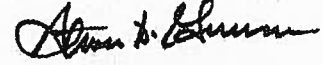


APPENDIX VOL. 1



CLERK OF THE COURT

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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-15-724269-C

Dept. No.: XXVI

**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

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

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

7 **JURISDICTION AND VENUE**

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

18 2. In addition, this court has jurisdiction over the Nevada statutory claims alleged
19 herein because a party seeking to recover unpaid wages has a private right of action pursuant to
20 Nevada Revised Statute ("NRS") sections 608.050, 608.250, and 608.140. *See Lucatelli v.*
21 *Texas De Brazil (Las Vegas) Corp.*, 2:11-CV-01829-RCJ, 2012 WL 1681394 (D. Nev. May 11,
22 2012) ("[T]he Nevada Supreme Court recently held that NRS § 608.040 contains a private
23 cause of action because it is "illogical" that a plaintiff who can privately enforce a claim for
24 attorneys' fees under NRS § 608.140 cannot privately enforce the underlying claim the fees
25 arose from."); *Busk v. Integrity Staffing Solutions, Inc.*, 2013 U.S. App. LEXIS 7397 (9th Cir.
26 Nev. Apr. 12, 2013) ("Nevada Revised Statute § 608.140 does provide a private right of action
27 to recoup unpaid wages."); *Doolittle v. Eight Judicial Dist. Court*, 54 Nev. 319, 15 P.2d 684;
28 1932 Nev. LEXIS 34 (Nev. 1932) (recognizing that former employees have a private cause of

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

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

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

13 PARTIES

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

17 6. Defendant TERRIBLE HERBST, INC., (hereinafter "Defendant") is a domestic
18 corporation incorporated in the state of Nevada, with its principle place of business in Las
19 Vegas, Nevada. The Defendant named herein is the employer of the Plaintiff and all Class and
20 Sub-Class members alleged herein. See, e.g. Exhibit 1 for just one example of common control
21 of terms and conditions of employment.

22 7. The Defendant is an employer engaged in commerce under the provisions of the
23 Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq.* and is an employer under NRS
24 608.011.

25 8. The identity of DOES 1-50 is unknown at the time and the Complaint will be
26 amended at such time when the identities are known to Plaintiff. Plaintiff is informed and
27 believes that each Defendants sued herein as DOE is responsible in some manner for the acts,
28

omissions, or representations alleged herein and any reference to "Defendant," "Defendants," or "Terrible Herbst" 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, 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.

11. For the first 60 days of employment, Defendant 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. Defendant rounds 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, 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.

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 Defendant, 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

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 Defendant, 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 Defendant 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

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

1 excess of 40 hours a week, and if they were paid less than one and one half the
2 minimum wage, then for all hours worked in excess of 8 hours a day; 4) Whether
3 Plaintiff and NEVADA SUB-CLASS Members were compensated for "all time
4 worked by the employee at the direction of the employer, including time worked
5 by the employee that is outside the scheduled hours of work of the employee"
6 pursuant to the Nevada Administrative Code ("NAC") 608.115(1), and NRS
7 608.016; and 5) Whether Defendant delayed final payment to Plaintiffs and
8 WAGES DUE AND OWING SUB-CLASS Members in violation of NRS
9 608.020-050.

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

20 **E. A Class Action Is A Superior Mechanism to Hundreds Of**
21 **Individual Actions.** A class action is superior to other available means for the fair
22 and efficient adjudication of their controversy. Each Member of the class and
23 each SUB-CLASS has been damaged and is entitled to recovery by reason of
24 Defendant's illegal policy and/or practice of failing to compensate its employees
25 in accordance with federal and Nevada wage and hour law. The prosecution of
26 individual remedies by each member of the class and each SUB-CLASS will be
27 cost prohibitive and may lead to inconsistent standards of conduct for Defendant
28

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, Defendant admits that "Terrible Herbst Is Hiring Cashiers Clerks For All Convenience Store Locations" at the rate of "\$8/hr. starting wage".

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

28. Defendant 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 Defendant, 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, 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.

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 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. Defendant's 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" 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.

37. By utilizing an improper system of rounding time records, Defendant 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 Defendant, 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 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. Defendant's 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" 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.

45. By utilizing an improper system of rounding time records, Defendant 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.

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)(1) 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.

53. In this manner, Defendant 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. Defendant's 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 Defendant 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).

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 accurately 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]henver 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 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.

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 breached 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.

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 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

1 with Plaintiff and NEVADA CLASS Members who worked the graveyard shift to pay them
2 \$8.50 for graveyard shift hours.

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

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

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

12 **JURY TRIAL DEMANDED**

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

14 **PRAYER FOR RELIEF**

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

- 17 1. For an order conditionally certifying the action under the FLSA and providing
18 notice to all FLSA CLASS members so they may participate in the lawsuit;
- 19 2. For an order certifying the action as a traditional class action under Nevada Rule
20 of Civil Procedure Rule 23 on behalf of all members of the NEVADA CLASS
21 and each proposed SUB-CLASS;
- 22 3. For an order appointing Plaintiff as the Representative of the NEVADA CLASS
23 and each SUB-CLASS and his counsel as Class Counsel for the NEVADA
24 CLASS and each SUB-CLASS;
- 25 4. For damages according to proof for minimum wage rate pay under the Nevada
26 Constitution for all hours worked without employer provided health insurance as
27 required by Article 15, Section 16 of the Constitution of the State of Nevada;
28

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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;
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: September 8, 2015

Respectfully Submitted,

THIERMAN BUCK LLP

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

Attorneys for Plaintiff

EXHIBIT 1

EXHIBIT 1

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

Employee Name John H. Herbst, Jr. Date 11/13/2014

Social Security Number 6834 Station # 233

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 11/13/2014 from 8:00 to 12:00

You should be in the seating area of the Employment Center by 8:00 AM

Employee Signature [Signature] Date 11/13/14

Instructor's Signature _____

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

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

TH017

EXHIBIT 2

EXHIBIT 2

As a result of the Fair Labor Standards Act, 29 U.S.C. § 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: [Signature]
Employer: Terrible Heibst -

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

EXHIBIT 4

EXHIBIT 4

Jodie Polkus <jpolkus@terribleherbst.com>
To: "jn0825@cox.net" <jn0825@cox.net>
Cc: Rebecca Jasso <rjasso@terribleherbst.com>
RE: {External} Contact Form Submission

June 23, 2015 8:00 AM

Mr. Neville,

When you come into apply our 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 our 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 Polkus
H/R Clerk
P:702-597-6105
F:702-597-6130
E:jpolkus@terribleherbst.com

The information contained in this message may be privileged and confidential, and protected from disclosure. If the reader of this message is not the intended recipient or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination or distribution of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately by replying, with history, to this message and deleting it from your computer.

-----Original Message-----

From: Rebecca Jasso
Sent: Tuesday, June 23, 2015 7:29 AM
To: Jodie Polkus
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

RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
MONTGOMERY Y. PAEK, ESQ., Bar # 10176
KATIE BLAKEY, ESQ., Bar # 12701
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway
Suite 300
Las Vegas, NV 89169-5937
Telephone: 702.862.8800
Fax No.: 702.862.8811

Attorneys for Defendant
TERRIBLE HERBST, INC.

<input checked="checked" type="checkbox"/> FILED <input type="checkbox"/> ENTERED	<input type="checkbox"/> RECEIVED <input type="checkbox"/> SERVED ON COUNSEL/PARTIES OF RECORD
OCT 13 2015	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

UNITED STATES DISTRICT COURT
DISTRICT OF 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. 2:15-cv-01968

(District Ct. Case No. A-15-724269-C)

**NOTICE TO FEDERAL COURT OF
REMOVAL OF CIVIL ACTION FROM
STATE COURT**

**[FEDERAL QUESTION UNDER 28 U.S.C.
§§ 1331; 1441 (c) & 1446]**

TO THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that Defendant TERRIBLE HERBST, INC. (hereinafter "Defendant") hereby removes the above-entitled action from the Eighth Judicial District Court in and for the County of Clark to the United States District Court in and for the District of Nevada pursuant to 28 U.S.C. §§ 1331, 1441(c), and 1446. This removal is based upon federal question jurisdiction and is timely. In support of this notice of removal, Defendant states to the Court as follows:

1. On September 8, 2015, an action was commenced in the Eighth Judicial District Court of Clark County, Nevada, entitled *JOHN W. NEVILLE, JR, on behalf of himself and all others*

1 *similarly situated, v. TERRIBLE HERBST, INC.*, designated as Case No. A-15-724269-C. A copy of
2 the Complaint is attached hereto as **Exhibit "A."**

3 2. The first date upon which Defendant was served with the Complaint was September
4 29, 2015 when it was served with a copy of the complaint and a summons from state court. A copy
5 of the Summons is attached hereto as **Exhibit "B."**

6 3. Plaintiff's Complaint purports to state two causes of action for failure to pay wages
7 and failure to pay overtime wages under the Fair Labor Standards Act ("FLSA") in violation of 29
8 U.S.C. § 201, *et. seq.* and 29 U.S.C. § 207. The Complaint is a civil action in which this Court has
9 original jurisdiction under the provisions of 28 U.S.C. § 1331. Therefore, the Complaint may be
10 removed to this Court pursuant to the provisions of 28 U.S.C. § 1441(a) and (c) and 28 U.S.C. §
11 1446 in that:

12 a. Plaintiff alleges that his fourth and fifth causes of action arise under 29 U.S.C.
13 29 U.S.C. § 201, *et. seq.* and 29 U.S.C. § 207. **Complaint ¶¶47-60.** Plaintiff asserts that Defendant
14 has violated the provisions of the FLSA which prohibit any employer from not paying wages and
15 overtime wages. *Id.*

16 b. The United States Supreme Court has held that complaints pleading a cause of
17 action under the FLSA are removable to federal court. *Breuer v. Jim's Concrete of Brevard, Inc.*,
18 123 S. Ct. 1882 (2003).

19 4. The Court also has supplemental jurisdiction over any remaining state law claims
20 pursuant to 28 U.S.C. §1367, and jurisdiction over any separate and independent claims as provided
21 in 28 U.S.C. § 1441(c).

22 5. Venue is proper in this Court as this is the court for the district and division
23 embracing the place where the action is pending in state court. 28 U.S.C. §§ 108 and 1441(a).

24 9. No joinders by any other defendant is required as Terrible Herbst, Inc. is the only
25 named defendant and has brought this Notice to Federal Court of Removal of Civil Action from
26 State Court.

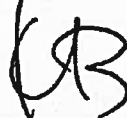
27 ///

28 ///

1 WHEREFORE, the Defendant prays that the above-referenced action now pending against it
2 in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark be
3 removed therefrom to this Court.

4
5 Dated: October 12, 2015

6 Respectfully submitted,

7 

8
9 RICK D. ROSKELLEY, ESQ.
10 ROGER L. GRANDGENETT II, ESQ.
11 MONTGOMERY Y. PAEK, ESQ.
12 KATIE BLAKEY, ESQ.
13 LITTLER MENDELSON, P.C.

14 Attorneys for Defendant
15 TERRIBLE HERBST, INC.

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 October 12, 2015, I served the within document:

NOTICE TO FEDERAL COURT OF REMOVAL OF CIVIL ACTION FROM STATE COURT

[FEDERAL QUESTION UNDER 28 U.S.C. §§ 1331; 1441 (c) & 1446]

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

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 declare under penalty of perjury that the foregoing is true and correct. Executed on October 12, 2015, at Las Vegas, Nevada.



Debra Perkins

Firmwide:136039469.1 036579.1021

EXHIBIT A

DISTRICT COURT CIVIL COVER SHEET

A-15-724269-C

CLARK

County, Nevada

XXVI

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
JOHN NEVILLE, JR., on behalf of himself	
and all others similarly situated	TERRIBLE HERBST, INC., and
	DOES 1 through 50, inclusive
Attorney (name/address/phone):	Attorney (name/address/phone):
Mark R. Thierman, #8285, Joshua D. Buck, #12187,	
Leah L. Jones, #13161, Thierman Buck, LLP	
7287 Lakeside Dr., Reno, NV 89511	
775/284-1500; 775-703-5027 (fax)	

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property	Torts
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate	Judicial Review/Appeal
Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract
Civil Writ	Other Civil Filing
<input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input checked="" type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

September 8, 2015

Date

/s/Joshua D. Buck

Signature of initiating party or representative

See other side for family-related case filings.

Electronically Filed
09/08/2015 01:15:45 PM



CLERK OF THE COURT

COMJD

Mark R. Thierman, Nev. Bar No. 8285

mark@thiermanbuck.com

Joshua D. Buck, Nev. Bar No. 12187

josh@thiermanbuck.com

Leah L. Jones, Nev. Bar No. 13161

leah@thiermanbuck.com

THIERMAN BUCK LLP

7287 Lakeside Drive

Reno, Nevada 89511

Tel. (775) 284-1500

Fax. (775) 703-5027

Attorneys for Plaintiff

**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-15-724269-C

Dept. No.: XXVI

**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

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

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

7 **JURISDICTION AND VENUE**

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

18 2. In addition, this court has jurisdiction over the Nevada statutory claims alleged
19 herein because a party seeking to recover unpaid wages has a private right of action pursuant to
20 Nevada Revised Statute ("NRS") sections 608.050, 608.250, and 608.140. *See Lucatelli v.*
21 *Texas De Brazil (Las Vegas) Corp.*, 2:11-CV-01829-RCJ, 2012 WL 1681394 (D. Nev. May 11,
22 2012) ("[T]he Nevada Supreme Court recently held that NRS § 608.040 contains a private
23 cause of action because it is "illogical" that a plaintiff who can privately enforce a claim for
24 attorneys' fees under NRS § 608.140 cannot privately enforce the underlying claim the fees
25 arose from."); *Busk v. Integrity Staffing Solutions, Inc.*, 2013 U.S. App. LEXIS 7397 (9th Cir.
26 Nev. Apr. 12, 2013) ("Nevada Revised Statute § 608.140 does provide a private right of action
27 to recoup unpaid wages."); *Doolittle v. Eight Judicial Dist. Court*, 54 Nev. 319, 15 P.2d 684;
28 1932 Nev. LEXIS 34 (Nev. 1932) (recognizing that former employees have a private cause of

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

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

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

13 PARTIES

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

17 6. Defendant TERRIBLE HERBST, INC., (hereinafter "Defendant") is a domestic
18 corporation incorporated in the state of Nevada, with its principle place of business in Las
19 Vegas, Nevada. The Defendant named herein is the employer of the Plaintiff and all Class and
20 Sub-Class members alleged herein. See, e.g. Exhibit 1 for just one example of common control
21 of terms and conditions of employment.

22 7. The Defendant is an employer engaged in commerce under the provisions of the
23 Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq.* and is an employer under NRS
24 608.011.

25 8. The identity of DOES 1-50 is unknown at the time and the Complaint will be
26 amended at such time when the identities are known to Plaintiff. Plaintiff is informed and
27 believes that each Defendants sued herein as DOE is responsible in some manner for the acts,
28

1 omissions, or representations alleged herein and any reference to "Defendant," "Defendants," or
2 "Terrible Herbst" herein shall mean "Defendants and each of them."

3 **FACTUAL ALLEGATIONS**

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

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

10 11. For the first 60 days of employment, Defendant paid Plaintiff and all hourly paid
11 new hires \$8.00 an hour *without* providing health insurance as required by Article 15, Section
12 16 of the Nevada Constitution, which falls below the requisite minimum wage of \$8.25.

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

14 13. Defendant rounds the time recorded by all hourly employees to the nearest 15
15 minutes for purposes of calculating payment of wages owed. Such rounding favors the
16 employer and deprives the employees of pay for time they actually perform work activities.
17 Indeed, Defendant requires, suffers or permits the employees to perform actual work during the
18 periods when no wages are paid due to the above described rounding.

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

24 ///

25 ///

26 ///

27 ///

28 ///

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 Defendant, 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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1 activities is compensable under federal law; and 3) Whether Defendant failed to
2 pay Plaintiff and FLSA CLASS Members one and one half times their regular rate
3 for all hours worked in excess of 40 hours a week.

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

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

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

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

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

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

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

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

4 **B. Plaintiff's Claims are Typical to Those of Fellow Class and**
5 **Sub-Class Members.** Each NEVADA CLASS and each Sub-Class Member is
6 and was subject to the same practices, plans, and/or policies as Plaintiff, as
7 follows: 1) Plaintiff failed to pay new hire employees the Nevada Constitutional
8 minimum wage because of a company-wide policy to pay all new hires less than
9 \$8.25 an hour and a company-wide policy of not providing medical insurance to
10 employees until after 60 days of continuous employment; 2) Defendant required
11 Plaintiff and all NEVADA CLASS Members to engage in pre and post shift
12 activities without compensation because of a companywide policy of rounding
13 time to the nearest 15 minute increment while at the same time requiring,
14 suffering or permitting employees to perform work during the time
15 uncompensated due to rounding; and 3) as a result of working employees without
16 compensation due to rounding that favored the employer and did not pay for time
17 actually worked, Defendant failed to pay Plaintiff and WAGES DUE AND
18 OWING SUB-CLASS Members all wages due and owing at the time of their
19 termination or separation from employment.

20 **C. Common Questions of Law and Fact Exist.** Common questions
21 of law and fact exist and predominate as to Plaintiff and the Nevada class,
22 including all sub-classes, including, without limitation the following: 1) Whether
23 or not employees were paid less than the Nevada Constitutional Minimum wage
24 times when the employer failed to provide health insurance as required by Article
25 15, Section 16 of the Nevada State Constitution; 2) Whether the time recorded by
26 Plaintiff and all other class Members but not paid due to a rounding policy is
27 compensable under federal and Nevada law; (3) Whether Defendant failed to pay
28 a premium rate of one and one half times their regular rate for all hours worked in

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1 excess of 40 hours a week, and if they were paid less than one and one half the
2 minimum wage, then for all hours worked in excess of 8 hours a day; 4) Whether
3 Plaintiff and NEVADA SUB-CLASS Members were compensated for "all time
4 worked by the employee at the direction of the employer, including time worked
5 by the employee that is outside the scheduled hours of work of the employee"
6 pursuant to the Nevada Administrative Code ("NAC") 608.115(1), and NRS
7 608.016; and 5) Whether Defendant delayed final payment to Plaintiffs and
8 WAGES DUE AND OWING SUB-CLASS Members in violation of NRS
9 608.020-050.

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

20 **E. A Class Action Is A Superior Mechanism to Hundreds Of**
21 **Individual Actions.** A class action is superior to other available means for the fair
22 and efficient adjudication of their controversy. Each Member of the class and
23 each SUB-CLASS has been damaged and is entitled to recovery by reason of
24 Defendant's illegal policy and/or practice of failing to compensate its employees
25 in accordance with federal and Nevada wage and hour law. The prosecution of
26 individual remedies by each member of the class and each SUB-CLASS will be
27 cost prohibitive and may lead to inconsistent standards of conduct for Defendant
28

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

3 **FIRST CAUSE OF ACTION**

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

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

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

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

13 23. In advertisements, such as Exhibit 3 attached hereto, Defendant admits that
14 "Terrible Herbst Is Hiring Cashiers Clerks For All Convenience Store Locations" at the rate of
15 "\$8/hr. starting wage".

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

18 25. Therefore, Defendant failed to pay the wages required by the State of Nevada
19 Constitution to all its newly hired hourly paid employees for at least the first 60 days of
20 employment.

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

23 27. Wherefore, Plaintiff further demands for himself and for NEVADA CLASS and
24 NEW HIRE SUB-CLASS Members payment by Defendant, the difference between their hourly
25 rate of pay and the hourly minimum wage required by Article 15, Section 16 of the Constitution
26 of the Stat of for all hours worked during the time in which they were not provided health
27 insurance for the four years immediately preceding the filing of this complaint until the date of
28 judgement after trial, together with attorneys' fees, costs, and interest as provided by law.

29. Wherefore, Plaintiff demands for himself and for NEVADA CLASS Members payment by Defendant, 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.

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

31. As can be seen from Exhibit 5 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.

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

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

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

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

14 **THIRD CAUSE OF ACTION**

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

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

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

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

21 41. NRS 608.018(1) provides as follows:

22 An employer shall pay 1 1/2 times an employee's regular wage
23 rate whenever an employee who receives compensation for
24 employment at a rate less than 1 1/2 times the minimum rate
25 prescribed pursuant to NRS 608.250 works: (a) More than 40
26 hours in any scheduled week of work; or (b) More than 8 hours in
27 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.

28 42. NRS 608.018(2) provides as follows:

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

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

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

10 45. By utilizing an improper system of rounding time records, Defendant did not pay
11 employees daily overtime premium pay to those Class Members who were paid a regular rate of
12 less than one and one half times the minimum wage premium pay and, failed to pay a weekly
13 premium overtime rate of pay of time and one half their regular rate for all members of the
14 Class Members who worked in excess of forty (40) hours in a week in violation of NRS
15 608.140 and 608.018.

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

23 **FOURTH CAUSE OF ACTION**

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

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

26 47. Plaintiff realleges and incorporates by reference all the paragraphs above in the
27 Complaint as though fully set forth herein.
28

THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511

(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com www.thiermanbuck.com

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

4 49. 29 U.S.C. § 206(a)(1) states that "Every employer shall pay to each of his
5 employees who in any workweek is engaged in commerce or in the production of goods for
6 commerce, or is employed in an enterprise engaged in commerce or in the production of goods
7 for commerce, wages at the following rates: (1) except as otherwise provided in this section, not
8 less than (A) \$5.85 an hour beginning on the 60th day after the enactment of the Fair Minimum
9 Wage Act of 2007; (B) \$6.55 an hour, beginning 12 months after that 60th day; and C) \$7.25 an
10 hour, beginning 24 months after that 60th day."

11 50. The practice of rounding is for administrative convenience only. 29 C.F.R. §
12 785.48 permits rounding employee times only if: this arrangement averages out so that the
13 employees are fully compensated for all the time they actually work.

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

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

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

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

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

6 **FIFTH CAUSE OF ACTION**

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

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

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

11 57. 29 U.S.C. Section 207(a)(1) provides as follows: "Except as otherwise provided
12 in the section, no employer shall employ any of his employees who in any workweek is engaged
13 in commerce or in the production of goods for commerce, or is employed in an enterprise
14 engaged in commerce or in the production of goods for commerce, for a workweek longer than
15 forty hours unless such employee receives compensation for his employment in excess of the
16 hours above specified at a rate not less than one and one-half times the regular rate at which he
17 is employed."

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

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

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

6 **SIXTH CAUSE OF ACTION**

7 **Failure to Timely Pay All Wages Due and Owing Upon Termination Pursuant to NRS**
8 **608.140 and 608.020-.050**

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

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

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

14 63. NRS 608.020 provides that "[w]henver an employer discharges an employee,
15 the wages and compensation earned and unpaid at the time of such discharge shall become due
16 and payable immediately."

17 64. NRS 608.040(1)(a-b), in relevant part, imposes a penalty on an employer who
18 fails to pay a discharged or quitting employee: "Within 3 days after the wages or compensation
19 of a discharged employee becomes due; or on the day the wages or compensation is due to an
20 employee who resigns or quits, the wages or compensation of the employee continues at the
21 same rate from the day the employee resigned, quit, or was discharged until paid for 30-days,
22 whichever is less."

23 65. NRS 608.050 grants an "employee lien" to each discharged or laid-off employee
24 for the purpose of collecting the wages or compensation owed to them "in the sum agreed upon
25 in the contract of employment for each day the employer is in default, until the employee is paid
26 in full, without rendering any service therefor; but the employee shall cease to draw such wages
27 or salary 30 days after such default."
28

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

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

7 68. Wherefore, Plaintiff demands thirty (30) days wages under NRS 608.140 and
8 608.040, and an additional thirty (30) days wages under NRS 608.140 and 608.050, all
9 members of the WAGES DUE AND OWING SUB-CLASS together with attorneys' fees, costs,
10 and interest as provided by law.

11 **SEVENTH CAUSE OF ACTION**

12 **Breach of Contract**

13 (On Behalf of Plaintiff and the NEVADA CLASS)

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

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

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

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

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

1 B. Overtime

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

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

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

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

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

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

21 77. Defendant further offered to pay Plaintiff and all NEVADA CLASS Members
22 who worked the graveyard shift at a heightened hourly rate of \$8.50 per hour. See Exhibit 2
23 attached hereto. Plaintiff and all NEVADA CLASS Members understood that they would be
24 compensated at this rate of pay for the hours they worked during the graveyard shift.
25 Defendant, however, paid Plaintiff and, upon information and belief, all other NEVADA
26 NEVADA CLASS Members who worked the graveyard shift at the lower base rate of \$8.00 per
27 hour for all hours worked during the graveyard shift. Defendant thus breached its agreement
28

1 with Plaintiff and NEVADA CLASS Members who worked the graveyard shift to pay them
2 \$8.50 for graveyard shift hours.

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

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

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

12 **JURY TRIAL DEMANDED**

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

14 **PRAYER FOR RELIEF**

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

- 17 1. For an order conditionally certifying the action under the FLSA and providing
18 notice to all FLSA CLASS members so they may participate in the lawsuit;
- 19 2. For an order certifying the action as a traditional class action under Nevada Rule
20 of Civil Procedure Rule 23 on behalf of all members of the NEVADA CLASS
21 and each proposed SUB-CLASS;
- 22 3. For an order appointing Plaintiff as the Representative of the NEVADA CLASS
23 and each SUB-CLASS and his counsel as Class Counsel for the NEVADA
24 CLASS and each SUB-CLASS;
- 25 4. For damages according to proof for minimum wage rate pay under the Nevada
26 Constitution for all hours worked without employer provided health insurance as
27 required by Article 15, Section 16 of the Constitution of the State of Nevada;
28

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Reno, NV 89511
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Email info@thiermanbuck.com www.thiermanbuck.com

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;
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: September 8, 2015

Respectfully Submitted,

THIERMAN BUCK LLP

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

Attorneys for Plaintiff

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 8:15 am

Employee Signature: [Signature]

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

I, undersigned, do hereby certify that I am an individual, and, 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: [Signature]
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: jin0825@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

2015 Sunday, April 26, 2015

Professional/Management

MANAGEMENT JOBS!

No Resume?

No Problem!

Monter Mendt assists 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!

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

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We are in the business of finding first solutions to fit our customers' needs.

Our Branch Manager in Las Vegas is a leader who has managed a sales and installation operation for similar business, has P&L exp, understands marketing and values customer. Must have excellent communication, computer and people skills.

Please submit your resume to:

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10000 E. Flamingo Ave., Suite 100

Las Vegas, NV 89119

702.735.0752

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Top Quality, Handmade

in Mirrored

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Call for pricing or information. Contact for details. Email: info@topqualitychandeliers.com

1-800-850-8500

to call us:

• 30% off starting wage

• \$3.00/hr. Overtime pay

• Benefits

• Training

• Advancement

• Full-time

• Part-time

Apply to present:

Key Territory Sales Location

in Franklin, NJ

1-800-850-8500

1000 E. Flamingo Ave., Suite 100

Las Vegas, NV 89119

702.735.0752

1000 E. Flamingo Ave., Suite 100

Las Vegas, NV 89119

Sales

EXHIBIT 4

EXHIBIT 4

Jodie Polkus <jpolkus@terribleherbst.com>
To: "jn0825@cox.net" <jn0825@cox.net>
Cc: Rebecca Jasso <rjasso@terribleherbst.com>
RE: {External} Contact Form Submission

June 23, 2015 8:00 AM

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 Polkus
HR Clerk
P:702-597-6105
F:702-597-6180
E:jpolkus@terribleherbst.com

The information contained in this message may be privileged and confidential, and protected from disclosure. If the reader of this message is not the intended recipient or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination or distribution of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately by replying, with history, to this message and deleting it from your computer.

-----Original Message-----

From: Rebecca Jasso
Sent: Tuesday, June 23, 2015 7:29 AM
To: Jodie Polkus
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

1 **IAFD**

2 Mark R. Thierman, Bar No. 8285

3 Joshua D. Buck, Bar No. 12187

4 Leah L. Jones, Bar No. 13161

5 **THIERMAN BUCK, LLP**

6 7287 Lakeside Dr.

7 Reno, NV 89511

8 Tel: 775-284-1500

9 Fax: 775-5027

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

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

14 **Plaintiff(s),**

15 **-vs-**

16 **TERRIBLE HERBST, INC., and DOES**
17 **1 through 50, inclusive,**

18 **Defendant(s).**

CASE NO. _____

DEPT. NO. _____

19 **INITIAL APPEARANCE FEE DISCLOSURE (NRS CHAPTER 19)**

20 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are
21 submitted for parties appearing in the above entitled action as indicated below:

22 **New Complaint Fee**

23 ☐ \$1530 ☐ \$520 ☐ \$299 ☒ \$270.00

24 **1st Appearance Fee**

☐ \$1483.00 ☐ \$473.00 ☐ \$223.00

25 **Name: John W. Neville, Jr.**

26 ☐ \$30

27 ☐ \$30

28 ☐ \$30

☐ \$30

Initial Appearance Fee Disclosure/9/8/2015

☐ Total of Continuation Sheet Attached

☐ \$ _____

TOTAL REMITTED: (Required)

Total Paid

\$ 270.00

DATED this 8th day of September, 2015.

/s/ Joshua D. Buck

Joshua D. Buck

EXHIBIT B

Served 9/23/15 @
10:00AM
Ch.

SUMM
Mark R. Thierman, Nev. Bar No. 8286
mark@thiermanbuck.com
Joshua D. Buck, Nev. Bar No. 12187
josh@thiermanbuck.com
Leah L. Jones, Nev. Bar No. 13161
leah@thiermanbuck.com
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7287 Lakeside Drive
Reno, Nevada 89511
Tel. (775) 284-1500
Fax. (775) 703-5027

Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Case No.: A-15-724269-C

Dept. No.: XXVI

Plaintiff(s),

-vs-

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

Defendant(s).

SUMMONS - CIVIL

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.
READ THE INFORMATION BELOW.

TO THE DEFENDANT(S): A civil Complaint has been filed by the Plaintiff(s) against
you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served
on you, exclusive of the day of service, you must do the following:

- 1 -
SUMMONS

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511

(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com; www.thiermanbuck.com

CLERK OF THE COURT

SEP 14 2015

RECEIVED

THIERMAN BUCK, LLP
7287 Lakeside Drive
Reno, NV 89511

(775) 284-1500 Fax (775) 703-5027
Email info@thiermanbuck.com; www.thiermanbuck.com

a. File with the Clerk of this Court, whose address is shown, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.

b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and failure to respond will result in a judgment of default against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

Submitted by:



Mark R. Thierman
Joshua D. Buck
Leah L. Jones
Attorneys for Plaintiff

STEVEN D. GRIERSON
CLERK OF COURT

By:  JOSEFINA SAN JUAN

SEP 15 2015

Deputy Clerk

Date

Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

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7 *Attorneys for Plaintiffs*

8 **UNITED STATES DISTRICT COURT**
9
10 **DISTRICT OF NEVADA**

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

13 Plaintiff,

14 vs.

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

17 Defendant(s).

Case No.: 2:15-cv-01968-KJD-PAL
MOTION FOR REMAND

18 Plaintiff John Neville, Jr., on behalf of himself and all others similarly situated,
19 ("Plaintiff") hereby moves that the Court enter an order of remand to the state court from which
20 this case arose. Plaintiff filed his Complaint and Jury Demand in the 8th Judicial District Court,
21 Clark County, Nevada on September 8, 2015. On October 15, 2015, Defendant Terrible Herbst,
22 Inc., filed a Notice of Removal, removing Plaintiff's state case to this Court based on federal
23 question jurisdiction. (*See* ECF Doc. NO. 1).

24 ///

25 ///

26 ///

27 ///

28

1 Plaintiff has filed a First Amended Complaint removing all federal claims pursuant to the
2 Fair Labor Standards Act. Because this Court will have no jurisdiction over the remaining state
3 claims, this case should be remanded back to the initiating Court.

4
5 DATED: November 3, 2015

Respectfully Submitted,

6 THIERMAN BUCK, LLP

7 /s/Joshua D. Buck

8 Mark R. Thierman, Bar No. 8285

9 Joshua D. Buck, Bar No. 12187

10 Leah L. Jones, Bar No. 13161

11 7287 Lakeside Drive

12 Reno, Nevada 89511

13 *Attorneys for Plaintiffs*

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Attorneys for Defendant
TERRIBLE HERBST, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF 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. 2:15-cv-01968-KJD-PAL

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION TO REMAND TO
STATE COURT**

Defendant TERRIBLE HERBST, INC. ("Defendant") by and through its attorneys of record, hereby files its Opposition to Plaintiff's Motion to Remand to State Court. This Opposition is supported by the following points and authorities, exhibits and declarations attached hereto, and any oral argument permitted by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On September 8, 2015, Plaintiff filed this action in the Eighth Judicial District Court of Clark County, Nevada. *See* **Petition for Removal [Doc. 1]**. Defendant was served with the Complaint on September 29, 2015. *Id.* In addition to state law claims, Plaintiff pled two causes of action that arose under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et. seq.* and 29 U.S.C. §

207. Accordingly, Defendant promptly removed the case to the United States District Court for the District of Nevada. *Id.*

In response, on October 19, 2015, Defendant filed its Motion to Dismiss. **Motion to Dismiss [Doc. 5]**. Therein, Defendant explained that virtually all of Plaintiff's claims were based on the same allegation that Defendant's time-rounding system is improper. *Id.* Additionally, all of Plaintiff's underlying state law causes of action lacked a private right of action and were based on allegations that demonstrated no actual violation of the law. *Id.*

On November 3, 2015, instead of addressing the deficiencies in his Complaint, Plaintiff filed an Amended Complaint, dropping his claims under 29 U.S.C. § 201, *et. seq.* and 29 U.S.C. § 207, and he simultaneously filed a Motion to Remand. **Amended Complaint [Doc. 8]; Motion to Remand [Doc. 9]**. However, the Amended Complaint retains the deficient state law causes of action.¹ **Motion to Dismiss Amended Complaint (filed concurrently herein)**. Plaintiff also represented to the Court that it has "no jurisdiction over the remaining state claims." **Motion to Remand [Doc. 9]**, at 2:2-3. Plaintiff misrepresents the law with respect to the properness of remand. As this Court knows, it may retain supplement jurisdiction over the remaining claims. *See*, 28 U.S.C. §1367. Indeed, this Court should retain jurisdiction as Plaintiff's decision to drop his federal causes of action was a manipulative and tactical decision designed to waste judicial time and effort.

II. LEGAL STANDARD

Federal jurisdiction depends upon the circumstances that exist at the time of removal. *See*, *Sparta Surgical Corp. v. National Ass'n of Secs. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir.1998) ("[J]urisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments"). "Once a federal court acquires removal jurisdiction over a case, it also acquires jurisdiction over pendent state claims. Dismissal of the federal claims does not deprive a federal court of the power to adjudicate the remaining pendent state claims." *Nishimoto v.*

¹ Of note, Plaintiff revised his first cause of action for "Failure to Pay Wages in Violation of the Nevada Constitution" to be based on Defendant's rounding procedures after Defendant pointed out in its Motion to Dismiss that his prior allegation regarding the waiting period for Defendant's health insurance plans, which authorize it to pay Nevada's lower-tier minimum wage, is proper under Nev. Const. art. XV § 16 and NAC 608.102. *See Motion to Dismiss [Doc. 5]*.

1 *Federman-Bachrach & Associates*, 903 F.2d 709, 715 (9th Cir. 1990) (citations omitted); *See also*,
 2 *Albingia Versicherungs A.G. v. Schenker Int'l, Inc.*, 344 F.3d 931, 936 (9th Cir. 2003) (court had
 3 discretion to exercise supplemental jurisdiction over state law claims after federal claim dismissed
 4 (unless dismissal was for lack of subject matter jurisdiction)), *amended at* 350 F.3d 916. Indeed, the
 5 United States Supreme Court recently confirmed that when a case is removed to federal court on a
 6 federal question claim, “[u]pon dismissal of the federal claim, the District Court retain[s] its
 7 statutory supplemental jurisdiction over the state-law claims.” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*,
 8 556 U.S. 635, 640, 129 S.Ct. 1862, 1867, 173 L.Ed.2d 843 (2009). Under these circumstances, any
 9 “decision declining to exercise that statutory authority was not based on a jurisdictional defect but on
 10 [the district court’s] discretionary choice not to hear the claims despite its subject-matter jurisdiction
 11 over them.” *Id.*

12 “When deciding whether to exercise supplemental jurisdiction, a district court should
 13 consider judicial economy, convenience, fairness, and comity.” *Hughes v. Unumprovident Corp.*,
 14 2009 WL 29895 (N.D.Cal., Jan. 5, 2009), *citing*, *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343,
 15 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *City of Chicago v. International College of Surgeons*,
 16 522 U.S. 156, 173, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997) (discussing the factors a court considers
 17 in deciding whether to exercise supplemental jurisdiction). When a plaintiff chooses to dismiss her
 18 federal claims, it does not divest the federal court of its supplemental authority over state-law claims.
 19 *See Petersen v. Cnty. of Stanislaus*, 2013 WL 1331221, at *4 (E.D. Cal. Apr. 1, 2013) *report and*
 20 *recommendation adopted*, 2013 WL 1680082 (E.D. Cal. Apr. 17, 2013). Rather, pursuant to
 21 precedents of the United States Supreme Court and the Ninth Circuit Court of Appeals, the federal
 22 court retains discretion to hear the remaining state-law claims. *Id.*

23 **III. ARGUMENT**

24 Plaintiff dropped his federal causes of action for no other reason than to waste judicial time
 25 and resources. Specifically, Plaintiff was aware upon filing of his lawsuit in Nevada state court that
 26 federal court was a proper forum for his claims. Nonetheless, he filed in state court knowing it would
 27 force Defendant to go through the time and expense of removing to federal court and that it would
 28 waste the time and resources of both the state and federal courts to process the removal procedure.

1 Thereafter, once the case was removed, Plaintiff took no action for several weeks, allowing the
2 Court to issue several notices and an order, and for Defendant to prepare and file a Motion to
3 Dismiss. Instead of addressing the blatant impropriety of his allegations, Plaintiff now seeks a re-
4 do of his lawsuit and to compel Defendant to follow him on his wild-goose chase through forums.

5 This is evident by the fact that although Plaintiff has dropped his federal law causes of action
6 in name, he is still pursuing those identical causes of action –just masquerading them as state law
7 causes of action. **See Defendant's Motion to Dismiss [Doc. 5], at 7-12; Motion to Dismiss**
8 **Amended Complaint (filed concurrently herein)** (explaining that there is no private right of action
9 for Plaintiff's state law claims). As stated above, this entire lawsuit is based on just one allegation –
10 that Defendant's time rounding system is improper. Plaintiff is not actually dropping any portion of
11 his lawsuit. He is engaging in forum shopping at the expense of both the state and federal court
12 systems and Defendant. Accordingly, this Court should exercise its discretion to maintain
13 jurisdiction over Plaintiff's Amended Complaint and deny Plaintiff's Motion for Remand with
14 prejudice.

15 **IV. CONCLUSION**

16 For the foregoing reasons, Plaintiffs' Motion to Remand to State Court should be denied with
17 prejudice.

18
19 Dated: November 16, 2015

20 Respectfully submitted,

21
22 /s/ Kathryn B. Blakey, Esq.
23 RICK D. ROSKELLEY, ESQ.
24 ROGER L. GRANDGENETT II, ESQ.
25 MONTGOMERY Y. PAEK, ESQ.
26 KATHRYN B. BLAKEY, ESQ.
27 LITTLER MENDELSON, P.C.

28
Attorneys for Defendant
TERRIBLE HERBST, INC.

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 November 16, 2015, I served the within document:

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO REMAND
TO STATE COURT**

☒ By CM/ECF Filing – Pursuant to FRCP 5(b)(3) and LR 5-4, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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 declare under penalty of perjury that the foregoing is true and correct. Executed on November 16, 2015, at Las Vegas, Nevada.

/s/ Erin J Melwak
Erin J. Melwak

Firmwide:136921777.1 036579.1021

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF 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.: 2:15-cv-01968-KJD-PAL

**PLAINTIFF'S NOTICE OF VOLUNTARY
DISMISSAL WITHOUT PREJUDICE**

FRCP RULE 41(a)(1)(A)(i)

NOTICE IS HEREBY GIVEN that Plaintiff JOHN W. NEVILLE, JR. voluntarily dismisses the above-captioned action *without prejudice* pursuant to Fed. R. Civ. P. Rule 41(a)(1)(A)(i), which states: "Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Defendant has not filed an answer or motion for summary judgment, and the class has not been certified.

DATED: November 23, 2015

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ Mark R. Thierman
Mark R. Thierman

Attorneys for Plaintiff

PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

U. S. DEPARTMENT OF LABOR
JAMES J. DAVIS, Secretary
BUREAU OF LABOR STATISTICS
ETHELBERT STEWART, Commissioner

**BULLETIN OF THE UNITED STATES }
BUREAU OF LABOR STATISTICS } No. 398**

M I S C E L L A N E O U S S E R I E S

**GROWTH OF LEGAL AID WORK
IN THE UNITED STATES**

**A STUDY OF OUR ADMINISTRATION OF JUSTICE
PRIMARILY AS IT AFFECTS THE WAGE EARNER
AND OF THE AGENCIES DESIGNED TO
IMPROVE HIS POSITION
BEFORE THE LAW**

By

Reginald Heber Smith, of the Boston Bar

and

John S. Bradway, of the Philadelphia Bar

with Preface by

William Howard Taft

Chief Justice United States Supreme Court



JANUARY, 1926

**WASHINGTON
GOVERNMENT PRINTING OFFICE
1926**

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PREFACE

I am indebted to Mr. Ethelbert Stewart for the opportunity to read the following report on a subject of great importance. He has asked me to write a preface to that report, and I am glad to do so.

The growth of legal aid work in the United States, as set forth herein by Mr. Reginald Heber Smith and Mr. John S. Bradway, discloses a field for practical reform in our administration of justice of great value. The social changes in our people, the transfer from country to urban life of the majority, the influx of peoples of foreign birth, and the great increase in the cost of litigation to persons taking part in it have together seriously impaired the usefulness of our courts to those who most need their protection. Our just pride in the institutions derived from the common law, embodied in our Federal and State Constitutions, is much of it in the maintenance of individual rights. They are chiefly valuable in enabling the individual, without dependence on executive favor, to maintain and defend in the courts his life, liberty, and property. The peculiar value of our constitutional Bill of Rights is not in high sounding declarations of substantive right, whose preservation is generally enjoined upon all Government authority in every country. They are to be found in the fundamental law of most States of the world and are too often more honored in the breach than in the observance. The real practical blessing of our Bill of Rights is in its provisions for fixed procedure securing a fair hearing by independent courts to each individual. It makes these adjective rights inviolable. The right of trial by jury, the right to be defended against unreasonable searches and seizures, the right requiring due process in the deprivation of life, liberty, or property illustrate the practical realization in Anglo-Saxon liberty of vesting the power in the individual as an individual to obtain, without cultivating the favor of official authority, fixed judicial procedure to protect his substantial rights. But if the individual in seeking to protect himself is without money to avail himself of such procedure the Constitution and the procedure made inviolable by it do not practically work for the equal benefit of all. Something must be devised by which everyone, however lowly and however poor, however unable by his means to employ a lawyer and to pay court costs, shall be furnished the opportunity to set this fixed machinery of justice going.

It was the consciousness of the harshness of the circumstances in shutting poor people out of the opportunity to appeal to courts that

induced Arthur von Briesen, that philanthropic leader of the bar, to organize and set on foot legal aid societies. This paper by these two gentlemen shows how much has already been thereby accomplished in furnishing to poor people good legal advice and good legal service.

Such societies have increased in various parts of the country and differ some in their organization, in the sources of their maintenance, whether by the bar, or by social aid societies, or by municipalities. The success of them and the real good that they have done are a testimony to the high spirit of many lawyers and reflect credit on the bar. Without expressing a final personal conclusion on the subject, it seems to me that ultimately these instrumentalities will have to be made a part of the administration of justice and paid for out of public funds. I think that we shall have to come, and ought to come, to the creation in every criminal court of the office of public defender, and that he should be paid out of the treasury of the county or the State. I think, too, that there should be a department in every large city, and probably in the State, which shall be sufficiently equipped to offer legal advice and legal service in suits and defenses in all civil cases, but especially in small claims courts, in courts of domestic relations, and in other forums of the plain people.

A great deal has been done to promote the achieving of justice for the poor and unfortunate in workmen's compensation acts. They have expedited just recoveries and have relieved the burdened courts, enabling them to dispose of other litigation heretofore long delayed.

It may be necessary, in order to prevent unwise or improper litigation, to impose a small fee for the bringing and carrying through of a suit by such free agencies. The department of free legal aid should be charged with the duty of examining every applicant and looking into his actual poverty and necessity and the probably just basis for his appeal. It may be well to unite both civil and criminal cases and make the public defender a part of the general department of free legal service. The growth of these legal aid organizations is the most satisfactory proof of their necessity.

We are greatly indebted to the gentlemen who have made this report, with its interesting exhibits, for proving, as they do prove, that the Congress and the legislatures of the States have within their grasp an opportunity for relieving our present judicial system of the just criticism that, in view of present court costs and the expense of lawyers' services, the equal protection of our laws is not infrequently denied.

WM. H. TAFT.

WASHINGTON, D. C., *June 2, 1925.*

v

In other States other types of legislation have been tried, but in each case the effort has been to secure a remedy for the unpaid workman which would avoid the delay, the expense, and the problem of securing the services of an attorney.

One group of States has endeavored to compel payment of wages by imposing a penalty for nonpayment, as by making the wages run till paid, leaving, however, the unpaid wage earner to collect the penalty through an ordinary suit in the ordinary courts.

Kansas (Acts of 1919, ch. 221, amending G. S. 1915, sec. 5875).—Wages run until paid.

Louisiana (Acts of 1920, ch. 150, sec. 2).—Wages run until paid.

Arkansas (Crawford & Moses Digest (1921), sec. 7125).—Wages run until paid or tendered.

California (see *More v. Indian Spring Co.*, 37 Calif. App. 370 (1918)).—Period not exceeding 30 days added to the unpaid wages.

Idaho (2 C. S. (1919), sec. 7381).—Same penalty as for California.

South Carolina (Acts of 1919, No. 20, amending Vol. I, Code of Laws, sec. 3812).—Same penalty as for California.

Montana (1 R. C. Mont., 1921, secs. 3085, 3086).—Penalty of 5 per cent of wages due.

Michigan (2 C. L. 1915, sec. 5585).—Penalty 10 per cent for each day's delay.

Indiana (see *State v. Indiana*, 1923, 139 N. E. 282).

Another group of States has endeavored to aid the workman by providing that if the laborer won, his lawyer's fee should be paid by the defendant.

Minnesota (Laws of 1919, ch. 175, sec. 5).—Attorney's fee of \$5; (1 Rev. Code (1921), sec. 3089) reasonable attorney fee.

Idaho (2 C. S. (1919), sec. 7380).—Reasonable attorney fee.

These laws are not altogether sufficient. Wage earners as a class require a cheap, speedy procedure and some one to work the machinery for them. These laws all impose a preliminary expense on the wage earner. They do not expedite the trial of the case in the courts, although the penalty is supposed to urge the employer to settle. They do not provide a means whereby the case will be conducted through the intricacies of legal procedure. The worker must secure a lawyer. Where there is no provision for an attorney's fee the worker is in a weak position. Where the attorney's fee is allowed it savors somewhat of a contingent fee arrangement, because the lawyer must win the case to get a fee. To bring the suit may require court costs and if the employee does not have the money for this the law is of little value to him.

The most interesting legislative effort has been to create an administrative official and place in his hands the duty of enforcing wage payment laws. This plan is established by the statutes of the following States:

California (Deering, G. L., California Cons., Supp. 1917-1919, act 2142 V., sec. 7).

Nevada (Acts 1919, ch. 71, sec. 7; Statutes 1920-21, ch. 138).

Utah (Acts 1919, ch. 71, sec. 9).

Wyoming (C. S. (1920), sec. 264).

Massachusetts (G. L. (1921), ch. 149 et seq.).

Washington (Acts 1919, ch. 191).

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

vs.

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.,

Defendant-Real Party in
Interest..

Docket Number: 70696

Electronically Filed
Eighth Judicial District Court
Nov 9, 2016 08:30 a.m.
Case No. A-15-728134-C
Elizabeth A. Brown
Clerk of Supreme Court

**DEFENDANT-REAL PARTY
IN INTEREST TERRIBLE
HERBST, INC.'S APPENDIX**

**DEFENDANT-REAL PARTY IN INTEREST TERRIBLE HERBST, INC.'S
APPENDIX**

VOLUME 1, BATES 000001-000083

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APPENDIX

Volume	Page Numbers	Description	Date Filed
1	000001-000029	State Court Complaint	09/09/2015
1	000030-000069	Federal Court Removal	10/13/2015
1	000070-000071	Motion For Remand	11/3/2015
1	000072-000076	Defendant's Opposition to Plaintiff's Motion to Remand	11/16/2015
1	000077	Plaintiff's Notice Of Voluntary Dismissal Without Prejudice	11/24/2015
1	000078-000083	Growth of Legal Aid Work in the United States, Bulletin No. 398 (Jan. 1926)	January 1926

October 31, 2016

Respectfully submitted,

/s/ Kathryn B. Blakey, Esq.

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
LITTLER MENDELSON, P.C.

Attorneys for Proposed Amici Curiae

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:

DEFENDANT-REAL PARTY IN INTEREST TERRIBLE HERBST, INC.'S APPENDIX

- ☒ By **CM/ECF Filing** – Pursuant to N.E.F.R. the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 31, 2016, at Las Vegas, Nevada.

/s/ Erin J. Melwak
Erin J. Melwak