum wage requirements at the time (even though those rates were adjusted to the applicable minimum wage) does not come close to meeting the MWA's collective bargaining exception. Accordingly, Respondents' new novel argument must be soundly rejected.

B. Nevada Law Requires That All Employees (Not Just Persons Who Work On A "Trial" Or "Break-in" Basis) Be Paid For All Their Hours They Work

Respondents' next novel argument that was never advanced below is that Appellant Jackson-Williams does not have a right to assert a claim for unpaid wages under NRS 608.016. RAB at pp. 19-24. Respondents claim that NRS 608.016 only applies to the scenario when a Nevada employee works on a "trial or break-in" basis

and does not apply to employees who work without compensation in the ordinary course of their employment. *Id.* at pp. 20-24. Respondents argue that the "text of [NRS 608.016] makes clear that it is intended to prevent employers from forcing employees to work without getting paid during a trial or break-in period." RAB at p. 20. Because Jackson-Williams was not in a trial or break in period during her last 8-months of employment, Respondents argue that "NRS 608.016 does not apply to [her]." RAB at p. 20.

Respondents' novel contention flies in the face of the plain language of the statute. At its essence, their argument asks this Court to interlineate the first sentence of the statute so that only the second sentence remains the law. This is statutory construction interpretation at its worst.

This Court interprets statutes according to their plain language, unless the statute is ambiguous, the plain meaning produces absurd results, or the interpretation was clearly not intended. *Echeverria v. State*, 495 P.3d 471, 476 (Nev., 2021). Here, NRS 608.016 provides as follows:

> **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 first sentence of the statute clearly states that an employer must pay an employee for each hour that the employee "works."[10] The second sentence then further mandates that an employer pay an employee even if the employee has only been hired on "trial" or "break-in" period.

Far from supporting Respondents' position that NRS 608.016's text is limited to "trial" or "break-in" periods, the plain language of the text broadly asserts that employers must pay all employees—regular hires, persons hired on a trial basis, or employees working during a break-in period—for all the hours that they labor on behalf of the company. Respondents' reading of the statute would eliminate the entire first sentence of the statute in favor of only the second. This is an absurd reading of NRS 608.016.

Furthermore, the Nevada Administrative Code (NAC) specifically rejects Respondents' reading of NRS 608.016. NAC 608.115(1), which derives its authority from NRS 608.016, specifically states, "An employer shall pay an employee for all time worked by the employee at the direction of the employer,

[10] "Work" is defined broadly as any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *In re: Amazon.Com, Inc. Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation.*, 905 F.3d 387, 399 (C.A.6 (Ky.), 2018) (interpreting Nevada law). The Sixth Circuit recognized that "the Nevada legislature has not defined what constitutes "work[]" but cited to this Court's decision in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 336 P.3d 951, 955–56 (2014) for the general proposition "it is appropriate to look to the federal law for guidance" on this issue. *Id.*

including time worked by the employee that is outside the scheduled hours of work of the employee." NAC 608.115(1) makes absolutely no mention of employees who work on a trial or break-in basis. It states that the requirement to pay for all hours worked applies to all employees. Accordingly, the plain language of NRS 608.016 and NAC 608.115 make it clear that an unpaid wage claim brought under NRS 608.016 is not limited to only persons who work on a "trial" or "break-in" basis.[11]

V. THE DISTRICT COURT ERRED BY APPLYING A 2-YEAR LIMITATIONS PERIOD TO ALL STATUTORY WAGE CLAIMS

The District Court held that all statutory wage claims are subject to a 2-year limitations period. JA Vol. 10, 2019. Respondents defend the District Court's decision by relying heavily on *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 768, 383, P.3d 257, 258 (2016), whereby this Court held that the MWA was subject to a

[11] Respondents' references to the Nevada legislative histories do not save their argument. First, this Court will not consult legislative histories when language of the statute is clear. *See Echeverria v. State*, 495 P.3d 471, 477 (Nev., 2021) ("[T]he State's resort to legislative history cannot create ambiguity where there is none."). Second, the legislative histories relied upon by Respondents do not support their broad contention that NRS 608.016 is limited only to persons who work on a "trial" or "break-in" basis. The legislative histories only support the assertion that the Legislature was concerned about employers extracting free labor from people that were hired on a "trial" or "break-in" basis. Indeed, this is likely why the Legislature added section 2 to NRS 608.016. But having more discussion about section 2 of NRS 608.016 does not mean that section 1 should be deleted by the judiciary. Just because one class of persons (persons who work on a "trial" and "break-in" basis) generates more discussion within the legislative process does not mean that the Legislature intended to exclude the other class of persons (regular employees) from statutory coverage.

2-year statute of limitations. RAB 31-35. While *Perry* may be superficially seen as analogous to the instant question presented, upon a deeper review, it is apparent that *Perry* has limited, if any, applicability to the analysis that must be performed here.

A. The Court In *Perry* Was Asked To Construe A Constitutional Provision That Did Not Contain Any Specific Or General *De Facto* Limitations Period

In *Perry*, the Court was asked to decide the statute of limitations for claims brought under Article 15, Section 16, of Nevada's Constitution (MWA). *See Perry* at 768. There was no express statute of limitations contained within the MWA itself; nor was there any *de facto* statute of limitations found anywhere else within the Nevada Constitution. *Id.* at 770 (recognizing that the MWA is "silent as to a statute of limitations period"). This Court was thus presented with the unique task of deciding the statute of limitations under a constitutional provision without any equivalent within the document of the Constitution. *Id.* As a result, this Court referred to the Nevada Revised Statutes for guidance and held that NRS 608.250, Nevada's statutory minimum wage provision and its 2-year limitations period, was most analogous to the MWA. *Id.*[12]

[12] To the extent that Respondents contend that *Perry* stands for the proposition that "[w]hen a right of action does not have an express limitations period, [the Nevada Supreme Court] appl[ies] the most closely analogous limitations period[]", *see Perry*, 132 Nev. at 774, the Nevada Legislature specifically rejected this type of construction following *Perry*. *See* https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7410/Text# (Approved

The important difference with the issue presented here, as opposed to the one presented in *Perry*, is that the Court must construe the limitations period of statutory provisions, as opposed to a constitutional provision. This is a critical distinction because, whereas the People of the State of Nevada did not provide a limitations period for the constitutional MWA or any general limitations periods for constitutional claims, the Nevada Legislature has specifically instructed courts and litigants as to the limitations period to be used for statutory violations of the Nevada Revised Statutes. *Compare* Nevada Constitution *with* NRS Chapter 11. Indeed, by enacting NRS 11.190(3), the Nevada Legislature specifically and expressly stated, "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.

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by the Governor on May 27, 2021) (Last visited Aug. 5, 2021) (stating that "the default statute of limitation to apply to certain causes of action whose statute of limitations is not otherwise prescribed by law***, regardless of whether the underlying cause of action is analogous to any other cause of action*** with a statute of limitations expressly prescribed by law") (emphasis added).

Herein lies the problem with the District Court's holding, and Respondents' arguments that Nevada statutory wage claims are all subject to a 2-year limitations period. The District Court and Respondents completely ignore the mandate that actions based upon a liability created by statute—such as statutory claims for unpaid wages and overtime—are subject to a 3-year limitations period. Instead, the District Court and Respondents blindly apply *Perry*'s construction of a constitutional provision for minimum wages to all wage claims brought under NRS Chapter 608 that do not contain a specific limitations period within the specific statutory provision. *See* JA Vol. 10, 2019 (ruling that "[t]his two-year statute of limitations period applies to NRS 608 statutory wage claims that are analogous to a cause of action for failure to pay an employee the lawful minimum wage. Id. Accordingly, a two-year statute of limitations applies to: Plaintiffs' First [through Fourth Causes of Action]").

The consequences of the District Court's ruling, at Respondents' urging, cannot be overstated. The District Court has judicially created statutes of limitations for non-minimum wage statutory wage claims that are in direct conflict with the Legislature's clear and express limitations periods. The Legislature is perfectly capable of providing for a different statutory period where it wishes to limit a limitations period, as it did with NRS 608.250-260. For example, NRS 608.260 "further limit[s] by specific statute" the general three-year default period by

mandating a shorter two-year limitations period for actions brought specifically under NRS 608.250. NRS 608.260 does not purport to limit causes of action arising under different statutory or constitutional provisions, and by its plain language limits only claims under NRS 608.250. Nor do other provisions within NRS 608 impose internal limitations periods similar to NRS 608.260. Had the Legislature intended to impose such limitations in other provisions contained in NRS Chapter 608, it could have easily done so. The Legislature's decision not to do so indicates its intent that, other than claims specifically arising out of NRS 608.250, all other statutory wage and hour claims are subject to the more general three-year limitations period set forth in NRS 11.190. By specifically including a limitations period for claims arising out of NRS 608.250 while remaining silent as to claims arising from other statutory provisions, the Legislature indicated that the statute provides an exception, not a general rule. Accordingly, transforming NRS 608.260's specific exception into a generally applicable rule by applying it to statutes outside the context of NRS 608.250 that do not contain similar limiting language would be improper. Accordingly, the District Court erred in holding that all non-minimum wage claims brought under NRS Chapter 608's provisions are limited to a 2-year limitations period.

B. NRS 608.020-.050 Is Not A Penalty; However, If It Is Determined To Be A Penalty, It Would Be Subject To A 2-year Limitations Period Pursuant To NRS 11.190(4)(b)

Respondents contend that even if this Court overrules the District Court's decision that all non-minimum wage claims brought under NRS Chapter 608 are subject to the 2-year limitations period, this Court should nonetheless hold that continuation wage claims brought under NRS 608.020-.050 are subject to a 2-year statute of limitations pursuant to NRS 11.190(4)(b). RAB 35-37. Appellants do not dispute that if this Court holds that claims brought under NRS 608.020-.050 are determined to be "penalties", then NRS 11.190(4)(b)'s 2-year limitations period enacted by the Legislature would apply. However, Appellants dispute that continuation wages are "penalties" that would be covered by NRS 11.190(4)(b).

NRS 608.020-.30 set forth legal requirements that Nevada employers fully compensate their employees within a specified time following the cessation of employment. If a Nevada employer fails to fully compensate his or her employee within the time frame specified under NRS 608.020-.030, the employee may continue to collect wages for up to 30 days under NRS 608.040 and/or 30 days under 608.050, depending on the manner in which the employees' employment ended. The titles of NRS 608.040 and 608.050 admittedly contain the word "penalty" but the text of the statutory provisions do not classify the remedy provided under the statute

as a "penalty"; instead, the remedy for failing to fully compensate an employee in a timely fashion shall be the continued payment of "wages."[13]

Here, the text of NRS 608.040 and/or 608.050 does not contain the word penalty within the statute. *See* NRS 608.040 (recognizing the remedy as "wages"—"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."); NRS 608.050 (recognizing the remedy as "wages"—"each of the employees may charge and collect wages in the sum agreed upon in the contract of employment for each day the employer is in default, until the employee is paid in full, without rendering any service therefor; but the employee shall cease to draw such wages or salary 30 days after such default."). Given the absence of any reference to the remedies contained in NRS 608.040 and 608.050 as "penalties", the only way these statutes could be construed as such is if the requirement that an employer pay a separated employee 30 days of additional wages meets the definition of a "penalty". The first step in determining whether 30 days of additional wages is a "penalty" must be to define the word "penalty."

[13] While a title of a statute may be considered in determining legislative intent, *see, e.g.*, *Coast Hotels and Casinos, Inc. v. Nevada State Labor Com'n*, 34 P.3d 546, 551, 117 Nev. 835, 841–42 (Nev., 2001), the plain language of the statute must first be considered, *see supra* at p. 22, *fn.* 11, *Echeverria v. State*, 495 P.3d at 477.

Black's Law Dictionary defines a "penalty" as "[p]unishment imposed on a wrongdoer, usually in the form of imprisonment or fine; especially, a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss)." PENALTY, Black's Law Dictionary (11th ed. 2019). Thirty days of additional wages is not a sum of money that is paid to the state. It should also not be construed as sum of money paid for a civil wrong. Logically, the 30-day additional pay remedy is to provide compensation to the former employee for continued living expenses when they are not fully compensated at the time of separation of employment. Employment is the lifeline for citizens in the state of Nevada. Without employment, Nevadans cannot pay for everyday essentials, such as food, clothing, and shelter. Accordingly, Appellants submit that the 30-day additional pay remedy should be construed as a form of compensation to the injured victim instead of a form of punishment imposed on the wrongdoer. To that end, the 30-day remedy provided for under NRS 608.040 and 608.050 would not be considered "penalties" and thus NRS 11.190(4)(b)'s 2-year statute of limitations would not apply to these claims either.

VI. THE DISTRICT COURT ERRED BY DISMISSING APPELLANT MARTEL'S CONTINUATION WAGE CLAIMS EVEN IF A 2-YEAR LIMITATIONS PERIOD APPLIES

The District Court entered summary judgment against Appellant Martel's continuation wage claims on the grounds that his last day worked was more than 2-

years from the filing of the complaint. JA Vol. 15, 2958-59. It is undisputed that Appellant Martel last worked on June 13, 2014 and that the complaint was first filed on June 14, 2016. *Id.* at 2958. But the District Court's focus on the "last day worked" by Appellant Martel was in error because a claim for continuation wages does not depend on the last day that an employee works, it depends on when the claim accrues. The District Court further erred in dismissing Appellant Martel's continuation wage claim by requiring him to demonstrate that he suffered an underlying wage violation during the last pay period (even though he alleged that he had and the District Court resolved disputed issues of fact against him). RAB 54-55.

A. The Limitations Period For A Continuation Wage Claim Cannot Begin Until The Claim Accrues And The Claim Did Not Accrue Until Final Wages Were "Due"

Appellants and Respondents appear to agree on at least one aspect of this appeal; a limitations period cannot begin until a claim accrues. The parties disagree, however, when accrual happens in the context of a continuation wage claim.

Respondents contend that the cause of action for a continuation wage claim "begins to accrue on the last day of employment." RAB at. pp. 37, 38. But in the same breath, Respondents state that "[b]ased on the statutory language, the wrong occurs, and the employee sustains injury, when the employer fails to pay "***on the day the wages or compensation is due***, as that is what triggers the penalty." *Id.* at 38 (emphasis added). Respondents' two statements above are irreconcilable. While

Respondents appear to admit that "what triggers the penalty" is when wages or compensation are "due", it simultaneously states that the accrual must be on the last day of employment. Despite Respondents' citations to the relevant statutory text, they refuse (yet again) to accept the plain language of that text.

NRS 608.030 guides the analysis as to when final wages become "due" under the law for employees who voluntarily terminate their employment. The parties agree that Appellant Martel's last day worked was June 13, 2014 (JA Vol. 14, 2685) and Respondents issued Appellant Martel a paycheck on June 16, 2014, which was three days after his last day worked. (JA Vol. 15, 2853.) However, the June 16, 2014 paycheck did not pay Appellant Martel all his wages due and owing for two types of work he previously completed at the direction of his employer. First, Appellant Martel did not receive wages owed for Respondents' admitted failure to pay wages for jammed shifts until sometime in early 2015, well over the statutorily prescribed timeframe. (JA Vol. 14, 2687-89, ¶¶ 7-16.) Second, Appellant Martel's wages for the alleged pre- and post-shift work competed throughout his entire employment were not included in the June 16, 2014 paycheck. (JA Vol. 5, 909-11, ¶¶ 14, 18, 19.) Nevertheless, Respondents admit that Appellant Martel's final wages were not due until June 19, 2014. RAB at 47, n.21 ("Under NRS 608.030 compensation is ***due*** 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.***" Emphasis added)). It belies common legal sense that a statute of limitations can begin to run on a claim before someone knows that he or she even has a claim. Therefore, the clock cannot possibly start to run on a statute of limitations in this instance unless and until the final wages become "due" to a former employee. Here, that date was, at its earliest, June 19, 2014.[14] Therefore, Appellant Martel had until June 19, 2016 to file his claim for continuation wages. Since he filed the instant action on June 14, 2016, his claim is timely under a 2-year limitations period.

B. There Is No Requirement That An Employee Be Limited To Continuation Wages For Violations Occurring During The Last Pay Period Worked

The District Court (and Respondents) believe that Nevada employees can only seek continuation wages under NRS 608.040 and 608.050 when the employee suffers a wage violation in the last pay period immediately preceding the separation

[14] Alternatively, Appellants argued in their Opening Brief, and still maintain here, that the continuation wage claim does not fully accrue until the remedy of 30 days of additional wages has accrued. *See* AOB at 49-50. Regardless of whether the accrual begins at the time the remedy is fully known (i.e., after 30-days of non-payment) or on the day that the final wages become "due", the District Court erred by concluding that the last day worked was the start of Appellant Martel's statute of limitations.

of employment. *See* JA Vol. 15, 2984 ("Section 608.040 of the Nevada Revised Statutes does not apply to wages that are not accrued during the final pay period of the employee"); RAB at 41-46. The District Court's holding, and Respondents' arguments, are without any legal basis or support.[15]

The plain language of the statute does not contain any such limiting language adopted by the District Court and urged by Respondents. As previously stated, NRS 608.030 sets forth the conditions for when an employee's final wages become "due". *See supra* at pp. 31-32 (providing that wages for an employee who voluntarily terminates his or her employment become due on the earlier of (i) the next regular pay day or (ii) 7 days following the day of involuntary termination). NRS 608.012 defines "Wages" as: "1. The amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time; and[,] 2. Commissions owed the employee, but excludes any bonus or arrangement to share profits."

Under the District Court's interpretation, an employer could refuse to pay an employee his or her wages for the pay period immediately preceding that last pay period worked for the employee and would not be liable for continuation wages. It

[15] The District Court held that NRS 608.050 does not apply to Appellant Martel because Mr. Martel resigned from his job. Appellants do not dispute that NRS 608.050 applies only to persons who are involuntarily terminated from employment (discharged or laid off), whereas NRS 608.040 applies to both voluntary and involuntary terminations ("discharged employee" or "resigns or quits").

cannot be disputed under this hypothetical that the employer would be guilty of failing to pay the employee all the wages due and owing upon termination. But under the District Court's interpretation of the continuation wage statutes, the employee would have no recourse to collect continuation wages because the underlying failure to pay wages or compensation did not occur in the last pay period prior to the termination of employment. There is simply no statutory basis for concluding as such.[16]

In their Answering Brief, Respondents cite to *Doolittle v. Eighth Judicial Dist. Court,* 54 Nev 319, 15 P.2d 684, 684-85 (1932), a case that Appellants similarly relied on in their Opening Brief. *See* RAB 43-46. While Respondents' long-winded discussion of Doolittle is perplexing,[17] the parties apparently agree that *Doolittle* should be consulted in deciding this issue.

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[16] Respondents argue that Appellants' interpretation of the continuation wage statutes would lead to the absurd result of an employee being able to seek continuation wages for the failure to fully compensate the employee for something that occurred ten (10) years prior to his separation. RAB at p. 42. This is, as a practical matter, an impossible hypothetical. A litigant pursuing such a claim would have to prove that he or she was not fully compensated his or her wages because of the event that happened 10-years prior, which would lead to a successful statute of limitations defense.

[17] Respondents argue that *Doolittle* is "telling" for three (3) reasons, none of which actually support their argument that an employee must suffer a wage violation in the last pay period prior to termination. *See* RAB 45-46. Instead, Respondents' analysis in this respect seems to be a cut and paste vendetta from a different case. *See id.* (referring to "this Court" as the court that decided *Descutner v. Newmont USA Ltd.*, 2012 WL 5387703 (D. Nev. Nov. 1, 2012)).

Appellants believe that *Doolittle* is supportive of their position that an employee need not only suffer a wage violation in the last pay period prior to termination to bring a continuation wage claim. In *Doolittle*, there is no evidence that the person employed was only eligible to recover continuation wages for the failure to pay wages in the last pay period; he was able to recover continuation wages for all the unpaid wages that he sought. Accordingly, the District Court's decision limiting continuation wages to only those instances when an employee suffers a wage violation during the last pay period prior to termination must be reversed.

C. Even If An Employee Must Suffer An Underlying Wage Violation In The Last Pay Period Worked, The District Court Erred By Resolving Disputed Facts and Relying On Evidence Raised For the First Time In Respondents' Reply Brief.

Even if the District Court did not err by holding that Nevada employees can only seek continuation wages under NRS 608.020-.050 for alleged wages violations that occur during the last pay period before an employee's separation from employment, the District Court nonetheless erred by concluding that Appellant Martel did not assert a claim for unpaid wages during his last pay period worked. *See* JA Vol. 15, 2984 ("No shift jamming, no off-the-clock banking, and no pre-shift meetings occurred during Mr. Martel's final pay period."). Yet again, the District Court committed reversible error by: (a) accepting new evidence that was submitted for the first time by Respondents in their Reply brief in support of summary

judgment, whereby preventing Appellants from responding to said evidence, and (b) resolving disputed issues of material fact in favor of the moving party, Respondents.

1. The District Court relied on evidence that was submitted for the very first time in the form of "supplemental declarations" in Respondents' Reply brief.

To support its conclusion that Appellant Martel did not suffer any wage violations during the last pay period, the District Court must have relied on new evidence that was submitted in support of Respondents' Reply brief. Respondents never put forth any evidence that Appellant Martel had not suffered a wage violation in their original motion for summary judgment. Instead, Respondents curtly argued that Appellant Martel's claims should be dismissed on the sole basis that the last day he worked was more than 2-years from the filing of the lawsuit. JA Vol. 12, 2378-79. The District Court accepted the undisputed fact that Appellant Martel's last day worked was June 14, 2014, as the dispositive fact for Appellant Martel's claims. For the reasons stated above, Appellant Martel's last day worked is not dispositive to his continuation wage claim. But to now suggest that the District Court's decision granting summary judgment should be upheld on some other grounds, even if the basis for the District Court's ruling is found to be unsound by this Court, again improperly usurps the jury's role in determining whether the allegations set forth in Appellant Martel's complaint can be proven at trial.

The first time that Respondents argued that Appellant Martel did not perform any uncompensated work in the last pay period was in Respondents' Reply in support of this Motion for Summary Judgment. JA Vol. 15, 2831-2849.[18] Raising supposed undisputed facts for the first time in a Reply brief, for which Appellants were prohibited from responding, is gamesmanship at is best, which is why courts refuse to allow it. *See, e.g., FortuNet v. Eqube International Inc.*, 2016 WL 344514, at *5 (D. Nev. 2016); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond.") (internal citation omitted); *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) ("It is well established in this circuit that the general rule is that appellants cannot raise a new issue for the first time in their reply briefs.") (internal quotations and citations omitted). Accordingly, the District Court's reliance on this evidence in support of its order granting Respondents' motion for summary judgment must be rejected.

[18] In their Reply, Respondents put forth two (2) supplemental declarations—Supplemental Declaration of Eric Candela and Supplemental Declaration of Susan Heaney Hilden. Appellants never had an opportunity to depose these individuals and test their assertions in the context of an adversarial process. Had this evidence been presented in Respondents' original motion for summary judgment, Plaintiffs could have responded, in writing, to each of the assertions and sought limited discovery.

2. The District Court erred by resolving disputed facts as to whether Appellant Martel suffered a wage violation in his last pay period prior to termination.

Even if this Court determined that the District Court did not error by considering new evidence that was submitted for the first time by Respondents in their Reply brief, the evidence that was submitted demonstrated that disputed facts existed as to whether Appellant Martel performed uncompensated work in his last pay period. Appellant Martel only worked front desk at the bowling alley when he was employed by Respondents. JA Vol. 15, 2870 (12:13-12:15). Except for the first few months of working the front desk at the bowling alley, Appellant Martel had to collect a cash bank. *Id.* at 2872 (18:23-19:5). In his deposition, Appellant Martel testified that he collected his cash bank prior to clocking-in as follow:

> Q. Okay. So let's -- as we said before, sometimes you did get a bank; right? Or a till.
> A. It was during the initial parts of my employment. What I do recall most, there was -- I would have to go and collect a bank from them. And I would have to go ahead and go up there, it was about 10 to 15 minutes before I got onto my shift. I would go to the cage, collect the money, and then from there go back to my department, put my money into the till, and then go and clock back in for my actual shift.

Id. at 2873 (21:9-21:18).[19]

[19] Appellant Martel further explained the process by which he received his cash bank and the fact that he was not compensated for this activity at Pages 24:14-27:6 of his deposition transcript. *See* JA Vol. 15, 2873-74

Even though Appellant Martel was prevented from highlighting this testimony in the lower court because this evidence was first put forth in Respondents' Reply, the District Court completely ignored Appellant Martel's testimony that he was required to collect a cash bank prior to clocking-in to the timekeeping system. Therefore, even relying on Respondents' own evidentiary submissions presented for the first time at the Reply stage indicates that there is at least a disputed issue of material fact as to whether Appellant Martel can prove that he was the victim of unpaid wages for this last pay period worked. Accordingly, the District Court's ruling that "[n]o shift jamming, no off-the-clock banking, and no pre-shift meetings occurred during Mr. Martel's final pay period[]" cannot stand.

VII. THE DISTRICT COURT'S CONCLUSION THAT APPELLANTS CANNOT REPRESENT OTHER UNION EMPLOYEES WITH RESPECT TO THE CLAIMS ALLEGED HEREIN IS MISTAKEN

The District Court held that Appellants cannot represent other union members unless Appellants prove that the union breached its duty of fair representation. *See* JA Vol. 15, 2990-91. Respondents support the District Court's conclusion by arguing that Appellants "lack standing as the current union employees' exclusive remedy would be through the collective bargaining process." RAB at 26.[20] Once again, Respondents are left to rely upon the unsigned and

[20] Respondents' lead argument in this respect is that Appellants cannot represent union members with respect to the wage claims alleged in this action

undated redlined draft CBA to support its argument that the purported CBA makes a "clear and unmistakable" waiver of Appellants' statutory wage claims. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255, 274 (2009) (holding that employee must arbitrate statutory claims only when CBAs are "clear and unmistakable" that such claims are to be arbitrated). General grievance provisions that do not specifically reference statutory claims to be waived are insufficient to meet this standard. *See, e.g., Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679, 679 (9th Cir. 2011) (requiring the CBA waiver to ""explicit[ly] incorporat[es] ... statutory antidiscrimination requirements." *citing Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80, 119 S.Ct. 391, 142 L.Ed.2d 361 (1998)).

Here, Respondents do not even cite the grievance procedure contained within the unsigned and undated draft redlined CBA as support for their argument. Instead, they rely upon the argument that the purported CBA "provid[es] an alternative overtime structure that provided more than what Nevada overtime required", "provid[es] an alternative rate scheme lower than the minimum wage", and "directly addresses issues of "straight time"", as evidence that the purported CBA "clearly and unmistakably" waived union members' rights to pursue statutory wage

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because the District Court has already dismissed those claims. RAB at 26 ("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."). Obviously, should this Court hold that Appellants' legal claims, on their own, lack merit, then they would not be able to represent other union members.

claims in court. RAB at 28. This is legally insufficient to create a waiver. *See Powell,* 457 F. App'x at 679. The only way that a waiver will be deemed to be "clear and unmistakable" is if Respondents could demonstrate that the purported CBA explicitly stated that NRS 608.016, 608.018, 608.020-.050, and Nevada Constitutional MWA claims must be grieved and/or arbitrated. The unsigned and undated redlined draft complaint does not contain any such explicit language.[21] Therefore, there is simply no basis to conclude that Appellants cannot properly represent other union members who are alleging statutory violations that are independent and separate from any potential benefit that may be conferred by a union CBA. For these reasons, the District Court erred by concluding that Appellants were required to sue their union for failure in their duty of representation and could not assert claims on a class basis under Rule 23 of the Nevada Rules of Civil Procedure for statutory wage claims.

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[21] The grievance procedure contained in the unsigned and undated draft redlined CBA can be found at JA Vol. 13, 2620-2621. The grievance procedure does not mention that it covers any claims other than those arising under the agreement. *Id.* at 2620 ("For purposes of this Agreement, a grievance is a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation of and application to employees covered by this Agreement, or any alleged violation of any provision of this Agreement.").

VIII. CONCLUSION

Appellants respectfully submit that the District Court's Orders granting summary judgment in favor of Respondents be reversed and this case be remanded for further proceedings.

Dated: November 24, 2021 Respectfully Submitted,

THIERMAN BUCK LLP

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CERTIFICATE OF COMPLIANCE

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

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

- This brief contains more than the allotted 7,000 words (10,557) and more than the allotted 650 lines of texts (950), as measured by Microsoft's Office 365 (word count) program, including footnotes, but excluding the disclosure statement, table of contents, table of authorities, required certificate of service, and certificate of compliance with these Rules, but is filed concurrently with a motion to exceed the type-volume limit pursuant to NRAP 32(a)(7)(D).

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

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

Dated: November 24, 2021 THIERMAN BUCK LLP

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 7287 Lakeside Drive, Reno, Nevada 89511. On November 24, 2021, the **Appellants' Reply Brief** was served on the following by using the Supreme Court's eFlex System:

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

Executed on November 24, 2021 at Reno, Nevada.

/s/ Brittany Manning
An Employee of Thierman Buck LLP