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

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

PETITIONER-PLAINTIFF'S REPLY BRIEF

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I. INTRODUCTION

Defendant-Real Party in Interest Terrible Herbst, Inc. ("Terrible Herbst") now admits that the District Court erred by dismissing the minimum wage claims of Petitioner-Plaintiff John W. Neville, Jr. ("Petitioner") for the payment of wages due under the Nevada Constitutional Minimum Wage Amendment ("MWA") arising from his employer requiring him to work without compensation "off the clock." But Terrible Herbst insists that Petitioner should still be forced to split his causes of action so that the District Court decides only the issues of minimum wages pay while the Labor Commissioner preforms the simple arithmetic exercise of calculating overtime pay due from the very same transaction and occurrence.[1] Answering Brief at p. 2, n. 1. Terrible Herbst wants this Court to hold that the District Court is without jurisdiction to grant complete relief to unpaid workers and cannot award damages that includes multiplying by 1.5 the sums due from those hours worked in excess of 8 per day or 40 per week. Terrible Herbst's position is contrary to the MWA, which states:

> An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be

[1] Terrible Herbst continues to deny that employees may sue in District Court for statutory overtime and continuation wages under NRS 608.140 even after the Federal Court of Appeals for the Ninth Circuit decision in *Evans v. Wal–Mart Stores, Inc*., 2016 WL 4269904 (9th Cir. Aug. 15, 2016), oral argument reported electronically sub nom C*harde Evans, Plaintiff-Appellant, v. Wal-Mart Stores, Inc.*, Defendant-Appellee., at 2016 WL 4041774.

> entitled to ***all remedies available under the law or in equity appropriate to remedy any violation of this section***, including but not limited to back pay, *damages*, reinstatement or injunctive relief.

Emphasis added.

Terrible Herbst's rationalization for this plea for judicial inefficiency can be encapsulated as follows: because there is not a specific grant of a private right of action within the text of NRS 608.016, NRS 608.018 and NRS 608.020-.050, an employee can only bring claims for violation of these statutes before the Labor Commissioner.[2] But if this case is about a pleading standard, then Terrible Herbst simply needs to review the operative complaint on file to see that all the causes of action in dispute are for wages due according to the Plaintiff's term of employment under NRS 608.140—the catch all private right of action enabling statute *for wages* in Chapter 608. If the plain meaning of the statute is clear, there is no need to dive into an extensive legislative analysis. In addition, there is no rule of statutory construction that indicates the private right of action must be repeated in every paragraph or section of the statute, especially because the sections and numbering of various enactments is a clerical function often performed after an entire bill with multiple parts has been enacted into law. *Fierle v. Perez*, 125 Nev.

[2] Terrible Herbst ignores the fact that, lien claimants have an express private right of action at NRS 108.237, *inter alia*, which is incorporated by reference and made applicable to all terminated employees in NRS 608.050(2).

728, 743, 219 P.3d 906, 915–16 (2009) (statutes should be interpreted in a manner to avoid conflict with other related statutes). For the reasons set forth more fully below, this Court should grant the Petitioner's request for a writ.

II. SUMMARY OF ARGUMENTS

Like most, if not all, "off the clock" wage cases, Petitioner was paid an agreed upon wage rate for working certain hours, and was not paid for working other hours.[3] The fact that Petitioner was not paid for all hours worked in violation of NRS 608.016 states a claim for minimum wages under the MWA as well as a claim for wages according to the terms of his employment under NRS 608.140. The exact same facts support Petitioner's claim for payment of premium pay for hours worked in excess of 8 per day or 40 per week, a violation of NRS 608.018 which gives rise to a suit for wages due according to the "term of his employment" under NRS 608.140. As a matter of pleading, Petitioner has always claimed these facts provided a cause of action under NRS 608.140 and the MWA, and not a stand-alone action under NRS 608.016, NRS 608.018 and NRS 608.020-050.[4]

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[3] In this case, the expressed rate was $8.00 an hour. For the first sixty days of employment, this rate was *below* the constitutionally required minimum wage rate because he was not even offered health insurance. But even after being provided health insurance, his effective rate was only $7.16 an hour—taking his total compensation and dividing it by all hours worked. NAC 608.125. This is still lower than the lower tier Constitutional Minimum Wage rate of $7.25 an hour.

[4] Petitioner also claimed a stand-alone private right of action under the first half of NRS 608.050(2) which states: "Every employee shall have a lien as

The remedies in the MWA are cumulative and supplemental to all other remedies. NRS 607.160(6) ("The actions and remedies authorized by the labor laws are cumulative."). By its own terms, the MWA says the employee "shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section." Damages, which is an enumerated remedy under the MWA, must include wages that the employee was entitled to by law, which in this case is the premium overtime rate of pay for all hours worked in excess of 8 in a day or 40 in a week under NRS 608.018. Since the MWA incorporates all existing remedies, it must preserve those remedies as well.

Terrible Herbst's argument that NRS 608.016, 608.018, and 608.020-.050 do not, in and of themselves, contain a private right of action must be rejected as irrelevant.[5] NRS 608.016, 608.018, and 608.020-.050 mandate certain wages as a term of employment—the mandate to pay all hours worked (NRS 608.016), the mandate to pay premium pay for hours worked in excess of 8 per day and/or 40 per

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provided in NRS 108.221 to 108.246. . ." Among other section of the lien statutes incorporated into NRS 608.050, NRS 108.237 provides a private right of action, stating in part: "The court shall award to a prevailing lien claimant, whether on its lien or on a surety bond, the lienable amount found due to the lien claimant by the court and the cost of preparing and recording the notice of lien, including, without limitation, attorney's fees, if any, and interest."

[5] Contrary to Terrible Herbst's position, if employees had no remedy for wages while employed, then the second part of the last sentence of NRS 608.050(2) (beginning with the word "and") would be redundant.

week (NRS 608.018) or the mandate to continue paying wages up to 30 days after termination if the employer does not deliver the final payment at the time of discharge or termination from employment (NRS 608.020-.040). But NRS 608.140 is an express private right of action to seek unpaid wages in court that does not have any self-contained term of employment requiring the payment of those wages. To put a separate private right of action in each section would be redundant. Obviously, the private right of action to collect wages as a term of employment must be the enabling device to effectuate recovery from all these other sections of Chapter 608 that have no self-contained private right of action but that mandate payment of certain wages as a term of the employment.

It is likewise unavailing to suggest that the Labor Commissioner is the exclusive enforcer of these provisions. The Labor Commissioner will be deemed to have exclusive jurisdiction only when there is no other provision to the contrary. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 961, 194 P.3d 96, 101 (2008) ("In Nevada, the Legislature has entrusted the labor laws' enforcement to the Labor Commissioner, ***unless otherwise specified.***") (emphasis added). Here, there is a provision to the contrary—NRS 608.140. In addition, splitting a cause of action is inefficient and a waste of resources simply to have the Labor Commissioner award overtime based upon the District Court's factual findings of hours worked and rate of pay, especially since the District Court case would be

binding on the Labor Commissioner and there is *de novo* review of the orders of the Labor Commissioner in the District Court. NRS 607.215(3).

In sum, the Nevada Legislature has unambiguously conferred a private right of action upon all Nevada employees to seek their unpaid wages in court. And while some of the laws regulating wages were enacted after today's NRS 608.140, the legislature knew there was a private right of action to collect wages due at the time it enacted those provisions and must be presumed to have relied on the existing private right of action language when it enacted those statutes as well.

III. ARGUMENT

A. Nevada's Minimum Wage Amendment Requires The District Court To Calculate Damages Based On An Overtime Rate When Applicable

Petitioner filed his complaint in the District Court seeking, *inter alia*, damages for being forced to work "off the clock" – for being paid nothing for a portion of the time the employer required, suffered or permitted him to work. Petitioner claims that damages include payment of wages for that uncompensated time at the statutorily required rate of pay, which in some cases includes overtime premium pay under NRS 608.018. Section 16 of Article 15 states,

> An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to *all remedies available under the law or in equity appropriate to remedy any violation of this*

> *section*, including but not limited to back pay, *damages*, reinstatement or injunctive relief. [Emphasis added.]

Initially, the District Court dismissed this claim because it believed that there was no private right of action under the MWA. Now, Terrible Herbst concedes that the District Court was in error to dismiss the MWA claim, but does not want damages to include any statutorily required overtime premiums. But once jurisdiction has been established under the MWA, the MWA itself says that the court has the duty to award damages in the full amount, which includes overtime by statute, which is a part of the terms of employment for all employees.

B. NRS 608.140 Provides A Private Right Of Action *And* For The Recovery Of Attorneys' Fees And Costs Upon Successful Prosecution Of A Wage Claim

NRS 608.140 is not solely an attorney fee shifting statute, as Terrible Herbst suggests. It provides a substantive right to seek unpaid wages in court ***and*** the recovery of attorneys' fees and costs if an employee is successful. The structure of this statutory provision is not abnormal. Indeed, most (if not all) statutory wage provisions that provide for a private right of action also contain an attorney fee-shifting provision. For instance, the MWA's private right of action provision also contains an attorney fee shifting clause. The Fair Labor Standards Act's ("FLSA") private right of action provision is drafted in the same fashion. *See* 29 U.S.C. §

216(b).[6] Just because a statutory provision contains an attorney fee shifting clause does not render the rest of the provision superfluous. Ultimately, it would be illogical to suggest that that the Nevada Legislature intended to adopt a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself.

C. The Private Right Of Action Conferred By NRS 608.140 Is Not Limited To A Claim Brought Pursuant To A Breach Of Contract

Terrible Herbst appears to suggest that NRS 608.140's private right of action is only actionable via a cause of action "sounding in contract." Answering Brief at p. 16. This argument has been recently chastised as a red herring by the Ninth in *Evans v. Wal–Mart Stores, Inc.*, supra. In that case, the Ninth Circuit reversed a federal district court's ruling that Nevada employees could only seek unpaid wages and other associated remedies in court for contractual violations. *See* 2016 WL 4269904, at *1 (9th Cir. Aug. 15, 2016). "[T]he district court granted summary judgment on grounds that waiting time penalties are only available when an employer fails to timely pay the 'contractually agreed upon wage,' not statutory

[6] "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

overtime pay." *Evans*, 2016 WL 4269904, at *1. This is the same theory by which other district courts have held that there is no private right of action and the same theory Defendant relies on here. *See, e.g.*, *Dannenbring v. Wynn Las Vegas, LLC*, 907 F. Supp. 2d 1214, 1219 (D. Nev. 2013) (stating that "the court finds that §608.140 does not imply a private right of action to enforce the labor statutes. *Descutner*, 2012 WL 5387703, at *2. Instead, §608.140 implies a private right of action to recover in contract only.").

The Ninth Circuit rejected this theory and held that terminated employees have a private right of action for statutorily mandated overtime premium pay both as wages and as compensation under NRS 608.040 and 608.050 respectively. *Evans v. Wal–Mart Stores, Inc.*, No. 14-16566, 2016 WL 4269904, at *1 (9th Cir. Aug. 15, 2016). During oral argument in *Evans*, Judge Silverman recognized that the argument of whether an employee states a cause of action for breach of contract or not was irrelevant to the question of whether there's a private right of action:

> So it seems to me we've got a little bit of a red herring here when we get bogged down on whether there was a contract of employment. There was a contract of employment. One of the terms was that they'll get paid $8.80 an hour. Another term was they could be discharged without cause. There may have been other terms, too. Isn't that right?

See Supplemental Filing (Doc. 2016-29346) (Transcript from the oral argument in *Evans*).

As Judge Silverman noted, every employment relationship involves a contract of employment. An employer promises to pay an employee in exchange for the employee performing work on behalf of the employer. One of the terms of the contract for employment is the amount of compensation. Indeed, the definition of a "wage" under NRS 608.012(1) is "[t]he amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time[.]" While an employer may agree to pay an employee wages well in excess of the statutory requirement set forth in NRS Chapter 608, an employer cannot pay less than these statutory minimums.[7] As a result, these statutorily imposed conditions are necessarily incorporated into the terms of the employment between and employer and an employee. *See Tyus v. Wendy's of Las Vegas, Inc.*, 2015 WL 5021644, at *4 (D. Nev. Aug. 21, 2015) (stating that "when a statute imposes additional obligations on an underlying contractual relationship, ***a breach of the***

[7] To this end, Terrible Herbst's argument that because NRS 608.016 and NRS 608.018 were enacted after NRS 608.140 there can be no private right of action to enforce those provisions is misplaced. The Legislature's decision to enact more protective legislation subsequent to the passage of NRS 608.140 does not make a claim for unpaid wages for those subsequently passed provisions any less actionable. Those provisions are part of any term of employment in Nevada and the legislature would not have enacted a "private right of action" where there already was one in this Chapter of the statutes covering these cases.

statutory obligation is a breach of contract . . . ." (citing *Brewer v. Premier Golf Properties*, 86 Cal. Rptr. 3d 225, 235 (Cal. Ct. App. 2008) (citations omitted)(emphasis added)).[8] In the event an employer does not pay wages in accordance with its statutorily imposed obligations, an employee has a right to sue for recovery of those wages.

In sum, Terrible Herbst's "sounding in contract" argument is nothing more than smoke screen. Here, Petitioner agreed to perform work for Terrible Herbst in exchange for an hourly rate of pay. Like all employment relationships in the state of Nevada, the terms of Petitioner's employment included that he be paid for all the hours he worked (NRS 608.016), he be paid overtime when he worked over 8 hours in a day and/or over 40 hours in a workweek (NRS 608.018), and that he be timely remitted all the wages due and owing to him at the cessation of his employment (NRS 608.020-.050). He has a private right of action to seek to recover the wages guaranteed to him by the term of this employment.[9]

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[8] In *Tyus*, this Court only held that there was no private right of action to sue under Nevada's Administrative Regulations, NAC 608.102 and NAC 608.104. *See Tyus v. Wendy's of Las Vegas, Inc.*, 2015 WL 463130, at *3 (D. Nev. Feb. 4, 2015).

[9] In one sense, Terrible Herbst is seeking to have this court adopt a pleading requirement that all unpaid wage claims be brought pursuant to a "breach of contract" cause of action. While unnecessary, Petitioner would not be opposed to such a requirement because the underlying result would be the same—he would have a private right of action to seek all unpaid wages under various provisions of NRS Chapter 608.

D. Public Policy Considerations Support A Private Right of Action to Recover Unpaid Wages

First, contrary to Amicus' hypothesis that a private right of action to recover unpaid wages in court would create "docket congestion", the exact opposite is true. Under the "no private cause of action theory," all "off the clock" cases would have to be tried in both the District Court for minimum wage damages, while the overtime claims under NRS 608.018 would have to be tried on the exact same facts before the Labor Commissioner. But under Petitioner's argument, the District Court would have concurrent jurisdiction under NRS 608.140 over both the overtime wages and the minimum wages due as a term of the employment contract.

Terrible Herbst has conceded that the District Court erred by dismissing Petitioner's claim under the MWA; that claim will proceed in court. The District Court will determine the hours worked but unpaid. Now, Terrible Herbst and Amicus suggest it would be a waste of judicial resources for the District Court to multiply by 1.5 those hours already determined to have been due payment which are also entitled to overtime premiums. App. at p. 8, ¶¶ 11-12.[10] Petitioner suggests

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[10] Petitioner also alleges that he was not paid the promised rate of pay that he was offered when he accepted employment with Terrible Herbst. These are separate facts apart from Petitioner's claim that he was not compensated for work performed pre and post shift. *See* App. at p. 7, ¶ 9, and pp. 16-17, ¶¶ 57-60.

that it is much more wasteful to require a separate action before the Labor Commissioner to merely assess some, but not all of the damages arising out of the same facts previously established in the District Court.[11]

Second, the availability of continuation wages under NRS 608.050 is another example of duplicate litigation proposed by Terrible Herbst and Amicus. Just like the plaintiff worker in *Dolittle* did almost 80 years ago,[12] Petitioner could sue in the District Court "as provided in NRS 108.221 to 108.246" both his employer and the owner of the property where he worked for unpaid wages according to his contract of employment. Under Terrible Herbst and Amicus' proposal however, he would have to bring another action for the statutorily imposed conditions of that contract (i.e. payment for all hours worked and overtime premiums) with the Labor Commissioner, who would have to apply the

[11] Amicus also argues that the Labor Commissioner will be more effective in adjudicating multiple claims against the same employer. This is misleading at best. The Labor Commissioner does not accept class action wage claims. *See* App. at 250, ¶ 4 ("My office does not accept class action wage claims against employers because there is no one from whom to take assignment of the debt."). This Court has agreed with the Labor Commissioner's practice of refusing to entertain class claims. *See Wynn Las Vegas, L.L.C. v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179, 1182 (2013) ("The Labor Commissioner's conclusion that NAC 607.200 does not permit class actions was within the regulation's language; thus, the district court should have deferred to the Labor Commissioner's interpretation."). Thus, systematic wage violations cannot be effectively resolved before the Labor Commissioner.

[12] *See Dolittle v. District Court*, 54 Nev. 319, 322 (1932).

finding of the District Court anyway, or be appealed right back to the same District Court under NRS 607.233. This Court has previously rejected the very process that Terrible Herbst and Amicus are advocating here. *See Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) ("As a general proposition, a single cause of action may not be split and separate actions maintained. (citation omitted) . . . The great weight of authority supports the single cause of action rule when the plaintiff in each case is the same person. Cases collected Annot. 62 A.L.R.2d 977 (1958)."). *Cf. Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 852, 124 P.3d 530, 540–41 (2005) (recognizing the benefit of avoiding "duplicative proceedings and inconsistent results.").

Lastly, the purpose of the Labor Commissioner's office is to facilitate resolution of employee wage claims not to frustrate them. With limited state funding, the Labor Commissioner uses its offices to pursue cases on behalf of low paid workers who cannot afford counsel only, leaving to the courts those cases where claimants are represented by private attorneys. NAC 607.095 ("If it appears to the Commissioner that a complainant can afford to employ private counsel, the Commissioner may inquire into the financial condition of the complainant to determine whether to take jurisdiction of the matter."); NRS 607.160(7)("If, after due inquiry, the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable claim for wages . . ."). The

creation of the office of the Labor Commissioner was not intended to create a bottle neck of legitimate claims which avoid timely resolution by private attorneys in the District Court. "The actions and remedies authorized by the labor laws are cumulative." NRS 607.160(6). The 1932 *Doolittle* case itself was a private action filed after the creation of the office of the Labor Commissioner in 1915. NRS 607.010.

Amicus seeks to have wage enforcement funded entirely by Nevada taxpayers, as opposed to allowing private parties to seek their own wages. The Nevada Labor Commissioner, an agency funded by the Nevada taxpayers, is already cash-strapped and understaffed. *See* App. at 249 ("Because of limited staffing and budged constraints, my office investigates and prosecutes wage claims on behalf of those wage claimants, generally of low and moderate incomes, who can't afford their own attorneys."). Pursuant to its Legislative authority, the Labor Commissioner only pursues wage claims on behalf of Nevada employees who cannot afford an attorney. App. 249 at ¶ 3. ("It is my opinion that individuals who can afford to employ their won attorneys can directly file and maintain a claim for wages against their employer in the Nevada courts."); *Id.* at ¶ 2 ("My office determines whether claimants have the financial ability to employ an attorney to represent them in pursuing their wage claims."); NRS 607.160(7), 607.170(1); NAC 608.075(2); *see also City Plan Dev., Inc. v. Office of Labor Com'r,* 121 Nev.

419, 426-27, 117 P.3d 182, 187 (2005) (recognizing that the Labor Commissioner's jurisdiction is discretionary). Ultimately, Terrible Herbst and Amicus' position would represent a radical shift from the current understanding of the law and saddle a state agency with an unworkable caseload.[13]

IV. CONCLUSION

For all the reasons discussed above, Petitioner-Plaintiff's Petition for Writ of Mandamus should be granted and the District Court's order dismissing Petitioner-Plaintiff's First, Second, Third, and Fourth causes of action should be reversed.

Dated this 14th day of December, 2016.

Respectfully Submitted,

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[13] Courts have been adjudicating wage claims since at least 1932. *See Dolittle*, 54 Nev. at 319, 322; App. 225-227 (*Mark v. Bluebird Apps, LLC, et al.*, Case No. A-15-716939-C), App. 229-232 (*Phelps v. MC Comm., Inc.*, Case No. A-11-634965-C); App. 234-236 (*Valdez v. Cox Comm. Las Vegas, Inc.*, Case No. A-09-597433-C); Supplemental Appendix (Supp. App.) 267-268 (*Grote v. The Greates Skycaps, et al.*, Case No. A-14-703051-C); Supp App. 269-271 (*Kulesza v. Las Vegas Racquet Ball Club*, Case No. A-14-710719-C); Supp. App. 272-277 (*Laurin, et al. v. Sitel Op. Corp.*, Case No. A-16-736053-C).

CERTIFICATE OF COMPLIANCE

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

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

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Finally, I hereby certify that I have read this Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

Dated: December 14, 2016

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 7287 Lakeside Drive, Reno, Nevada 89511. On December 14, 2016, the following document was served on the following:

PETITIONER-PLAINTIFF'S REPLY BRIEF

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

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Executed on December 14, 2016, at Reno, Nevada.

/s/ Tamara Toles
Tamara Toles