

IN THE SUPREME COURT OF NEVADA

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

Petitioner-Plaintiff,

vs.

Docket Number: 70696

Eighth Judicial District Court

Case No. A-15-728134-C

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

Respondents,

and

TERRIBLE HERBST, INC.,

Real Party in Interest-Defendant.

**REAL PARTY IN INTEREST-DEFENDANT TERRIBLE HERBST, INC.'S
ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION**

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ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION

NRAP 26.1 DISCLOSURE

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

TERRIBLE HERBST, INC., a Nevada corporation d/b/a TERRIBLE HERBST, is a privately-held company and no publically traded company owns 10% or more of TERRIBLE HERBST, INC.'s stock.

Dated: October 31, 2016

Respectfully submitted,

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I. INTRODUCTION

The issue presented this Court is straight forward: Does the plain language of NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 create a private right of action enforceable outside the administrative scheme expressly provided by the Nevada Legislature. The very simple answer is no. There is no need to engage in the statutory or interpretive scavenger hunt suggested by Petitioner. Petitioner implores this Court to read the plain language of the above statutes out of existence. Indeed, Petitioner repeatedly implores this Court to disregard its own clear precedent and asks that it create private rights of action where none exists. Petitioner asks this Court to ignore the Nevada Legislature’s express instruction that each of the above statutes be enforced exclusively by the Labor Commissioner.

Petitioner’s Writ must be denied for three key reasons: (1) the plain language of NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 does not provide for a private right of action; (2) by express statute and recognition of this Court, the right to enforce NRS 608.005–608.195 rests exclusively with the Labor Commissioner; and (3) Petitioner’s reliance on NRS 608.140 to “imply” a private right of action is misplaced at best because it is a statute for attorney’s fees - not a designation of a private right of action for statutes which were created decades later.

Accordingly, Petitioner's Writ as to NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 must be denied in its entirety and the District Court's decision upheld.

II. STATEMENT OF THE ISSUE

Does a private right of action exist under NRS 608.016, NRS 608.018, and/or NRS 608.020 – NRS 608.050?¹

III. STATEMENT OF THE CASE AND PROCEDURE

This case arises out of Plaintiff John Neville's ("Petitioner") Class Action Complaint filed on November 24, 2015, for 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 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. **Petitioner's Appendix ("PA") 005-027.**² All five causes of

¹ With regard to the Nevada Constitution's Minimum Wage Amendment, Nev. Const. art. XV § 16 ("MWA"), the Real Party in Interest does not dispute that the MWA specifically provides for a private right of action to enforce its provisions (Nev. Const. art. XV § 16(B)) and the lower court's ruling was in error as to that point.

² Petitioner originally filed a complaint with identical state causes of action and added federal causes of action seeking identical relief. **Real Party In Interest's Appendix ("RA") 1-29.** Real Party in Interest removed that case to the United States District Court for the District of Nevada. **RA 30-69.** Petitioner then amended his complaint, dropping all the federal causes of action, and filed a

action are based on the allegation that Real Party in Interest's time rounding policy is improper. **Id.** Contained within the breach of contract claim is the additional allegation that at the time Petitioner was hired, he was promised \$8.50 per hour for graveyard work but he was actually only paid \$8.00 for graveyard work. **Id.**

On December 31, 2015, Real Party in Interest Terrible Herbst, Inc. dba Terrible Herbst ("Real Party in Interest") brought a Motion to Dismiss Pursuant to NRCP 12(c) asserting that Petitioner's Complaint should be dismissed in its entirety because the facts alleged by Petitioner demonstrate that Real Party in Interest's time rounding policy is neutral on its face and in application and that it did not systematically work against Petitioner; rather, Petitioner systematically chose to use the neutral rounding system to his own disadvantage, contrary to company policy, and then filed this lawsuit claiming he is entitled to wages and overtime as a result of his own improper use of the neutral time-rounding policy. **PA 028-118.** Real Party in Interest further argued that Petitioner had not pled any actual violation of the Nevada Constitution's Minimum Wage Amendment, Nev. Const. art. XV § 16 because he was paid \$0.75 over minimum wage and could not allege his cumulative pay fell below minimum wage. **Id.** Finally, and relevant to

Motion to Remand. **RA 70-71.** Real Party in Interest filed an opposition to the Motion to Remand asserting Petitioner was forum shopping. **RA 72-76.** Plaintiffs filed a Voluntary Dismissal closing that case. **RA 77.** That same day, they filed the instant case asserting the identical causes of action as the amended complaint filed in federal court. **PA 005-027.**

the instant writ, Real Party in Interest asserted that there is no private right of action under Petitioner's NRS 608 claims because the legislature specifically excluded any such private right of action under those statutes and, further, gave exclusive enforcement power to the Nevada Labor Commissioner. **Id.**

In response, Petitioner filed an Opposition arguing that his time sheets demonstrate that Real Party in Interest's time rounding policy is not neutral. **PA 119-250.** He then conflated Real Party in Interest's arguments against his Nevada Constitution claims and NRS 608 claims and argued there is a private right of action to collect wages in Nevada – even though Real Party in Interest never argued that the Nevada Constitution's Minimum Wage Amendment does not have a private right of action. **Id.** Finally, he relied heavily on unpublished District Court orders which have permitted suits under the same NRS 608 statutes and asked the District Court to ignore federal court authority which analyzed the issue more thoroughly pursuant to this Court's guidance in *Baldonado*. **Id.** Real Party in Interest filed a Reply (**PA 251-266**) and the District Court heard oral arguments on the Motion.

On April 22, 2016, the District Court entered an order dismissing Petitioner's NRS 608 claims on the basis that there is no private right of action under those claims. **PA 1-4.**³

³ The Court also dismissed Petitioner's Nevada Constitutional claims and, in what

IV. LEGAL ARGUMENT

A. The Plain Language Of NRS 608.016, NRS 608.018, And NRS 608.020 – NRS 608.050 Does Not Provide For A Private Right Of Action

Only in the absence of express clear language does this Court attempt to ascertain legislative intent. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958, 194 P.3d 96, 101 (2008) (citing *U.S. Design & Constr. v. I.B.E.W. Local 357*, 118 Nev. 458, 461, 50 P.3d 170, 172 (2002)); see also *Harris Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003). Additionally, “it is not the business of [the] court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.” *Falcke v. Douglas County*, 116 Nev. 583, 589 (2000). Moreover, as this court made abundantly clear in *Baldonado*, while specifically addressing Nevada’s labor statutes, “the absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy.” *Baldonado* 124 Nev. at, 959 (citing *Richardson Constr. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d

was likely a clerical error or oversight, stated the dismissal was due to their being no private right of action under the Nevada Constitution for minimum wage claims. **Id.** Instead of requesting reconsideration or clarification on the Nevada Constitution aspect of the decision, Petitioner filed the instant Writ requesting that this Court address whether there is a private right of action under the Nevada Constitution’s Minimum Wage Amendment and under NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050. Real Party in Interest does not dispute that the lower court was in error on this point.

21, 23 (2007) (citing *Sports Form*, 108 Nev. at 40–41, 823 P.2d at 903); see also *Maldonado v. Dominguez*, 137 F.3d 1, 7 (1st Cir.1998) (noting that there is a “strong presumption” against inferring a private cause of action); *Vikco Ins. Services, Inc. v. Ohio Indem.*, 70 Cal.App.4th 55, 82 Cal.Rptr.2d 442, 447 (1999) (explaining that, because courts are not to “insert what has been omitted from a statute,” courts will assume that the legislature will make its intent to create a private cause of action clear through direct, understandable, and unmistakable terms); *Provencher v. Town of Enfield*, 284 Conn. 772, 936 A.2d 625, 630 (2007) (“[I]t is a rare occasion that [the Connecticut Supreme Court] will be persuaded that the legislature intended to create something as significant as a private right of action but chose not to express such an intent in the statute.”)). Therefore, when the legislature does not intend for a private right of action to exist, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Baldonado*, 124 Nev. at 959 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)).

Here, NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 are completely silent as to whether a private right of action exists to enforce their terms. Accordingly, there is no basis for finding a private right of action where none exists. Moreover, the plain clear language of NRS 608.180 expressly states that

“[t]he Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced.” NRS 608.180; *see also Baldonado*, 124 Nev. at 961. Thus, it would be completely nonsensical to assume that NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 have a private right of action when the plain clear language of NRS 608.180, the only statute to discuss the enforcement of NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050, states that such enforcement lies with the Labor Commissioner – not the courts. This is further demonstrated by the fact that the legislature has demonstrated that it will specifically include a private right of action for Nevada wage statutes when it intends for one to exist. For example, Nevada’s minimum wage statutes, NRS 608.260 and the Nevada Constitution’s Minimum Wage Amendment, Nev. Const. art. XV § 16 both expressly provide for a private right of action. NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 do not. Accordingly, because NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050 do not provide for a private right of action one does not exist.

B. The Right To Enforce NRS 608.005–608.195 Rests Exclusively With The Labor Commissioner

1. The Nevada Legislature Expressly Tasked The Labor Commissioner With Enforcing Nevada’s Wage Statutes

In addition to not providing for a private right of action, the Nevada Legislature has expressly ordered the Labor Commissioner, not the Courts, to

enforce NRS 608.016, NRS 608.018, and NRS 608.020 – NRS 608.050. *See* NRS 608.180(1); *see also* U.S. Department of Labor: *Growth of Legal Aid Work in the United States, Bulletin No. 398* (Jan. 1926) (**RA 78-83**) (explaining that the Nevada Legislature created the Labor Commissioner for the purpose of enforcing wage payment laws). Specifically, NRS 608.180 provides that “[t]he Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced.” NRS 608.180. Indeed, as this Court has recognized, “[i]n Nevada, the Legislature has entrusted the labor laws’ enforcement to the Labor Commissioner, unless otherwise specified.” *Baldonado*, 24 Nev. at 961.

Petitioner, however, asserts that there must be a private right of action under NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 because the Labor Commissioner “may only exercise jurisdiction over claims in instances where a claimant demonstrates that he or she cannot afford a private attorney to take his or her wage case.” ***See Petitioner’s Writ 22:18-23:4***. This assertion is false for three reasons.

First, the statute Petitioner relies upon, NRS 607.170, does not limit the Labor Commissioner’s jurisdiction to “only” the kind of cases it contemplates. Rather, it describes situations in which the Labor Commissioner, based on the discretion vested in him by the Nevada Legislature, determines that the claim is

enforceable in the courts. *See* NRS 607.170(1). Indeed, this statute strongly suggests that most Nevada wage statutes are not enforceable in courts as it states it is within the Labor Commissioner’s discretion whether the “claim for wages or commissioner or other action is valid and enforceable in the courts.” *Id.*

Second, the NRS 608.195 expressly states that criminal and administrative penalties – not civil – are the appropriate redress for violations of NRS 608.005 to 608.195. In accordance with this provision, the Nevada Legislature expressly gave the Labor Commissioner authority to direct the district attorney, the Deputy Labor Commissioner, the Attorney General, or special counsel to “prosecute the action for enforcement according to law.” NRS 608.180.

Third, the Labor Commissioner can, does, and has been specifically instructed by the Nevada legislature to enforce “claims for wages” via the agency hearing process which, in addition to providing robust civil remedies for individuals, also imposes penalties for violations of a labor law or regulation. NRS 607.160; NRS 607.207. Indeed, the Nevada legislature has consistently clarified that Labor Commissioner Hearings are the appropriate forum for all wage claims except those in which enforcement is *exclusively* vested elsewhere. *See i.e.* NRS 607.160.

The legislative history of NRS 607 affirms this point. In 2001 the Nevada Legislature vested the Labor Commissioner with the authority to adopt regulations

that would assist it in enforcing Nevada’s wage statutes; it authorized the Labor Commissioner to designate additional individuals to conduct hearings and issue decisions on those statutes; and it gave the Labor Commissioner discretionary authority over which cases must be criminally perused by the attorney general. **Senate Bill No. 373–Committee on Commerce and Labor (Chapter 90).** The Nevada Legislature was expressly clarifying that it is the Labor Commissioner that should be enforcing Nevada’s wage statutes.

Similarly, in 2003, the Nevada Legislature elaborated that the Labor Commissioner’s authority includes the imposition of both civil and administrative remedies when claims or complaints are brought by individuals. **Assembly Bill No. 143–Committee on Commerce and Labor (Chapter 140, AB 143).** Further, it expanded NRS 608.180 to require the Labor Commissioner to enforce NRS 608.005 to 608.195, inclusive. **Id.** Therefore, not only can the Labor Commissioner provide individuals redress for NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 violations, it is required to by statute to do so. Courts and litigants alike, cannot ignore this directive.

2. *This Court Has Recognized That The Authority To Enforce NRS 608.016, NRS 608.018, Or NRS 608.020 – NRS 608.050 Rests Exclusively With The Labor Commissioner*

This Court in *Baldonado*, familiar with this clear statutory language and legislative history, was emphatic that “the absence of an express provision

providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy.” *Baldonado*, 194 P.3d at 101. In ruling that there was no private right of action under sections 608.100, 608.160, and 613.120, the *Baldonado* Court made clear that the Labor Commissioner’s authority covered sections 608.005 to 608.195 and that “when an administrative official is expressly charged with enforcing a section of laws, a private cause of action generally cannot be implied.” *Id.* at 102. This is because in Nevada “the Legislature has entrusted the labor laws’ enforcement to the Labor Commissioner, unless otherwise specified” and “[t]he Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced.” *See id.* Accordingly, this Court has unequivocally set forth that a party cannot assert a private right of action under NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050. *Baldonado*, 124 Nev. 951; *see also See Cardoza v. Bloomin’ Brands, Inc.*, 2014 WL 3748641, at *1 (D. Nev. July 30, 2014).

Petitioner disputes this point by relying on footnote 33 of *Baldonado*, dicta, which notes, “a private cause of action to recover unpaid wages is entirely consistent with the express authority under NRS 608.140 to bring private actions for wages unpaid and due.” *See Baldonado*, 194 P.3d at 104 n. 33. However, the *Baldonado* Court did not address the question of whether section 608.140

authorized a private suit or, more importantly, what kinds of suits it implied. *See id.* Rather, it made the comment in footnote 33 “to contrast those sections of the labor code under which there was no language possibly implying any kind of private right of action at all.” *Descutner v. Newmont USA Ltd.*, 2012 WL 5387703, at *2 (D. Nev. Nov. 1, 2012) (*discussing Baldonado*, 194 P.3d at 104 n. 33). NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 are those statutes.

Nonetheless, Petitioner attempts to support his tenuous reading of *Baldonado*, which he asserts requires the Court to create or imply a private right of action, by pressing the Court to follow the reasoning in *Csomos v. Venetian Casino Resort, LLC*, No. 55203, 2011 WL 4378744, at *3 (Nev. Sept. 19, 2011), an unpublished Nevada Supreme Court case. That case, however, was premised entirely on the logic this Court applied in *Fierle v. Perez*, 125 Nev. 728, 735–36, 219 P.3d 906, 910-11 (2009), which was expressly overturned four years later in *Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364 (2013) for the exact same logical flaw Petitioner is asserting here. Specifically, in *Perez*, this Court examined whether a professional medical corporation could be subject to NRS 41A.07’s affidavit requirement, even though NRS 41A.071 does not address professional medical corporations. *Perez*, 125 Nev. at 735–36. The *Perez* Court decided to find the “intent” of the statute based on the 2004 amendments to Chapter 41A and read the statute in harmony with NRS 89.020(7) because NRS

41A.071 did not have a definition for “professional corporation.” Four years later, however, in *Chambers* the Court expressly rejected its reasoning in *Perez* finding that because there was no statutory ambiguity in NRS 41A.071, it was incorrect to try to examine the “intent” of the statute and to “unnecessarily [reach] beyond its plain language.” *Chambers*, 129 Nev. Adv. Op. 25.

That same logic must apply here. There is no ambiguity in NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 and there is no reason to reach beyond the language of any of the statutes to determine whether the Legislature intended to include a private right of action. The Legislature did not put a private right of action into any of the statutes and there is no basis for attempting to decipher the Legislative intent as to whether one exists. There is no private right of action under NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050.

C. 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

1. The Statutory Language Of NRS 608.140 Does Not Create A Private Right Of Action For Claims For Wages

The plain language of NRS 608.140 does not create a private right of action under NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050. It is an independent statute granting a private right of action for attorney fees whenever certain criteria are met – including a separate basis for bringing a wage claim. 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.

NRS 608.140 (emphasis added). Thus, in order to be awarded attorney fees under NRS 608.140, a party must first (a) have a cause of action to bring suit for wages due; (b) have a decision from a court for those wages due; and (c) have made a demand at least 5 days before bringing a suit for an amount that did not exceed the amount found due. NRS 608.140 does not state that an employee has a cause to bring suit for wages earned and due according to the terms of his or her employment or that any specific statute confers such a right. It merely states that whenever, meaning *if* or in the event an employee has cause to bring suit for wages, then the remaining terms of NRS 608.140 apply. Thus there is no basis to infer NRS 608.140 creates a private right of action for NRS 608.016, NRS 608.018, or NRS 608.020 – NRS 608.050 or to try to decipher the Legislator’s intent, when the plain language is clear and NRS 608.140 is only a statute for attorney fees.

This is further emphasized by the fact NRS 608.140 predated NRS 608.018 and NRS 608.016 by 50 and 60 years respectively, and neither overtime nor

minimum wage standards were in place at that time. *See Descutner v. Newmont USA Ltd.*, 2012 WL 5387703, at *2 (D. Nev. Nov. 1, 2012). Thus, “[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 NRS 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 statute NRS 608.260 passed in 1965 and again drafted in the Minimum Wage Amendment, Nev. Const. art. 15, § 16, passed in 2006. If NRS 608.140 was always meant to allow the recovery of any “wages” for any statute in NRS 608, there would be no need for these later explicit laws. Thus, consistent with the historical passage dates and use of private right of action language, it is clear that NRS 608.140 does not create a private right of action on NRS 608.018 or NRS 608.016.⁴ It allows for attorney fees when a litigant has a

⁴ In fact, it is this very historical analysis that is completely ignored or not addressed in all of Plaintiff’s cited court cases that rely on a tenuous reading of the *Baldonado* footnote 33 for a bootstrapped implied private right of action for other

cause of action sounding in contract or under a statute expressly providing a private cause of action such as NRS 608.260 and/or the Minimum Wage Amendment.

Similarly, a historical analysis 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 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

NRS 608 statutes through NRS 608.140. *See e.g. Guzman v. Lincoln Tech, Inst., Inc.*, Case No. 2:13-cv-2251-RFB-VCF (D. Nev. Apr. 16, 2015); *Phelps v. MC Communs., Inc.*, 2011 U.S. Dist. LEXIS 84428, 6-7 (D. Nev. Aug. 1, 2011); *Busk v. Integrity Staffing Solutions, Inc.*, 2011 WL 2971265, *7 (D. Nev. July 19, 2011); *Buenaventura v. Champion Drywall, Inc.*, 2011 U.S. Dist. LEXIS 86508, 2011 WL 1071760, *3 (D. Nev. Mar. 21, 2011); *Daprizio v. Harrah's Las Vegas, Inc.*, 2010 U.S. Dist. LEXIS 84307, *11-12 (D. Nev. Aug. 17, 2010); *Fetrow-Fix v. Harrah's Entm't, Inc.*, 2010 U.S. Dist. LEXIS 125625 (D. Nev. Nov. 16, 2010); *Cueto-Reyes v. All My Sons Moving Co.*, 2010 U.S. Dist. LEXIS 119787, 6-7 (D. Nev. Nov. 10, 2010); *Lucatelli v. Texas de Brazil (Las Vegas) Corp.*, 2012 U.S. Dist. LEXIS 66765, *7 (D. Nev. May 11, 2012); and *Valdez v. Cox Communications Las Vegas, Inc., et. al.*, Case No. A-09-597433-C, Dept. 1 (Aug. 6, 2012).

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.*

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. 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 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 Petitioner to manufacture a cause of action by cobbling these statutes together.

Finally, Plaintiff has not and cannot satisfy NRS 608.140's requirement of a demand for a "in writing, at least 5 days before suit was brought, for a sum not to exceed the amount" prior to filing suit. As Petitioner conceded in his Opposition below, meeting this requirement is "impossible" in actions like the instant suit wherein Plaintiff is claiming he is owed wages based on a tenuous legal argument and not an actual contract as NRS 608.140 contemplates. **Plaintiff's Opposition, at 23:4-10.** Accordingly, Plaintiff requests that the court ignore the plain language of NRS 608.140 because "NRS 608 is designed to protect the health and welfare of workers employed in private enterprise." **Id., at 23:11-16.** Ironically, however, Plaintiff, in making this impossibility argument, is actually hoisted on his own petard as he convincingly demonstrates that NRS 608.140 simply was not intended apply to his own case. As such, there is no basis for Plaintiff's second, third, and fourth causes of action.

V. CONCLUSION

For all of the reasons stated above, this Court should deny Appellant's writ and uphold the district court's finding that 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.

Dated: October 31, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

Dated: October 31, 2016

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, 89169. On October 31, 2016, I served the within document:

REAL PARTY IN INTEREST-DEFENDANT TERRIBLE HERBST, INC.'S ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION

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

Executed on October 31, 2016, at Las Vegas, Nevada.

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