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**IN THE SUPREME COURT OF NEVADA**

JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated,

Plaintiff-Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF COUNTY OF CLARK, and the HONORABLE ADRIANA ESCOBAR, DISTRICT JUDGE

Respondents

and

TERRIBLE HERBST, INC.,

Defendant-Real Party in Interest



Docket Number: 70696

District Court Case No: A-15-728134-C

**APPENDIX VOLUME 1 OF 2**

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CLERK OF THE COURT

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

* * *

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|---|---|
| JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated,<br><br>Plaintiff(s),<br><br>vs.<br><br>TERRIBLE HERBST, INC., and DOES 1 through 50, inclusive,<br><br>Defendant(s). | Case No.: A-15-728134-C<br>Dept. No.: XIV |

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)**

This matter concerning Defendant TERRIBLE HERBST, INC.'s Motion to Dismiss pursuant to NRCP 12(b)(5) came on Hearing before Department XIV of the Eighth Judicial District Court of Clark County, Nevada, Honorable Judge Adriana Escobar presiding, on February 25, 2016 at 9:30 a.m. This Court subsequently took Under Advisement the matter.

After considering all the pleadings and oral argument of counsel, the Court makes the following findings:

In Nevada, the Legislature has entrusted the labor laws' enforcement to the Labor Commissioner, unless otherwise specified. NRS 607.160(1). In Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 954 (2008), the Nevada Supreme Court held that the Nevada Labor Commissioner is entrusted with the responsibility of enforcing Nevada's labor laws, and generally must administratively hear and decide complaints that arise under those laws. Thus, in Baldonado, the Supreme Court held that no private action exists to enforce NRS

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

608.160, NRS 608.100 and NRS 613.120. Id. at 958.

Defendants' argue that NRS 608.140 expressly provides for a private right of action to recoup unpaid wages. Defendants' reliance upon NRS 608.140 and *dicta* contained in a footnote to the Baldonado decision is mostly misplaced. Indeed, NRS 608.140 provides that an employee may bring suit for wages earned and due according to the terms of his or employment. Here, however, most of Plaintiff JOHN W. NEVILLE, JR.'s claims are based upon alleged violations of Nevada's labor laws, not based upon the "terms of his or her employment." The private right of action provided by NRS 608.140 and referred to in the *dicta* contained within footnote 33 of Baldonado applies only to unpaid wage claims based upon the "terms of employment" and not unpaid wage claims based upon alleged violations of Nevada's labor laws.

Accordingly, Plaintiffs have no private right of action to bring claims based upon alleged failures to pay minimum wages (Article 15 Section 16 of the Nevada Constitution); failure to pay wages for all hours worked (NRS 608.016); failure to pay overtime wages (NRS 608.018); and failure to pay all wages due and owing upon termination (NRS 608.020 through NRS 608.050), as these claims are based upon alleged violations of Nevada's labor laws. The Nevada Labor Commissioner properly adjudicates these claims.

In contrast, Plaintiff does have a private right of action for unpaid wages based upon the allegation contained in paragraph 57 of their Complaint alleging that the Defendants promised to pay Plaintiff a heightened hourly rate of $8.50 per hour instead of a base wage of $8.00 per hour as compensation for all hours worked during the graveyard shift. This claim is based on alleged "terms of employment", a breach of contract claim, and does not rely upon the application of Nevada's labor laws. Thus, there is a private right of action pursuant to NRS 608.140.

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**ADRIANA ESCOBAR**
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155



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Based on the foregoing, it is hereby ORDERED:

Defendants' motion to dismiss is GRANTED in part and DENIED in part as follows:

1. The First, Second, Third, and Fourth Causes of Action are DISMISSED WITHOUT PREJUDICE;

2. Defendant's Motion to Dismiss the Fifth Cause of Action is DENIED as to Plaintiff's claim for unpaid wages based upon Defendant's alleged promise to pay Plaintiff a heightened hourly wage of $8.50 per hour for all hours worked during graveyard shift, as this claim is based upon the alleged "terms of employment", a breach of contract claim, rather than enforcement of Nevada's labor laws.

DATED this 20 day of April 2016

A. Escobar

ADRIANA ESCOBAR
DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

**A-15-728134-C**

I hereby certify that on or about the date filed, this document was e-served or a copy of this document was placed in the attorney's folders in the Clerk's office or mailed to:

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**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated,

Plaintiff,

vs.

TERRIBLE HERBST, INC., and DOES 1 through 50, inclusive,

Defendant(s).

Case No.: A-15-728134-C
Dept. No.: V

**FIRST AMENDED CLASS ACTION COMPLAINT**

**(EXEMPT FROM ARBITRATION PURSUANT TO NAR 5)**

1) Failure to Pay Minimum Wages in Violation of the Nevada Constitution;

2) Failure to Compensate for All Hours Worked in Violation of NRS 608.140 and 608.016;

3) Failure to Pay Overtime in Violation of NRS 608.140 and 608.018;

4) Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050; and

5) Breach of Contract.

**JURY TRIAL DEMANDED**

COMES NOW Plaintiff JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated and alleges the following:

All allegations in the Complaint are based upon information and belief except for those allegations that pertain to the Plaintiff named herein and his counsel. Each allegation in the

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Complaint either has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

**JURISDICTION AND VENUE**

1. The Nevada state court has jurisdiction over the state law claims alleged herein because the amount in controversy exceeds $10,000 and because Plaintiff has a private right of action for minimum wages for all hours worked pursuant to Section 16 of Article 15 of the Nevada State Constitution. Article 15, Section 16(B) of the Constitution of the State of Nevada states in relevant part: "An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs."

2. In addition, this court has jurisdiction over the Nevada statutory claims alleged herein because a party seeking to recover unpaid wages has a private right of action pursuant to Nevada Revised Statute ("NRS") sections 608.050, 608.250, and 608.140. *See Lucatelli v. Texas De Brazil (Las Vegas) Corp.*, 2:11-CV-01829-RCJ, 2012 WL 1681394 (D. Nev. May 11, 2012) ("[T]he Nevada Supreme Court recently held that NRS § 608.040 contains a private cause of action because it is "illogical" that a plaintiff who can privately enforce a claim for attorneys' fees under NRS § 608.140 cannot privately enforce the underlying claim the fees arose from."); *Busk v. Integrity Staffing Solutions, Inc.*, 2013 U.S. App. LEXIS 7397 (9th Cir. Nev. Apr. 12, 2013) ("Nevada Revised Statute § 608.140 does provide a private right of action to recoup unpaid wages."); *Doolittle v. Eight Judicial Dist. Court*, 54 Nev. 319, 15 P.2d 684; 1932 Nev. LEXIS 34 (Nev. 1932) (recognizing that former employees have a private cause of action to sue their employer (as well as third party property owners where the work was performed) for wages and waiting penalties under NRS 608.040 and NRS 608.050).

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3. Venue is proper in this Court because one or more of the Defendants named herein maintains a principal place of business or otherwise is found in the judicial district and many of the acts complained of herein occurred in Clark County, Nevada.

**PARTIES**

4. Plaintiff JOHN W. NEVILLE, JR., (hereinafter "Plaintiff" or "NEVILLE") is a natural person who is and was a resident of the State of Nevada and has been employed by Defendant as a non-exempt hourly employee during the relevant time period alleged herein.

5. Defendant TERRIBLE HERBST, INC., (hereinafter "Defendant") is a domestic corporation incorporated in the state of Nevada, with its principle place of business in Las Vegas, Nevada. The Defendant named herein is the employer of the Plaintiff and all Class Members alleged herein.

6. The Defendant is an employer engaged in commerce under the provisions of NRS 608.011.

7. The identity of DOES 1-50 is unknown at the time and the Complaint will be amended at such time when the identities are known to Plaintiff. Plaintiff is informed and believes that each Defendants sued herein as DOE is responsible in some manner for the acts, omissions, or representations alleged herein and any reference to "Defendant," "Defendants," or "Terrible Herbst" herein shall mean "Defendants and each of them."

**FACTUAL ALLEGATIONS**

8. Plaintiff has been employed by Defendant as a cashier at one of its Las Vegas convenience store locations.

9. Plaintiff was offered to be paid a base hourly rate of $8.00 per hour for all non-graveyard hours worked and $8.50 for all graveyard hours worked. Despite being offered $8.50 per hour for graveyard hours, Defendant never compensated Plaintiff at the $8.50 rate. Instead, Defendant compensated Plaintiff at a base hourly rate of $8.00 for all the hours that he worked.

10. Plaintiff was scheduled for, and regularly worked, at least 5 shifts per week, 8 hours per shift, and 40 hours per workweek.

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11. Upon information and belief, Defendant maintains an unlawful rounding policy whereby it rounds the time recorded and worked by all hourly employees to the nearest 15 minutes for purposes of calculating payment of wages owed. Such rounding favors the employer and deprives the employees of pay for time they actually perform work activities. Indeed, Defendant requires, suffers or permits the employees to perform actual work during the periods when no wages are paid due to the above described rounding. *See* Exhibit 1 attached hereto (Defendant required all employees to clock in no more than seven minutes before the beginning of a scheduled shift and to clock out no more than seven minutes after the end of their regularly scheduled shift).

12. As a result of Defendant's rounding policy, Plaintiff performed work for which he was not compensated. Plaintiff was routinely denied approximately 14 minutes of uncompensated work time per shift that he worked. Attached hereto as Exhibit 2 is a true and correct copy of Plaintiff's time sheet together with his corresponding itemized pay statement. As indicated on the time sheet, Plaintiff routinely clocked in approximately 7 minutes prior to the start of his shift and up to 7 minutes after the end of his shift. During the time period covered by this time sheet, Plaintiff was clocked in for 81 hours and 48 minutes. Plaintiff performed work activities during those hours. As indicated by the itemized pay statement, Plaintiff was only compensated for 80 hours during that time period. Plaintiff was thus deprived 1 hour and 48 minutes of overtime wages for the time period represented in Exhibit 2 (June 25, 2014 to July 8, 2014). In other words, Defendant stole $21.60 from Plaintiff. This is just one example of unpaid wage that are due to Plaintiff. By virtue of Defendant's rounding policy, Defendant stole money from Plaintiff and all other hourly paid employees for each and every day, each and every workweek, and each and every pay period they worked.

## CLASS ACTION ALLEGATIONS

13. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

14. Plaintiff brings this action on behalf of himself and the following similarly situated and typical employees in Nevada as a true class action under Nevada law: **All hourly**

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**paid employees employed by Defendant, in the State of Nevada within six years immediately preceding the filing of this action until the date of judgement after trial.**

15. **The Class is Sufficiently Numerous.** Upon information and belief, Defendant employs, and has employed, in excess of 500 Class Members within the applicable statute of limitations. Because Defendant is legally obligated to keep accurate payroll records, Plaintiff alleges that Defendant's records will establish the identity and ascertainably of members of the Class as well as their numerosity.

16. **Plaintiff's Claims are Typical to Those of Fellow Class Members**. Each Class Member is and was subject to the same practices, plans, and/or policies as Plaintiff, as follows: (1) Defendant required Plaintiff and all Class Members to engage in pre- and post-shift activities without compensation because of a companywide policy of rounding time to the nearest 15 minute increment while at the same time requiring, suffering or permitting employees to perform work during the time uncompensated due to rounding; (2) as a result of working employees without compensation due to rounding that favored the employer and did not pay for time actually worked, Defendant failed to pay Plaintiff and Class Members who are former employees all wages due and owing at the time of their termination or separation from employment ; and (3) Defendant failed to properly pay Plaintiff and all Class Members the promised amount for all hours worked and for all hours worked on the graveyard shift.

17. **Common Questions of Law and Fact Exist.** Common questions of law and fact exist and predominate as to Plaintiff and the Class, including, without limitation the following: (1) Whether the time recorded by Plaintiff and all other class Members but not paid due to a rounding policy is compensable under Nevada law; (2) Whether Defendant failed to pay a premium rate of one and one half times their regular rate for all hours worked in excess of 40 hours a week, and if they were paid less than one and one half the minimum wage, then for all hours worked in excess of 8 hours a day; (3) Whether Plaintiff and Class Members were compensated for "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee" pursuant to the Nevada Administrative Code ("NAC") 608.115(1), and NRS 608.016; (4)

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Whether Defendant delayed final payment to Plaintiff and Class Members who are former employees in violation of NRS 608.020-050; and (5) Whether Defendant breach its contract to pay Plaintiff and Class Members for all the hours that they worked and for all hours worked during the graveyard shift.

18. **Plaintiff Is an Adequate Representative of the Class.** Plaintiff will fairly and adequately represent the interests of the Class because Plaintiff is a member of the Class, he has issues of law and fact in common with all members of the Class, and he does not have any interests antagonistic to the members of the Class. Plaintiff and counsel are aware of their fiduciary responsibilities to Members of the Class and are determined to discharge those duties diligently and vigorously by seeking the maximum possible recovery for the Class.

19. **A Class Action Is A Superior Mechanism to Hundreds Of Individual Actions.** A class action is superior to other available means for the fair and efficient adjudication of their controversy. Each Member of the Class has been damaged and is entitled to recovery by reason of Defendant's illegal policy and/or practice of failing to compensate its employees in accordance with Nevada wage and hour law. The prosecution of individual remedies by each member of the Class will be cost prohibitive and may lead to inconsistent standards of conduct for Defendant and result in the impairment of the rights and the disposition of their interest through actions to which they were not parties.

## FIRST CAUSE OF ACTION

### Failure to Pay Minimum Wages in Violation of the Nevada Constitution

(On Behalf of Plaintiff and all members of the Class)

20. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

21. Article 15 Section 16 of the Nevada Constitution sets forth the requirements the minimum wage requirements in the State of Nevada and further provides that "[t]he provisions of the section may not be waived by agreement between an individual employee and an employer. . . . An employee claiming violation of the section may bring an action against his or her employer in the courts of the State to enforce the provisions of the section and shall be

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entitled to all remedies available under the law or in equity appropriate to remedy any violation of the section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce the section shall be awarded her or her reasonable attorney's fees and costs."

22. Defendant failed to pay Plaintiff and the Class any wages for the hours that they unlawfully rounded off of employees' time cards. Indeed, Defendant paid Plaintiff and the Class zero dollars ($0.00) for the hours that they spent engaging in pre- and post-shift activities because of Defendant's rounding policy. Zero dollars ($0.00) is less than the Nevada's minimum wage of $7.25/$8.25.

23. Because there is no statute of limitations explicitly applicable to violations of the constitution, the four year "catch all" provisions of NRS 11.220 apply.

24. Wherefore, Plaintiff demands for himself and for Class Members payment by Defendant at the minimum wage for all hours that were unlawfully rounded off employee's time cards for the four years immediately preceding the filing of this complaint until the date of judgement after trial, together with attorneys' fees, costs, and interest as provided by law.

## SECOND CAUSE OF ACTION

**Failure to Pay Wages for All Hours Worked in Violation of NRS 608.140 and 608.016**

(On Behalf of Plaintiff and all members of the Class)

25. Plaintiff realleges and incorporates by the reference all the paragraphs above in the Complaint as though fully set forth herein.

26. Nevada Revised Statutes ("NRS") 608.140 provides that an employee has a private right of action for unpaid wages.

27. NRS 608.016 entitled, "Payment for each hour of work; trial or break-in period not excepted" states that: "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."

28. Nevada Administrative Code ("NAC") 608.115(1), entitled "Payment for time worked. (NRS 607.160, 608.016, 608.250)" states: "An employer shall pay an employee for all

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time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee."

29. Defendant's system of rounding of hours systematically worked in favor of the employer and against the employee is not permitted under Nevada law.

30. Because of this unlawful "rounding system" Defendant did not pay employees for all time worked before the commencement of the employee's regular shift start time nor all time worked after the end of their regularly scheduled shift time.

31. By utilizing an improper system of rounding time records, Defendant did not pay Plaintiff and the Class for every hour worked, but required, suffered or permitted them to work up to seven minutes a day at the beginning of each shift and up to seven minutes a day at the end of each shift.

32. Wherefore, Plaintiff demands for himself and for all Class Members payment by Defendant at their regular rate of pay, or any applicable overtime premium rate, whichever is higher, for the times worked each shift but not paid, for three years immediately preceding the filing of this complaint until the date of judgement after trial, together with attorneys' fees, costs, and interest as provided by law.

## THIRD CAUSE OF ACTION

**Failure to Pay Overtime Wages in Violation of NRS 608.140 and 608.018**

(On Behalf of Plaintiff and all members of the Class)

33. Plaintiff realleges and incorporates by this reference all the paragraphs above in this Complaint as though fully set forth herein.

34. NRS 608.140 provides that an employee has a private right of action for unpaid wages.

35. NRS 608.018(1) provides as follows:

> An 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 prescribed pursuant to NRS 608.250 works: (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

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> scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

36. NRS 608.018(2) provides as follows:

> An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works more than 40 hours in any scheduled week of work

37. Defendant's system of rounding of hours systematically worked in favor of the employer and against the employee is not permitted under Nevada law.

38. Because of this unlawful "rounding system" Defendant did not pay Plaintiff and the Class for all time worked before the commencement of the employee's regular shift start time nor all time worked after the end of their regularly scheduled shift time.

39. By utilizing an improper system of rounding time records, Defendant did not pay Plaintiff and Class Member daily overtime premium a regular rate of less than one and one half times the minimum wage premium pay and, failed to pay a weekly premium overtime rate of pay of time and one half their regular rate for all members of the Class Members who worked in excess of forty (40) hours in a week in violation of NRS 608.140 and 608.018.

40. Wherefore, Plaintiff demands for himself and for the Class Members payment by Defendant at one and one half times their "regular rate" of pay for all hours worked in excess of eight (8) hours in a workday for those class members whose regular rate of pay did not exceed the one and one half the minimum wage set by law, and premium overtime rate of one and one half their regular rate for all class members who worked in excess of forty (40) hours a workweek during the Class Period together with attorneys' fees, costs, and interest as provided by law.

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**FOURTH CAUSE OF ACTION**

**Failure to Timely Pay All Wages Due and Owing Upon Termination Pursuant to NRS 608.140 and 608.020-.050**

(On Behalf of Plaintiff and the Class)

41. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

42. NRS 608.140 provides that an employee has a private right of action for unpaid wages.

43. NRS 608.020 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."

44. NRS 608.040(1)(a-b), in relevant part, imposes a penalty on an employer who fails to pay a discharged or quitting employee: "Within 3 days after the wages or compensation of a discharged employee becomes due; or 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 for 30-days, whichever is less."

45. NRS 608.050 grants an "employee lien" to each discharged or laid-off employee for the purpose of collecting the wages or compensation owed to them "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."

46. By failing to pay Plaintiff and all members of the Class who are former employees for all hours worked in violation of state law, at the correct legal rate, Defendant has failed to timely remit all wages due and owing to Plaintiff and all members of the Class who are former employees.

47. Despite demand, Defendant willfully refuses and continues to refuse to pay Plaintiff and all Class Members who are former employees.

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48. Wherefore, Plaintiff demands thirty (30) days wages under NRS 608.140 and 608.040, and an additional thirty (30) days wages under NRS 608.140 and 608.050, for all members of the Class who are former employees together with attorneys' fees, costs, and interest as provided by law.

**FIFTH CAUSE OF ACTION**

**Breach of Contract**

(On Behalf of Plaintiff and the Class)

49. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

50. At all times relevant herein, Defendant had an agreement with Plaintiff and with every Class Member to pay an agreed upon hourly wage rate for all hours they worked for Defendant. Indeed, Defendant offered to pay Plaintiff and Class Members a specific rate of pay in exchange for Plaintiff and Class Members' promise to perform work for Defendant. Plaintiff and the Class complied with their obligation each and every day by showing up for work and performing labor for Defendant. Defendant failed in its obligation to pay Plaintiff and Class Members for all the hours that they worked for Defendant.

51. The parties' employment agreement also necessarily incorporated all applicable provisions of state law, including the labor laws of the State of Nevada.

52. A term of Plaintiff's employment contained in Defendant's Handbook, Exhibit 3 attached hereto, that was given to Plaintiff and all putative Class Members specifically contains at page 26 the following two sections:

A. "The Company prohibits off-the-clock work. The Company expects to pay you for all time worked and expects you to make sure that all time you work is properly recorded."

B. Overtime: "As necessary, you may be required to work overtime. All overtime work must be previously authorized by a supervisor. The Company provides compensation for all overtime hours worked by non-exempt employees in accordance with state and federal law. Failure to obtain authorization from a

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supervisor prior to working overtime may result in disciplinary action, up to and including termination of employment.

"Exempt employees are expected to work as much of each work day as is necessary to complete their job responsibilities."

53. Defendant breached its agreement with Plaintiff and Class Members by failing to compensate them for all hours worked, namely, for not paying for all hours reported truthfully as worked, and by not paying overtime required by law on such unpaid hours, where applicable.

54. As a result of Defendant's breach, Plaintiff and Class Members have suffered economic loss that includes lost wages and interest.

55. The statute of limitations for breach of a written agreement is six years.

56. Wherefore, Plaintiff demands for himself and for Class Members that Defendant pay Plaintiff and Class Members their agreed upon rate of pay for all hours worked off the clock during the relevant time period alleged herein together with attorney's fees, costs, and interest as provided by law.

57. Defendant further offered to pay Plaintiff and all Class Members who worked the graveyard shift at a heightened hourly rate of $8.50 per hour. *See* Exhibit 4 attached hereto. Plaintiff and all Class Members understood that they would be compensated at this rate of pay for the hours they worked during the graveyard shift. Defendant, however, paid Plaintiff and, upon information and belief, all other Class Members who worked the graveyard shift at the lower base rate of $8.00 per hour for all hours worked during the graveyard shift. Defendant thus breached its agreement with Plaintiff and Class Members who worked the graveyard shift to pay them $8.50 for graveyard shift hours.

58. As a result of Defendant's breach, Plaintiff and Class Members who worked the graveyard shift have suffered economic loss that includes lost wages and interest.

59. The statute of limitations for breach of a written agreement is six years.

60. Wherefore, Plaintiff demands for himself and for Class Members who worked the graveyard shift that Defendant pay Plaintiff and Class Members who worked the graveyard shift their agreed upon rate of pay for all hours worked during the graveyard shift during the

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relevant time period alleged herein together with attorney's fees, costs, and interest as provided by law.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a jury trial pursuant to Nevada Rule of Civil Procedure 38.

**PRAYER FOR RELIEF**

Wherefore Plaintiff, individually and on behalf of all Members of the Class alleged herein, prays for relief as follows:

1. For an order certifying the action as a traditional class action under Nevada Rule of Civil Procedure Rule 23 on behalf of all members of the Class;

2. For an order appointing Plaintiff as the Representative of the Class and his counsel as Class Counsel for the Class;

3. For damages according to proof for minimum wage rate, the regular rate or the overtime premium rate, if applicable, for all hours worked but not paid due the Defendant's so called "rounding."

4. For waiting time penalties pursuant to NRS 608.140 and 608.040-.050;

5. For damages pursuant to Defendant's breach of contract;

6. For interest as provided by law at the maximum legal rate;

7. For reasonable attorneys' fees authorized by statute;

8. For costs of suit incurred herein;

9. For pre-judgment and post-judgment interest, as provided by law; and

10. For such other and further relief as the Court may deem just and proper.

DATED: November 24, 2015

Respectfully Submitted,

**THIERMAN BUCK LLP**

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

Attorneys for Plaintiff

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

# EXHIBIT 1

EXHIBIT 1

January 15, 2014

To All:

We must adhere to the 7 minute rule. If you are scheduled at 6am do not come to work at 5am please come to work 7 minutes before your shift. The same goes for clocking out. This applies to all shifts.

The Company is encouraging a reduction in overtime, so we cannot start our shifts early. Please remember that you must always be clocked in when performing work.

Also, if you leave the premise, to cash a check or get lunch you must clock in and out. You cannot leave the premise being clocked in.

Thanks,
Mitch

# EXHIBIT 2

EXHIBIT 2

Work week Wednesday to Tuesday

Weekly Time Clock Exception Report - Hourly Employees

Date: Department: Store 278

Name: John Wardle

| Day | Date | Description | Time In | Time Out | Hours |
|---|---|---|---|---|---|
| *Wednesday* | | off | : Am/Pm | : Am/Pm | |
| Thursday | | off | : Am/Pm | : Am/Pm | |
| Friday | 6/27 | DAY | 5:53 Am/Pm | 2:05 Am/Pm | |
| Saturday | 6/28 | DAY | 5:54 Am/Pm | 2:02 Am/Pm | |
| Sunday | 6/29 | SWING | 1:53 Am/Pm | 10:00 Am/Pm | |
| Monday | 6/30 | Grave | 9:53 Am/Pm | 6:03 Am/Pm | |
| Tuesday | 7/1 | Grave | 9:53 Am/Pm | 6:02 Am/Pm | |
| *Wednesday* | 7/2 | off | : Am/Pm | : Am/Pm | |
| Thursday | 7/3 | off | ~~6:55~~ Am/Pm | : Am/Pm | |
| Friday | 7/4 | H | 9:53 Am/Pm | 6:00 Am/Pm | |
| Saturday | 7/5 | SWING | 1:57 Am/Pm | 10:06 Am/Pm | |
| Sunday | 7/6 | SWING | 1:53 Am/Pm | 10:06 Am/Pm | |
| Monday | 7/7 | Grave | 9:53 Am/Pm | 6:03 Am/Pm | |
| Tuesday | 7/8 | Grave | 9:53 Am/Pm | 6:03 Am/Pm | |
| | | | | O/T Hours | |
| | | | | Total | |

Description

W-Worked off Premises H-Pay Holiday (Manager's Discretion

F-Forgot Badge N-New Hire M-Missed Punch O-Other (Please explain)

John Wardle

Employee's Signature

Supervisor Approval

**Employee ID**
0220335

278

**Start Per.**
June 25, 2014

**Employee Name**
**JOHN W. NEVILLE JR**

**End Per.**
July 8, 2014

**Social Sec. No.**
XXX-XX-6836

**Date**
07/16/2014

Vacation Hours Available

Sick Time Available

## PAY

| Code | Rate | Hours | Amount |
|---|---|---|---|
| HOURLY | $8.00 | 80.00 | $640.00 |
| **Totals** | | 80.00 | $640.00 |

## TAXES

| Code | Withheld | YTD |
|---|---|---|
| Med. | $9.28 | $98.14 |
| S.S. | $39.68 | $419.62 |
| FIT | $42.78 | $443.15 |

## DEDUCTIONS

| Code | Amount | YTD |
|---|---|---|

## BENEFITS

| Code | Amount | YTD |
|---|---|---|

**Gross YTD** $6,768.00

**Net YTD** $5,807.09

**Net Pay** $548.26

TERRIBLE HERBST

"The Best Bad Guy In The West"

**TERRIBLE HERBST, INC.**
NSB - PAYROLL ACCOUNT

P. O. BOX 93417
LAS VEGAS, NV 89193

**Nevada State Bank**
**PO BOX 990**
**LAS VEGAS, NV 89125-0990**

425935

94-77/1224

Pay Five Hundred Forty Eight Dollars and 26 Cents

DATE
Jul 16, 2014

AMOUNT
$548.26

to the Order of:

***JOHN W. NEVILLE JR***
**3264 FOSSIL SPRINGS ST**
**LAS VEGAS, NV 89135**

# EXHIBIT 3

# EXHIBIT 3


# EMPLOYEE HANDBOOK
# 2010 UPDATE

**The Company prohibits off-the-clock work.** The Company expects to pay you for all time worked and expects you to make sure that all time you work is properly recorded.

Exempt employees may be required to record their time worked and report full days of absence from work due to vacation.

Any errors in your pay should be reported immediately to your supervisor, who will work with Human Resources or Payroll to correct errors. Normally corrections will be reflected on your next regular paycheck.

## Breaks

You are entitled to one 10-minute paid break for each four hours worked or major fraction thereof. Smoking breaks are to be included in your authorized breaks. Meal breaks are to be determined by your departmental schedules. Breaks must be taken in a designated break area.

## Overtime

As necessary, you may be required to work overtime. All overtime work must be previously authorized by a supervisor. The Company provides compensation for all overtime hours worked by non-exempt employees in accordance with state and federal law. Failure to obtain authorization from a supervisor prior to working overtime may result in disciplinary action, up to and including termination of employment.

Exempt employees are expected to work as much of each work day as is necessary to complete their job responsibilities.

## Lost or Stolen Paychecks

Please report a lost or stolen paycheck to Human Resources immediately. A new paycheck will be issued within 24 hours after the stop payment process has been completed.

## Tip Reporting

In accordance with Internal Revenue Service requirements, tipped employees must report all tips for income tax purposes. The Company participates in the IRS's tip compliance agreement program and a standard amount is reported for you to the IRS through the payroll system. It is your responsibility to report all income to the IRS, so if you choose not to participate in the tip compliance agreement program, see Human Resources about obtaining an Employee Daily Record of Tips booklet. This booklet provides the proper forms that you need to account for daily tip earnings. Tips booklets may be turned into Payroll on a weekly basis prior to the end of the pay period.

# EXHIBIT 4

EXHIBIT 4

## Professional Management

MANAGEMENT JOBS!

No Resume?
No Problem!

Monster Match assigns a professional to hand-match each job seeker with each employer!

This is a FREE service!

Simply create your profile online and, for the next 180 days, our professionals will match your profile to employers who are hiring right now!

CREATE YOUR PROFILE NOW:

Reviewjournal.com/jobs

No Resume
Needed!

Use our convenient Online form today so our professionals can get started matching you with employers that are hiring - NOW!

Choose from one of the following positions to enter your information:

* Bank Branch Manager
* Construction Supervisor
* General Management
* Hospitality Manager
* Marketing Manager
* ce Manager
* erty Management
* aurat Management
* ail Management
* Sales Manager

[redacted]

We are in the business of helping find solutions to fit our customer's needs. Our Branch Manager in Las Vegas is a leader who has managed a sales and installation operation (or similar business), has P&L exp, understands marketing and values customers. Must have excellent communication, computer and people [redacted]
Please send [redacted]
jobs@[redacted]

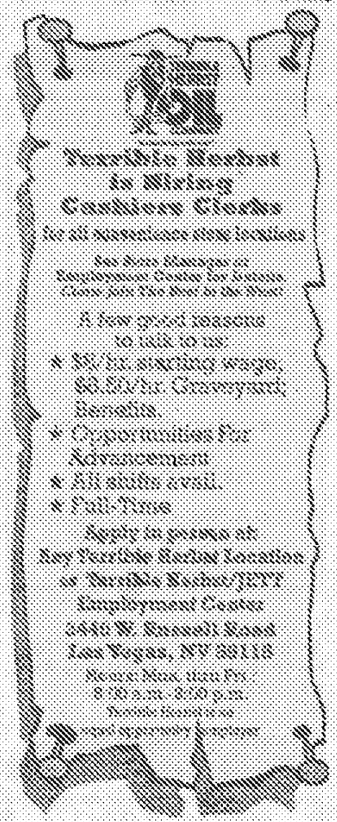
## Real Estate

Agents
REAL ESTATE ASSOCIATES
Need 10 more individuals.
Training, leads and support.
Classes start every week.
Income potential $100,000 year. Call Bette Leal, Broker
702-732-7262

Century 21
Consolidated
www.c21consolidated.com

APARTMENT MGR WANTED
Min 5 yrs exp req. Sal + rent + util + insur benefit. Live on site. Fax resume to 702-233-0752

## Retail




## Sales

**0056**
RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
MONTGOMERY Y. PAEK, ESQ., Bar # 10176
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Attorneys for Defendant
TERRIBLE HERBST, INC.,

DISTRICT COURT

CLARK COUNTY, NEVADA

JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated,

Plaintiff,

vs.

TERRIBLE HERBST, INC., and DOES 1 through 50, inclusive,

Defendant.

**Case No. A-15-728134-C**

**Dept. V**

**MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)**

**Hearing Date:** 02/04/16
**Hearing Time:** 9:00 AM

Defendants TERRIBLE HERBST, INC., (hereinafter "Terrible's" or "Defendant"), by and through its attorneys of record, Littler Mendelson, P.C., hereby moves this Court for an order dismissing Plaintiff John Neville's Complaint pursuant to Nevada Rules of Civil Procedure 12(b)(5). This Motion is made and supported by the attached Memorandum of Points and Authorities, all other pleadings on file with the Court in this matter and any oral argument permitted by the Court.

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Dated: December 31, 2015

LITTLER MENDELSON

By:_____
RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
Attorneys for Defendant

**NOTICE OF MOTION**

TO: PLAINTIFF JOHN W. NEVILLE, JR

TO: ATTORNEYS FOR PLAINTIFF

**YOU** will please take notice that the undersigned will bring the foregoing Motion to Dismiss for hearing before the above-entitled court in Department 5, on the 04 day of Feb., 2016, at the hour of 9:00 a.m./~~p.m.~~

DATED: December 31, 2015

LITTLER MENDELSON

By:_____
RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
Attorneys for Defendant

**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Plaintiff has brought this self-styled class-action lawsuit based on allegations which show no actual violation of law. Specifically, all of Plaintiff's causes of action are in their essence claims for alleged improper rounding – despite his allegations which show Defendant's rounding system is in fact proper. For example, Plaintiff alleges that Defendant rounds time recorded to the nearest 15

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minutes.[1] **Amended Complaint, at ¶11**. This is a perfectly legal and permissible practice in Nevada as long as the rounding does not favor the employer over the employee. Here, under Plaintiff's own allegations he could clock-in up to seven minutes *after* the start of his assigned shift and still be compensated as though he had arrived on time. **Id**. This system in no way favored Defendant over Plaintiff. Plaintiff's theory for his case fails before it even begins.

Moreover, Plaintiff alleges that Defendant violated the Nevada Constitution's Minimum Wage Amendment, Nev. Cost. art. XV § 16, because he was paid "zero dollars" for the minutes which were rounded to the nearest quarter hour. **Amended Complaint, at ¶22.** As stated above, rounding to the nearest 15 minutes is a legal and permissible practice in Nevada. Moreover, Plaintiff admits he was paid $8.00 an hour - $0.75 over the applicable minimum wage of $7.25[2] – and makes no allegations that his cumulative pay ever fell below $7.25 per hour. **Amended Complaint, at ¶9.** Accordingly, the Nevada Minimum Wage Amendment is completely inapplicable to this case.

Finally, the majority of Plaintiff's causes of action, in addition to lacking a factual basis, are also procedurally nonviable. For example, Plaintiff seeks relief under NRS 608.016 and NRS 608.018, which courts in Nevada have repeatedly held are statutes wherein the right to enforce rests *exclusively* with the Nevada Labor Commissioner - thus there is no private right of action under either statute. Similarly, he has pled breach of contract and failure to pay wages upon termination claims which are actually just a rehashing of his NRS 608.016 and NRS 608.018 claims. However, like his NRS 608.016 and NRS 608.018 claims, these causes of action are legally flawed and cannot be used to create a private right of action where none exists.

In sum, Plaintiff has not set forth sufficient factual allegations to show a plausible claim for relief under any of his causes of action and instead has demonstrated that he has no basis for relief. Moreover, several of his causes of action are legally impermissible. Accordingly, for all the reasons discussed herein, Plaintiff's Complaint should be dismissed in its entirety.

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[1] For example, under the rounding policy, an employee who clocks-in at 7:53 a.m. will be deemed to have clocked-in at 8:00 a.m. and an employee who clocks-in at 7:52 a.m. is deemed to have clocked-in at 7:45 a.m.

[2] Pursuant to the Minimum Wage Amendment and applicable regulations, employers who provide employees with health insurance pay the minimum wage rate of $7.25 per hour. Plaintiff has not alleged that his employer failed to provide him health insurance nor which tier minimum wage he believes applies. ***See* Amended Complaint, at ¶22.**



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## II. LEGAL STANDARD FOR MOTION TO DISMISS

Dismissal of Plaintiff's Complaint is appropriate under Nevada Rule of Civil Procedure 12(b)(5), which provides, in pertinent part, that a Court may dismiss a claim for relief for "failure to state a cause of action." According to the Nevada Supreme Court, dismissal is appropriate under Nevada Rule of Civil Procedure 12(b)(5) whenever the allegations contained in a complaint, when "taken at face value" and construed favorably in the complainant's favor, fail to state a cognizable claim for relief. *Morris v. Bank of America*, 110 Nev. 1274, 1276, 886 P.2d 454 (1994); *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110 (1985). A complaint, or portions thereof, may be dismissed where "it appears beyond doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact would entitle him to relief." *Edgar*, 101 Nev. at 226, 669 P.2d at 112 (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "A bare allegation is not enough" to survive a motion to dismiss because a pleading "must set forth sufficient facts to establish all necessary elements of a claim for relief." *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 875 (Nev. 2000).

In ruling on a motion to dismiss for failure to state a claim, the court may take into account any exhibits attached to the complaint and matters in the record. *Schmidt v. Washoe Cnty.*, 123 Nev. 128, 133, 159 P.3d 1099, 1103 (2007) *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (*citing Breliant v. Preferred Equities Corp.,* 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993)). If documents are physically attached to the complaint, then a court may consider them if their "authenticity is not contested" and "the plaintiff's complaint necessarily relies on them." *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (citation, internal quotations, and ellipsis omitted). A court may also treat certain documents as incorporated by reference into the plaintiff's complaint if the complaint "refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

## III. LEGAL ARGUMENT

Plaintiff has asserted five causes of action: (1) Failure to Pay Wages in Violation of the Nevada Constitution; (2) Failure to Compensate for All Hours Worked in Violation of NRS 608.140



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and 608.016; (3) Failure to Pay Overtime in Violation of NRS 608.140 and 608.018; (4) Failing to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050; and (5) Breach of Contract. Defendant moves to dismiss all five causes of action on the grounds that Plaintiff has not pled any actual violation of law and has failed to set forth sufficient allegations of fact to support plausible claims for relief against Defendant under the applicable and controlling law.

### A. Plaintiff's Complaint Should Be Dismissed Because Time Clock Rounding to the Nearest Quarter Hour is a Legal Practice in Nevada

The primary basis of Plaintiff's Complaint is his allegation that "Defendant maintains an unlawful rounding policy whereby it rounds the time recorded and worked by all hourly employees to the nearest 15 minutes for purposes of calculating payment of wages owed."[3] **Amended Complaint, at ¶¶11, 12, 22, 29-31, 37-40, 46-47, 50-56**. This practice, however, is legally permissible under both Nevada and Federal law. The Nevada Labor Commissioner provided an Advisory Opinion on this exact issue of time clock rounding on June 21, 2013. **Advisory Opinion of the Nevada Labor Commissioner on the Use of Time Clock Rounding to Calculate Employee Pay, June 21, 2013, a true and correct copy is attached hereto as Exhibit A**. Therein, it determined that time clock rounding is appropriate in the state of Nevada so long as the rounding policy is used in a manner that does not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. **Id**. This determination is consistent with federal law which also states that for enforcement purposes, the payment of wages based on recording and computing time to the nearest five minutes, or the nearest one tenth or quarter of an hour, is accepted provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. 29 C.F.R. § 785.48(b); s*ee also* Wage and Hour Opinion Letter FLSA2008-7NA, May 15, 2008; Wage and Hour Opinion Letter November 7, 1994; *see also* Field Operation Handbook § 30a02(b).

Here, Plaintiff alleges that employees are required to "clock in *no more than* seven minutes

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[3] Plaintiff has also alleged as part of his Fifth Cause of Action for breach of contract that Defendant was required to pay him $8.50 per hour when he worked the graveyard shift. **Amended Complaint, at ¶57**. As will be discussed in more detail below, this allegation does not save Plaintiff's Fifth Cause of Action because the newspaper clipping it is based upon is not a contract.



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before the beginning of a scheduled shift and to clock out *no more than* seven minutes after the end of their regularly scheduled shift." **Amended Complaint, at ¶¶11, 12, 22, and 30.** (emphasis added). Therefore, pursuant to Plaintiff's own allegations, he could have clocked-in seven minutes *after* the start of his shift, or seven minutes *before* the end of his shift, and still been compensated for that time – even though he would not have been working. Additionally, as Plaintiff admits by acknowledging that Defendant rounds to the nearest quarter-hour, he could have clocked-in or out eight minutes before or after his shift and still have been compensated for the seven minutes he was not clocked-in. This form of rounding is in fact in Plaintiff's favor and therefore perfectly consistent with Nevada and Federal law.

Accordingly, Plaintiff's Complaint must be dismissed with prejudice because, as Plaintiff's own allegations demonstrate, Defendant's rounding policy is legally permissible in the state of Nevada.

### B. Plaintiff's First Cause of Action Should Be Dismissed Because the Facts Alleged in the Complaint Do Not Show A Violation of Nevada's Minimum Wage Amendment

In the event this Court does not dismiss the entire Complaint despite the fact that rounding to the nearest quarter hour is an acceptable practice in Nevada, Plaintiff's first cause of action still fails because he has not alleged any actual violation of Nevada's minimum wage. Specifically, Plaintiff alleges that Defendant violated the Nevada Constitution, Article 15, Section 16(A) (the "Minimum Wage Amendment" or "MWA") because "Defendant paid Plaintiff and the Class zero dollars ($0.00) for the hours that they spent engaging in pre- and post-shift activities because of Defendant's rounding policy." **Amended Complaint, at ¶22**. As stated above, Defendant's rounding policy is legally proper. Moreover, the Amended Complaint is completely devoid of any allegation regarding when or if Plaintiff's rate of pay ever fell below the minimum wage. To the contrary, Plaintiff admits that he was paid $8.00 per hour – $0.75 over the applicable minimum wage. In regard to any alleged uncompensated time, Plaintiff would have to work enough hours to negate that extra $0.75 per hour he earned while working for Defendant in order to fall below the minimum wage. He has made no such allegation. Indeed, Plaintiff's failure to allege essential elements to his minimum wage claims would improperly force the Court to make up for those deficiencies with speculation and conjecture

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as to whether there were workweeks when Plaintiff wage rate fell below the minimum wage. Being thus insufficiently pled, Plaintiff's first cause of action must be dismissed.

### C. Plaintiff's Second, Third, and Fourth Causes of Action Should be Dismissed Because There Is No Private Right of Action Under NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 Nor Does One Exist Via a Bootstrapping to NRS 608.140

In addition to the fact that rounding to the nearest quarter hour is an acceptable practice in Nevada, Plaintiff's second, third and fourth causes of action must be dismissed because those claims are brought under statutes with no private right of action. Specifically, Plaintiff has improperly combined NRS 608.016, NRS 608.018, NRS 608.020 – NRS 608.050 and NRS 608.140 into one claim for relief to obfuscate the lack of actionable relief under each of those statutes. This is improper for two reasons: (1) there is no private right of action under NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050; and (2) Plaintiff's reference to NRS 608.140 does not remedy the lack of private rights of action for these statutes. Accordingly, Plaintiff's second, third and fourth causes of action must be dismissed as a matter of law.

#### 1. The Right to Enforce NRS 608.005–608.195 Rests Exclusively With the Labor Commissioner

Courts in Nevada have repeatedly held that the right to enforce NRS 608.016 and NRS 608.018 rests *exclusively* with the Nevada Labor Commissioner and therefore, there is no private right of action under those statutes. *Cardoza v. Bloomin' Brands, Inc.*, 2014 WL 3748641, at *1 (D. Nev. July 30, 2014) (finding that plaintiffs have no right to privately enforce NRS 608.016 or NRS 608.018 as a matter of law); *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874, at *3 (D. Nev. June 17, 2014) (*citing Dannenbring v. Wynn Las Vegas, LLC*, 907 F.Supp.2d 1214, 1219 (D.Nev.2013)) (finding that NRS 608.180 charges the labor commissioner with enforcement of NRS 608.005–608.195 and therefore no private rights of action exist for the included statutes); *Gamble v. Boyd Gaming Corp.*, 2014 WL 2573899, at *4 (D. Nev. June 6, 2014) (holding that there is no private remedy to enforce labor statutes, including NRS 608.016, which impose external standards for wages and hours). NRS 608.016 and NRS 608.018 do not contain any language concerning a private right of action because those statutes are enforced by the Nevada Labor Commissioner under



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NRS 608.180 instead. Specifically, NRS 608.180 states that "[t]he Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced. . ." NRS 608.180. Accordingly, Plaintiff's claims under NRS 608.016 and NRS 608.018 fail as a matter of law.

Additionally, as with NRS 608.016 and NRS 608.018 above, NRS 608.020 – NRS 608.050 have no language regarding any private right of action. Therefore, as with NRS 608.016 and NRS 608.018, NRS 608.020 – NRS 608.050 fall within the Nevada Labor Commissioner's enforcement of NRS 608.005 – NRS 608.195 as required by NRS 608.180. This has been affirmed by numerous recent cases such as *Dannenbring* which have explicitly dismissed claims for NRS 608.020 and 608.040 as not actionable. The Labor Commissioner's enforcement of all statutes within NRS 608.005 – NRS 608.195 was again upheld in *McDonagh*. Accordingly, Plaintiff's claims under 608.020 – NRS 608.050 also fail as a matter of law.

2. NRS 608.140 Does Not Create A Private Right of Action for Plaintiff's NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 Claims

Plaintiff's claims under NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 are not saved via his insertion of NRS 608.140. In addition to the lack of any statutory language allowing NRS 608.140 to be combined with other NRS 608 statutes, recent case law has also debunked this use of NRS 608.140 to impart private rights of action in claims involving labor statutes that are not claims arising from contracted sums. As further explained below, several federal district courts in Nevada have undertaken this analysis and have held that the historical passage date of NRS 608.140 in 1925 prevents its application to later-enacted statutes as the Nevada Legislature could not possibly have contemplated that the contractual action for unpaid wages in NRS 608.140 would be applied to such labor statutes which were still fictional in 1925. This would include NRS 608.016 which was not passed until 1985 and NRS 608.018 which was not passed until 1975. Nevada case law further indicates that NRS 608.020 - NRS 608.050 must be read together as a set of rules for the distribution of a final paycheck to fired or quitting employees and not for alleged off-the-clock work or overtime that are mentioned nowhere in the statutes. Accordingly, Plaintiff has misapplied NRS 608.140 in the face of contrary statutory language and case law.



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a. *The Statutory Language of NRS 608.140 Does Not Provide a Private Right of Action Unless There Is a Calculable Sum*

Under the plain language of NRS 608.140, there is no private right of action under Plaintiff's pled facts because NRS 608.140 only allows a suit for wages arising out of a "sum" due under contracted "terms of. . . employment." NRS 608.140 was passed in 1925 along with NRS 608.050 and 608.190 as a part of statutes governing mechanic and employee lien and payment rights. That is why the plain language of NRS 608.140 provides for a "mechanic" or other employee to bring "suit" only if a 5-day "demand. . . in writing" is made "for a *sum*" for wages earned "according to the *terms* of his or her employment." NRS 608.140 (Emphasis added). Specifically, NRS 608.140 states that:

> Whenever a mechanic, artisan, miner, laborer, servant or employee shall have cause to bring suit for wages earned and due according to the terms of his or her employment, and shall establish by decision of the court or verdict of the jury that the amount for which he or she has brought suit is justly due, and that a demand has been made, in writing, at least 5 days before suit was brought, for a sum not to exceed the amount so found due, the court before which the case shall be tried shall allow to the plaintiff a reasonable attorney fee, in addition to the amount found due for wages and penalties, to be taxed as costs of suit.

This demand for payment and associated private right of action to bring suit was part of NRS 608.050's employee lien that predated the mechanic's lien statute that was passed 30 years later through NRS 108.222's enactment in 1965. NRS 608.050(b) and NRS 608.108.222. NRS 608.050's "wages to be paid at termination of service" was also revised to explicitly include the later-passed mechanic's lien "as provided in NRS 108.221 to 108.246." NRS 608.050(b). NRS 608.190 also reinforces these lien rights as it prevents a person from denying that the "amount is due" to secure a discount on the "indebtedness." Accordingly, the plain language of NRS 608.140 coupled with the other 1925 statutes clearly indicate a private right of action only for a "sum" that is calculable for which a written demand can be made and a lien attached.

b. *Controlling Case Law Supports the Holding that No Private Right of Action Exists for NRS 608.140 Outside of Contractual Suits*

In reviewing this language and the historical passage date of NRS 608.140, the District Court for the District of Nevada, in *Descutner v. Newmont USA Ltd.*, 2012 WL 5387703, at *2 (D. Nev.



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Nov. 1, 2012), held that NRS 608.140 "only implies a private right of action [for an employee] to recover wages 'earned and due according to the terms of his or her employment,' and therefore appears to govern fees and costs only in common law contractual suits." (Emphasis added). The *Descutner* court further held that the statute "does not imply a private remedy to enforce the labor statutes, which impose external standards for wages and hours." *Id.* In so holding, the court provided an analysis of the definition of "terms of employment," finding that the word "terms" as used in the statute indicates "negotiated terms, as per a contract, not externally imposed standards, as per a statute." *Id.* at *11. The court supported this conclusion 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. Given a linear understanding of time, it simply is not possible that NRS 608.140 could have been intended to provide or accommodate, or modify any implied private right of action under 608.016 or 608.018, though it does show the legislature knew how to take a private right of action into account if it desired to do so, which it did not do in either sections 608.016 or 608.018. In fact, the legislature's desire to include a private right of action for only certain wage claims was again confirmed when the Nevada Legislature later drafted an explicit private right of action when it enacted the Nevada minimum wage statutes in 1965. NRS 608.260. Thus, consistent with the historical passage dates and use of private right of action language, the *Descutner* Court held that there was no private right of action for recovery of overtime wages pursuant to NRS 608.018 and dismissed the claim. *Id.* at *14-15.

Similarly, a historical analysis similar to that in *Descutner* supports holding that there is no private right of action for NRS 608.020 – NRS 608.050 - which are also known as the "final paycheck" statutes. Instructive of this point is a 1994 Nevada Attorney General opinion of NRS 608.040 which 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 tore down convention displays pursuant to a collective bargaining agreement ("CBA"). Opinion No. 94-25, 1994 Nev. AG LEXIS 10.

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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.* The Nevada Attorney General, in analyzing this claim, 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.*

Specifically, 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 who does not have terms regarding the timing of payments should generally be paid no later than three days after he is fired or seven days after he quits. *Id.* at 5-6.

The 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 alleged off-the-clock work or overtime that are mentioned nowhere in the statutes. 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 as described by *Descutner*. Third, the *Doolittle* 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



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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.

Nevada case law follows this rationale. In *Baldonado* and *Busk v. Integrity Staffing Solutions, Inc.,* the Nevada Supreme Court and the Ninth Circuit only held that the language of NRS 608.140 provides a private right of action and never applied that private right of action to non-contractual claims. 713 F.3d 525, 533 (9th Cir. 2013) *cert. granted*, 134 S. Ct. 1490, 188 L. Ed. 2d 374 (2014) and *rev'd*, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014.). Thus, those courts *never* analyzed NRS 608.140's application to non-contractual claims such as off-the-clock allegations or overtime claims or final paycheck claims that are alleged through labor statutes like NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050. Indeed, there is no authority allowing Plaintiff to manufacture a cause of action by cobbling these statutes together.

There is case law, however, which provides for the contrary. In *Dannenbring v. Wynn Las Vegas, LLC*, 907 F.Supp.2d 1214 (D. Nev. 2013), another court from the District of Nevada adopted the historical impossibility analysis in *Descutner*, holding that NRS 608.140 does not imply a private right of action to enforce the labor statutes, but only a right of action to recover in contract. *Id.* at 1219-20. Accordingly, the court in *Dannenbring* dismissed claims alleging violations of NRS 608.018, 608.020 and 608.040.

More recently in *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874 (D. Nev. June 17, 2014) and *Gamble v. Boyd Gaming Corp.*, 2014 WL 2573899 (D. Nev. June 6, 2014), courts from this District again held that no private right of action exists to enforce Nevada's labor statutes, including NRS 608.018, and dismissed the plaintiffs' overtime claims under NRS 608.018. In *McDonagh*, the court held:

> Notably, NRS 608.180 charges the labor commissioner with enforcement of NRS 608.005-608.195, which this court finds persuasive to imply that no private rights of action exist for the included statutes.

*See also, Lucatelli v. Texas De Brazil (Las Vegas) Corp.*, 2012 WL 1681394 (D. Nev. May 11, 2012) (dismissing plaintiff's claim under NRS 608.018 for overtime pay and finding that the violations of Nevada labor statutes could not be asserted as private rights of action); *Latonya Tyus, et*



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*al. v. Wendy's of Las Vegas, et al.*, 2:14-cv-00719-GMN-VCF, [ECF No. 40] (D. Nev., Feb. 15, 2015) (dismissing plaintiffs' claims for violation under NRS 608.018 pursuant to defendants' assertion that no private right of action exists under the statute).

In *Busk v. Integrity Staffing Solutions*, the Ninth Circuit, directly addressing meal period claims like the ones Plaintiff has asserted here, noted that "the Nevada legislature has entrusted the enforcement of th[e] statute [NRS 608.019] to the state Labor Commissioner by expressly providing that the 'Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced.'" *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 533 (9th Cir. 2013) cert. granted, 134 S. Ct. 1490, 188 L. Ed. 2d 374 (2014) and rev'd, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014.)[4] (*citing* Nev. Rev. Stat. § 608.180 and *Baldonado v. Wynn Las Vegas*, LLC, 194 P.3d 96, 102 (Nev. 2008) (*citing* Nev. Rev. Stat. § 608.180 and *Baldonado v. Wynn Las Vegas*, LLC, 194 P.3d 96, 102 (Nev. 2008).

With respect to NRS 608.016, the Legislature has expressly ordered the Labor Commissioner to enforce that statute. *Baldonado*, 194 P.3d at 102. Thus, "in light of the statutory scheme requiring the Labor Commissioner to enforce the labor statutes and the availability of an adequate administrative remedy for those statutes' violations, the Legislature did not intend to create a parallel private remedy for NRS 608.016 violations." *Id. Baldonado's* broad language and warning against lightly implying private causes of action makes clear that NRS 608.016 is within the Labor Commissioner's exclusive jurisdiction. Numerous Nevada Courts have explained that the same must be true for NRS 608.018. *McDonagh*, 2014 WL 2742874; *Gamble*, 2014 WL 2573899; *Lucatelli*, 2012 WL 1681394 (dismissing plaintiff's claim under NRS 608.018 for overtime pay and finding that the violations of Nevada labor statutes could not be asserted as private rights of action); and *Latonya Tyus*, 2:14-cv-00719-GMN-VCF, [ECF No. 40] (dismissing plaintiffs' claims for violation under NRS 608.018 pursuant to defendants' assertion that no private right of action exists under the statute). Additionally, as shown in the *Doolittle* case, the historical application of NRS 608.040 and

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[4] Of note, Plaintiff's Complaint also cites to this case, but fails to mention that it was overturned by the Supreme Court of the United States for the exact proposition Plaintiff relies upon. ***See* Amended Complaint, at ¶2**. Defendant's citations to this case are proper as the case was overturned on other grounds.



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608.050 was in the context of employment contract terms. Therefore, the history, structure and plain language of NRS 608.020 – NRS 608.050 show that they were never intended to apply to off-the-clock work, overtime, or any other non-contract based claims. *See i.e. Doolittle*, 54 Nev. 319 at 320. Accordingly, Plaintiff cannot assert a private right of action under NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 and the claims under these statutes must be dismissed.

Next, in addition to all the reasons set forth above, to the extent Plaintiff is alleging a violation of the rules for the distribution of a final paycheck to fired or quitting employees, he has not pled sufficient facts to substantiate such a claim. Plaintiff has not pled his dates of employment or that he was terminated. Therefore, there is no basis whatsoever for Plaintiff's claim that he was not timely paid all wages due and owed upon termination. Accordingly, for this reason as well, Plaintiff's sixth cause of action should be dismissed. *See Morris v. Bank of America*, 110 Nev. 1274, 1276, 886 P.2d 454 (1994).

Finally, because proper demand is a threshold requirement to any NRS 608.140 claim and Plaintiff's second, third and fourth causes of action are based on NRS 608.140, Plaintiff has incorporated by reference the demand letter he sent to Defendant for unpaid wages.[5] **Amended Complaint, at ¶¶25-48**; **Letter re Neville Lawsuit attached hereto as Exhibit B**. However, as explained to Plaintiff in Defendant's response to that letter, Plaintiff's demand is deficient under NRS 608.140. ***See*** **Defendant's Response to Letter re Neville Lawsuit attached hereto as Exhibit C**. NRS § 608.140 requires that an employee make a demand "for a sum not to exceed the amount so found due." (Emphasis added). NRS § 608.140. Plaintiff's demand did not provide a "sum" and instead, provided a table of formulas that have no amounts whatsoever. For this reason, in addition to all those discussed above, Plaintiff's attempts to bring a claim under NRS 608.140 are improper.

/ / /

### C. Plaintiff's Fifth Cause of Action - Breach of Contract/Breach of Covenant of Good Faith and Fair Dealing - Should be Dismissed For Failure to Show the

[5] A court may also treat certain documents as incorporated by reference into the plaintiff's complaint if the complaint "refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).



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**Existence of A Valid Contract That Was Breached By Defendants**

Plaintiff's breach of contract cause of action fails for three reasons: (1) to the extent it relies on Plaintiff's "improper rounding" allegations it is actually just a re-hashing of his earlier causes of action wherein he alleged violations of Nevada wage and over-time laws; (2) Defendant's employee handbook is not a contract; and (3) the job advertisement attached to Plaintiff's Amended Complaint is not a contract.

1. State Laws Are Not Contractual Terms

With respect to Plaintiff's allegations that state laws were part of a contract between Plaintiff and Defendant, he alleges that "the parties' employment agreement necessarily incorporated all applicable provisions of both state and federal laws, including the labor laws of the State of Nevada." **Amended Complaint, at ¶51**. However, as discussed above, Nevada law is clear that "terms of employment," when part of a breach of contract claim include "negotiated terms, as per a contract, not externally imposed standards, as per a statute." *Descutner,* 2012 WL 5387703, at *2. Accordingly, Nevada laws do not create a contractual relationship between Plaintiff and Defendant. Additionally, for all the reasons discussed above, Plaintiff's causes of action for violations of state law fail as a matter of law.

2. Defendant's Handbook is Not a Contract

Next, Plaintiff asserts that Defendant's handbook created terms of employment and that Defendant allegedly breached those terms. **Amended Complaint, at ¶¶52-54**. However, it is well established in Nevada that the mere existence of an employee handbook and/or written procedures, as a matter of law, is not sufficient to establish a *prima facie* case rebutting the at-will employment presumption. All employees in Nevada are presumed to be at-will employees. *Sw. Gas Corp. v. Vargas*, 111 Nev. 1064, 1071, 901 P.2d 693, 697 (1995) (*citing American Bank Stationery v. Farmer*, 106 Nev. 698, 701, 799 P.2d 1100, 1101–02 (1990)). Although "'contractual obligations can be implicit in employer practices and policies and as reflected in employee handbooks,'. . . at-will employees have no contractual rights arising from the employment relationship that limit the employer's ability . . . to change the terms of employment." *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 966, 194 P.3d 96, 106 (2008) (*quoting D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d



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206 (1991). Additionally, "[E]mployers may prevent implied contractual liability from arising in the first instance by including a disclaimer in their employment handbooks." *Id.* For example, in *Baldonado*, the plaintiffs' breach of contract claim based on an employee handbook failed because (a) employers may prospectively modify terms of employment; and (b) the employee handbook expressly stated that "any" policies were subject to unilateral modification. *Id.*

Similarly, in *Yeager v. Harrah's Club, Inc.* the plaintiff asserted that the employee handbook issued by his employer created a contractual right to termination only for cause. 111 Nev. 830, 837, 897 P.2d 1093, 1097 (1995). The at-issue employee handbook listed some general guidelines of personnel policy and twenty-three modes of conduct that would absolutely result in dismissal. *Id.* The Nevada Supreme Court, ruling against the plaintiff, determined the handbook was not an employment contract because nothing in the handbook stated that the twenty-three listed infractions are the exclusive causes for termination. *Id.* The Court reasoned: "It is more plausible that [the employer] merely intended the handbook to be a guideline for employees to measure their conduct against." *Id.*

Applying the Nevada Supreme Court's reasoning in the aforementioned cases to this action, it is clear that the handbook is not a contract as a matter of law. ***See* Pages 6-7 of Terrible Herbst Employee Handbook attached hereto as Exhibit D and incorporated by reference into Amended Complaint at ¶¶52-54**. First, nothing in the handbook changes the at-will status of employment nor is there any provision indicating termination can only be for cause. **Id**. The handbook does not assert that it is an exclusive or definitive list of Defendant's policies and there is no indication that the handbook is the basis for employment. **Id**. More importantly, like the handbook in *Baldonado*, Defendant's handbook contains an express disclaimer that it is not a contract and that all policies are subject to unilateral modification. **Id**. Specifically, the handbook states:

> Employment with the Company is at will. This means that employment may be terminated for any or no reason, with or without cause or notice by you or the Company. Nothing in this handbook or in any other document or oral statement shall limit the Company's right to terminate an employee at will.
>
> This policy of at will employment may be revised, deleted or



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> suspended only by a written employment agreement signed by the owner of the Company, which expressly revises, modifies, deletes or supersedes the policy of at will employment.
>
> With the exception of employment at will, terms and conditions or employment with the Company may be modified at the sole discretion of the Company with or without cause or notice at any time. No implied contract concerning any employment related decision, term or condition of employment can be established by any other statement, conduct, policy or practice, nor does any arise from the terms or conditions set forth in this handbook.

**Id., at 6-7.** Accordingly, the handbook in no way creates an employment contract or any contract whatsoever. For this reason, Plaintiff's fifth cause of action must be dismissed with prejudice.

3. A Job Advertisement is Not A Contract

Plaintiff asserts that "Defendant . . . offered to pay Plaintiff and all Class Members who worked the graveyard shift at a heightened hourly rate of $8.50 per hour." **Amended Complaint, at ¶57**. To evidence this assertion, he attached a newspaper clipping from April 26, 2015, wherein there is an advertisement which states "A few good reasons to talk to us: *$8/hr. starting wage; $8.50/hr. Graveyard; Benefits." **Amended Complaint, at Exhibit 4.** Therefore, according to Plaintiff, because he allegedly worked the graveyard shift and was paid at a rate of $8.00 per hour, Defendant breached its agreement with Plaintiff. **Amended Complaint, at ¶57**.

As an initial matter, Defendant has not pled his dates of employment. Therefore, the Court would have to speculate as to whether Plaintiff was employed during the time period he was allegedly offered $8.50 per hour for graveyard hours – on or after April 26, 2015. ***See* Amended Complaint, at Exhibit 4.** Although outside the scope of this Motion to Dismiss, Plaintiff's last day of employment with Defendant was April 14, 2015. Thus, it is likely that Plaintiff has not pled his dates of employment because they would show that this alleged "contract" never could have applied to him. As such, based on the facts Plaintiff has pled, there are not sufficient allegations to form a plausible claim for relief.

Next, even if Plaintiff had been employed after the printing of the attached advertisement, the advertisement still could not have created a contract. For an advertisement to become an offer, it either has to contain specific language that commits the advertiser to making an offer or language



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that invites a consumer to act without further communication between the parties. RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (1979). Courts adhering to this principle usually hold that advertisements do not constitute offers, but rather are invitations to solicit offers. SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 4:7, at 286-87 (4th ed. 1990). Moreover, a valid contract cannot exist when material terms are lacking or are insufficiently certain and definite. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Material terms include provisions such as subject matter, price, payment terms, quantity, and quality that are sufficiently certain and definite to support specific performance. *Matter of Estate of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 277 (1991).

Here, the advertisement states "See Store Manager or Employment Center for Details," thus specifically indicating that material terms were lacking from the advertisement and that further communication between the parties was necessary. ***See* Amended Complaint, at Exhibit 4.** Additionally, there is no explanation whatsoever regarding the job position "Cashiers Clerks" nor what hours are considered "Graveyard." **Id**. The advertisement includes the word "Benefits" without further explanation as well. **Id**. In sum, the advertisement is an invitation to inquire into employment with Defendant and nothing more. It does not constitute a contract and Plaintiff's fifth cause of action must be dismissed with prejudice.

### D. A Two Year Statute of Limitations Applies to Plaintiff's Minimum Wage Violation Claims

In the event the Court allows Plaintiff to proceed with any of his causes of action, the Court should limit all of Plaintiff's minimum wage claims to the extent they seek relief beyond the applicable two-year statute of limitations. Plaintiff asserts that the four-year "catch all" statute of limitation in NRS 11.220 applies. **Amended Complaint, at ¶23**. This is incorrect. All minimum wage violation claims in Nevada are subject to a two-year statute of limitations. NRS 608.260. Specifically, NRS 608.260 states:

> If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provision of NRS 608.250, the employee may, at any time within two years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and



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> the employee or any acceptance of a lesser wage by the employee is not a bar to the action.

Thus, NRS 608.260 is clear: minimum wage claims filed outside the two-year statute of limitations are untimely. Additionally, Nevada courts have overwhelmingly held that claims brought under the MWA are subject to a two-year statute of limitations. *See i.e. Hanks v. Briad Rest. Grp., L.L.C.,* 2015 WL 4562755 (D. Nev. July 27, 2015); *Tyus v. Wendy's of Las Vegas, Inc.*, 2015 WL 1137734 (D. Nev. Mar. 13, 2015); *Golden v. Sun Cab Inc.*, A-13-678109-C (Dec. 5, 2014) (Order attached hereto as **Exhibit E**); *Perry v. Terrible Herbst, Inc.*, A-14-704428-C (Dec. 16, 2014) and (February 10, 2015) (Order attached hereto as **Exhibit F**); *Williams et al. v. Claim Jumper Acquisition Company, LLC*, A-14-702048 (Sept. 22, 2014) (Order attached hereto as **Exhibit G**);[6] *Rivera v. Peri & Sons Farms, Inc.*, 805 F.Supp.2d 1042 (D. Nev., 2011) *aff'd in part, rev'd in part*, 735 F.3d 892 (9th Cir. 2013); *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874 (D. Nev. June 17, 2014).[7] As this Court explained in *Golden v. Sun Cab Inc.*, "[t]he [MWA] does not set forth a limitation period and the two year period set in NRS 608.250 is not irreconcilable with the [MWA]." **Exhibit E.** Accordingly, this Court concluded that "the two year limitation period should apply." **Id**. As such, to the extent Plaintiff seeks relief beyond the applicable two-year statute of limitations his minimum wage claims should be dismissed with prejudice.

## IV. CONCLUSION

For the reasons set forth above, Defendant requests that this Court grant its Motion to Dismiss because all of Plaintiff's causes of action fail to state cognizable claims upon which relief may be granted.

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[6] This order has been appealed to the Nevada Supreme Court and oral argument on the statute of limitations was heard on October 6, 2015.

[7] Two outlier decisions also exist. *See Diaz et al. v. MDC Restaurants et al.*, A-14-701633 (Feb. 3, 2015) and *Sheffer v. U.S. Airways, Inc*2015 WL 3458192 (D. Nev. June 1, 2015) *reconsideration denied sub nom. Sheffer v. US Airways, Inc.*, 2015 WL 4276239 (D. Nev. July 14, 2015). Both decisions; however, overlook clear Nevada Supreme Court authority and the mandate for the Nevada Labor Commissioner to enforce Nevada's minimum wage laws.



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Dated: December 31, 2015

Respectfully submitted,

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**PROOF 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 December 31, 2015, I served the within document:

**DEFENDANT'S MOTION TO DISMISS**

☒ Via **Electronic Service** - pursuant to N.E.F.C.R Administrative Order: 14-2.

☒ By **United States Mail** – a true copy of the document listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

Mark R. Thierman, Esq.
Joshua D. Buck, Esq.
Leah L. Jones, Esq.
Thierman Buck LLP
7287 Lakeside Drive
Reno, NV 89511

Attorneys for Plaintiff

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 31, 2015, at Las Vegas, Nevada.

Debra Perkins

Debra Perkins

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# EXHIBIT A

BRIAN SANDOVAL
Governor

BRUCE BRESLOW
Director

THORAN TOWLER
Labor Commissioner

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Department of Business & Industry

# OFFICE OF THE LABOR COMMISSIONER

http://www.LaborCommissioner.com

June 21, 2013

Mr. Rob Parker
Human Resources Representative
Nevada Association of Employers

Re: Advisory Opinion of the Nevada Labor Commissioner
Use of time clock rounding to calculate employee pay

Mr. Parker:

In response to your request for an Advisory Opinion from the Nevada Labor Commissioner as to ***whether the use of time clock rounding to calculate employee pay is appropriate under Nevada law,*** the Office of the Labor Commissioner has conducted a thorough review of all relevant statutes, regulations, and case law. It is the position of the Nevada Labor Commissioner that time clock rounding is appropriate so long as the rounding policy is used in a manner that does not result, over a period of time, in a failure to compensate employees properly for all the time actually worked.

## I. THERE IS NO NEVADA LAW REGARDING TIME CLOCK ROUNDING

Although the Nevada Labor Commissioner recognizes that many Nevada employers engage in time clock rounding to calculate employee pay, there is no Nevada statute or case law permitting or prohibiting such a practice. However, pursuant to NRS 608.016, employers are required to compensate employees for all time worked. If time clock rounding results in an employer failing to compensate an employee for all time the employee actually worked, the employer would be in violation of NRS 608.016 and subject to an adverse final decision by the Labor Commissioner. Therefore, the only time this office becomes concerned with time clock rounding is when it fails to adequately compensate employees.

However, the Office of the Labor Commissioner has been receiving an increasing number of questions from Nevada employers and employees alike concerned about time clock rounding despite this office's position. Therefore, the Office of the Labor Commissioner has undertaken a careful review of all relevant federal regulations under the Fair Labor Standards Act and authority in other states for guidance and to alleviate those concerns.

## II. FEDERAL LAW PERMITS TIME CLOCK ROUNDING

Under the Fair Labor Standards Act (FLSA), employers are permitted to use time clock rounding under certain circumstances. Specifically, the federal regulation states:

> It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually worked. ***For enforcement purposes this practice of computing working time will be accepted provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.*** (29 C.F.R. § 785.48(b), emphasis added.)

Courts have consistently held that this regulation permits employers to use time rounding in determining employee pay so long as the policy is neutral on its face and in its application and does not, on average, under-compensate employees. Therefore, as long as time clock rounding policies do not result, over time, in a failure to compensate employees for all time actually worked, employers who round are in compliance with federal law.

Additionally, as the regulation itself indicates, employers across the country have used time clock rounding as a method for calculating time worked for many years. Absent controlling or conflicting state law, there is no reason why this practice could not continue.

## III. OTHER STATES FOLLOW FEDERAL LAW PERMITTING TIME CLOCK ROUNDING

Many states, like Nevada, do not specifically address time clock rounding by statute, regulation, or case law. However, these states construe the requirements of their wage and hour laws in a manner consistent with the federal regulation permitting time clock rounding. For example, an Arizona court found that because Arizona had no law that "disapproves of the federal rounding regulations or suggests that these regulations are inconsistent with the policies underlying the

Arizona wage laws" that it was reasonable to interpret Arizona law in a manner consistent with the federal regulation. East v. Bullocks, Inc., 34 F.Supp.2d 1176, 1184 (D. Ariz. 1998).

More recently, a California court approved of time clock rounding so long as "the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they actually worked.'" See's Candy Shops, Inc. v. Superior Court, 210 Cal. App. 4th 889, 907 (Cal. App. 4th Dist. 2012). The Court recognized that time clock rounding is a practical method for calculating time worked and can be a neutral calculation tool for paying employees. Further, the net effect of time clock rounding is to allow employers to efficiently calculate hours worked without imposing unnecessary burdens on employees.

## IV. TIME CLOCK ROUNDING IS NOT INCONSISTENT WITH NEVADA LAW

The Office of the Labor Commissioner is tasked with enforcing Nevada wage and hour laws. In particular, this office is charged with ensuring that all employees are treated fairly under the law. It is the position of the Nevada Labor Commissioner that time clock rounding is not inconsistent with Nevada wage and hour laws.

For enforcement purposes, so long as Nevada employers utilize a time clock rounding policy that will not result, over time, in a failure to compensate employees properly for all time worked, they will not be in violation of Nevada law, pursuant to NRS 608.016. For this office to take a different position would result in an additional burden on Nevada employers and deny them a practical and effective tool for calculating time worked that is available to all other employers throughout the country.

## CONCLUSION

After a thorough review of all applicable statutes and authority, it is the position of the Nevada Labor Commissioner that time clock rounding is appropriate so long as the rounding policy is used in a manner that does not result, over a period of time, in a failure to compensate employees properly for all the time actually worked.

Sincerely,

Thoran Towler
Nevada Labor Commissioner

# EXHIBIT B

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August 18, 2015

***Via Certified Mail***

Terrible Herbst, Inc.
Terrible Herbst Oil, Inc.
E.T.T., Inc.
Terrible's Hotel & Casino, Inc.
c/o Registered Agent
Chris Kemper
5195 Las Vegas Blvd., South
Las Vegas, NV 89119

***Re: Violation of Nevada State Wage and Hour Laws***

Dear Mr. Kemper,

Pursuant to Nevada Revised Statute Section 608.140, demand is hereby made for payment within five (5) days for unpaid wages, penalties, interest, and attorneys' fees, due and owing to JOHN W. NEVILLE, JR., and a class of all similarly situated former employees of TERRIBLE HERRBST, INC., TERRIBLE HERBST OIL, INC., E.T.T., INC., and TERRIBLE'S HOTEL & CASINO, INC. (collectively "Terrible Herbst"). As a courtesy, I have enclosed a confidential draft complaint providing a more complete factual and legal basis of our client's claims.

As evidenced by the draft complaint, Plaintiff intends to file the complaint as a class action on behalf of all other similarly situated and typical persons employed by Terrible Herbst. Prior to obtaining relevant and necessary information pertaining to the number of putative class members employed in the State of Nevada during the relevant time period, the number of hours worked by class members during that time period, and the rate of pay for each putative class member during that period, Plaintiff is unable to provide a precise computation of damages at this time. Nevertheless, Plaintiff submits that the following formula may be used to estimate the amount of damages owed:

| **DAMAGES FORMULA** | |
|---|---|
| Failure to Pay Wages for All Hours Worked in Violation of 29 U.S.C. § 201, et. seq | (Total number of Class Members) x (Total Number of Unpaid Hours Worked over the 3-Year Liability Period for each Class Member) x (Class Members' Regular Rate of Pay) x (Liquidated Damages—*i.e.*, Double Damages) |

| | |
|---|---|
| Failure to Pay Overtime in Violation of 29 U.S.C. § 207 | (Total number of Class Members) x (Total Number of Unpaid Overtime Hours Worked over the 3-Year Liability Period for each Class Member) x (Class Members' Overtime Rate of Pay) x (Liquidated Damages—*i.e.*, Double Damages) |
| Failure to Pay Minimum Wages in Violation of the Nevada Constitution | (Total number of Class Members) x (Total Number of Unpaid Hours Worked over the 6-Year Liability Period for each Class Member) x (Applicable Minimum Wage Rate) |
| Failure to Compensate for All Hours Worked in Violation of NRS 608.140 and 608.016 | (Total number of Class Members) x (Total Number of Unpaid Hours Worked over the 3-Year Liability Period for each Class Member) x (Class Members' Regular Rate of Pay) |
| Failure to Pay Overtime in Violation of NRS 608.140 and 608.018; | (Total number of Class Members) x (Total Number of Unpaid Overtime Hours Worked over the 3-Year Liability Period for each Class Member) x (Class Members' Overtime Rate of Pay) |
| Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050 | (Total number of Class Members who are Former Employees) x (Former Class Members' Regular Rate of Pay) x (8 hours per day) x (30-days) |
| Breach of Contract | (Total number of Class Members) x (Total Number of Unpaid Hours Worked over the 6-Year Liability Period for each Class Member) x (Applicable Wage Rate (Overtime or Regular Rate) |
| Attorneys' Fees | Recoverable in Addition to Unpaid Wages At One Third to Total Recovery (Half of What the Class Recovery) or Lodestar, Whichever is Greater, As Provided by Statute. |
| Interest | 5.25% of Wages Owed over the Relevant Liability Period |

This letter also serves to give you notice that legal action may be taken against you; thus, you have a duty to preserve evidence that is relevant to this potential action. See Bass-Davis v. Davis, 122 Nev. 442, 450 (2006); Banks v. Sunrise Hosp., 120 Nev. 822, 830-31 (2004). In

addition to your duty to preserve traditional forms of documentary evidence (e.g., hard copy documents), we fully expect that any future litigation relating to this action will involve significant amounts of electronic and recorded data. Due to its format, such data is particularly susceptible to deletion, modification, and corruption. Accordingly, we hereby demand that you cease any and all existing electronic and recorded data deletion (whether pursuant to a data retention policy or not) and preserve all such information until the final resolution of this matter.

For the purposes of this preservation demand letter, "electronic and recorded data" includes, but is not limited to, the following: audio recordings, videotape, e-mail, instant messages, word processing documents, spreadsheets, databases, calendars, telephone logs, telephone recorded messages, voicemail messages, internet usage files, and all other electronically stored information created, received, and/or maintained by the parties on computer systems. The sources of the documentary evidence and electronic and recorded data include, but are not limited to, all hard copy files, computer hard drives, removable media (e.g., CDs, DVDs, and flash/thumb drives) and the like, file server or data array (e.g. RAID), laptop computers, cell phones, Blackberry devices, personal digital assistants (PDAs), and any other locations where hard copy and electronic data is stored. Keep in mind that any of the above-mentioned sources of relevant information may include personal computers the parties or their employees use or have access to at home, or from other locations. It also includes inaccessible storage media, such as back-up tapes that may contain relevant electronic information not existing in any other form.

Your attention to these matters is appreciated. Please do not hesitate to contact me if you have questions or would like to discuss possible early resolution of this action.

Very truly yours,

THIERMAN BUCK, LLP

JOSHUA D. BUCK

Enclosure

CONFIDENTIAL

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**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated,

Plaintiff,

vs.

TERRIBLE HERBST, INC., TERRIBLE HERBST OIL, INC, E.T.T., INC., TERRIBLE'S HOTEL & CASINO, INC. and DOES 1 through 50, inclusive,

Defendant(s).

Case No.:

Dept. No.:

**COLLECTIVE AND CLASS ACTION COMPLAINT**
**(EXEMPT FROM ARBITRATION PURSUANT TO NAR 5)**

1) Failure to Pay Minimum Wages in Violation of the Nevada Constitution;

2) Failure to Compensate for All Hours Worked in Violation of NRS 608.140 and 608.016;

3) Failure to Pay Overtime in Violation of NRS 608.140 and 608.018;

4) Failure to Pay Wages for All Hours Worked in Violation of 29 U.S.C. § 201, et. seq;

5) Failure to Pay Overtime in Violation of 29 U.S.C. § 207;

6) Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050; and

7) Breach of Contract.

**JURY TRIAL DEMANDED**

COMES NOW Plaintiff JOHN W. NEVILLE, JR., on behalf of himself and all others similarly situated and alleges the following:

All allegations in the Complaint are based upon information and belief except for those allegations that pertain to the Plaintiff named herein and her counsel. Each allegation in the Complaint either has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

**JURISDICTION AND VENUE**

1. This Court has original jurisdiction over the state law claims alleged herein because the amount in controversy exceeds $10,000 and because Plaintiff has a private right of action for minimum wages for all hours worked pursuant to Section 16 of Article 15 of the Nevada State Constitution. Article 15, Section 16(B) of the Constitution of the State of Nevada states in relevant part: "An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs."

2. In addition, this court has jurisdiction over the Nevada statutory claims alleged herein because a party seeking to recover unpaid wages has a private right of action pursuant to Nevada Revised Statute ("NRS") sections 608.050, 608.250, and 608.140. *See Lucatelli v. Texas De Brazil (Las Vegas) Corp.*, 2:11-CV-01829-RCJ, 2012 WL 1681394 (D. Nev. May 11, 2012) ("[T]he Nevada Supreme Court recently held that NRS § 608.040 contains a private cause of action because it is "illogical" that a plaintiff who can privately enforce a claim for attorneys' fees under NRS § 608.140 cannot privately enforce the underlying claim the fees arose from."); *Busk v. Integrity Staffing Solutions, Inc.*, 2013 U.S. App. LEXIS 7397 (9th Cir. Nev. Apr. 12, 2013) ("Nevada Revised Statute § 608.140 does provide a private right of action to recoup unpaid wages."); *Doolittle v. Eight Judicial Dist. Court*, 54 Nev. 319, 15 P.2d 684; 1932 Nev. LEXIS 34 (Nev. 1932) (recognizing that former employees have a private cause of

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action to sue their employer (as well as third party property owners where the work was performed) for wages and waiting penalties under NRS 608.040 and NRS 608.050).

3. This Court also has jurisdiction over the federal claims alleged herein pursuant to Fair Labor Standards Act ("FLSA"), because 29 U.S.C. § 216(b) states (emphasis supplied): "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal ***or State court of competent jurisdiction*** by any one or more employees for and in behalf of himself or themselves and others employees similarly situated." Plaintiff has, or will shortly, file with this court a consent to join this action.

4. Venue is proper in this Court because one or more of the Defendants named herein maintains a principal place of business or otherwise is found in the judicial district and many of the acts complained of herein occurred in Clark County, Nevada.

**PARTIES**

5. Plaintiff JOHN W. NEVILLE, JR., (hereinafter "Plaintiff" or "NEVILLE") is a natural person who is and was a resident of the State of Nevada and has been employed by Defendants, and each of them, as a non-exempt hourly employee during the relevant time period alleged herein..

6. Defendants TERRIBLE HERBST, INC., TERRIBLE HERBST OIL, INC, E.T.T., INC, and TERRIBLE'S HOTEL & CASINO, INC (hereinafter "Defendants") and each of them, is a domestic corporation incorporated in the state of Nevada, with each of them having its principle place of business in Las Vegas, Nevada. Each of the Defendants named herein is the employer, and/or the joint employer of the Plaintiff and all Class and Sub-Class members alleged herein. See, e.g. Exhibit 1 for just one example of common control of terms and conditions of employment.

7. Each Defendant is an employer engaged in commerce under the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq.* and is an employer under NRS 608.011.

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8. The identity of DOES 1-50 is unknown at the time and the Complaint will be amended at such time when the identities are known to Plaintiff. Plaintiff is informed and believes that each Defendants sued herein as DOE is responsible in some manner for the acts, omissions, or representations alleged herein and any reference to "Defendant," "Defendants," or "Barclays" herein shall mean "Defendants and each of them."

**FACTUAL ALLEGATIONS**

9. Plaintiff has been employed by Defendant as a cashier at one of its Las Vegas convenience store locations.

10. Plaintiff was offered to be paid a base hourly rate of $8.00 per hour for all non-graveyard hours worked and $8.50 for all graveyard hours worked. Despite being offered $8.50 per hour for graveyard hours, Defendants never compensated Plaintiff at the $8.50 rate. Instead, Defendants compensated Plaintiff at a base hourly rate of $8.00 for all the hours that he worked.

11. For the first 60 days of employment, Defendants paid Plaintiff and all hourly paid new hires $8.00 an hour ***without*** providing health insurance as required by Article 15, Section 16 of the Nevada Constitution, which falls below the requisite minimum wage of $8.25.

12. Plaintiff was scheduled for, and regularly worked, at least a 40 hour workweek.

13. Defendants round the time recorded by all hourly employees to the nearest 15 minutes for purposes of calculating payment of wages owed. Such rounding favors the employer and deprives the employees of pay for time they actually perform work activities. Indeed, Defendants require, suffer or permit the employees to perform actual work during the periods when no wages are paid due to the above described rounding.

14. Plaintiff was routinely denied approximately 14 minutes of uncompensated time per shift that he worked. Since Plaintiff was scheduled for, and indeed worked, at least 40 hours per workweek, the amount of time that was rounded off his pay was to be paid at the overtime rate of pay of 1.5 times his regular hourly rate. Plaintiff was deprived 70 minutes of uncompensated time per workweek that he worked.

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**COLLECTIVE AND CLASS ACTION ALLEGATIONS**

15. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

16. Plaintiff brings the action on behalf of himself and all other similarly situated and typical employees employed in Nevada as both a collective action under the FLSA and a true class action under Nevada law.

17. The **FLSA CLASS** consists of all hourly paid employees employed by Defendants, and each of them, in the United States within three years immediately preceding the filing of this action until the date of judgement after trial.

18. With regard to the conditional certification mechanism under the FLSA, Plaintiff is similarly situated to those that she seeks to represent for the following reasons, among others:

A. Plaintiff seeks preliminary and final certification and requests an order from this court that notice of this action be sent to all prospective FLSA CLASS Members so that they may become party plaintiffs in this litigation pursuant to 29 U.S.C. §216(b) if they so desire.

B. Defendant employed Plaintiff as an hourly employee who did not receive minimum wages and, where applicable, overtime premium pay at one and one half times the regular rate of pay for all hours worked over forty (40) hours in a workweek when, due to an unlawful rounding policy, Defendant suffered or permitted Plaintiff to work without any compensation for approximately 14 minutes per shift.

C. Plaintiff's situation is similar to those he seeks to represent because Defendant failed to pay Plaintiff and all other FLSA CLASS Members for all time they were required to work, including time spent performing pre-shift and post-shift work activities without compensation after the work day had begun.

D. Common questions exists as to: 1) Whether Defendant's system of rounding hours actually worked was lawful, 2) Whether the time spent by Plaintiff and all other FLSA CLASS Members engaged in pre-shift and post-shift

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activities is compensable under federal law; and 3) Whether Defendant failed to pay Plaintiff and FLSA CLASS Members one and one half times their regular rate for all hours worked in excess of 40 hours a week.

E. Upon information and belief, Defendant employs, and has employed, in excess of 500 FLSA CLASS Members within the applicable statute of limitations.

F. Plaintiff has signed a Consent to Sue form, which is attached to the Complaint as Exhibit 2. Consent to sue forms are not required for state law claims under Rule 23 of the Nevada Rules of Civil Procedure.

19. The **NEVADA CLASS** consists of all hourly paid employees employed by Defendants, and each of them, in the State of Nevada within six years immediately preceding the filing of this action until the date of judgement after trial. The NEVADA CLASS is further divided into the following sub-classes:

A. **NEW HIRE SUB-CLASS**: All members of the NEVADA CLASS employed by Defendants, and each of them, within four years immediately preceding the filing of this complaint until the time of judgement after trial who earned a hourly wage rate less than $8.25 an hour without actually having health insurance provided by the employer as required by Article 15, Section 16 of the Nevada State Constitution.

B. **WAGES DUE AND OWING SUB-CLASS**: All members of the NEVADA CLASS who are former employees.

20. Rule 23 treatment is appropriate for the Nevada Class and each subclass specified herein for the following reasons:

A. **The NEVADA CLASS and each SUB-CLASS is Sufficiently Numerous.** Upon information and belief, Defendant employs, and has employed, in excess of 500 NEVADA CLASS Members and at least several hundred within each sub-class within the applicable statute of limitations. Because Defendant is

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legally obligated to keep accurate payroll records, Plaintiff alleges that Defendant's records will establish the identity and ascertainably of members of the NEVADA Class and each SUB-CLASS as well as their numerosity.

B. **Plaintiff's Claims are Typical to Those of Fellow Class and Sub-Class Members.** Each NEVADA CLASS and each Sub-Class Member is and was subject to the same practices, plans, and/or policies as Plaintiff, as follows: 1) Plaintiff failed to pay new hire employees the Nevada Constitutional minimum wage because of a company-wide policy to pay all new hires less than $8.25 an hour and a company-wide policy of not providing medical insurance to employees until after 60 days of continuous employment; 2) Defendant required Plaintiff and all NEVADA CLASS Members to engage in pre and post shift activities without compensation because of a companywide policy of rounding time to the nearest 15 minute increment while at the same time requiring, suffering or permitting employees to perform work during the time uncompensated due to rounding; and 3) as a result of working employees without compensation due to rounding that favored the employer and did not pay for time actually worked, Defendant failed to pay Plaintiff and WAGES DUE AND OWING SUB-CLASS Members all wages due and owing at the time of their termination or separation from employment.

C. **Common Questions of Law and Fact Exist.** Common questions of law and fact exist and predominate as to Plaintiff and the Nevada class, including all sub-classes, including, without limitation the following: 1) Whether or not employees were paid less than the Nevada Constitutional Minimum wage times when the employer failed to provide health insurance as required by Article 15, Section 16 of the Nevada State Constitution; 2) Whether the time recorded by Plaintiff and all other class Members but not paid due to a rounding policy is compensable under federal and Nevada law; (3) Whether Defendant failed to pay a premium rate of one and one half times their regular rate for all hours worked in

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excess of 40 hours a week, and if they were paid less than one and one half the minimum wage, then for all hours worked in excess of 8 hours a day; 4) Whether Plaintiff and NEVADA SUB-CLASS Members were compensated for "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee" pursuant to the Nevada Administrative Code ("NAC") 608.115(1), and NRS 608.016; and 5) Whether Defendant delayed final payment to Plaintiffs and WAGES DUE AND OWING SUB-CLASS Members in violation of NRS 608.020-050.

D. **Plaintiff Is an Adequate Representative of the Class and each SUB-CLASS.** Plaintiff will fairly and adequately represent the interests of the NEVADA CLASS and each SUB-CLASS because Plaintiff is a member of the class and each SUB-CLASS, he has issues of law and fact in common with all members of the class and each SUB-CLASS, and he does not have any interests antagonistic to the members of the class or any SUB-CLASS. Plaintiff and counsel are aware of their fiduciary responsibilities to Members of the class and each SUB-CLASS and are determined to discharge those duties diligently and vigorously by seeking the maximum possible recovery for the class and sub-class as a group.

E. **A Class Action Is A Superior Mechanism to Hundreds Of Individual Actions.** A class action is superior to other available means for the fair and efficient adjudication of their controversy. Each Member of the class and each SUB-CLASS has been damaged and is entitled to recovery by reason of Defendant's illegal policy and/or practice of failing to compensate its employees in accordance with federal and Nevada wage and hour law. The prosecution of individual remedies by each member of the class and each SUB-CLASS will be cost prohibitive and may lead to inconsistent standards of conduct for Defendant

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and result in the impairment of the rights and the disposition of their interest through actions to which they were not parties.

**FIRST CAUSE OF ACTION**

**Failure to Pay Minimum Wages in Violation of the Nevada Constitution**

(On Behalf of Plaintiff and all members of the NEVADA CLASS and the NEW HIRE SUB-CLASS)

21. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

22. For the past four years, Article 15, Section 16(A) of the Constitution of the State of Nevada requires that every employer pay a wage to each employee of not less than eight dollars and twenty five cents ($8.25) per hour worked if the employer does not provide at least the minimum health benefits specified in the constitution.

23. In advertisements, such as Exhibit 3 attached hereto, Defendants admit that "Terrible Herbst Is Hiring Cashiers Clerks For All Convenience Store Locations" at the rate of "$8/hr. starting wage".

24. Defendants fail to provide health insurance to any newly hired employee for at least the first 60 days of employment, as evidenced in Exhibit 4 attached hereto.

25. Therefore, Defendants, and each of them, fail to pay the wages required by the State of Nevada Constitution to all its newly hired hourly paid employees for at least the first 60 days of employment.

26. Because there is no statute of limitations explicitly applicable to violations of the constitution, the four year "catch all" provisions of NRS 11.220 apply.

27. Wherefore, Plaintiff further demands for himself and for NEVADA CLASS and NEW HIRE SUB-CLASS Members payment by Defendants, and each of them, the difference between their hourly rate of pay and the hourly minimum wage required by Article 15, Section 16 of the Constitution of the Stat of for all hours worked during the time in which they were not provided health insurance for the four years immediately preceding the filing of this complaint

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until the date of judgement after trial, together with attorneys' fees, costs, and interest as provided by law.

28. Defendants also failed to pay Plaintiff and the NEVADA CLASS any wages for the hours that they unlawfully rounded off of employees' time cards.

29. Wherefore, Plaintiff demands for himself and for NEVADA CLASS Members payment by Defendants, and each of them, the minimum wage for all hours that were unlawfully rounded off employee's time cards for the four years immediately preceding the filing of this complaint until the date of judgement after trial, together with attorneys' fees, costs, and interest as provided by law.

## SECOND CAUSE OF ACTION

**Failure to Pay Wages for All Hours Worked in Violation of NRS 608.140 and 608.016**

(On Behalf of Plaintiff and all members of the NEVADA CLASS)

30. Plaintiff realleges and incorporates by the reference all the paragraphs above in the Complaint as though fully set forth herein.

31. As can be seen from Exhibit 5 attached hereto, Defendants, and each of them, require all employees to clock in no more than seven minutes before the beginning of a scheduled shift and to clock out no more than seven minutes after the end of their regularly scheduled shift.

32. All employees are expected, required, suffered and/or permitted to start working as soon as they clock in for the start of their shift and for all time until they clock out at the end of their scheduled shift.

33. Nevada Revised Statutes ("NRS") 608.016 entitled, "Payment for each hour of work; trial or break-in period not excepted" states that: "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."

34. Nevada Administrative Code ("NAC") 608.115(1), entitled "Payment for time worked. (NRS 607.160, 608.016, 608.250)" states: "An employer shall pay an employee for all

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time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee."

35. Defendants' system of rounding of hours systematically worked in favor of the employer and against the employee is not permitted under Nevada law.

36. Because of this unlawful "rounding system" Defendants did not pay employees for all time worked before the commencement of the employee's regular shift start time nor all time worked after the end of their regularly scheduled shift time.

37. By utilizing an improper system of rounding time records, Defendants, and each of them, did not pay employees for every hour worked, but required, suffered or permitted employees to work up to seven minutes a day at the beginning of each shift and up to seven minutes a day at the end of each shift.

38. Wherefore, Plaintiff demands for himself and for all NEVADA CLASS Members payment by Defendants, and each of them, payment at the Nevada Constitutional minimum wage, or their regular rate of pay, or any applicable overtime premium rate, whichever is higher, all wages due for the times worked each shift but not paid, for three years immediately preceding the filing of this complaint until the date of judgement after trial, together with attorneys' fees, costs, and interest as provided by law.

## THIRD CAUSE OF ACTION

**Failure to Pay Overtime Wages in Violation of NRS 608.140 and 608.018**

(On Behalf of Plaintiff and all members of the NEVADA CLASS)

39. Plaintiff realleges and incorporates by this reference all the paragraphs above in this Complaint as though fully set forth herein.

40. NRS 608.140 provides that an employee has a private right of action for unpaid wages.

41. NRS 608.018(1) provides as follows:

> An 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 prescribed pursuant to NRS 608.250 works: (a) More than 40

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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.

42. NRS 608.018(2) provides as follows:

An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works more than 40 hours in any scheduled week of work

43. Defendants' system of rounding of hours systematically worked in favor of the employer and against the employee is not permitted under Nevada law.

44. Because of this unlawful "rounding system" Defendants did not pay employees for all time worked before the commencement of the employee's regular shift start time nor all time worked after the end of their regularly scheduled shift time.

45. By utilizing an improper system of rounding time records, Defendants, and each of them, did not pay employees daily overtime premium pay to those Class Members who were paid a regular rate of less than one and one half times the minimum wage premium pay and, failed to pay a weekly premium overtime rate of pay of time and one half their regular rate for all members of the Class Members who worked in excess of forty (40) hours in a week in violation of NRS 608.140 and 608.018.

46. Wherefore, Plaintiff demands for herself and for the NEVADA Class Members payment by Defendant at one and one half times their "regular rate" of pay for all hours worked in excess of eight (8) hours in a workday for those class members whose regular rate of pay did not exceed the one and one half the minimum wage set by law, and premium overtime rate of one and one half their regular rate for all class members who worked in excess of forty (40) hours a workweek during the Class Period together with attorneys' fees, costs, and interest as provided by law.

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**FOURTH CAUSE OF ACTION**

**Failure to Pay Wages in Violation of the FLSA, 29 U.S.C. § 201, et seq.**

(On Behalf of Plaintiff and all members of the FLSA CLASS)

47. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

48. Pursuant to the FLSA, 29 U.S.C. § 201, et seq., Plaintiff and all FLSA CLASS Members are entitled to compensation at their regular rate of pay or minimum wage rate, whichever is higher, for all hours actually worked.

49. 29 U.S.C. § 206(a)(l) states that "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) except as otherwise provided in this section, not less than (A) $5.85 an hour beginning on the 60th day after the enactment of the Fair Minimum Wage Act of 2007; (B) $6.55 an hour, beginning 12 months after that 60th day; and C) $7.25 an hour, beginning 24 months after that 60th day."

50. The practice of rounding is for administrative convenience only. 29 C.F.R. § 785.48 permits rounding employee times only if: this arrangement averages out so that the employees are fully compensated for all the time they actually work.

51. Rounding of actual time worked to the nearest 15 minute increment is not allowed to give employers more working time for free. The practice of computing working time by rounding is unlawful under federal law if it is used in such a manner that it results, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. 29 C.F.R. § 785.48(b).

52. In this case, the rounding was almost always in the employer's favor. In addition, the rounding was not done because of lines at the time clock or other administrative issues. The employees were suffered or permitted to work during the periods of time that were reduced or deducted due to the rounding process.

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53. In this manner, Defendants and each of them, failed to compensate Plaintiff and the FLSA CLASS Members for the time spent engaging in pre and post-shift activities; Defendant failed to pay Plaintiff and the FLSA CLASS Members for all hours worked.

54. Defendants' unlawful conduct has been widespread, repeated, and willful. Defendant knew or should have known that its policies and practices have been unlawful and unfair.

55. Wherefore, Plaintiff demands for himself and for all others similarly situated, that Defendants pay Plaintiff and all other members of the FLSA CLASS the minimum hourly wage rate or their regular rate of pay, whichever is greater, for all hours worked during the relevant time period together with liquidated damages, attorneys' fees, costs, and interest as provided by law.

**FIFTH CAUSE OF ACTION**

**Failure to Pay Overtime Wages in Violation of the FLSA, 29 U.S.C. § 207**

(On Behalf of Plaintiff and all members of the FLSA CLASS)

56. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

57. 29 U.S.C. Section 207(a)(1) provides as follows: "Except as otherwise provided in the section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

58. By rounding and failing to compensate Plaintiff and FLSA CLASS Members for time spent engaging in pre and post-shift activities, Defendant failed to pay Plaintiff and FLSA SUB-CLASS Members overtime for all hours worked in excess of forty (40) hours in a week in violation of 29 U.S.C. Section 207(a)(1).

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59. The Department of Labor's rounding rules are readily apparent and it is well understood that the rounding of employee hours is prohibited when it is not administratively difficult to accurate reflect actual hours that an employee works and must not disadvantage the employee over time. Here, Defendant's policy of rounding employee hours pre and post shift in order to extract additional minutes of work from employees for free has been widespread, repeated, and willful. Defendant knew or should have known that its policies and practices have been unlawful and unfair.

60. Wherefore, Plaintiff demands for himself and for all others similarly situated, that Defendant pay Plaintiff and FLSA CLASS Members one and one half times their regular hourly rate of pay for all hours worked in excess of forty (40) hours a week during the relevant time period together with liquidated damages, attorneys' fees, costs, and interest as provided by law.

**SIXTH CAUSE OF ACTION**

**Failure to Timely Pay All Wages Due and Owing Upon Termination Pursuant to NRS 608.140 and 608.020-.050**

(On Behalf of Plaintiff and the WAGES DUE AND OWING SUB-CLASS)

61. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

62. NRS 608.140 provides that an employee has a private right of action for unpaid wages.

63. NRS 608.020 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."

64. NRS 608.040(1)(a-b), in relevant part, imposes a penalty on an employer who fails to pay a discharged or quitting employee: "Within 3 days after the wages or compensation of a discharged employee becomes due; or 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

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same rate from the day the employee resigned, quit, or was discharged until paid for 30-days, whichever is less."

65. NRS 608.050 grants an "employee lien" to each discharged or laid-off employee for the purpose of collecting the wages or compensation owed to them "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."

66. By failing to pay Plaintiff and all members of the NEVADA SUB-CLASS for all hours worked in violation of state and federal law, at the correct legal rate, Defendant has failed to timely remit all wages due and owing to Plaintiff and all members of the WAGES DUE AND OWING SUB-CLASS.

67. Despite demand, Defendant willfully refuses and continues to refuse to pay Plaintiff and all WAGES DUE AND OWING SUB-CLASS Members.

68. Wherefore, Plaintiff demands thirty (30) days wages under NRS 608.140 and 608.040, and an additional thirty (30) days wages under NRS 608.140 and 608.050, all members of the WAGES DUE AND OWING SUB-CLASS together with attorneys' fees, costs, and interest as provided by law.

**SEVENTH CAUSE OF ACTION**

**Breach of Contract**

(On Behalf of Plaintiff and the NEVADA CLASS)

69. Plaintiff realleges and incorporates by reference all the paragraphs above in the Complaint as though fully set forth herein.

70. At all times relevant herein, Defendant had an agreement with Plaintiff and with every NEVADA CLASS Member to pay an agreed upon hourly wage rate for all hours they worked for Defendant. Indeed, Defendant offered to pay Plaintiff and NEVADA CLASS Members a specific rate of pay in exchange for Plaintiff and NEVADA CLASS Members' promise to perform work for Defendant.

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71. The parties' employment agreement necessarily incorporated all applicable provisions of both state and federal law, including the labor laws of the State of Nevada.

72. A term of Plaintiff's employment contained in Defendant's handbook that was given to Plaintiff and all putative NEVADA CLASS Members specifically contains at page 26 the following two sections:

> A. "The Company prohibits off-the-clock work. The Company expects to pay you for all time worked and expects you to make sure that all time you work is properly recorded."
>
> B. Overtime
>
> As necessary, you may be required to work overtime. All overtime work must be previously authorized by a supervisor. The Company provides compensation for all overtime hours worked by non-exempt employees in accordance with state and federal law. Failure to obtain authorization from a supervisor prior to working overtime may result in disciplinary action, up to and including termination of employment.
>
> Exempt employees are expected to work as much of each work day as is necessary to complete their job responsibilities.

73. Defendant beached its agreement with Plaintiff and NEVADA CLASS Members by failing to compensate them for all hours worked, namely, for not paying for all hours reported truthfully as worked, and by not paying overtime required by law on such unpaid hours, where applicable.

74. As a result of Defendant's breach, Plaintiff and NEVADA CLASS Members have suffered economic loss that includes lost wages and interest.

75. The statute of limitations for breach of a written agreement is six years.

76. Wherefore, Plaintiff demands for himself and for NEVADA CLASS Members that Defendant pay Plaintiff and NEVADA CLASS Members their agreed upon rate of pay for all hours worked off the clock during the relevant time period alleged herein together with attorney's fees, costs, and interest as provided by law.

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77. Defendant further offered to pay Plaintiff and all NEVADA CLASS Members who worked the graveyard shift at a heightened hourly rate of $8.50 per hour. *See* Exhibit 2 attached hereto. Plaintiff and all NEVADA CLASS Members understood that they would be compensated at this rate of pay for the hours they worked during the graveyard shift. Defendant, however, paid Plaintiff and, upon information and belief, all other NEVADA NEVADA CLASS Members who worked the graveyard shift at the lower base rate of $8.00 per hour for all hours worked during the graveyard shift. Defendant thus breached its agreement with Plaintiff and NEVADA CLASS Members who worked the graveyard shift to pay them $8.50 for graveyard shift hours.

78. As a result of Defendant's breach, Plaintiff and NEVADA CLASS Members who worked the graveyard shift have suffered economic loss that includes lost wages and interest.

79. The statute of limitations for breach of a written agreement is six years.

80. Wherefore, Plaintiff demands for himself and for NEVADA CLASS Members who worked the graveyard shift that Defendant pay Plaintiff and NEVADA CLASS Members who worked the graveyard shift their agreed upon rate of pay for all hours worked during the graveyard shift during the relevant time period alleged herein together with attorney's fees, costs, and interest as provided by law.

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**JURY TRIAL DEMANDED**

Plaintiff hereby demands a jury trial pursuant to Nevada Rule of Civil Procedure 38.

**PRAYER FOR RELIEF**

Wherefore Plaintiff, individually and on behalf of all Members of the FLSA CLASS, the NEVADA CLASS and the SUB-CLASSES alleged herein, prays for relief as follows:

1. For an order conditionally certifying the action under the FLSA and providing notice to all FLSA CLASS members so they may participate in the lawsuit;

2. For an order certifying the action as a traditional class action under Nevada Rule of Civil Procedure Rule 23 on behalf of all members of the NEVADA CLASS and each proposed SUB-CLASS;

3. For an order appointing Plaintiff as the Representative of the NEVADA CLASS and each SUB-CLASS and his counsel as Class Counsel for the NEVADA CLASS and each SUB-CLASS;

4. For damages according to proof for minimum wage rate pay under the Nevada Constitution for all hours worked without employer provided health insurance as required by Article 15, Section 16 of the Constitution of the State of Nevada;

5. For damages according to proof for minimum wage rate, the regular rate or the overtime premium rate, if applicable, for payment under NRS 608.140 and 608.016, for all hours worked but not paid due the Defendant's so called "rounding."

6. For damages according to proof at the regular rate pay under federal laws for all hours worked but not paid due the Defendant's unlawful "rounding" policy;

7. For damages according to proof for overtime compensation under federal law for all hours worked over 40 per week;

8. For liquidated damages pursuant to 29 U.S. C. § 216(b);

9. For waiting time penalties pursuant to NRS 608.140 and 608.040-.050;

10. For damages pursuant to Defendant's breach of contract;

11. For interest as provided by law at the maximum legal rate;

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12. For reasonable attorneys' fees authorized by statute;

13. For costs of suit incurred herein;

14. For pre-judgment and post-judgment interest, as provided by law; and

15. For such other and further relief as the Court may deem just and proper.

DATED: August 18, 2015

Respectfully Submitted,

**THIERMAN BUCK LLP**

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

Attorneys for Plaintiff

**THIERMAN BUCK LLP**
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# EXHIBIT 1

EXHIBIT 1

# TERRIBLE HERBST,
# E.T.T., INC,
# TERRIBLE'S HOTEL & CASINO

Employee Name: John W. Neville Jr. Date: 2/13/2014

Social Security Number: 6836 Station #: 278

A requirement of your employment with Terrible Herbst Oil, Inc., E.T.T., Inc., Terrible's Hotel & Casino is that you attend the New Employee Orientation. Your attendance at the Orientation is **MANDATORY.** You have been scheduled to attend the Orientation on FRI 2-21, 2014 from 9:00 to 12:00 pm

You should be in the seating area of the Employment Center by 8:50 am.

Employee Signature: John W. Neville Jr. Date: 2/13/14

Instructor's Signature

***This will become part of the Employee's Personnel File.***

White Copy - Instructor Yellow Copy - Station Manager Pink Copy - Employee

TH047

# EXHIBIT 2

EXHIBIT 2

Pursuant to the Fair Labor Standards Act, 29 U.S.C.S. § 216(b), the undersigned hereby gives my consent in writing to become a party plaintiff against my Employer, Former Employer, and/or any and all its affiliated entities identified below. I authorize the filing of a copy of this consent form in Court. I further consent to join this and/or any subsequent or amended suit against the same or related defendant for wage and hour violations.

Dated this 24th____ day of _____July_____, 2015

Name: John Neville
(Please Print)

Signature: John Neville

Employer: Terrible Herbst -

The following contact information below will be redacted before filing with the Court:

Address: 3264 Fossil Springs Street

City: Las Vegas State: NV Zip: 89135-2124

Email: jn0825@cox.net

Telephone: 702 838 4839

Please return via Fax, Email or U.S. Mail to:

Thierman Buck LLP
7287 Lakeside Drive
Reno, NV 89511
Phone: 775-284-1500
Fax: 775-703-5027
Email: info@thiermanbuck.com

# EXHIBIT 3

EXHIBIT 3

## Professional/ Management

MANAGEMENT JOBS!

No Resume?
No Problem!

Monster Match assigns a professional to hand-match each job seeker with each employer!

This is a FREE service!

Simply create your profile online and, for the next 180 days, our professionals will match your profile to employers who are hiring right now!

CREATE YOUR PROFILE NOW:

Reviewjournal.com/jobs

No Resume Needed!

Use our convenient Online form today so our professionals can get started matching you with employers that are hiring - NOW!

Choose from one of the following positions to enter your information:

- Bank Branch Manager
- Construction Supervisor
- General Management
- Hospitality Manager
- Marketing Manager
- ice Manager
- erty Management
- aurat Management
- tail Management
- Sales Manager

We are in the business of helping find solutions to fit our customer's needs
Our Branch Manager in Las Vegas is a leader who has managed a sales and installation operation (or similar business), has P&L exp, understands marketing and values customers. Must have excellent communication, computer and people
Please send
jobs@

## Real Estate

Agents
REAL ESTATE ASSOCIATES
Need 10 more individuals. Training, leads and support. Classes start every week. Income potential $100,000 year. Call Bette Leal, Broker 702-732-7282

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Consolidated
www.c21consolidated.com

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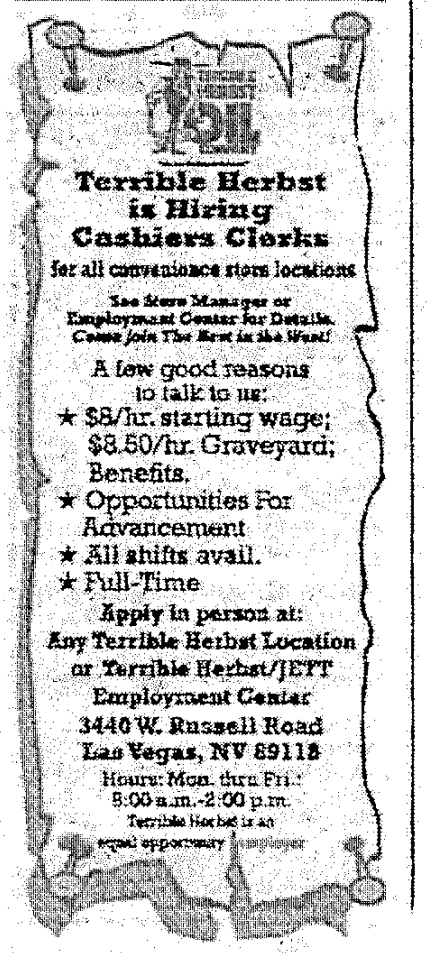
Min 5 yrs exp req. Sal + rent + util + insur benefit. Live on site. Fax resume to 702-233-0752

## Retail




## Sales

# EXHIBIT 4

# EXHIBIT 4

Jodie Poikus <jpoikus@terribleherbst.com> June 23, 2015 8:00 AM
To: "jn0825@cox.net" <jn0825@cox.net>
Cc: Rebecca Jasso <rjasso@terribleherbst.com>
RE: {External} Contact Form Submission

---

Mr. Neville,

When you come into apply are office hours are 8:00am to 2:00pm M-F. If you come to our office to apply in the afternoon, please be here no later than 1:40pm we lock are doors at 2:00pm. If you get hired we offer insurance the 1st of month following 60 days after you start. If you have any other questions please feel free to call me.

Address:
3440 W. Russell Rd.
Las Vegas, NV. 89118

Thank You,

Jodie Poikus
H/R Clerk
P:702-597-6105
F:702-597-6130
E:jpoikus@terribleherbst.com



-----Original Message-----
From: Rebecca Jasso
Sent: Tuesday, June 23, 2015 7:29 AM
To: Jodie Poikus
Subject: FW: {External} Contact Form Submission

-----Original Message-----
From: TerribleHerbst.com [mailto:rjasso@terribleherbst.com]
Sent: Monday, June 22, 2015 12:53 PM
To: Rebecca Jasso
Subject: {External} Contact Form Submission

Customer Name: John Neville
Department: Other
via Contact Form Submission

# EXHIBIT 5

EXHIBIT 5

January 15, 2014

To All:

We must adhere to the 7 minute rule. If you are scheduled at 6am do not come to work at 5am please come to work 7 minutes before your shift. The same goes for clocking out. This applies to all shifts.

The Company is encouraging a reduction in overtime, so we cannot start our shifts early. Please remember that you must always be clocked in when performing work.

Also, if you leave the premise, to cash a check or get lunch you must clock in and out. You cannot leave the premise being clocked in.

Thanks,
Mitch

# EXHIBIT C

Littler
Employment & Labor Law Solutions Worldwide

**Littler Mendelson, PC**
3960 Howard Hughes Parkway
Suite 300
Las Vegas, NV 89169-5937

Montgomery Y. Paek
702.862.7721 direct
702.862.8800 main
702.973.2508 fax
mpaek@littler.com

September 1, 2015

**VIA U.S. MAIL AND EMAIL (INFO@THIERMANBUCK.COM)**

Joshua D. Buck, Esq.
Thierman Buck, LLP
7287 Lakeside Drive
Reno, NV 89511

**Re:** ***John W. Neville, Jr.'s allegations regarding Nevada State Wage and Hour Laws***

Dear Mr. Buck:

This letter is to advise you that Littler Mendelson, P.C. represents Terrible Herbst, Inc. in the above referenced matter. Please direct all future communications to our attention.

We reviewed your correspondence dated August 18, 2015 and the draft complaint. All entities other than Terrible Herbst, Inc. are improperly named. Gaming operations, including but not limited to Terrible's Hotel & Casino were part of a separate entity and were sold in 2010 subsequent to a bankruptcy proceeding. Should you proceed with the threatened litigation, we request that you confirm this information and name only the proper party.

Additionally, consider this Terrible Herbst's formal response to your alleged demand for payment under Nevada Revised Statute section 608.140. Your demand is not in compliance with NRS § 608.140. NRS § 608.140 requires that an employee make a demand "for a sum not to exceed the amount so found due." (Emphasis added). NRS § 608.140. Your August 18, 2015 demand does not provide a "sum" and instead, you provide a table of formulas that have no amounts whatsoever. Further, some of these formulas reference statute of limitations that are incorrect and not based in any law. Therefore, we request that you provide a "sum" for (1) putative named plaintiff John W. Neville, Jr. and for (2) the putative class described in your letter and attached Complaint as required by NRS § 608.140.

Further, in *Descutner v. Newmont USA Ltd.*, the court held that NRS § 608.140 only allows a private cause of action to sue in contract and not under the labor code for a statutory violation such as overtime. *Descutner v. Newmont USA Ltd.*, 2012 U.S. Dist. LEXIS 156656 at 6-9, 14-15 (D. Nev. Nov. 1, 2012). Further, in *McDonagh et al. v. Harrah's Las Vegas, Inc. et al.*, the court held that "NRS 608.140 'does not imply a private remedy to enforce labor statutes, which impose external standards for wages and hours,' but only provides private rights of action for contractual claims." *McDonagh et al. v. Harrah's Las Vegas, Inc. et al.*, 2014 U.S. Dist. LEXIS 82290 *9-10 (D. Nev. June 17, 2014) quoting *Descutner* at 2. As such, we request that you

clarify that your NRS § 608.140 demand is solely for your seventh cause of action for Breach of Contract. Additionally, your Breach of Contract claim alleges a 6-year statute of limitations based on a written agreement. Complaint at ¶¶ 75 and 79. Therefore, we request that Mr. Neville provide the written contract upon which he bases this Breach of Contract claim.

Additionally, be advised that several of your proposed Complaint claims are not "warranted by existing law" as required by Rule 11(b). Nev. R. Civ. P. 11(b)(2); Fed. R. Civ. P. 11(b)(2). Specifically, there is no private right of action for NRS §§ 608.016, 608.018 and 608.020-050 claims as stated in your second, third and sixth causes of action. The case law cited in your Complaint is misapplied as the most recent case law has clarified that there is no private right of action under those NRS 608 statutes. In *Dannebring v. Wynn Las Vegas, LLC*, the court conducted a comprehensive review of the existing case law – including your Complaint cited cases of *Lucatelli* and *Busk* - and agreed with the *Descutner* court that the "statutory language and the legislative history of NRS § 608.040" does not imply a private right of action to enforce the labor statutes. *Dannenbring v. Wynn Las Vegas, LLC*, 2013 U.S. Dist. LEXIS 9658, 11 (D. Nev. Jan. 23, 2013). Further, in *McDonagh*, the court held that no private rights of action exist for NRS 608.005 – 608.195 because the Nevada Labor Commissioner is charged with enforcement of those statutes. *McDonagh et al. v. Harrah's Las Vegas, Inc. et al.*, 2014 U.S. Dist. LEXIS 82290 *9-10 (D. Nev. June 17, 2014) quoting *Descutner v. Newmont USA Ltd.*, 3:12-cv-00371-RCJ-VPC, 2012 WL 5387703, *2 (D. Nev. 2012). Therefore, we trust that you will re-evaluate these claims to ensure that they are warranted by existing law before certifying any pleading or paper under Rule 11.

Thank you for your prompt attention to this matter. Should you have any questions regarding this correspondence, do not hesitate to contact us.

Sincerely,

Montgomery Y. Paek

cc: Via email only (Rick D. Roskelley, Wendy M. Krincek, Roger L. Grandgenett, Kathryn B. Blakey)

Firmwide:135577848.2 999999.3412

# EXHIBIT D


"The Best Bad Guy In The West"

# EMPLOYEE HANDBOOK
# 2010 UPDATE

**Prohibited Retaliation**
Applicable law and Company policy prohibit retaliation against any employee for opposing, reporting or threatening to report prohibited discrimination or harassment, or for participating in any manner in an investigation, proceeding or hearing regarding prohibited discrimination or harassment. The Company will not retaliate against employees who complain of prohibited discrimination or harassment and will not permit such retaliation by its agents.

**Reporting Prohibited Harassment, Discrimination and Retaliation**
The Company takes a "zero-tolerance" stance against any form of prohibited harassment, discrimination, or retaliation. If you believe you have been subjected to prohibited discrimination, harassment or retaliation on the job, or if you are aware of an incident of prohibited discrimination, harassment or retaliation involving another employee, please provide a written or verbal report to Human Resources or the Operations Manager as soon as possible. If you do not feel comfortable bringing the issue to either these individuals, you may report the issue to any member of Management.

Your report should include details of the incident(s), the name of individuals involved, the names of any witnesses, and any documentary evidence. All incidents of prohibited discrimination, harassment and retaliation that are reported will be investigated. The investigation will be completed and a determination made and communicated to you as soon as practical. The Company will endeavor to protect the privacy and confidentiality of all parties involved to the extent possible consistent with a thorough investigation. If the Company determines that prohibited discrimination, harassment or retaliation has occurred, it will take remedial action commensurate with the severity of the offense. Appropriate action will also be taken to deter any future discrimination, harassment or retaliation.

In furtherance of this policy and the Company's zero-tolerance policy regarding prohibited discrimination, harassment and retaliation, all supervisory employees who witness such conduct or otherwise become aware of any allegations or complaints of such activity must report it to Human Resources and their supervisor immediately.

A supervisory employee's failure to immediately report such activity, complaints or allegations may result in discipline up to and including termination of employment.

**At Will Employment**

Employment with the Company is at will. This means that employment may be terminated for any or no reason, with or without cause or notice by you or the Company. Nothing in this handbook or in any other document or oral statement shall limit the Company's right to terminate

an employee at will.

This policy of at will employment may be revised, deleted or suspended only by a written employment agreement signed by the owner of the Company, which expressly revises, modifies, deletes or supersedes the policy of at will employment.

With the exception of employment at will, terms and conditions or employment with the Company may be modified at the sole discretion of the Company with or without cause or notice at any time. No implied contract concerning any employment related decision, term or condition of employment can be established by any other statement, conduct, policy or practice, nor does any arise from the terms or conditions set forth in this handbook.

**Our Philosophy on Unions**

We are a union-free Company and we want to remain union-free. We firmly believe that bringing in a union to our Company would be bad for you, our employees. Unions can hinder the ability of employees and employers to deal directly with each other to address issues in the workplace. We do not want anything that would impede our open door policy or affect our ability to communicate directly with you, our employees. You have certain rights under the National Labor Relations Act, including the right to refrain from union activities. We encourage you to reject union representation and to help keep the Company union-free.

**Our Commitment to You**

The Company is proud of the direct, close working relationship our managers and employees have built and maintain. We strive to preserve this environment, because we believe that working together is the best way to solve problems and improve our workplace. Please feel free to share your concerns and suggestions directly, by going to your Supervisor, Manager, or Director of Human Resources.

The Company is committed to ensuring that employees are treated fairly and that job-related issues and employee concerns are resolved in a timely manner. Because of our strong commitment to you, an open door policy is in place. Our open door policy gives all employees access to all levels of management should the need arise, up to, and including your Supervisor, Manager, or Director of Human Resources. We want you to use this open door policy whenever you have a concern or issue. The Company will actively oppose, within the boundaries of the law, any attempt to limit your right to communicate directly with supervisors and management.

**Personnel Records**

Please keep your personnel records up to date. There are times when we may need to reach you on short notice. It is your responsibility to be

# EXHIBIT E

A-13-678109-C

DISTRICT COURT
CLARK COUNTY, NEVADA

| Other Civil Filing | COURT MINUTES | December 05, 2014 |
|---|---|---|

A-13-678109-C Neal Golden, Plaintiff(s)
vs.
Sun Cab Inc, Defendant(s)

**December 05, 2014** **9:00 AM** **All Pending Motions**

**HEARD BY:** Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 03B

**COURT CLERK:** Denise Trujillo

**RECORDER:** Lara Corcoran

**REPORTER:**

**PARTIES PRESENT:**

| | |
|---|---|
| Blakey, Kathryn B. | Attorney |
| Greenberg, Leon | Attorney |
| Paek, Montgomery Y. | Attorney |
| Sniegocki, Dana | Attorney |

**JOURNAL ENTRIES**

- DEFT'S MOTION FOR PARTIAL SUMMARY JUDGMENT & MOTION TO DISMISS... PLTF'S OPPOSITION AND COUNTERMOTION FOR DISCOVERY AS PER NRCP RULE 56(f)... PLTF'S COMPLAINT UNDER NRCP RULE 12

Prior to hearing, counsel provided with tentative ruling as follows: This is a class action lawsuit brought by cabdrivers of Deft. for failure to pay the minimum wage. The matter had been stayed for a lengthy period of time pending the Supreme Court s decision on the question of whether the exception for taxicab drivers to the minimum wage requirement, which is contained in NRS 608.250(2), applies to deprive taxicab drivers of the minimum wage in the face of Article 15, Section 16 of the Nevada Constitution which was an amendment to the constitution by way of initiative petition and ratification. The Supreme Court has now decided that matter in Thomas v. Yellow Cab Corp., 130 Nev. Adv. Op. 52 (June 26, 2014)and held that the Constitutional Amendment does indeed supplant the exceptions listed in NRS 608.250(2). This leaves Deft. with two further arguments: (1) that the two year limit on filing an action under NRS 608.260 to recover the difference between the wage paid and the amount of the minimum wage bars the first claim for relief by Deft. Golden (and

all others so similarly situated) who was not employed within two years of the filing of the suit; and (2)that Pltf s third claim for waiting-time penalties under NRS 608.040 must be dismissed because Pltf s did not bring a cause of action for Attorneys fees under NRS 608.140, or because the section does not apply where an employee is paid upon separation, but subsequently disputes the amount paid. The Statute of Limitations Argument: Article 15, Section 16(B) provides in relevant part: The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement .
An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief.
NRS 608.260 provides in pertinent part: If any employer pays any employee a less amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action. (emphasis added) Thus, the Constitutional Amendment is more expansive than NRS 608.260. While NRS 608.260 provides for a limited remedy of recovery of the difference in the wage paid, the Constitution provides for all remedies available in law or in equity appropriate to remedy any violation, including, but not limited to, recovery of back pay, damages and injunctive relief. Additionally, the minimum wage is no longer prescribed by regulation of the Labor Commissioner, but rather by the very terms of the Nevada Constitution which prescribe how the wage shall be determined. Previously, under NRS 608.250, the Labor Commissioner was presumably free to decline a match of the federal minimum wage if she determined that those increases are contrary to the public interest.
In opposition to Deft s statute of limitations argument, Pltf s argue that there is no statute of limitations for an action to enforce the Constitutional Provision because no limitation is set forth in the section and subsection B prohibits a waiver of the minimum wage requirement by an individual employee, so that should be interpreted to be a bar to any limitation. Alternatively, Pltf s argue that applying a statute of limitations would be inequitable; that Deft should be equitably estopped from invoking the statute of limitations because they failed to advise Pltf s of their minimum wage rights as required by the Nevada Constitution , or that the statute should be equitably tolled until the date of the decision in Thomas v. Yellow Cab, Supra. Finally, Pltf s argue that if there is a limitation on the time to bring an action under the Constitutional amendment, it is either a 6, 4 or 3 year limitation period. The Court finds Pltf s first argument (i.e. that there is no period of limitations for an action claiming a violation of Article 15, Section 16) and second argument (i.e. that the provision within subsection B of Section 16 prohibiting a waiver of the minimum wage requirements by agreement between and individual employee and an employer amount to a prohibition against any period of limitation) unpersuasive. NRS 11.010 provides that Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. Article 15, Section 16 contemplates a civil action, but does not prescribe a limitation on the action, and so a statutory limitation period must apply. The

anti-contractual waiver provision does not amount to an exception to NRS 11.010. A statute of limitations applies to all civil actions, legal and equitable, and if the cause of action is not particularly specified elsewhere in a statute, it is included in the catchall statute, NRS 11.220 providing for a 4 year period. Deft. argues that a two year period has been prescribed by NRS 608.260 and cites to two federal cases for the proposition that the two year statute of limitations in NRS 608.260 was not implicitly repealed by Nevada s Constitutional amendment. Specifically, Deft. cites to Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892 (9th Cir. 2013) and McDonagh v. Harrah s Las Vegas, Inc. 2014 WL 2742874, 2014 U.S. Dist. LEXIS 82290 (D. Nev. June 17, 2014). Actually, River v. Peri & Sons did not so hold. Instead, the court held that because the appellant farmworkers failed to raise the argument in the lower court it was deemed waived. While the court in McDonagh v. Harrah, Supra, did make a finding that the constitutional provision was not intended to change this two-year statute of limitations, it did so without any analysis beyond noting that the provision was silent on whether it changed the two-year statute. Pltf s have also argued that other limitation periods should apply NRS 11.190(1)(b) because compensation was paid pursuant to a written agreement; NRS 11.190(2)(c) because if there was not a written agreement, there was an unwritten contract; and NRS 11.220 because there is no other period provided; NRS 11.190(3)(a) because it is an action for a liability created by statute; or NRS 11.190(3)(c) because it is an action for the taking of personal property. The Nevada Supreme Court has determined that the term action as used in NRS 11.190 refers to the nature or subject matter of the claim and not to what the pleader says it is, and it is the nature or subject matter of the claim that will determine what limitation period applies. Hartford Insurance Group v. Statewide Appliances, Inc., 87 Nev. 195, 484 P.2d 569 (1971). In the Hartford Insurance case, the insurance company, as the subrogee of its insured, filed an action for breach of express and implied warranties which were extended by the Deft. upon the sale of a water heater which subsequently exploded causing damage to the insured s home. The insurance carrier argued that NRS 11.190(2)(c) applied [an action upon a contract, obligation or liability not founded upon an instrument in writing]. The court, focusing on the nature of the action found that NRS 11.190(3)(c) [an action for injuring personal property]

- applied because the Pltf. sought recovery for injuries to personal property which NRS 11.190(3)(c) specifically governs. In Blotzke v. Christmas Tree, Inc. 88 Nev. 449, 499 P.2d 647 (1972), Pltf. sued his employers for personal injuries alleging that they had not provided a safe place to work. The court s focus was the Pltf s attempt to assert a contract claim with a longer statute of limitations. The court, finding that the action sounded in tort rather than contract, applied the shorter limitation period which barred the claim. State Farm v. Wharton, 88 Nev. 183, 495 P.2d 359 (1972) involved an automobile accident and State Farm sued as subrogee of its insured, thereby stepping into the shoes of its insured. The carrier insisted that since it paid the insured under its insurance contract, a 6 year statute of limitations should apply. Again, the nature of the action was for personal injuries presumably caused by the wrongful act or neglect of the adverse, so that the 6 year limitation period would not apply. Thus, the Court is to look to the real purpose of the cause of action in determining the applicable provision of the limitation statute. Here, it is clear that the purpose of the first cause of action is to collect the difference between the wages paid and the minimum wage required, assuming that the former was less than the latter. The Constitutional provision does not set forth a limitation period and the two year period set in NRS 608.250 is not irreconcilable with the Constitutional

provision. Thomas v. Nevada Yellow Cab Corp., Supra, did not implicitly repeal the entire statutory framework of NRS Chapter 608 concerning minimum wage (i.e NRS 608.250 through 608.290. Since the nature of the action here is the same as the nature of the action described in NRS 608.260, the two year limitation period should apply.
Tolling of the period:
Pltf s argue that even if the two year limitation period applies, it should be tolled because Deft. failed to advise Pltf s of their minimum wage rights. Specifically, Pltf s cite to Article 15, Section (16)(A) which requires an employer to provide written notification of rate adjustments to each of its employees. Firstly, this provision does not require an employer to notify employees of their right to a minimum wage. Thus, Pltf s may not rest on this argument alone to toll the statute, but it may be a factor when considering whether the doctrine of equitable tolling should be applied to the 2 year limitation period found in Nevada s wage and hour statutes. Equitable tolling is defined as [t]he doctrine that the statute of limitations will not bar a claim if the Pltf. , despite diligent efforts, did not discover the injury until after the limitations period had expired City of North Las Vegas v. State Local Government Employee-Management Relations Bd., 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011) quoting Black s Law Dictionary 618 (9th ed. 2009). The doctrine has been adopted in Nevada in discrimination claims addressed to the Nevada Equal Rights Commission under Chapter 613 because procedural technicalities that would bar claims of discrimination will be looked upon with disfavor. Copeland v. Desert Inn Hotel, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983). Nonetheless, even in the situations where equitable tolling may be considered, certain factors should be analyzed when determining whether the doctrine will apply. Among these are the claimant s diligence, knowledge of the relevant facts, reliance on misleading authoritative agency statements and/or misleading employer conduct, and any prejudice to the employer. Id. Nevada has also applied equitable tolling to time limits for filing claims for the refund of tax overpayments, See State Dept. of Taxation v. Masco Builder Cabinet Group, 127 Nev. Adv. Op. 67, 265 P.3d 666 (2011), but emphasized that Even when the claim s untimeliness is due to a procedural technicality, application of the doctrine is appropriate only when the danger of prejudice to the Deft. is absent and the interests of justice so require. Id. quoting Seino v. Employers Ins. Co of Nevada, 121 Nev. 146, 152, 111 P.3d 1107, 1112 (2005). Masco told the Tax Department s auditor that it was requesting a refund, stated its basis for said request, and this was communicated by the auditor in writing to his supervisors in the Tax Department. The only flaw was that Masco had not sent its own refund request letter to the Tax Department. The court in applying the doctrine of equitable tolling, considered this a mere procedural technicality. Similarly, in Copeland v. Desert Inn Hotel, Supra, the claimant did not file a Charge of Discrimination with NERC although she did go to the Commission offices and tell the relevant facts to a NERC representative who promised to get back to her. The Copeland court found these facts, asserted in a declaration by the Pltf. , were sufficient to preclude summary judgment in light of the doctrine. Here, Pltf. Golden has submitted a declaration stating that in August of 2010, he filed a written claim with the Labor Commissioner asserting that he had not been paid the minimum wage. It appears that thereafter, he never followed up on his claim, but that is not entirely clear from the declaration. He does admit that the Labor Commissioner never advised him that he did not have a valid claim for violation of the minimum wage provision. Clearly, the Labor Commissioner was aware of the Constitutional Amendment. See NAC 608.100 added to NAC by the Labor Commissioner by R055-07 in 2007. The civil action herein was filed on March 11, 2013-- 32

months later, but there is no explanation as to why it was not filed earlier or how and when Golden apparently became aware of his right to file a civil action. Golden s affidavit does demonstrate that he was aware of his right to a minimum wage that was apparently the basis of his complaint to the Labor Commissioner. Because Golden has acknowledged in his declaration that he knew of the of his minimum wage rights, the Nevada cases involving tolling under the delayed discovery rule are inapposite. Pltf s have requested that they be permitted to conduct discovery on issues concerning the factors bearing upon equitable tolling and have submitted a declaration of counsel. The Court would like Pltf. s counsel to elaborate further in oral argument as to what he believes may be revealed in discovery that would support an equitable tolling argument.
The Equitable Estoppel argument:
Pltf s argue that Deft s should be equitably estopped from asserting a statute of limitations but provide no clear analysis of why equitable estoppel should apply. Equitable estoppel works to prevent someone from asserting legal rights that in equity and good conscience should not be available due to that person s conduct. The four elements of equitable estoppel are: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. In re Harrison Living Trust, 121 Nev. 217, 223, 112 P.3d 1058, 1062 (2005). The Pltf s have made no arguments that demonstrate equitable estoppel applies here. Counsel may wish to address this in oral argument. The Third Cause of Action pursuant to NRS 608.040: Pltf. s third cause of action claims that they are entitled to the statutory penalty for a late payment of wages owed an employee at the time the employee resigns or quits his employment. NRS 608.040 which provides: 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.
NRS 608.180 charges the Labor Commissioner with enforcement of NRS 608.005 through 608.195. Deft s argue that Pltf s have no private right of action to collect the penalty provided for under the statute. Whether a private cause of action can be implied is a question of legislative intent. Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 958, 194 P.3d 96, 100 (2008) Baldonado addressed NRS 608.160 and held that the statute contained no express provision for a private action and that there was no evidence that the legislature intended to create one where there is an adequate administrative process in place via the Labor Commissioner. Like NRS 608.160, NRS 608.040 does not contain an express provision for private action. Pltf s argue that NRS 608.140 allows for assessment of attorney fees in a private cause of action so that this is an indication that the legislature intended to a private cause of action for the collection of the penalties provided for in NRS 608.040. While NRS 608.140 does indeed provide for the recovery of attorney s fees in a suit for wages under a contract of employment (i.e. according to the terms of his or her employment ) it does so in connection with a common law cause of action for the recovery of wages (i.e. Breach of contract). NRS 608.160 merely creates an exception from the American Rule, and allows for an award of attorney s fees by a court in a common law action for breach of contract involving wages in an employment contract. NRS

608.040 is not similar to 608.140 in this way. There is no indication that the legislature intended to create a private right of action for the collection of the late payment penalties which is all Pltf. seek in their third claim from relief. (The Court was unable to read the federal unpublished opinions which were cited but not attached as exhibits, because only LEXIS cites were provided and the Court only has access to Westlaw. Therefore, the arguments regarding the necessity of pleading a cause of action under NRS 608.140 in order to obtain the penalties under 608.040 are unclear to the Court.) Thus, Deft s Motion for judgment on the pleading as to that claim should be GRANTED.

Arguments by counsel. Colloquy between Court and counsel regarding equitably tolling. Further arguments by Mr. Greenberg. COURT advised is will allow Discovery on the issue of statute of limitations should be equitably tolled. Mr. Paek objected as he believes there will be prejudice to his client as they don't have records. Further arguments by counsel. COURT stated findings and ORDERED, Discovery is opened for the limited purpose regarding statute of limitations being equitably tolled. Further arguments by counsel. Court advised counsel used Lexis Nexus while siting their positions, but Court only has access to Westlaw. Court directed counsel to submit courtesy copies of the Federal cases so Court can look at legislative intent, and will take this issue, for 3rd claim of relief under advisement. COURT ORDERED, Motion for Partial Summary Judgment is DENIED WITHOUT PREJUDICE and counsel can renew motion at the close of discovery, and countermotion is GRANTED as to equitable tolling.

# EXHIBIT F

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TERRIBLE HERBST, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

DEBORAH PERRY, an individual, on behalf of herself and all similarly-situated individuals,

Plaintiff,

vs.

TERRIBLE HERBST, INC., a Nevada corporation, d/b/a TERRIBLE HERBST; and DOES 1 through 100, inclusive,

Defendant.

Case No. A-14-704428-C

Dept. No. XXXII

**ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO NRCP 12(C) WITH RESPECT TO ALL CLAIMS FOR DAMAGES OUTSIDE THE TWO-YEAR STATUTE OF LIMITATIONS AND ALL CLAIMS BY PLAINTIFF PERRY AND DENYING PLAINTIFFS' COUNTERMOTION FOR SUMMARY JUDGEMNT**

On September 26, 2014, Defendant TERRIBLE HERBST, INC.'S ("Terrible Herbst" or "Defendant"), filed its Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and All Claims by Plaintiff Perry. In response, on October 13, 2014, Plaintiffs filed their Opposition to Defendant's Motion For Judgment On The Pleadings Re Claims Prior To Two Years Before Filing and Plaintiffs' Countermotion For Partial Summary Judgment Re Limitation Of The Action. On December 16, 2014, at 10:30 a.m. the Court heard oral arguments on the competing motions and determined that the two year statute of limitation in NRS 608.260 was the applicable statute of limitations.

After colloquy regarding whether there was a discovery allowance applicable to each party individually, the Court continued the matter and allowed supplemental briefing. On January 9, 2015, Plaintiffs filed their supplemental briefing. Defendant responded on January 23, 2015 and Plaintiffs replied on January 30, 2015. The Court heard oral arguments regarding the supplemental briefing on February 10, 2015, and based on the pleadings and papers filed therein, the Court maintained its prior decision that the two year statute of limitation in NRS 608.260 was the applicable statute of limitations relevant to actions by employees to recover the difference between the minimum wage and the amount paid.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and All Claims by Plaintiff Perry is GRANTED.

IT IS FURTHER ORDERED that all claims for back pay outside the two-year statute of limitations, including the sole claim asserted by Plaintiff Deborah Perry, in Plaintiffs' First Amended Class Action Complaint, are DISMISSED.

IT IS FURTHER ORDERED that Plaintiffs' Countermotion For Partial Summary Judgment Re Limitation Of The Action is DENIED.

DATED this 3 day of Mar, 2015.

HON. ROB BARE
DISTRICT COURT JUDGE

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Respectfully submitted by:

By: _____
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# EXHIBIT G

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DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| LISA WILLIAMS, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>CLAIM JUMPER ACQUISITION COMPANY, LLC,<br><br>Defendant. | CASE NO.: A-14-702048<br>DEPARTMENT NO. XX<br><br>**ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING LIMITATION OF ACTION** |

This matter having come on for hearing on the 10th day of September, 2014; Daniel Bravo, Esq., Bradley S. Schrager, Esq., and Don Springmeyer, Esq., appearing for the Plaintiffs; Elayna J. Touchah, Esq., appearing for the Defendant; and the Court having heard arguments of counsel, and being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion for Partial Summary Judgment brought by the Plaintiffs. This is an individual and proposed class action which seeks relief on behalf of all employees of the Defendant, Claim Jumper Acquisition Company LLC, who have been compensated during their employment at a rate less than the minimum hourly wage allegedly required under Nevada law. The Amended Complaint filed on July 23, 2014, asserts a single cause of action based upon alleged violations of Article XV, section 16 of the Nevada Constitution (commonly called the "Minimum Wage Amendment").

(2) The instant Motion seeks a ruling by the Court regarding the appropriate

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DISTRICT JUDGE
DEPARTMENT XX

limitations period that should apply to the Plaintiffs' claim. Specifically, the parties seek clarification regarding whether the two-year limitations period set forth in NRS 608.260 applies to the instant cause of action. The Plaintiffs aver that the limitations period set forth in NRS 608.260 does not apply on its face to the instant claim which is based upon a Constitutional provision enacted after NRS 608.260 was enacted, and even if it can be read as somehow applying to the Plaintiffs' claims, it has been "impliedly repealed" by the enactment of Article XV, section 16. In Opposition, the Defendant avers that this action is governed by the two-year period set forth in NRS 608.260.

(3) The instant Motion is styled as a Motion seeking summary judgment pursuant to NRCP 56. The Defendant's Opposition argues that the instant Motion is not a proper NRCP 56 because it does not actually seek entry of judgment on any claim, but rather seeks something along the lines of an "advisory opinion" on a question of law that does not actually dispose of the claim asserted in the Amended Complaint. The Defendant is technically correct. The Plaintiffs' Motion seeks to know what limitations period governs it claims, a question whose answer would not actually result in the entry of judgment on its claim or any portion of its claim; at best, the answer to that question would only reduce the number of members of the putative class (by excluding members seeking relief solely for injuries that occurred before the expiration of the applicable limitations period) or reduce the amount of damages that the class members might be entitled to recover at trial (by limiting their recoverable damages only to injuries that occurred before the expiration of the applicable limitations period). Normally, a party cannot ask this Court to summarily enter "judgment" pursuant to NRCP 56 on something less than a claim or cause of action. *E.g.*, *Arado v. General Fire Extinguisher Corp.*, 626 F.Supp. 506, 509 (N.D.Ill. 1985) (FRCP 56 "simply does not permit the piecemealing of a single claim or the type of issue-narrowing sought here [because] the Rule authorizes only the granting of



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appealable 'judgments' disposing of entire claims")[1]; *RePass v. Vreeland*, 357 F.2d 801, 805 (3d Cir. 1966) ("it is clear that summary judgment cannot be invoked to dispose of [something less than a] claim"); *Westinghouse Electric Corp. v. Fidelity and Deposit Co.*, 63 B.R. 18, 23 (E.D.Pa. 1986) ("Partial summary judgment may not be invoked to dispose of only part of a single claim"). However, in this case, the question raised by the Plaintiffs' Motion is one that will likely recur at various points during this litigation (for example, when certifying and defining the class, during discovery, or when deciding how the jury is to be instructed on the damages that it can award) and therefore it needs to be resolved at some point during this litigation. Moreover, the question is purely one of law whose resolution does not appear to depend on any particular facts or evidence that might be uncovered during discovery, and therefore its answer is unlikely to change during the course of this litigation. Therefore, even if the instant Motion is not procedurally proper in all respects under NRCP 56 and would not result in the entry of a final judgment for any party, it raises a question that will guide the parties during this litigation and therefore for reasons of efficiency and judicial economy the Court deems it prudent to address the legal question presented by the parties, even if doing so results in an Order by this Court that may technically be somewhat premature in that it would ordinarily have been brought at a later point in the litigation.

(4) The question at hand is whether the two-year limitations period of NRS 608.260 applies to a claim alleging a violation of Article XV, section 16 of the Nevada Constitution. The Minimum Wage Amendment (Article XV, section 16) was adopted in 2006 with an effective date of November 28, 2006, and reads in its entirety as follows:

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[1] Where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this Court in applying the Nevada Rules. *E.g., Executive Management Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 53 (2002). NRCP 56 is identical to FRCP 56.

Sec. 16. **Payment of minimum compensation to employees.**

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. 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. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An



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employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

(5) NRS 608.260 reads as follows:

**NRS 608.260 Action by employee to recover difference between minimum wage and amount paid; limitation of action.** If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action.

(6) NRS 608.250 states as follows:

**NRS 608.250 Establishment by Labor Commissioner; exceptions; penalty.**

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest.

2. The provisions of subsection 1 do not apply to:

(a) Casual babysitters.



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(b) Domestic service employees who reside in the household where they work.
(c) Outside salespersons whose earnings are based on commissions.
(d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 days of agricultural labor in any calendar quarter of the preceding calendar year.
(e) Taxicab and limousine drivers.
(f) Persons with severe disabilities whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

(7) By this Motion, the Plaintiffs argue that the two-year limitations period of NRS 608.260 does not apply on its face to claims brought under the Minimum Wage Amendment because the Plaintiffs' Constitutional claim does not allege that they were paid a wage less than that "prescribed by regulation of the Labor Commissioner." The Plaintiffs also contend that, even if NRS 608.260 were construed to apply to Constitutional claims rather than violations of regulations, NRS 608.260 has been "impliedly repealed" by the enactment of the Minimum Wage Amendment because the Labor Commissioner's power to perform the duties set forth in NRS 608.250 no longer exist by operation of the Minimum Wage Amendment. The Plaintiffs cite *Thomas v. Yellow Cab Corp.*, 327 P.3d 518 (Nev. 2014) for the proposition that NRS 608.250 has been repealed by the Minimum Wage Amendment. Because NRS 608.250 is a major portion of NRS 608.260, the Plaintiffs contend that NRS 608.260 has been repealed as well. In *Thomas v. Yellow Cab Corp.*, 327 P.3d 518 (Nev. 2014), the Nevada Supreme Court held that the Minimum Wage Amendment operated to impliedly repeal the portions of NRS 608.250 that created any statutory "exclusions" among the class of "employees" expressly eligible to receive the minimum wage under the Minimum Wage Amendment. The Court held that a statute could not operate to carve out an exclusion to a class expressly defined in the Nevada Constitution, because "a

constitutional amendment, adopted subsequent to the enactment of the statute relied on by counsel for petitioner, is controlling over the statute that addresses the same issue. Statutes are construed to accord with constitutions, not vice versa." *Id.* at 521 (internal citations omitted). Thus, when a statute and a Constitutional provision are "irreconcilably repugnant" such that "both cannot stand," the Constitutional provision must be read to have "impliedly repealed" the statute. *Id.* (citations omitted). From this, the Plaintiffs argue that the entirety of NRS 608.250 and 608.260 have been "impliedly repealed" by the Minimum Wage Amendment. Specifically, the Plaintiffs argue that the duties of the Labor Commissioner set forth in NRS 608.250 have been entirely abolished by the Minimum Wage Amendment and therefore the entire scheme set forth in NRS 608.250 and 608.260 no longer exists.

(8) Two federal courts have concluded that the two-year limitations period of NRS 608.260 applies to claims alleging a violation of the Minimum Wage Amendment. *E.g., Rivera v. Peri & Sons*, 735 F.3d 892 (9th Cir. 2013); *McDonough v. Harrah's Las Vegas*, 2014 WL 2742874 (D.Nev. June 17, 2014). However, federal court decisions on questions of state law, while persuasive if their reasoning is sound, are not binding either on this Court or upon the Nevada Supreme Court.

(9) Prior to the enactment of the Minimum Wage Amendment in 2006, any claim alleging a violation of Nevada's minimum wage laws or regulations would have been subject to a limitations period of two years under NRS 608.260. There is no indication anywhere on the face of the Minimum Wage Amendment that it was intended to change this scheme. For this reason, federal courts have concluded that claims arising under the Minimum Wage Amendment were intended to be governed by the two-year limitations period that previously governed such claims under NRS 608.260. However, the reasoning employed by those federal courts strikes this Court as somewhat superficial because it is also true that, prior to 2006, the minimum wage in Nevada was established by way of regulation issued by the state Labor Commissioner pursuant to standards set forth in NRS 608.250, and any claim based upon a failure by

an employer to pay the minimum wage when required to do so would have been based upon a violation of NRS 608.260 and those regulations. In contrast, in this case the Plaintiffs attempt to frame their claim as a "Constitutional tort" based directly upon a violation of a provision of the Nevada Constitution, rather than as a claim brought under NRS 608.260 alleging a violation of a regulation issued by the Labor Commissioner. If the Plaintiffs' claim is indeed a true Constitutional tort rather than a claim based upon a violation of NRS 608.260, then at least arguably the two-year limitations period of NRS 608.260 would not apply to such a Constitutional tort.

(10) A cause of action can be based directly upon a violation of a provision of a state Constitution or the U.S. Constitution if the plaintiff can demonstrate that a constitutional violation was a "cause-in-fact" of the injuries and the resulting damages, and the injuries were a "reasonably foreseeable consequence" of the actor's act or omission. *E.g., Smith v. City of Oak Hill*, 2014 WL 4627947 (11th Cir. September 17, 2014); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). The "cause-in-fact" must arise from an action that violates a specific constitutional provision. *E.g., Strehlke v. Grosse Pointe Public Schools System*, 2014 WL 4603482 (E.D.Mich. September 15, 2014) (not "every governmental decision with which one disagrees [is] a constitutional tort").

(11) But in this case, it is not clear that the Plaintiffs' claim is such a thing. On its face, the Minimum Wage Amendment does not merely establish a straightforward uniform minimum wage rate to be paid to every employee in Nevada at all times. Rather, the Minimum Wage Amendment sets a specific floor and then expressly requires the Governor (through the state Labor Commissioner) to adjust the rate periodically as follows:

> These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All

> Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1.

(12) Thus, the effective minimum wage rate in Nevada is not merely what is stated in Article XV section 16, but rather is expressly defined as a wage rate set by the Labor Commissioner based partially upon data from the U.S. Department of Labor. It follows that any employee who claims to have been illegally paid less than the then-existing minimum wage is not necessarily alleging a Constitutional tort, but rather is alleging a violation of the wage rates established in the bulletin issued by the state Labor Commissioner in effect on the date of the alleged violation. In other words, the "cause-in-fact" of any such claim is not that the employee has not been paid the particular dollar amount set forth in the Minimum Wage Amendment, but that he has not been paid the wage rate set forth in the periodic bulletins issued by the Labor Commissioner pursuant to the Minimum Wage Amendment. Thus, the legal standard that the Plaintiffs allege was violated is the wage rate established by the Labor Commissioner, not Article XV section 16 itself. Although that wage rate is established pursuant to the methodology articulated in the Minimum Wage Amendment, the Minimum Wage Amendment does not itself define what that exact rate is at any given moment in time. Therefore, any claim that an employee has been illegally paid less than the effective minimum wage rate actually alleges a violation of wage rates established by state regulation rather than alleging a direct violation of Article XV section 16 of the Nevada Constitution. Consequently, although styled as a "Constitutional tort," the Plaintiffs' claim actually appears to be one alleging a violation arising under NRS 608.260.

(13) The Court notes that the Minimum Wage Amendment does, by its plain terms, impose duties directly upon private employers doing business in Nevada. Thus, the Plaintiffs' claim could plausibly be interpreted as a "Constitutional tort" based upon

an alleged violation of the duties imposed upon employers by the Minimum Wage Amendment to pay the minimally required wage rate. But those minimally required wage rates are nonetheless set by the Labor Commissioner, not by the Minimum Wage Amendment itself. Thus, even if the Plaintiffs' claim were construed in this manner as a "Constitutional tort" arising from the failure of an employer to pay the minimum wage as required by Article XV section 16, the genesis or "cause-in-fact" of the claim is that the employer did not pay the wage rates set by the Labor Commissioner.

(14) For purposes of the present Motion the Court need not definitively determine which interpretation is correct, because, under either interpretation, the Minimum Wage Amendment is not "irreconcilably repugnant" with the regulatory and statutory scheme set forth in NRS 608.250 and 608.260 (excepting that the exclusions of NRS 608.250(2) have been repealed). The Minimum Wage Amendment does not supplant or abolish the duties of the state Labor Commissioner in establishing the current minimum wage rate, but rather still requires the Labor Commissioner to issue regulations establishing minimum wage rates, albeit changing how those duties are performed. The state Labor Commissioner still sets the effective minimum wage rate in Nevada via periodic regulation, and he still does so based upon data from the federal government, and he still cannot violate federal law in doing so. Therefore, on its face, NRS 608.250 and 608.260 are not irreconcilable with the Minimum Wage Amendment, but rather are quite obviously intended to be complementary (with the exception noted in *Thomas*).

(15) Accordingly, a claim alleging that an employee has been illegally paid less than the effective minimum wage rate is a claim that alleges a violation of the rates established by the Labor Commissioner, not a claim that alleges a violation of the rates set forth in the Minimum Wage Amendment. Thus, the Plaintiffs' claim in this case, although styled as a violation of Article XV section 16, actually appears to allege a violation arising under NRS 608.260. Such a claim is governed by the two-year statutory period set forth in NRS 608.260.

(16) It is so ORDERED.

DATED: September 22, 2014

JEROME T. TAO
DISTRICT COURT JUDGE

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing, by E-Service, by mailing, by placing copies in the attorney folder's in the Clerk's Office or faxing as follows:

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