

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 MAUREEN CLARK and SONYA )
4 ALEXANDER, )
5 Plaintiff, )
6 vs. )
7 BANK OF AMERICA, N.A., )
8 Defendant. )
9

Case No.: 2:16-cv-02228-GMN-VCF

ORDER

10
11 Pending before the Court is the Motion to Dismiss, (ECF No. 40), filed by Defendant
12 Bank of America N.A., (“Defendant”). Plaintiffs Maureen Clark (“Clark”) and Sonya
13 Alexander (“Alexander”) (collectively “Plaintiffs”) filed a Response, (ECF No. 45), and
14 Defendant filed a Reply, (ECF No. 46).

15 Also pending before the Court are Plaintiffs’ Motion for Conditional Certification, (ECF
16 No. 37), and Motion to Reconsider, (ECF No. 49).<sup>1</sup> Defendant filed a Response, (ECF No. 42),
17 to the Motion for Conditional Certification, and Plaintiffs filed a Reply, (ECF No. 44).

18 I. BACKGROUND

19 This case arises out of alleged Fair Labor Standards Act (“FLSA”) violations involving
20 Defendant not paying Plaintiffs “from the beginning of the first principal activity of the
21 workday to the end of the last principal activity of the workday.” (Am. Compl. ¶ 4, ECF No.
22 36). Clark worked at Defendant’s call center in Las Vegas, Nevada, from April 1999 to May
23 2016, and Alexander worked at the same call center from June 2005 to December 2015. (See id.
24 ¶¶ 16, 27). Plaintiffs were employed as “hourly call center agents,” which they termed

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<sup>1</sup> Defendant filed a Non-Opposition to Plaintiffs’ Motion for Reconsideration, (ECF No. 50).

1 “Agents.” (Id. ¶ 2). While working there, Plaintiffs allege that before they could clock-in for  
2 their shifts, they were required to “boot up and login to various computer programs, software  
3 programs, and applications in order to access required information and software,” and that this  
4 process took “substantial time on a daily basis ranging from 5 to 10 minutes per day, and up to  
5 30 minutes on days where their computers were not working properly.” (Id. ¶¶ 19, 20).  
6 Because of this, Plaintiffs allege that Defendant deprived Plaintiffs and other members of the  
7 putative class of wages owed for their preliminary work activities. (See id. ¶ 30). Plaintiffs  
8 allege these collective action allegations on behalf of “[a]ll current and former hourly customer  
9 service agents who worked for Defendant at any time after September 20, 2013.” (Id. ¶ 35).

10 On September 21, 2016, Plaintiffs filed their Complaint alleging three causes of action:  
11 (1) violation of the fair labor standards act; (2) violations of NRS §§ 608.016, 608.018, and  
12 608.020; and (3) breach of contract. (See generally Compl., ECF No. 1). On January 4, 2017,  
13 Defendant filed its first Motion to Dismiss. (See generally Mot. to Dismiss, ECF No. 29). The  
14 Court entered its Order on August 30, 2017, where it dismissed Alexander’s FLSA claim  
15 without prejudice and Plaintiffs’ second cause of action with prejudice regarding a private right  
16 of action pursuant to Nevada Revised Statutes (“NRS”) §§ 608.016 and 608.018 with prejudice.  
17 (See Order, 7:10–20, ECF No. 35).

18 Plaintiffs filed an Amended Complaint and a Motion for Conditional Certification on  
19 September 13, 2017. (See generally Am. Compl., ECF No. 36); (see generally Mot. for  
20 Conditional Certification, ECF No. 42). In addition, Plaintiffs filed a Motion to Reconsider,  
21 which Defendant has filed a Non-Opposition. (See generally Mot. to Recons., ECF 49); (see  
22 generally Non-Opposition, ECF No. 50). On September 27, 2017, Defendant filed its Motion  
23 which seeks to, inter alia, Dismiss the Amended Complaint. (See generally Mot. to Dismiss,  
24 ECF No. 40).

1 **II. LEGAL STANDARD**

2 **A. Motion to Dismiss**

3 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
4 which relief can be granted. Fed. R. Civ. P. 12(b)(6); Bell Atl. Corp v. Twombly, 550 U.S, 544,  
5 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on  
6 which it rests, and although a court must take all factual allegations as true, legal conclusions  
7 couched as factual allegations are insufficient. Twombly, 550 U.S. at 555. Accordingly, Rule  
8 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
9 of a cause of action will not do.” Id. “To survive a motion to dismiss, a complaint must contain  
10 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
11 face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “A  
12 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
13 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. This  
14 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” Id.

15 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
16 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
17 amendment. DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992). Pursuant  
18 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in  
19 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the  
20 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
21 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
22 amendment, etc.” Foman v. Davis, 371 U.S. 178, 182 (1962).

23 **B. Motion to Reconsider**

24 “[A] motion for reconsideration should not be granted, absent highly unusual  
25 circumstances.” Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted).

1 Reconsideration is appropriate where: (1) the court is presented with newly discovered  
2 evidence, (2) the court committed clear error or the initial decision was manifestly unjust, or (3)  
3 if there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah County v.*  
4 *ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). However, a motion for reconsideration is not  
5 a mechanism for rearguing issues presented in the original filings. *Backlund v. Barnhart*, 778  
6 F.2d 1386, 1388 (9th Cir. 1985). Furthermore, although the court enjoys discretion in granting  
7 or denying a motion under this rule, “amending a judgment after its entry remains an  
8 extraordinary remedy which should be used sparingly.” *Allstate Ins. v. Herron*, 634 F.3d 1101,  
9 1111 (9th Cir. 2011) (internal quotation marks and citation omitted).

### 10 **III. DISCUSSION**

11 In the instant Motion, Defendant seeks dismissal only of Plaintiffs’ collective action  
12 claims. (See Mot. to Dismiss 10:15–17). In the alternative, Defendant moves to strike  
13 Plaintiffs’ collective action claims from the pleadings or for a more definite statement. (*Id.*  
14 16:5–6).

15 Additionally, Plaintiffs move for reconsideration of their state law claims, which the  
16 Court dismissed in its initial Order. (See generally Mot. to Recons.); (see Order, 5:17–6:12).  
17 The Court will address each Motion in turn.

#### 18 **A. Defendant’s Motion to Dismiss the Collective Action Allegations**

19 Defendant asserts two arguments in support of its Motion to Dismiss: (1) that a 12(b)(6)  
20 motion is the correct procedural vehicle to test the sufficiency of a collective action claim; and  
21 (2) that Plaintiffs have failed to allege a class of similarly situated individuals with comparable  
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1 positions and assignments harmed by a single policy, plan, or decision.<sup>2</sup> (See Reply, 6:17–19);  
2 (see Mot. to Dismiss 10:24–25, 12:23–24). The Court addresses each in turn.

3 **i. The Appropriateness of a 12(b)(6) Motion to Dismiss**

4 As a threshold matter, Plaintiffs assert in their Response that a 12(b)(6) motion is  
5 procedurally improper for a collective action claim because it operates as an “end-run around”  
6 the two-stage conditional certification process. (See Response 2:13–14). Defendant argues that  
7 Plaintiffs must allege that the putative class is similarly situated to a “plausible degree, as  
8 required by *Iqbal* and *Twombly*.” (Reply 10:6–7).

9 This District has determined that collective action allegations must survive Rule 12(b)(6)  
10 and state a claim for relief that is plausible on its face in order to move onto the conditional  
11 certification stage. See *Bogdon v. Newmont USA Ltd.*, No. 3:11-cv-00317-LDG, 2011 WL  
12 6253151, at \*3 (D. Nev. Dec. 2, 2011). A motion to dismiss does not consider whether a  
13 Plaintiff has raised facts to conditionally certify a collective action. See *id.* Rather, the Court  
14 looks to whether the Plaintiff has alleged sufficient facts that he or she may proceed to bring  
15 such a motion. See *id.* Thus, the Court determines that Defendant’s 12(b)(6) Motion to Dismiss  
16 is an appropriate vehicle to test the sufficiency of Plaintiffs’ collective action allegation and  
17 will address Defendant’s Motion.

18 **ii. Similarly-Situated Individuals**

19 In regards to the merits of Defendant’s Motion, Defendant asserts that Plaintiffs have  
20 failed to allege that the putative class is “similarly situated.” (See Mot. to Dismiss 10:19–16:4).  
21 To certify a class under the FLSA, a plaintiff must make substantial allegations that the putative  
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24 <sup>2</sup> Defendant’s argument regarding the sufficiency of a motion to dismiss is contained in its Reply. (See Reply  
25 6:17–10:17). In its Motion to Dismiss, Defendant makes two arguments in support of dismissing the collective  
action allegations: (1) that Plaintiffs have failed to allege a proposed collective with comparable positions and  
assignments; and, (2) that Plaintiffs have failed to allege that a single policy, decision, or plan harmed the entire  
putative collective group. (See Mot. to Dismiss 10:24–25, 12:23–24). For the sake of clarity, the Court considers  
Defendant’s two arguments in support of dismissal together.

1 class members together were the victims of a single decision, policy, or plan. See *Wood v.*  
2 *TriVita Inc.*, No. cv.-08-0765-PHX-SRB, 2009 WL 2046048, at \*3 (D. Ariz. Jan. 22, 2009).  
3 Courts in the Ninth Circuit have looked to several factors in determining whether plaintiffs are  
4 similarly situated for purposes of the FLSA, including:

- 5 (1) Whether there is evidence that the alleged activity was part of an
- 6 institution wide practice; (2) the extent of the similarities among the
- 7 members of the proposed collective action, in particular whether the
- 8 members all are challenging the same employment practice; and
- (3) the extent to which the members of the proposed action will rely
- on common evidence.

9 *Wood v. TriVita Inc.*, 2009 WL 2046048, at \*4; see also *Longnecker v. Am. Exp. Co.*, No. 2:14-  
10 cv-0069-HRH, 2014 WL 4071662, at \*4 (D. Ariz. Aug. 18, 2014); see also *Trinh v. JP Morgan*  
11 *Chase & Co.*, 2008 WL 1860161 at \*3 (S.D. Cal. April 22, 2008).

12 In the initial stage of conditional certification, however, the plaintiff bears a very light  
13 burden. See *Prentice v. Fund for Public Interest Research, Inc.*, No C-06-776-SC, 2007 WL  
14 2729187, at \*2 (N.D. Cal. Sept. 18, 2007) (explaining that because “a motion for conditional  
15 certification typically comes before discovery, and is made in anticipation of a more searching  
16 review, a movant bears a very light burden in substantiating its allegations . . .”). Therefore, at  
17 the motion to dismiss stage, a plaintiff need only allege facts sufficient for the Court to  
18 conclude as plausible that the putative class members are similarly situated. See *Bogdon*, 2011  
19 WL 6253151, at \*3 (emphasis added).

20 In its Motion to Dismiss, Defendant relies heavily on *Creech v. Holiday CVS, LLC*, 2012  
21 WL 4483384 (M.D. La. Sept. 28, 2012), and *Kemp v. Target Corp.*, 2013 WL 5289799 (N.D.  
22 Ala. Sept. 18, 2013). (See Mot. to Dismiss 11:10–20). However, not only are these cases from  
23 out of this circuit, but also they are factually distinguishable from the case at bar. In *Creech*,  
24 the plaintiff alleged only his own duties as a shift supervisor without giving any description  
25 about the parties he alleged to be “similarly situated” other than the fact that they “provided  
customer services.” See *Creech*, 2012 WL 4483384 at \*3. Additionally, the plaintiff’s

1 allegation of the defendant’s “systematic scheme,” without more, was insufficient to establish a  
2 plausible violation. See *id.* In *Kemp*, the plaintiff failed to provide any job descriptions to  
3 describe the putative class and sweepingly alleged that the class included those individuals  
4 performing work requiring “equal skill, effort, and responsibility.” See *Kemp*, 2013 WL  
5 5289799 at \*3.

6 Here, however, Plaintiffs have alleged both the putative class’s job duties and  
7 Defendant’s policy with more specificity than the plaintiffs in both *Creech* and *Kemp*. (See *Am.*  
8 *Compl.* ¶¶ 18–30, 35–36). Plaintiffs have alleged that the putative class consists of employees  
9 who “respond[] to client inquiries regarding account balances, account activity, and interest  
10 rates; assist[] clients with online technical issues; and explain[] and process[] client  
11 transactions.” (*Am. Compl.* ¶ 18). Plaintiffs have also excluded from this class “Defendant’s  
12 executives, administrative, and professional employees, including computer professionals and  
13 outside sales persons.” (*Id.* ¶ 36). Further, Plaintiffs have alleged sufficient facts regarding  
14 Defendant’s policy, plan, or decision. (See *id.* ¶¶ 19–30). Plaintiffs allege that Defendant used  
15 its attendance policies to coerce Plaintiffs into coming in early to boot up their computers and  
16 did not instruct Plaintiffs to refrain from this activity until their scheduled start time. (See *id.*  
17 ¶ 27–29).

18 Although Defendant correctly points out that Plaintiff inconsistently uses “customer  
19 service agent” and “call center agent” interchangeably, this is insufficient to substantiate a  
20 motion to dismiss. (See *Mot. to Dismiss* 12:1–9). Moreover, the question still remains as to  
21 whether the putative class will actually be certified, but at the present stage, Plaintiffs have  
22 alleged sufficient facts to survive Rule 12(b)(6). As such, Plaintiffs have asserted facts to  
23 plausibly infer that there are other groups of similarly-situated employees who are subject to  
24 Defendant’s same alleged policies. Accordingly, Defendant’s Motion to Dismiss Plaintiff’s  
25 collective action allegations is denied.

1                   **i. Defendant’s Alternative Motion to Strike and Motion for a More**  
2                   **Definite Statement**

3                   If Defendant’s Motion to Dismiss is denied, Defendant moves the Court to alternatively  
4 strike portions of the FAC or require a more definitive statement. The Court will address each  
5 alternative Motion in turn.

6                   Defendant first seeks in the alternative to strike Plaintiffs’ putative collective action  
7 allegations “because Plaintiffs have failed to plead facts to support any plausibly basis for  
8 collective relief, much less nationwide collective relief.” (Mot. to Dismiss 10:21–23) (emphasis  
9 in original). A court may grant a motion to strike if the contested language constitutes an  
10 “insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed .R.  
11 Civ. P. 12(f). Moreover, federal courts generally disfavor motions to strike. *Orquiza v.*  
12 *Walldesign, Inc.*, No. 2:11-CV-1374 JCM CWH, 2012 WL 2327685, at \*6 (D. Nev. June 19,  
13 2012). Here, as discussed supra, the Court does not find that Plaintiff failed to plead facts to  
14 support a plausible basis for nationwide collective relief. Additionally, the Court does not find  
15 that Plaintiffs’ allegations are immaterial or impertinent. Accordingly, Defendant’s Motion to  
16 Strike in the alternative is denied.

17                   If Defendant’s Motion to Dismiss and Motion to Strike are denied, then Defendant seeks  
18 in the alternative for a more definite statement. Specifically, Defendant argues that “[t]he  
19 putative collective, alternatively defined as ‘customer service agents,’ or ‘call center Agents’ is  
20 defined according to positions that were not held by Plaintiffs or anyone else at the Bank during  
21 the relevant time period.” (Mot. to Dismiss 16:19–21). Defendant continues, “[t]his forces  
22 Defendant to guess which position or positions the putative collective actually includes. (Id.  
23 16:21–22). “A party may move for a more definite statement of a pleading to which a  
24 responsive pleading is allowed but which is so vague or ambiguous that the party cannot  
25 reasonably prepare a response.” Fed. R. Civ. P. 12(e). Rule 12(e) motions are viewed with



1 disfavor and are rarely granted because of the minimal pleading requirements of the Federal  
2 Rules. *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1077 (C.D. Cal. 1994). A Rule 12(e)  
3 motion is not a substitute for discovery; such a motion attacks unintelligibility in a pleading,  
4 not mere lack of detail. *Wood v. Apodaca*, 375 F. Supp. 2d 942, 949 (N.D. Cal. 2005). If the  
5 detail sought by a motion for more definite statement is obtainable through discovery, the  
6 motion should be denied. *Beery v. Hitachi Home Elecs. (America), Inc.*, 157 F.R.D. 477, 480  
7 (C.D. Cal. 1993). Here, the Court finds that Plaintiffs sufficiently plead the scope of their  
8 putative collective class necessary for the instant stage in the proceeding. The framing of the  
9 class, albeit inconsistent, is not overly vague or ambiguous and provides parameters by which  
10 Defendant can abide. Accordingly, the Court denies Defendant's request for a more definite  
11 statement and denies the entirety of Defendant's Motion.

#### 12 **B. Plaintiffs' Motion to Reconsider**

13 Plaintiffs move for reconsideration of their Nevada state law claims under Nevada  
14 Revised Statutes ("NRS") §§ 608.016, 608.018, and 608.260. (Mot. to Recons. 2:12–15). In its  
15 previous Order, the Court dismissed Plaintiffs' state law claims with prejudice because federal  
16 case law from this District confirmed that NRS § 608 did not support a private right of action  
17 for unpaid wages. (Order 5:17–6:12, ECF No. 35). However, Plaintiffs request reconsideration  
18 of these claims due to the Nevada Supreme Court's recent decision holding that a plaintiff has a  
19 private right of action under NRS § 608 pursuant to *Neville v. Eighth Judicial Dist. Court*, 406  
20 P3d 499 (Nev. 2017). (See Mot. to Recons. 2:4–7).

21 In light of the Nevada Supreme Court's decision, and in light of Defendant's Non-  
22 Opposition, (ECF No. 50), the Court grants Plaintiff's Motion to Reconsider. Accordingly, the  
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1 Court grants Plaintiffs leave to file a second amended complaint only to re-allege their state law  
2 claims.<sup>3</sup>

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss, (ECF No. 40), is  
5 **DENIED.**

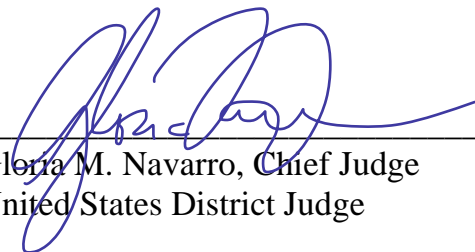
6 **IT IS FURTHER ORDERED** that Defendant's Motion to Strike, (ECF No. 40), is  
7 **DENIED.**

8 **IT IS FURTHER ORDERED** that Defendant's Motion for a More Definite Statement,  
9 (ECF No. 40), is **DENIED.**

10 **IT IS FURTHER ORDERED** that Plaintiffs' Motion to Reconsider, (ECF No. 49), is  
11 **GRANTED.** Plaintiffs shall have fourteen (14) days from the filing date of this Order to file a  
12 second amended complaint with the revived state law claims. Failure to file a second amended  
13 complaint by this date shall result in the dismissal of Plaintiffs' claims with prejudice.

14 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Conditional Certification,  
15 (ECF No. 37), is **DENIED as moot.**

16 **DATED** this 14 day of June, 2018.

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21 Gloria M. Navarro, Chief Judge  
22 United States District Judge  
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25 <sup>3</sup> Because the Court is permitting Plaintiffs to reallege their state law claims, the Court denies as moot Plaintiffs' Motion for Conditional Certification, (ECF No. 37). Plaintiffs may refile their Motion for Conditional Certification after the filing of the second amended complaint.