IN THE SUPREME COURT OF

THE STATE OF NEVADA

****

DEFENDANT FREEMAN EXPOSITIONS, LLC (improperly named THE FREEMAN COMPANY, LLC),

Petitioner,

v.

The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, In and For the COUNTY OF CLARK, the Honorable TREVOR ATKIN, District Judge, Department VIII

Respondent,

and

JAMES ROUSHKOLB

Real Party in Interest.

Supreme Court Case No.:

District Court Case No.: A-19-805268-C

Trial Date: August 2, 2021
(Five-Week Stack)

PETITIONERS' APPENDIX TO FREEMAN EXPOSITIONS, LLC'S PETITION FOR A WRIT OF MANDAMUS (VOLUME 2 OF 2)

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer
Paul T. Trimmer, NV SBN 9291
Lynne K. McChrystal, NV SBN 14739
300 S. Fourth Street, Suite 900
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Lynne.McChrystal@jacksonlewis.com

INDEX (APPENDIX VOLUME II)

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis P.C. and that on this 8th day of July, 2021, I caused to be served a true and correct copy of **PETITIONERS' APPENDIX TO FREEMAN EXPOSITIONS, LLC'S PETITION FOR A WRIT OF MANDAMUS (VOLUME 2 OF 2)** to the following:

Via Electronic Mail	***Via Hand Delivery***
Christian Gabroy GABROY LAW OFFICES The District at Green Valley Ranch 170 South Green Valley Parkway Suite 280 Henderson, Nevada 89012 *Attorneys for Plaintiff/Real Party in Interest*	Hon. Veronica M. Barisich Eighth Judicial District Court Department V Regional Justice Center 200 Lewis Avenue Las Vegas, Nevada 89155 *Respondent*

/s/ Wende Hughey
Employee of Jackson Lewis, P.C.

EXHIBIT I

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JAMES ROUSHKOLB,

Plaintiff(s),

v.

FREEMAN COMPANY, LLC,

Defendant(s).

Case No. 2:19-CV-2084 JCM (NJK)

ORDER

Presently before the court is the Freeman Company's ("defendant") motion to dismiss. (ECF No. 13). James Roushkolb ("plaintiff") filed a response (ECF No. 15), to which defendant replied (ECF No. 16).

I. Background

The instant action arises from an employment dispute. Plaintiff regularly used medical marijuana at night to treat post-traumatic stress disorder ("PTSD") pursuant to a doctor's recommendation. (ECF No. 1-1 at 2). Plaintiff, a member of the Teamsters, Chauffeurs, Warehousemen, and Helpers, Local 631, International Brotherhood of Teamsters ("the union"), worked as a journeyman. (*Id.* at 6; ECF No. 13 at 2). Defendant hired him as temporary labor. (ECF No. 1-1 at 6).

Plaintiff was working with another employee to remove a piece of plexiglass from the ceiling when he dropped the plexiglass, causing it to shatter. (*Id.* at 6–7). Following the accident, defendant requested that plaintiff take a drug test, which he failed on account of his medical marijuana use the previous night. (*Id.* at 7). Plaintiff claims he was not under the influence on the job site. (*Id.*) Defendant fired plaintiff as a result of his failed drug test. (*Id.*)

Plaintiff now brings claims under several Nevada employment statutes claiming that defendant did not accommodate his disability. (ECF No. 1–1). Defendant moves to dismiss all claims. (ECF No. 13).

II. Legal Standard

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the

line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

III. Discussion

A. Preemption

Plaintiff, as a union member, is subject to a collective bargaining agreement ("CBA"). (*See* ECF No. 13 at 2). Defendant argues that plaintiff's claims require the court to interpret the CBA. (*Id* at 7). Thus, plaintiff's state law claims are preempted by the federal Labor Management Relations Act ("LMRA") § 301. (*Id.*) This court disagrees.

The LMRA gives federal courts exclusive jurisdiction over violations of collective bargaining agreements. 29 U.S.C. § 185. It also preempts any state law claim that is "substantially dependent on the terms of an agreement made between parties to a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). There is a two-step test to determine if the LMRA preempts a state claim. *See Burnside v. Kiewit*, 491 F.3d 1053, 1059 (9th Cir. 2007). First, the court must determine whether the cause of action results from a right granted under state law or by the CBA. *See id.* Second, the court must determine whether the claim requires interpretation of the CBA. *See id.*

Plaintiff fails to mention the CBA in his complaint. Certainly, he does not avoid preemption by withholding mention of the CBA or § 301. *See Stallcorp v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1048 (9th Cir. 1987). However, where the complaint alleges rights that exist generally, independent of the CBA, § 301 does not apply. *See Livadas v. Bradshaw*,

512 U.S. 107, 124 (1994); *Davies v. Premier Chemicals, Inc.*, 50 Fed. App'x 811, 812 (9th Cir. 2002) (holding that § 301 did not preempt a tortious discharge claim under Nevada law).

Here, plaintiff does not allege any claims wholly dependent on the CBA. (ECF No. 1-1). Plaintiff's claims all arise under Nevada law and are available for pursuit by anyone, not just members of the union subject to the CBA. *See Davies*, 50 Fed. App'x 811, 812 (9th Cir. 2002).

Further, adjudicating this matter does not require the court to interpret the CBA. "[T]he need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691–92 (9th Cir. 2001). Defendant cannot defensively rely on the CBA's terms to trigger preemption. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001). Here, the CBA is asserted only defensively. (*See* ECF No. 15 at 6–12). Defendant argues that the court must interpret articles 4 (employer's rights), 14 (discipline procedures), and 15 (drug policy) to adjudicate plaintiff's claims. (*See* ECF No. 13 at 6). But plaintiff does not challenge any of the policies contained in these sections of the CBA. Nowhere in plaintiff's complaint is there an inherent need to consult or interpret the terms of the CBA.

Because plaintiff raises claims arising under state law, and the court will not have to interpret the CBA, plaintiff's claims are not preempted by the LMRA.

B. Jurisdiction

A federal court must possess jurisdiction over an action to hear the dispute. *Weeping Hollow Avenue Trust v. Spencer*, 831 F.3d 1110, 1112 (9th Cir. 2016). If a court determines at any time that it lacks subject matter over an action, it must dismiss or remand the case as appropriate. See *id.* at 1114 (reversing and remanding with instructions to remand the case to state court, as the district court lacked subject matter jurisdiction over the claims).

Here, the defendant removed the case to federal court based on federal question jurisdiction pursuant to the LMRA. (ECF No. 1). The court has determined the LMRA is inapplicable to plaintiff's claims. Therefore, the court no longer holds subject matter jurisdiction by virtue of federal question. Defendant, despite being a Texas corporation, specifically

disclaims diversity jurisdiction, presumptively due to the amount in controversy, which is never mentioned. (ECF No. 10 at 2). Therefore, the court, *sua sponte*, remands this suit to state court.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to dismiss (ECF No. 13) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that this matter be, and the same hereby is, REMANDED to the state court due to this court's lack of subject matter jurisdiction.

DATED July 2, 2020.

James C. Mahan

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

A-19-805268-C

JAMES ROUSHKOLB,

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James C. Mahan
U.S. District Judge

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Further, adjudicating this matter does not require the court to interpret the CBA. "[T]he need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691–92 (9th Cir. 2001). Defendant cannot defensively rely on the CBA's terms to trigger preemption. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001). Here, the CBA is asserted only defensively. (*See* ECF No. 15 at 6–12). Defendant argues that the court must interpret articles 4 (employer's rights), 14 (discipline procedures), and 15 (drug policy) to adjudicate plaintiff's claims. (*See* ECF No. 13 at 6). But plaintiff does not challenge any of the policies contained in these sections of the CBA. Nowhere in plaintiff's complaint is there an inherent need to consult or interpret the terms of the CBA.

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IT IS FURTHER ORDERED that this matter be, and the same hereby is, REMANDED to the state court due to this court's lack of subject matter jurisdiction.

DATED July 2, 2020.

James C. Mahan
UNITED STATES DISTRICT JUDGE

I hereby attest and certify on 7/2/2020 that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By MONICA REYES Deputy Clerk

James C. Mahan
U.S. District Judge

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:19-cv-02084-JCM-NJK
Internal Use Only

Roushkolb v. Freeman Company, LLC
Assigned to: Judge James C. Mahan
Referred to: Magistrate Judge Nancy J. Koppe
Case in other court: Eighth Judicial District Court-Clark County Nevada, A-19-805268-C
Cause: 05:704 Labor Litigation

Date Filed: 12/05/2019
Jury Demand: Both
Nature of Suit: 720 Labor: Labor/Mgt. Relations
Jurisdiction: Federal Question

Plaintiff

James Roushkolb

represented by **Christian James Gabroy**
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Email: christian@gabroy.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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TERMINATED: 12/17/2019

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Email: kmesser@gabroy.com
ATTORNEY TO BE NOTICED

V.

Defendant

Freeman Company, LLC
true name
Freeman Expositions, Inc.

represented by **Lynne McChrystal**
Jackson Lewis, P.C.
Bank of America Plaza
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Fax: (702) 921-2461
Email: trimmerp@jacksonlewis.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/05/2019	1	PETITION FOR REMOVAL from Eighth Judicial District Court-Clark County Nevada, Case Number A-19-805268-C, (Filing fee $ 400 receipt number 0978-5801009) by The Freeman Company, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Civil Cover Sheet)(Trimmer, Paul) NOTICE of Certificate of Interested Parties requirement: Under Local Rule 7.1-1, a party must immediately file its disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. (Entered: 12/05/2019)
12/05/2019	2	CERTIFICATE of Interested Parties by The Freeman Company, LLC. There are no known interested parties other than those participating in the case (Trimmer, Paul) (Entered: 12/05/2019)
12/05/2019		Case randomly assigned to Judge James C. Mahan and Magistrate Judge Nancy J. Koppe. (ADR) (Entered: 12/05/2019)
12/05/2019	3	MINUTE ORDER IN CHAMBERS of the Honorable Judge James C. Mahan on 12/5/2019. Statement regarding removed action is due by 12/20/2019. Joint Status Report regarding removed action is due by 1/4/2020. (Copies have been distributed pursuant to the NEF - ADR) (Entered: 12/05/2019)
12/05/2019		(Court only) **NON-PUBLIC** CIP Deadline terminated per 2 . (ADR) (Entered: 12/05/2019)
12/05/2019	4	CERTIFICATE of Interested Parties by James Roushkolb. There are no known interested parties other than those participating in the case (Gabroy, Christian) Modified on 12/9/2019 (MMM). (Entered: 12/05/2019)
12/07/2019	5	**NOTICE terminated as entered in error by Clerk's Office** ~~ERROR NOTICE to counsel re filing of 4 Certificate of Interested Parties. All interested parties were not properly entered on the docket. You must add ALL Corporate Parents and/or Corporate Affiliates to the case.~~ ~~Attorney **Paul T. Trimmer** advised to refile ECF No. 4 in accordance with FRCP 7.1 and LR 7.1-1, and shall enter all persons, associations of person, firms, partnerships or~~

		~~corporations (including parent corporations) which have a direct pecuniary interest in the outcome of the case.~~ ~~(no image attached) (MMM)~~ Modified on 12/9/2019 (MMM). (Entered: 12/07/2019)
12/09/2019	6	STIPULATION to Extend Time re 1 Complaint by Defendant Freeman Company, LLC. (McChrystal, Lynne) Modified on 12/9/2019 to add docket entry relationship (MMM). (Entered: 12/09/2019)
12/10/2019	7	ORDER Granting 6 First Stipulation for Extension of Time Re: Complaint contained in the 1 Petition for Removal. Freeman Company, LLC's answer due 1/7/2020. Signed by Magistrate Judge Nancy J. Koppe on 12/10/2019. (Copies have been distributed pursuant to the NEF - SLD) (Entered: 12/10/2019)
12/13/2019	8	MOTION to remove attorney Justin Shiroff,Esq. from the Electronic Service List in this case by Plaintiff James Roushkolb. (Gabroy, Christian) (Entered: 12/13/2019)
12/17/2019	9	ORDER Granting 8 Motion to Remove Attorney Justin Shiroff from the Electronic Service List for Plaintiff. Signed by Magistrate Judge Nancy J. Koppe on 12/16/2019. (Copies have been distributed pursuant to the NEF - SLD) (Entered: 12/17/2019)
12/20/2019	10	STATEMENT REGARDING REMOVAL by Defendant Freeman Company, LLC. (Trimmer, Paul) (Entered: 12/20/2019)
01/02/2020	11	Second STIPULATION *and Order to Extend Deadline for Defendant's Response to Plaintiff's Complaint* re 1 Petition for Removal,, by Defendant Freeman Company, LLC. (McChrystal, Lynne) (Entered: 01/02/2020)
01/03/2020	12	ORDER Granting 11 Stipulation for Extension of Time. Freeman Company, LLC answer due 1/21/2020. Signed by Magistrate Judge Nancy J. Koppe on 1/3/2020. (Copies have been distributed pursuant to the NEF - JQC) (Entered: 01/03/2020)
01/21/2020	13	MOTION to Dismiss 1 Petition for Removal,, by Defendant Freeman Company, LLC. Responses due by 2/4/2020. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Trimmer, Paul) (Entered: 01/21/2020)
02/03/2020	14	NOTICE of Appearance by attorney Kaine M. Messer on behalf of Plaintiff James Roushkolb. (Messer, Kaine) (Entered: 02/03/2020)
02/04/2020	15	RESPONSE to 13 Motion to Dismiss by Plaintiff James Roushkolb. Replies due by 2/11/2020. (Attachments: # 1 Exhibit I, # 2 Exhibit II, # 3 Index of Exhibits) (Gabroy, Christian) (Entered: 02/04/2020)
02/11/2020	16	REPLY to Response to 13 Motion to Dismiss by Defendant Freeman Company, LLC. (Trimmer, Paul) (Entered: 02/11/2020)
04/10/2020	17	ORDER - Parties have failed to file a Discovery Plan/Scheduling Order. The Joint Proposed Discovery Plan is due by 4/17/2020. Signed by Magistrate Judge Nancy J. Koppe on 4/10/2020. (Copies have been distributed pursuant to the NEF - DRS) (Entered: 04/10/2020)
04/17/2020	18	Stipulated Discovery Plan and Scheduling Order by Plaintiff James Roushkolb. (Gabroy, Christian) (Entered: 04/17/2020)
04/20/2020	19	Order Denying without Prejudice 18 Discovery Plan and Scheduling Order. An amended discovery plan must be filed by 4/22/2020. Signed by Magistrate Judge Nancy J. Koppe on 4/20/2020.(Copies have been distributed pursuant to the NEF - DRS) (Entered: 04/20/2020)
04/20/2020		(Court only) **NON-PUBLIC** Set deadline for Discovery Plan/Scheduling Order

		due by 4/22/2020. (DRS) (Entered: 04/20/2020)
04/22/2020	20	Amended Stipulated Discovery Plan and Scheduling Order re 19 Order, by Defendant Freeman Company, LLC. (McChrystal, Lynne) . (Entered: 04/22/2020)
04/23/2020	21	SCHEDULING ORDER granting 20 Amended Discovery Plan and Scheduling Order Discovery due by 10/12/2020. Motions due by 11/11/2020. Proposed Joint Pretrial Order due by 12/11/2020. Signed by Magistrate Judge Nancy J. Koppe on 4/23/2020. (Copies have been distributed pursuant to the NEF - DRS) (Entered: 04/23/2020)
04/23/2020	22	ORDER that the Court issues this order to advise the parties that discovery motions filed in this case will not be briefed according to the default schedule outlined in Local Rule 7-2(b), but will instead be briefed on shortened deadlines absent leave from the Court, see Local Rule IA 1-4. Signed by Magistrate Judge Nancy J. Koppe on 4/23/2020. (Copies have been distributed pursuant to the NEF - DRS) (Entered: 04/23/2020)
07/02/2020	23	ORDER Denying as moot 13 Motion to Dismiss and Remanding this matter back to the state Court. Signed by Judge James C. Mahan on 7/2/2020. (Copies have been distributed pursuant to the NEF; Certified copy of Order and Docket sheet sent to State Court this date - DRS) (Entered: 07/02/2020)

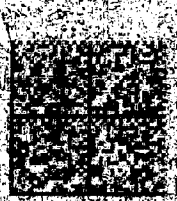
I hereby attest and certify on 7/2/2020 that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By MONICA REYES Deputy Clerk

CLERK U.S. DISTRICT COURT
DISTRICT OF NEVADA
LLOYD D. GEORGE U.S. COURTHOUSE
333 LAS VEGAS BLVD. SO. – RM 1334
LAS VEGAS, NV 89101

OFFICIAL BUSINESS



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Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89101

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Attorneys for Defendant
Freeman Expositions, LLC
Improperly Named The Freeman Company, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES ROUSHKOLB,

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, Inclusive,

Defendants.

Case No. A-19-805268-C

FREEMAN EXPOSITIONS, LLC'S MOTION TO DISMISS

HEARING REQUESTED

Freeman Expositions, LLC improperly named as the Freeman Company, LLC ("Freeman" or "Defendant"), by and through its counsel, Jackson Lewis P.C., moves to dismiss Plaintiff James Roushkolb's ("Plaintiff") Complaint in its entirety. Plaintiff's first, second, third, fourth, and fifth causes of action, which he has entitled unlawful employment practices, tortious discharge, deceptive trade practices, and violation of the medical needs of an employee pursuant to NRS 453A.010 *et. seq*, respectively, fail to state a claim pursuant to NRCP 12(b)(5). The five causes of action fail to state claims upon which relief could be granted.

This request is based on the attached Memorandum of Points and Authorities, all

pleadings and documents on file with the Court, and any argument that the Court deems proper.

Dated this 31st day of July 2020.

JACKSON LEWIS P.C.

/s/ Lynne K. McChrystal
Paul T. Trimmer, Bar #9291
Lynne K. McChrystal, Bar #14739
JACKSON LEWIS P.C.
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101

Attorneys for Defendant Freeman Expositions, LLC, Improperly Named The Freeman Company, LLC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Freeman employed Plaintiff as a journeyman. As a journeyman, he was represented for purposes of collective bargaining by the Teamsters, Chauffeurs, Warehouseman and Helpers, Local 631, International Brotherhood of Teamsters (the "Union" or "Local 631"), and the terms and conditions of his employment were governed by the collective bargaining agreement (the "CBA" or the "Agreement") between Freeman and Local 631. *See* **Exhibit A** (relevant sections of the June 1, 2017-May 31, 2021 collective bargaining agreement).

Plaintiff's Complaint contains five causes of action: (1) unlawful employment practices, (2) tortious discharge, (3) deceptive trade practices, (4) negligent hiring, training, and supervision and (5) violation of the medical needs of an employee pursuant to NRS 453A.010 *et. seq*. Each of these claims, at its core, is predicated on the allegation that Plaintiff's July 11, 2018 discharge was unlawful. Each claim fails as a matter of law. Accordingly, the Complaint should be dismissed with prejudice.

II. STANDARD OF REVIEW

Nevada Rule of Civil Procedure 12(b)(5) provides, in pertinent part, that the Court may "dismiss a complaint or an individual claim for relief for failure to state a cause of action." Nev.

R Civ. P. 12(b)(5). According to the Nevada Supreme Court, "[a] bare allegation is not enough" to survive a motion to dismiss; a pleading "must set forth sufficient facts to establish all necessary elements of a claim for relief." *Hay v. Hay,* 100 Nev. 196, 678 P.2d 672, 674 (1984).

If Plaintiff's allegations fail to raise a plausible right to relief, then Defendant's Motion to Dismiss should be granted. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

III. STATEMENT OF FACTS

Plaintiff was terminated on July 11, 2018 following a workplace accident and subsequent drug test. Compl. ¶¶ 40-41, 54, 65; **Exhibit B**. His termination letter to the Union stated that that Plaintiff was ineligible for dispatch. **Ex. B**.

The terms and conditions of Plaintiff's employment were governed by Freeman's collective bargaining agreement with the Union. *See* **Exs. A & B**. Articles 4, 13, 14 and 15 of are specifically relevant to this case. Article 4 vests Freeman with the "right to hire, promote, transfer, suspend, or discharge workers" for just cause. *Id.* Article 13 sets forth detailed grievance and arbitration procedures for resolving alleged violations of the CBA, including allegedly improper terminations. *Id.* Article 14 sets forth parallel, but equally mandatory, disciplinary procedures for casual employees such as Plaintiff, including when Freeman may issue a Letter of No Dispatch immediately rather than following the progressive discipline procedure.[1] *Id.* Article 14 also provides a procedure wherein a casual employee, such as Plaintiff, may challenge a Letter of No Dispatch[2] through his or her Union, which may in turn

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[1] As described in the CBA, Freeman generally hires "casual employees" on a job-by-job basis by placing a call to the Union hall. The hall fills the labor order by identifying then unassigned journeyman teamsters who are qualified to perform the work described in the work call, and then dispatches the selected journeymen to Freeman. At the conclusion of the work call, the journeyman is released from Freeman's payroll and returns to the Union hall to await another call from Freeman or any other employer who has a collective bargaining relationship with the Union.

[2] Under the terms of the CBA, "regular employees" have seniority and are subject to discipline or discharge for "just cause." "Casual employees," in contrast, do not have seniority because they are employed periodically and then released back to the hall. Similarly, in the event casual employees perform poorly at the jobsite they are not typically subject to discipline or discharge. They are instead released and, when appropriate, Freeman sends to the Union a letter of "No Dispatch," memorializing the Company's determination that the employee will not

present the casual employee's challenge to a Joint Committee. *Id.* The Joint Committee, which is the "arbitrator" for purposes of resolving the matter, considers and ultimately makes a final determination as to whether the employee engaged in the alleged conduct and if a lesser penalty than a permanent Letter of No Dispatch is warranted. *Id.*

Article 15 of the CBA contains a collectively bargained Drug and Alcohol Policy (the "Drug Policy"). The Drug Policy provides for post-accident testing for illegal drugs, including marijuana. *Id.* Employees who test above the listed cutoff for marijuana will be considered to have violated the Drug Policy. Any dispute between Freeman and the Union regarding the interpretation or application of the CBA is subject to mandatory arbitration. *Id.* If an employee disputes disciplinary action, including discharge, the CBA requires the employee to lodge a written claim within twelve days of the disciplinary action or the grievance is barred. *Id.*

Plaintiff's first cause of action is "unlawful employment practices" pursuant to "lawful use of a product outside premises." Compl. at ¶¶ 69-76. Plaintiff claims Freeman had "discriminatorily terminated [him], because [he] engaged in the lawful use of medical marijuana outside the premises…during his non-working hours." *Id.* at ¶ 71. Plaintiff alleges that his termination was "wrongful" because his "offsite use of medical marijuana [did] not adversely affect [his] ability to perform his job or the safety of other employees and requests an order reinstating his employment." *Id.* at ¶¶ 72, 75.

Plaintiff's second cause of action is for tortious discharge-violation of public policy. *Id.* at ¶¶ 77-82. It essentially duplicates Plaintiff's first claim. Plaintiff asserts Freeman "terminated [him] for reasons which violate public policy including…Nevada's public policy against terminating an employee for the lawful use of medical marijuana…." *Id.* at ¶ 78. The "public policy" Plaintiff refers to is the same statute, NRS 613.333(1)(b) cited in his first cause of action.

The third claim in the Complaint is for "deceptive trade practices." Compl. at ¶¶ 83-102. Again, the cause of action is based on Plaintiff's termination. *Id.* at ¶¶ 92, 96. He baldly alleges that "by engaging in the practices herein, and otherwise acting in a deceitful and fraudulent

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be accepted for future labor calls. Like discipline or discharge, letters of No Dispatch are subject to the CBA's mandatory dispute resolution procedure.

manner, [Freeman] violated the Nevada's Deceptive Trade Practices Act…." *Id.* at ¶89.

Plaintiff characterizes his fourth cause of action as negligent hiring, training, and supervision. *Id*. at ¶¶ 103-108. As with his first, second and third causes of action, the claim is predicated on Plaintiff's discharge. *Id.* Plaintiff asserts Feeman "owed a duty to [Plaintiff] to adequately train and supervise its employees in regard to all correct policies and procedures related to medical marijuana laws and/or **termination polices or procedures**." *Id.* at ¶106 (emphasis added).

Plaintiff's fifth and final cause of action repackages his termination claim as an action for "violation of needs of employee who engages in medical use of marijuana to be accommodate by employer." *Id*. at ¶¶ 109-129. Plaintiff cites to NRS 453A.010 *et seq*. as the basis for this cause of action. This statue, however, does not provide for a private cause of action. *See* NRS 453A.010 *et seq*. Nonetheless, Plaintiff alleges Freeman "failed to provide [him] with a reasonable accommodation and subjected [him] to adverse employment actions, **including terminating [him]**." *Id*. at ¶ 127 (emphasis added).

IV. ARGUMENT

A. Plaintiff's Unlawful Employment Practices Claim Fails as a Matter of Law.

Plaintiff's first cause of action alleges Freeman unlawfully discharged him in violation of NRS 613.333 *et seq*. The text of the statute does not support his claim. To begin with, and as admitted in his Complaint, Plaintiff was discharged because the Company concluded that he was under the influence of marijuana when, while working as a rigger, he dropped a large plate of glass which he was attempting to suspend from the ceiling. Further, this statute was enacted in 1991, prior to the enactment of the medical marijuana legislation cited in Plaintiff's Complaint. It provides:

> It is an unlawful employment practice for an employer to…[d]ischarge or otherwise discriminate against any employee concerning the employee's compensation, terms, conditions or privileges of employment, because the employee engages in the **lawful use in this state of any product** outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees.

NRS 613.333 (1)(b)(emphasis added). Plaintiff does not specifically allege that marijuana is a "product" contemplated by the statute but does allege that his use of marijuana is lawful. Compl. ¶ 71. There also is no legal precedent or legislative history (marijuana was not legalized until *after* NRS 613.333 was enacted) to support Plaintiff's repurposing of the statute, and Plaintiff accordingly fails to state a claim.

Analogous cases in the Ninth Circuit reject the idea that a medicinal marijuana user is entitled to any special deference under the law. In *James v. City of Costa Mesa*, 684 F.3d 825, 828 (9th Cir. 2012), the Ninth Circuit analyzed whether the City of Costa Mesa's decision to raid medical marijuana facilities that are authorized under state law violate Title II of the Americans with Disabilities Act ("ADA"). The Court ruled that marijuana, even when legal under state law, still constituted "illegal drug use" under federal law and thus determined that "the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use." *Id.* at 828, n.3 (*citing* 42 U.S.C. § 12210(a)).

The Colorado Supreme Court effectively summarized the issue in *Brandon Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 18, 350 P.3d 849, 852 (2013):

> At the time of plaintiff's termination, all marijuana use was prohibited by federal law. *See* 21 U.S.C. § 844(a); *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (state law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting use and possession); *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." (citations omitted)). It remains so to date…Plaintiff acknowledges that medical marijuana use is illegal under federal law but argues that his use was nonetheless "lawful activity" for purposes of section 24-34-402.5 because the statutory term "lawful activity" refers to only state, not federal law. We disagree.

Id. As the court in *Coats* explained, it was not required to interpret lawful activity as including activity that is prohibited by federal law but is not prohibited by state law. This Court should reject Plaintiff's first cause of action on the same grounds.

B. Plaintiff's Wrongful Discharge Claim Fails as a Matter of Law.

Plaintiff's second cause of action, for wrongful termination, plainly fails to state a claim for relief under Nevada law. In this state, "tortious discharge actions are severely limited to

those rare and exceptional cases where the employer's conduct violates strong and compelling policy." *Sands Regent v. Valgardson*, 105 Nev. 436, 440 (1989); *see also State v. Eighth Judicial District Court (Anzalone)*, 118 Nev. 151-52 (2002); *Bigelow v. Bullard*, 111 Nev. 1178, 1181 (1995) ("The only exception to the general rule that at-will employees can be dismissed without cause is the so-called public policy exception discussed in Western States, a case in which tort liability arose out of an employer's dismissing an employee for refusing to follow his employer's orders to work in an area that would have been dangerous to him.").

Here, Plaintiff alleged that he tested positive for marijuana following a post-accident drug test and that his use of marijuana was protected. Even if those allegations are true, however, they do not state a claim for tortious discharge as a matter of law. The Nevada Supreme Court has allowed wrongful discharge claims to proceed only when: 1) an employee was terminated for refusing to engage in unlawful conduct, *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1321 (1998); 2) an employee was terminated for refusing to work in unreasonably dangerous conditions, *Western States v. Jones*, 107 Nev. 704 (1991); or 3) when an employee was terminated for filing a workers compensation claim, *Hansen v. Harrah's*, 100 Nev. 70 (1984). Plaintiff's allegations do not fit within any of these protected categories and given the facts of this case, it is unlikely that the Nevada Supreme Court would expand a narrow exception to cover the Plaintiff's claim, particularly since it has rejected similar claims on a number of occasions. *See, e.g., Bigelow*, 111 Nev. at 1187. Nevada courts have never found that terminating an employee for using medical marijuana (in violation of state-adopted federal law) "constitutes a qualifying public policy violation and warrants an exception to the at-will employment doctrine." *Whitfield v. Trade Show Servs.*, No. 2:10-CV-00905-LRH-VCF, 2012 U.S. Dist. LEXIS 26790, at *18 (D. Nev. Mar. 1, 2012).

Other jurisdictions have rejected wrongful termination claims premised on the alleged lawful uses of marijuana. In *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 759, 257 P.3d 586, 597 (2011), the Washington Supreme Court noted that plaintiffs have no legal right to use marijuana under federal law pursuant to 21 U.S.C §§ 812, 844(a). The *Roe* court rejected plaintiff's contention that federal drug law could be completely separated from the

state tort claim for wrongful discharge, and found that "holding a broad public policy exists that would require an employer to allow an employee to engage in illegal activity" would not be proper when assessing narrow exceptions to the at-will employment doctrine. *Id*. The Court should apply the same analysis here.

C. Plaintiff's Deceptive Trade Practices Claim Fails as a Matter of Law.

Plaintiff's third cause of action, brought pursuant to the Nevada Deceptive Trade Practices Act ("NDTPA"), inappropriately attempts to bring his labor dispute under the auspices of a consumer protections statute. The NDTPA was enacted "primarily for the protection of consumers." *Sobel v. Hertz Corp*., 698 F.Supp.2d 1218, 1224 (D. Nev. 2010) (grant of summary judgment overturned on non-DPTA claim by *Sobel v. Hertz Corp*, 674 Fed. Appx. 663 (9th Cir. 2017)). It also provides protection for businesses against unfair competition. *See Southern Service Corp. v. Excel Bldg. Services, Inc*., 617 F.Supp.2d 1097, 1099 (D. Nev., 2007) (citing NRS 598.0953(1)). To that end, Courts in this district have held that the elements of a NDTPA violation are as follows: (1) an act of consumer fraud by the defendant (2) causing plaintiff (3) damage. *Govereau v. Wellish*, 2012 U.S. Dist. LEXIS 151494, Case No. 2:12-CV-00805-KJD-VCF *4-5, 2012 WL 5215098 (D. Nev. 2012) (noting that neither this Court nor any other jurisdiction had ever permitted an "employee to sue an employer under this theory" and citing *Picus v. Wal-Mart Stores, Inc*., 256 F.R.D. 652 (D. Nev. 2009). None of those facts are alleged here and dismissing Plaintiff's claims would be consistent with the majority approach adopted in other jurisdictions. *See, e.g., Anderson v. Sara Lee Corp*., 508 F.3d 181, 190 (4th Cir. 2007) (North Carolina deceptive trade practices act does not extend to employment disputes); *Dobbins v. Scriptfleet, Inc*., 2012 U.S. Dist. LEXIS 23131, 2012 WL 601145, 4 (M.D. Fla. 2012) (Florida's deceptive trade practices act does not apply where there is no consumer relationship between employee and employer).

Moreover, Plaintiff's cause of action under the NDTPA fails the requirement that fraud be pled with particularity. *See George v. Morton*, 2007 U.S. Dist. LEXIS 15980, *11 (D. Nev. Mar 1, 2007) (NRS § 598 statements that rely on fraud must satisfy the pleading requirements of Rule 9(b)). Rule 9(b) requires pleading fraud with particularity; a plaintiff's allegations must

contain the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP,* 476 F.3d 756, 764 (9th Cir. 2007). Plaintiffs must also set forth "what is false or misleading about a statement, and why it is false." *Ebeid ex rel. U.S. v. Lungwitz,* 616 F.3d 993, 998 (9th Cir. 2010). Here, Plaintiff fails to satisfy the heightened pleading standards. He merely alleges that "by engaging in the practices herein, and otherwise acting in a deceitful and fraudulent manner, [Freeman] violated the Nevada's Deceptive Trade Practices Act…." *Id.* Compl., ¶89. NRS Chapter 598 itself is forty-five pages and contains ten definitions of "deceptive trade practice" by itself. *See, e.g.*, NRS 598.0915 to NRS 598.0925. None of them equate a job offer with an "advertisement" as Plaintiff alleges in his Complaint. Compl. ¶ 87. Plaintiff's additional bulk citations to portions of NRS 598 does not satisfy the heightened pleading standards. The lack of specificity in Plaintiff's Complaint mandates this claim be dismissed.

D. Plaintiff's Claim for Negligent Hiring, Training, and Supervision Fails as a Matter of Law.

Plaintiff's fourth cause of action for negligent hiring, training, and supervision (hereinafter "negligent hiring") fails to state a claim because it is preempted by NRS 613.330, *et seq.*, which provides the exclusive remedy for tort claims premised on illegal employment practices. "NRS § 613.330 *et seq.* provides the exclusive remedy for tort claims premised on illegal employment practices. The Nevada Supreme Court, as well as the District Court for the District of Nevada, have held that tort claims premised on discrimination in employment are remedied under the statute." *Brinkman v. Harrah's Operating Co., Inc.,* 2:08-cv-00817-RCJ-PAL, 2008 U.S. Dist. LEXIS 123992 at*3 (D. Nev. October 16, 2008); *see also Valgardson,* 777 P.2d at 900.

In *Valgardson*, 777 P.2d at 900, the Nevada Supreme Court ruled that an employee could not maintain separate tort claims premised upon discriminatory conduct that was subject to the comprehensive statutory remedies provided by NRS 613.310 *et seq*. The Nevada Supreme Court subsequently clarified and strengthened this holding in *D'Angelo v. Gardner*, 107 Nev. 704 (1991), explicitly confirming that the statutory scheme set forth in NRS 613.310 *et seq*. was the

sole remedy available for claims of discrimination, displacing potentially overlapping common law torts. Because there is an adequate statutory remedy for unlawful discrimination, Nevada courts will not permit a plaintiff to recover in tort for the same claims. The U.S. District Court for the District of Nevada has applied the same rationale and dismissed state tort claims when such claims were premised upon discriminatory conduct covered by state or federal statutes with adequate remedies. *See Jackson v. Universal Health Servs.*, No. 2:13-cv-01666-GMN-NJK, 2014 U.S. Dist. LEXIS 129490 (D. Nev. Sept. 15, 2014) (dismissing negligent hiring, supervision and training claim based on alleged race and gender discrimination when there is an exclusive statutory remedy for these claims); *Westbrook v. DTG Operations, Inc.*, No. 2:05-cv-00789-KJD-PAL, 2007 U.S. Dist. LEXIS 14653, at *19 (D. Nev. Feb. 28, 2007) (dismissing negligence *per se* claim based on violations of the Americans with Disabilities Act); *Colquhoun v. BHC Montevista Hospital, Inc.,* No. 2:10-cv-0144-RLH-PAL, 2010 U.S. Dist. LEXIS 57066 (D. Nev. June 9, 2010) (dismissing negligent hiring, supervision and training claim based on alleged discrimination, stating "the fact that an employee acts wrongfully does not in and of itself give rise to a claim for negligent hiring, training or supervision"); *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442 (D. Nev. 1996) (the court dismissed the plaintiff's public policy wrongful discharge claim concluding that an available statutory remedy existed under federal law in the Americans With Disabilities Act ("ADA")).

Moreover, even if the Court were inclined to consider the claim, the allegations in the Complaint – that Freeman failed to ensure that managers are familiar with state marijuana law – do not establish a claim. "The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996). There is no common law duty to hire and/or train employees so that they are aware of the complexities of medical marijuana law under state and federal standards. Indeed, it would be strange, at the least, to hold an employer liable for hiring "unfit" employees when the employer merely acted in accordance with its Drug Policy and federal law. Accordingly, Plaintiff's fourth cause of action must be dismissed for failure to state a cognizable claim for relief.

E. Plaintiff's Fifth Cause of Action Fails to State a Claim for "Violation of the Medical Needs of an Employee Who Engages in Medical Use of Marijuana to be Accommodated by Employer."

Plaintiff's fifth cause of action is for failure to accommodate pursuant to NRS 453A.10, *et seq.* But the allegations in the Complaint do not state a claim. The statute does not contain a private right of action, and Plaintiff's citation to NRS 453A.800(3), which falls under section entitled in part "medical use of marijuana **not required** to be allowed in workplace," conflicts with his contention that his termination for use of marijuana was unlawful. (emphasis added). Plaintiff's other allegations, on their face, render a cause of action based on this statute impossible. Plaintiff claims "**he never requested an accommodation** other than a reasonable accommodation not to terminate him, despite a positive indication for medical marijuana…." Compl., ¶123 (emphasis added). Plaintiff plainly cannot claim that Freeman violated NRS 453A.800 by failing to grant an accommodation that he admittedly "never requested."

Even if Plaintiff's allegations were reframed and recharacterized to fit with the ambit of the statutory text, the claim still fails. A decision by the Supreme Court of Montana is instructive. In *Johnson v. Columbia Falls Aluminum Co*., LLC, 2009 MT 108N, P5, 2009 Mont. LEXIS 120, *5, the Supreme Court of Montana held that Montana's Medical Marijuana Act ("MMA") does not provide an employee with an express or implied private right of action against an employer. *Id.* Instead, the MMA specifically provided that it cannot be construed to require employers to accommodate the medical use of marijuana in any workplace. *Id.*

NRS 453A.800(2) similarly does not "require an employer to allow the medical use of marijuana in the workplace." NRS 453A.800(3) expressly does not "require an employer to modify the job or working conditions of an employee who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer…." The business purposes of Freeman's Drug Policy are clearly articulated in the CBA and the law does not require accomodation. **Ex. A**. Accordingly, even if this Court were to construe Plaintiff's fifth cause of action in the light most favorable to Plaintiff, he cannot state a claim as a matter of law.

V. CONCLUSION

For the reasons set forth above, Plaintiff's Complaint should be dismissed in its entirety because, based on the allegations in the Complaint, Plaintiff's claims fail as a matter of law.

Dated this 31st day of July, 2020.

JACKSON LEWIS P.C.

/s/ Lynne K. McChrystal

Paul T. Trimmer, Bar #9291
Lynne K. McChrystal, Bar #14739
JACKSON LEWIS P.C.
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101

Attorneys for Defendant
Freeman Expositions, LLC Improperly
Named The Freeman Company, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 31st day of July 2020, I caused to be served via the Court's Odyssey File and Serve, a true and correct copy of the above foregoing **DEFENDANT'S MOTION TO DISMISS** properly addressed to the following:

Christian Gabroy
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, Nevada 89012

Attorney for Plaintiff James Roushkolb

/s/ Mayela E. McArthur
Employee of Jackson Lewis P.C.

4849-0657-4022, v. 1

EXHIBIT A

EXHIBIT A

Collective Bargaining Agreement

Between

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

AND

Global Experience Specialists, Inc.

and

Freeman Expositions, Inc.

June 1, 2017 to May 31, 2021

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PREAMBLE

THIS AGREEMENT is made by and between [Employer] (hereinafter referred to as the "Employer") and TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (hereinafter referred to as the "Union"), who, by their signatures endorsed hereon, have signified their approval thereof.

Should any provision of this Agreement violate or conflict with any state or federal law or regulation, such provision shall be null and void, and shall be reopened for negotiations so as to comply with said law or regulation; but the remainder of this Agreement shall be binding upon the parties hereto in accordance with the remainder of its terms.

Whenever in this Agreement employees are referred to in the male gender, it is agreed such reference applies to the female employees as well as male employees.

ARTICLE 1
UNION RECOGNITION

Section A. The Employer hereby recognizes the Union as the sole collective bargaining agent for all employees of the Employer, in the wage scales and classifications set forth herein in the Employer's operation located within the jurisdiction of the signatory Local Union.

Section B. It is the intent and purpose of the parties herein that this Agreement will promote and improve the industrial and economic relationship between the Employer and its employees and to set forth herein the basic Agreement covering rates, hours of work, and conditions of employment to be observed between the parties hereto during the life of this Agreement.

ARTICLE 3
UNION RIGHTS

Section A. The Company agrees that, subject to the provisions of this Agreement, the Union shall at all times be free to exercise its rights provided under the National Labor Relations Act and Law.

Section B. The Business Representative of the Union will be allowed access to the property of the Employer to contact employees relative to provisions of this Agreement at any reasonable time and will cooperate to minimize interference with the Employer's business. The Company agrees not to interfere with any Business Representative of the Union while in the process of his/her duties.

Section C. The Employer will provide bulletin boards for official Union notices at the Employer's warehouse(s) and labor trailer(s) on a permanent basis and temporary bulletin boards during move-in, show days, and move-out at the Las Vegas Convention Center, the Sands Exposition Center and Mandalay Bay. Upon notice that provided bulletin boards for official Union notices are inoperable or in disrepair the Company will repair or replace such boards.

Section D. The Union at its sole discretion will determine who is eligible for dispatch according to its dispatch rules and policies.

ARTICLE 4
MANAGEMENT RIGHTS

Section A.

The Employer shall have the exclusive right to determine its policies and to manage its business, including:

1. Specifying the methods of operation and types of equipment to be used.
2. Determining the size of its working force and the extent to which its operation or part thereof shall be operated or shutdown.
3. The right to hire, promote, transfer, suspend, or discharge workers.
4. Scheduling its operations and selecting the equipment to be used at various jobs, including the right to make technological changes.

The above listing of management rights is not intended to be, nor shall it be considered, a restriction of or a waiver of any of the rights of the Employer not listed and not specifically abridged in this Agreement whether or not such rights have been exercised in the past.

In no case, shall the above management rights be in derogation of any of the terms and conditions of this Labor Agreement between the parties.

Section B. Employer's Rules, Regulations, Policies and Procedures

1. All employees covered by this Agreement are bound by and must comply with all reasonable rules, regulations, policies and procedures of the Employer, show management or facility where the work covered by this Agreement is being performed.

2. The Employer reserves the right to modify, amend or change any existing rules, regulations, policies or procedures and to implement, at any time, new reasonable rules, regulations, policies or procedures, as long as such modifications, amendments or changes or new rules, regulations, policies or procedures do not conflict with any specific provision of this Agreement. The Employer shall provide the Union with a copy of any new rule, regulation, policy or procedure. When practicable, the Employer will provide such copy two (2) weeks prior to implementation, as well as an opportunity to meet and confer at the written request of the Union.

ARTICLE 5
DUES CHECK-OFF

Section A. Upon receipt of an authorization signed by any employee covered by this Agreement from the Union, the Employer shall, in accordance with the terms of such authorization and in accordance with this Agreement, deduct from such employee's earnings, on the first pay period of each month, the amount owed to the Union by the employee for his/her monthly Union dues. Such deducted dues shall be paid to the Union within fifteen (15) calendar days of the time of such deduction.

Section B. Where an employee who is on check-off is not on the payroll during the week in which the deduction is to be made or has no earnings or has insufficient earnings during that week, the employee must make arrangements with the Union and/or the Employer to pay such dues in advance.

Section C. The Employer will recognize an authorization for deductions from wages of any employee, if in compliance with state law, to the Union Political Action Committee or Drive.

Infractions of these rules by a Steward may be cause for discipline.

Section H. The Union will instruct all its members that they have no right to refuse to perform work in accordance with any instructions from Employer supervision and that, in the event they question such instructions, their sole recourse is through the grievance and arbitration process set forth herein.

Section I. The Employer will notify the Steward of any on-the-job injury as soon as possible and also will inform the Union of any serious on-the-job injury.

Section J. The Union may elect not to assign a Steward when jobsite conditions may not warrant one.

Section K. Working Stewards who are required to be away from their assigned duties to perform Steward responsibilities on site will notify the designated managerial representatives assigned to that show or his/her designee prior to leaving those assigned duties. The designated manager and the Steward will decide on the urgency of the request to leave their assigned duties. Whenever practical the assigned work duties should be completed prior to leaving their assigned duties. Such Steward responsibilities will be performed as expeditiously as possible so that the Steward will return to work as quickly as possible.

ARTICLE 13
GRIEVANCE AND ARBITRATION PROCEDURE

Section A. A grievance shall be limited and only defined as a dispute regarding the interpretation and/or application of the provisions of this Agreement arising during the term of this Agreement filed by the Union signatory to this Agreement or by an employee covered by this Agreement alleging a violation of terms and provisions of this Agreement.

Section B. Procedure. All grievances covered by this Article shall be handled exclusively in the following manner:

STEP ONE:

A grievance may not be filed unless the issue is first discussed informally at the jobsite between a Representative designated by the Union and a Supervisor(s) designated by the Employer, both with the authority to resolve a dispute, and that Supervisor(s) has refused or failed to adjust the issue on an informal basis. Any such informal resolution must be implemented within the time agreed upon in the resolution, or if a pay issue, within ten (10) business days. Such informal resolutions are not precedential for either side. If the Union was unaware of the alleged violation or grievance the Union may address such in Step Two.

STEP TWO:

All grievances to be valid shall be filed with the designated representative of the Employer in writing via verifiable email, facsimile, Certified Mail or in person within ten (10) business days after the first occurrence of the event giving rise to the grievance, or within ten (10) business days of the time the employee or the Union reasonably could have acquired knowledge of the event. The Union must obtain a signed receipt of the grievance from a designated Employer Representative(s). A grievance must be reduced to writing, citing the facts involved and the specific Article(s) and Section(s) of this Agreement alleged to have been violated. A grievance which does not meet these requirements shall be null and void, and will not be processed in accordance with this procedure.

STEP THREE:

The Employer Representative(s) and the Union Representative(s) will meet and discuss the grievance, within fourteen (14) calendar days. Prior to such meeting the Union must designate the grievance or grievances to be discussed. More than one (1) meeting may be requested and held within the fourteen (14) calendar day period. If the Employer Representative(s) does not make himself/herself available to meet within the fourteen (14) calendar day period, the Union may take the grievance to arbitration. If the Representative of the Employer and the employee and/or the Representative of the Union are unable to resolve the grievance within twenty-one (21) calendar days after the filing of the grievance, the grievance may only be submitted to arbitration by the Union giving the Employer written notice of its intent to do so within said twenty-one (21) calendar days. If the grievance is resolved at this step, such resolution will be reduced to writing within said twenty-one (21) days and shall be implemented within ten (10) calendar days. Such written resolution or the notice of intent to arbitrate from the Union shall be submitted via verifiable email, facsimile, Certified Mail or hand delivered.

Section C. Arbitration. An impartial arbitrator shall be selected from a panel of seven (7) arbitrators obtained from either the National Association of Arbitrators or Federal Mediation and Conciliation Services. The party requesting the panel of arbitrators shall direct the aforementioned to supply only members of the National Academy of Arbitrators, unless the parties mutually agree upon an arbitrator. The fees and expenses of the arbitrator shall be equally shared by the Company and the Union.

Section D. The arbitrator shall hold a hearing within ninety (90) calendar days of his/her selection unless otherwise agreed. The hearing shall not be public. The arbitrator shall afford the Union and the Employer liberal rights to present evidence, exhibitory, documentary and witnesses, and to examine and cross-examine witnesses. The Union and the Employer may be represented as individually desired. Upon the arbitrator's or Union's request, or Employer's desire, and when practicable, the Employer and the Union shall make employees available as

witnesses. All employee witnesses shall be free of restraint, interference, coercion and reprisal and, in wages, shall be kept whole by the party requesting said witness.

Section E. The arbitrator shall not have the authority to modify, amend, alter, add to or subtract from any provision of this Agreement. The Union shall have the right to grieve and the arbitrator shall have the right to rule on any grievance within the scope of Section A as long as the grievance is filed and processed within the time limits of this Article, even if the grievance is filed after the termination date of this Agreement. However, the Union shall not have the authority to grieve and the arbitrator shall not have the authority to rule on any matter, whether or not it meets the definition of a grievance under Section A, which arises after the termination date of this Agreement, or which is not filed or processed within the time limits specified in this Article.

Arbitrator will be allowed a reasonable amount of time, if needed (one to two hours) following the hearing to prepare his/her bench decision and provide such decision in writing no later than thirty (30) calendar days following the hearing date.

1. In cases where a bench decision is not given the arbitrator will render the finding and award in writing within thirty (30) days after the conclusion of the hearing.

2. In cases where a bench decision is not given and post briefs are written such briefs shall be due to the arbitrator no later than thirty (30) days from the termination of the hearing. The arbitrator will render the finding and award in writing within thirty (30) days of the receipt of post hearing briefs.

3. In cases where a bench decision is not given and post briefs are written and a stenographer or other recording device is used such briefs shall be due to the arbitrator no later than thirty (30) days from the receipt of such minutes or recording. The arbitrator will render the finding and award in writing within thirty (30) days of the receipt of post hearing briefs.

The arbitrator shall have the power to and may, from time to time, provide reasonable continuances and postponements of the hearing(s) as deemed appropriate or as agreed by the Union and the Employer. Parties will agree to meet after the normal work day (nights) and/or Saturdays to accommodate the Arbitrator's schedule.

At arbitration meetings there will be no stenographers allowed or other recording devices, nor post hearing briefs, unless mutually agreed to. Mediator and arbitration expenses will be split equally between both parties.

Section F. In any arbitration hearing concerning the discipline and/or discharge of a Regular Seniority employee, for a named infraction set forth in the sub-paragraphs of Article 14, Section B , the arbitrator's sole authority shall be to determine if the employee committed the act or

infraction alleged by the Employer. The arbitrator shall have no authority to modify the disciplinary penalty imposed by the Employer if the arbitrator finds the employee did commit the act or infraction alleged by the Employer.

Section G. The arbitrator shall base his/her ruling on a preponderance of the evidence. The arbitrator shall have no authority to modify the standard of proof required to anything other than a preponderance of the evidence.

Section H. The expenses of arbitration, including the arbitrator's fee and expenses, the cost of the court reporter transcript, and the cost, if any, of the facilities in which the hearing is held, shall be borne equally by the Employer and the Union. All expenses incurred by either party in the preparation or presentation of its case are to be borne solely by the party incurring such expense.

Section I. The time limits contained in this Article are to be strictly enforced. Any grievance shall be considered null and void if not filed and/or processed by the Union or the aggrieved employee in strict accordance with the time limitations set forth in this Article unless these time limitations have been expressly extended or waived in writing by the Employer and the Union.

Section J. Nothing herein shall preclude the Union or an employee covered by this Agreement from exercising the statutory rights of the employee to process an alleged case(s) of illegal discrimination with any regulatory authority having jurisdiction over such cases or in court.

ARTICLE 14
DISCIPLINE/DISCHARGE/LETTER OF NO DISPATCH

Section A. Casual Employees

1. Progressive Discipline – Casual Employees

The purpose of this procedure is to provide the affected casual employee with notice of his/her deficiencies or problems and to provide the employee with the opportunity to take corrective action. To be valid any such written warning must be issued within ten (10) business days after the Employer first became aware of the alleged deficiency or problem warranting the warning notice. A copy of any written warning notice must be given or sent to the employee when the warning is issued. A copy of the warning notice must also be sent to the Union by verifiable email, fax or by certified mail. The Employer, prior to issuing a Letter of No Dispatch, must issue the employee at least two

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(2) written warning notices, of the same or similar offense, within a twelve (12) month period, stating the deficiency or problem which prompted the written notice. If the Employer issues a Letter of No Dispatch for any reason other than those set forth below of this article the Employer must first follow the progressive procedure set forth herein

2. Letters of No Dispatch – Casual Employees

The Employer may immediately issue a Letter of No Dispatch to a casual employee barring that casual employee from employment with the Employer for any of the following reasons:

a. Possession of any weapon, other than a tool of the trade, on any jobsite or on any Company premises, including parking lots or violence or threats of violence toward another person except reasonable self-defense.

b. Dishonesty, including but not limited to stealing/theft, falsification or the unauthorized use, removal or possession of property not belonging to the employee.

c. Refusal of a job assignment, except for safety reasons, and/or including, but not limited to, quitting in response to an assignment, leaving jobsite and/or assignment without authorization, except in the case of a verifiable emergency.

d. Harassing, obscene or abusive behavior toward another person.

e. Solicitation of, or acceptance of any gratuity from any person associated with a trade show.

f. Reckless behavior or willfully or negligently misusing, destroying or damaging any property of the Employer, show management, exhibitor or convention facility.

g. Work done in competition with the Employer while employed by the Employer.

h. Insubordination or other refusal to follow the order of a supervisor or other management representative of the Employer.

i. Conviction of a felony involving assault, theft, terrorist activity, or any other felony that adversely affects employment.

In addition to the above, the Employer may also immediately issue a Letter of No Dispatch to a casual employee for violation of the Drug and Alcohol Policy.

In the event the Employer suspends a casual employee pending an investigation of an alleged violation covered by this Section, the Employer must complete the investigation within ten (10) business days. At the end of that period, the Employer must either issue a warning notice or

Letter of No Dispatch or the Employer must reimburse the employee for work missed during the period of the investigation, unless mutually agreed otherwise. All violations other than those covered by this Section shall not be cause for suspension.

The Employer will consider factors such as an employees work history and past infractions when determining the duration of a suspension or a Letter of No Dispatch.

Any Letter of No Dispatch shall contain the date of the event; article(s) and section(s) of the Collective Bargaining Agreement relied upon to issue the Letter and the duration of the No Dispatch. Any casual employee may challenge the No-Dispatch Letter by filing a written claim with the Union against the Employer within twelve (12) days of mailing of such a No-Dispatch Letter to the employee by Certified Mail. The Employer shall fax or send via verifiable email a copy to the Union the same day it is mailed to the employee. A designated representative of the Union shall evaluate the merit of the claim. If that Union representative determines the claim has merit, the Union may present the claim to a Joint Committee described below no later than twenty (20) days after receipt of the claim by the Union.

Such Committee shall consist of two (2) representatives, one appointed by the Employer and the other shall be the Secretary-Treasurer of the Union or his/her designee if the Secretary-Treasurer is unavailable during the twenty (20) day period. In no event shall the designee be the same person who performed the Union's initial evaluation of the claim.

3. Joint Committee – Casual Employees

The Joint Committee shall have the ability to resolve the claim in one of the following ways:

a) The Committee finds that the employee has engaged in such conduct, and the No-Dispatch Letter should remain in force.

b) The Committee finds that the Employer has failed to prove that the employee engaged in the conduct prohibited by any of the reasons set forth in the No-Dispatch Letter, then the No-Dispatch Letter shall be null and void and the employee will be made whole for all lost wages and benefits.

c) The Committee may agree to compromise on a substitute decision as a resolution. The Committee has the authority to reach a decision of a lesser penalty than a permanent Letter of No Dispatch. Such decision, resolution or compromise shall be final and binding on all parties and will be non-precedential.

If the Committee reaches a deadlock the case may be filed to a binding arbitration. The authority of the arbitrator shall be specifically limited to the matters submitted to the arbitrator. The arbitrator shall have no authority in any manner to amend, alter, modify or change any provisions of this Agreement. The arbitrator shall have the authority to resolve the claim in one of the aforementioned ways.

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Where the Joint Committee by majority vote settles a dispute, such decision shall be final and binding on both parties and the employee(s) involved, with no further appeal.

Section B. Regular Seniority Employees

1. Cause for Discipline.

No regular seniority employee shall be discharged, suspended without pay or subjected to other disciplinary action without just cause.

When a regular employee is discharged or disciplined, any prior disciplinary action of that employee during the term of his employment shall be relevant in determining the just cause of the discharge or discipline. Prior disciplinary action is not a condition precedent to the discharge or to discipline of a regular employee. The sole condition shall be whether the discharge or discipline was for just cause.

The parties recognize that many different types of conduct or infractions can constitute just cause for discharge or for disciplinary action. The parties agree that just cause for discharge without prior discipline shall include, but not be limited to:

a) Gross insubordination toward a supervisor or toward any other person at the Employer's premises or show site.

b) Dishonesty.

c) Recklessness resulting in property damage or personal injury while on duty.

d) Loss, revocation of driver's license for employees in runner classification. Loss, revocation are defined as per state laws, and Employer must be notified by employee of any pending action.

e) Drunkenness or drinking alcohol on duty.

f) Violation of the Drug and Alcohol Policy in a manner which warrants discharge under the Drug and Alcohol Policy incorporated in this Agreement.

g) Fighting while on duty or on the Employer's premises or at the Employer's jobsite, excepting reasonable self-defense.

h) Refusal to follow the order of a supervisor or other representative of the Employer.

i) Possession of any weapon, other than tool of the trade, on any jobsite or on the Company premises, including parking lots.

j) Unauthorized use of company equipment or failure to immediately report an accident, or carrying unauthorized passenger.

2. Whenever the Employer receives verifiable information that a regular seniority employee may have engaged in conduct warranting discipline, the Employer shall issue discipline, if any, within ten (10) calendar days of the time the Employer received such information or could reasonably have acquired knowledge of the information. If such initial discipline is a suspension pending further investigation, the Union and the Employer shall meet within ten (10) calendar days thereafter for the Union to present the grievant, witnesses, and/or evidence regarding the alleged conduct of the employee. The Employer shall issue final discipline, if any, within ten (10) calendar days after such meeting. These time limits may be extended by mutual Agreement of the parties. Nothing in this provision requires that the Employer suspend a regular seniority employee prior to assessing discipline up to and including discharge.

3. In disciplinary cases of regular seniority employees which do not warrant discharge without prior discipline under the terms of Section A of this Article, the Employer will not discharge or suspend without pay any regular employee unless that employee has been given at least two (2) written disciplinary warning notices within 12 months.

4. Copies of written warning notices shall be sent to the Union.

5. The Employer shall not dismiss nor reprimand an employee for making a complaint or giving evidence with respect to alleged violations of any provisions of this Agreement.

6. Mitigation of Damages. Any regular seniority employee covered by this Agreement who is discharged by the Employer and who disputes his discharge was for just cause shall have an affirmative duty to mitigate any potential damages which might result to the Employer in the event the discharge action involved is subject to Article 13-Grievance/Arbitration and an arbitrator overrules the discharge. An arbitrator acting under the terms of this Agreement who sustains the grievance of a discharged employee shall have no authority to award any back pay to that employee unless that employee or the Union has affirmatively proven by a preponderance of the evidence that the employee has fulfilled his duty to mitigate damages at all times since his discharge.

7. Any regular seniority employee who feels he/she has been unjustly discharged or suspended has the right to refer the action to the grievance procedure of this contract.

ARTICLE 15
DRUG AND ALCOHOL POLICY

[Employer] (hereinafter referred to as the Company) and the Union are committed to providing the safest and most productive work environment for all of the Company's employees represented by the Union. This policy is therefore to ensure that all the Teamster represented employees of the Company work in an environment free of the negative effects of illegal drug use and the misuse of legal drugs and alcohol. The Company and the Union recognize that early recognition and treatment of substance abuse problems are key to successful rehabilitation, and therefore, strongly encourage employees prior to violating the terms of this Article to seek help and use their Employee Assistance Program.

Section A. PROHIBITED CONDUCT

All Teamster represented employees are prohibited from:

1. Using, possessing, manufacturing, distributing or selling illegal drugs, or legal drugs in an illegal manner, at any job site, on any Company properties (defined here and throughout this Article as properties which are owned, leased or are under contract to use), on Company business, in company supplied vehicles or vehicles being used for company business or during working hours.

2. Unauthorized use of alcohol, using illegal drugs or misusing legal drugs (in excess of that recommended or approved by the prescribing physician) at any job site, on any Company properties, on company business, in company supplied vehicles or vehicles being used for company business or during working hours.

3. Being under the influence of alcohol, illegal drugs or misused legal drugs (in excess of that recommended or approved by the prescribing physician) at any job site, on any Company properties, on company business, in company supplied vehicles or vehicles being used for company business or during working hours.

4. Possession and/or storage of any illegal drug or unsealed containers of alcohol at any job site, on any Company properties, in a Company vehicle, company supplied vehicle or vehicle used for company business or while on company business.

5. Substituting, adulterating or tampering with any breath or urine sample used in the testing process.

6. Failing to submit a breath or urine sample for testing in the following manner:

    a. Failure to provide an adequate breath or urine sample for testing without a valid medical reason.

b. Failure within two (2) hours of signing the consent form, to produce a sample suitable for testing, e.g. such as a sample that falls out of proper temperature range.

7. Refusing to consent to testing or engaging in conduct that clearly obstructs the testing process including but not limited to failure to sign the required forms, failure to report to the testing site within the time allocated, failure to cooperate with the testing personnel and failing to remain readily available for a test.

8. Failure to cooperate and/or successfully complete any requirements of the evaluation and rehabilitation processes.

9. *Conviction or guilty plea in any court proceeding involving the distribution, sale or* trafficking of illegal drugs or alcohol.

10. Failure to notify a supervisor or manager of the use of prescription or over-the-counter drugs which the employee should have known may alter the employee's physical or mental ability to perform his/her job functions. Further, employees must follow all physician, manufacture or package insert directions when taking prescription or over-the-counter drugs.

11. Failure to pass any required drug and/or alcohol test as mandated by this policy.

Section B. TESTING

Drug and alcohol testing is an effective way to determine if an employee is inappropriately using drugs and/or alcohol. The methods used to determine the presence of alcohol and/or *drugs shall be urine for drugs and breath testing for alcohol.*

The Company may do the following tests for the presence of illegal drugs and/or alcohol in an individual's system.

1. REASONABLE SUSPICION DRUG AND/OR ALCOHOL TESTING. If the Company has a "reasonable suspicion" that an employee has violated this Policy, the Company may require the employee to submit to both alcohol and controlled substance tests immediately. "Reasonable suspicion" means that a management representative, based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee, has reached a good faith suspicion of such a violation. A supervisor's report must be available to the Union within 24 hours.

2. POST-ACCIDENT DRUG AND/OR ALCOHOL TESTING. Employees involved in an accident at a job site or on Company properties, on company business, during working hours, or while driving a company-supplied vehicle or other vehicle used for company business

when such accident involves any other person or results in either (a) a fatality, (b) bodily injury or (c) property damage will be subject to a post-accident drug and/or alcohol test. The employee must remain readily available at the medical facility, worksite or site of the accident for the purpose of submitting to the drug and/or alcohol test.

3. GOVERNMENT REQUIRED DRUG AND/OR ALCOHOL TESTING. The Company fully complies with all government regulations concerning drug and/or alcohol testing including testing under the Department of Transportation's (DOT) Anti-drug and Alcohol Abuse Statutes as administered by the Federal Highway Authority (FHWA).

4. RANDOM DRUG AND/OR ALCOHOL TESTING. All employees will be subject to unannounced random drug and/or alcohol testing during any working hours and will be included in the pool for selection. The selection of the employees to be tested out of that pool will be done by an independent testing facility or other entity outside of the Company's control. The random selection procedure will ensure that all employees will be treated fairly and equally. The testing will occur on a periodic basis reasonably spread throughout the year. The Company reserves the right to determine and also to change the percentage of employees to be randomly selected. At the completion of testing, the Employer shall immediately provide the list used to call the employees for the present round of testing to the Union.

When it is determined that an employee is to be tested other than random testing, the Employer shall summon the presence of a Union official and permit at least thirty (30) minutes for a Union official to arrive. The parties agree that time is of the essence in such matters and, if a Union official fails to arrive within the time set, the Employer may send the employee to be tested. In the case of reasonable suspicion testing, if the management representative still maintains a good faith suspicion of a violation after the arrival of the Union official, the employee may be sent for the test. A Union Steward or other designated Union official may accompany the employee, if such Union official arrives within the time set forth in this Agreement, to witness and confirm the collection procedures. Any dispute as to the reasonableness of the event shall be subject to the grievance procedure.

Section C. COLLECTION AND TESTING PROCEDURES

Along with the concern to maintain a safe and drug-free workplace for all of the Company's employees represented by the Union, the Company and the Union are also concerned about protecting the rights of such Company employees under this anti-drug and alcohol program. They want to ensure that the collection and testing procedures are conducted in a scientifically valid program to insure fairness, scientific accuracy and the highest integrity in the process. Under this program, the Company will retain the services of an independent Health & Human Services approved laboratory which will test by way of urine collection for the presence of amphetamines, marijuana metabolites, cocaine metabolites, opiate metabolites (heroin) and phencyclidine (PCP). The laboratory will further test for the presence of alcohol by taking

breath samples through the use of a DOT approved breathalyzer. In addition, to insure fairness and integrity in the process, the collection and chain of custody procedures, Medical Review Officer review of positives only, and split sample testing will also be adopted by the Company as part of this program. The Employer may, at its sole option, in the case of reasonable suspicion or post-accident testing, have the laboratory perform a quick test which will quickly screen out all negatives to allow the employee who tests negative to return to work as quickly as possible. Should the quick test result in a "non-negative" the laboratory shall then initiate the normal testing procedure under this policy. In addition, the Company will submit to the lab periodic blind samples to insure the integrity of the process.

Upon the completion of all such tests, except for a reasonable cause test, the employee may, at the Employer's option, be returned to work if he or she is otherwise physically released to return to work and shall continue to work as assigned pending the test results. For employees tested under the reasonable cause standard, they shall not return to work until the test results are reported to the Employer. If the test is negative, the employee shall be returned to work status and paid for whatever time he or she would have worked in the absence of the test.

Section D. EVALUATION AND VIOLATION RATES

All employees will be tested based upon the cut off levels under the DOT rules. In addition, certain employees, such as those holding a commercial driver's license operating vehicles in interstate commerce fall within the jurisdiction of those DOT rules and are subject to the sanctions imposed by those rules and the provisions of this policy. Under those rules, the minimum cut-off levels are as follows:

a. ALCOHOL - an alcohol concentration of .04 or above

b.

ILLEGAL DRUGS	Screening Cut-off	Confirmation Cut-off
Amphetamines	1,000	500 ng/ml
Cocaine	300	150 ng/ml
Marijuana	50	15 ng/ml
Opiates	2,000	2000 ng/ml
Phencyclidine	25	25 ng/ml

Under this program, any employee who tests at or over these cutoff levels for drugs or alcohol or engages in any of the prohibited conduct as enumerated herein has violated this policy.

Section E. CONSEQUENCES FOR VIOLATION OF THIS POLICY

Once the Employer has established that "chain of custody" has been met and the cut-off levels have been exceeded, the following shall apply:

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Once an employee violates any provision of this Policy, other than by failing a drug and/or alcohol test and/or by violating Section A.6 of this Policy, the employee shall be immediately and permanently terminated from employment with the Company and immediately and permanently ineligible for dispatch by the Union to any Employer signatory to a convention industry Agreement with the Union.

Once an employee fails any drug and/or alcohol test under this Policy and/or violates Section A.6 of this Policy, the employee shall be immediately removed from the Company's payroll and is immediately suspended from employment and ineligible for dispatch by the Union to any Employer signatory to a convention industry contract with the Union for a period of thirty (30) days or the completion of the MAP program, whichever is later. Such an employee must, as a condition of re-eligibility for dispatch, complete any required evaluation and rehabilitation programs as required by the Membership Aid Plan (MAP), pass a return-to-duty test taken at the employee's cost prior to his/her return to work, abide by all terms of this Drug and Alcohol Policy and be subject to, in addition to testing under other provisions of this Policy, six (6) additional company paid follow-up drug and/or alcohol tests within a period of one year following the date that the employee returns to work with that Company, but no more than a total of six (6) times during the five (5) year period following that date.

Once an employee who is employed or dispatched pursuant to the preceding paragraph again fails any drug and/or alcohol test under this Policy, such employee shall be immediately and permanently terminated from employment and immediately and permanently ineligible for dispatch by the Union to any Employer signatory to a convention industry contract with the Union.

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EXHIBIT B

EXHIBIT B

FREEMAN

July 11, 2018

via Verifiable Email
& U.S. Mail

Danny Jackson
Business Agent
Teamsters Local 631
700 N. Lamb Blvd.
Las Vegas, NV 89110

Re: LETTER OF TERMINATION
James Roushkolb (–4480) Journeyman

Dear Mr. Jackson,

Freeman regrets the error that occurred on June 27, 2018 when we mailed our letter indicating a first positive drug result. On June 9, 2018 Mr. Roushkolb did have a second positive result with the first positive occurring January 19, 2009. This document supersedes our correspondence of June 27, 2018.

Therefore, Mr. Roushkolb is immediately and permanently terminated from employment effective July 11, 2018 in accordance with the terms of the current Collective Bargaining Agreement, Drug and Alcohol Policy, and shall be permanently ineligible for dispatch to any employer signatory to the Convention Industry contract with the Teamsters Union, Local 631. Additionally, Mr. Roushkolb may not work at any Freeman facility.

Please call me at 702-579-1778 should either you or Mr. Roushkolb have any questions, desire further clarification, or need additional information.

Sincerely,

Julie Messer
Manager - Risk Management

mc

cc: James Roushkolb, U.S. Certified Mail # 7013 2630 0002 2750 9913
Allen Lind, Vice President-General Manager
John Giordano, General Manager
Mike Lamoreaux, General Manager
Cheryl A. King, Regional Director, Labor Relations
Dede King, Office Manager
Marsha Conrad, Labor Relations Admin.
Dispatch, Teamsters Local 631

Electronically Filed
8/7/2020 5:05 PM
Steven D. Grierson
CLERK OF THE COURT

OPP

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Attorneys for Plaintiff James Roushkolb

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

JAMES ROUSHKOLB, an individual;

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive;

Defendant.

Case No: A-19-805268-C
Dept.: VIII

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW Plaintiff James Roushkolb ("Plaintiff" or "Roushkolb"), by and through his attorneys Christian Gabroy, Esq. and Kaine Messer, Esq. of Gabroy Law Offices, and hereby submits his Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint ("Motion").

This Response is made and based upon the following Memorandum of Points and Authorities, other papers and pleadings in this action, and any oral argument this Honorable Court may entertain.

Dated this _7_ day of August, 2020

GABROY LAW OFFICES

By: _/s/ Christian Gabroy_____
Christian Gabroy (#8805)
Kaine Messer (#14240)
170 S. Green Valley Pkwy, Suite 280
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an important matter concerning the rights and privileges guaranteed to Nevada workers by our state Constitution. As will be discussed *infra*, Plaintiff James Roushkolb relied on and followed his physician's advice, and in doing so exercised such Constitutional rights. For doing so, Defendant terminated him.

Seeking redress, Plaintiff filed his complaint in the Eight Judicial District Court in Clark County, Nevada on or about November 12, 2019. *See* Plaintiff's Nov. 12, 2019 Complaint ("Complaint"). On or about December 5, 2019, Defendant The Freeman Company, LLC ("Defendant") removed this action to federal court. *See* Defendant's Petition for Removal, December 5, 2019, as Exhibit 1. On or about January 21, 2020, Defendant moved to dismiss the matter in federal court. *See* Defendant's Motion to Dismiss, January 21, 2020, as Exhibit 2.

This is Defendant's second bite at the apple in its effort to dismiss Plaintiff's claims. Defendant's first attempt failed, and it brings such claims to this Court once again. After responsive pleadings in federal court, the Hon. Judge Mahan found the Defendant's federal Labor Management Relations Act ("LMRA") claims did not apply, and as such, the court denied the motion to dismiss as moot, and remanded the matter to this Court on or about July 2, 2020. *See* Hon. Judge Mahan's Order, July 7, 2020, as Exhibit 3.[1]

Defendant now asks this Court to deny Plaintiff his voter-approved, Constitutionally-protected rights via their Motion. Each of Plaintiff's causes of action are grounded in our state Constitution, our statutes, and our common law. For the reasons stated herein, Plaintiff respectfully requests this Honorable Court deny Defendant's Motion in its entirety so that his claims may proceed and be decided on their merits.

II. FACTUAL ALLEGATIONS

In the 1998 and 2000 general election, Nevada voters approved the amending of

[1] This Court may consider such records for purposes of a motion to dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("[A] court may take judicial notice of matters of public record." (internal quotation marks omitted)).

our state Constitution to specifically provide for the use of marijuana for medical purposes by Nevadans. Complaint, p. 4. In 2001, the legislature exercised its power under the initiative by passing A.B. 453 which established Nevada's laws, codified in NRS Chapter 453A, regulating the use of medical marijuana. A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66. *Id*. at p. 5. When the Legislature passed A.B. 453, it explained in the preamble that it intended for the bill to "carry out the will of the people of this state and to regulate the health, medical practices and well-being of those people in a manner that respects their personal decisions concerning the relief of suffering through the medical use of marijuana." A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053. *Id*. at p. 5. Nevada then began offering medical marijuana registration cards to identify patients using medical marijuana. *Id*.

In accordance with Nevada law, the State of Nevada issued Roushkolb his Medical Marijuana Patient Identification Card on or about May 14, 2018. *Id*. at p. 6-7. On or about the winter of 1995, Roushkolb, a former corrections officer with the Cuyahoga County Sheriff's Department, was ambushed, assaulted, and nearly killed by a dangerous inmate. *Id.* As a result, Roushkolb suffers from PTSD and severe pain, a disability that substantially limits one or more of his major life activities. *Id*. at p. 6. Despite his disability, Plaintiff still acts as a primary caregiver for his 92-year-old father, a veteran of World War II. *Id.*

Defendant hired Roushkolb in or around January 2018. *Id*. at p 7.

In or around June of 2018, despite the lack of proper equipment, Defendant's management gave an unsafe order to Roushkolb and a coworker to tear down a large piece of plexiglass suspended approximately fifteen feet off the ground. *Id*. at p. 7. Roushkolb and his coworker were forced to use a single, two-sided, twelve-foot high ladder to try and lower the plexiglass, where such an act would normally involve machinery such a scissor lift. *Id*. Before Roushkolb could get into position on the ladder to get a controlled grip on his side of the glass, his coworker let go, causing the glass to fall to the floor and shatter. *Id*. at p. 7-8. No one, including Roushkolb and the coworker, was injured in any

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way by the plexiglass falling to the floor. *Id*. at p. 8. Roushkolb was not impaired in any way at the time of the incident. *Id*. Indeed, at no time did Roushkolb work for Defendant while under the influence of marijuana. *Id*. at p. 14.

Roushkolb then underwent a drug test as directed by the Defendant. *Id*. at p. 8. Roushkolb tested positive only for THC, consistent with his medical marijuana usage and Constitutional rights. *Id*.

As a result of the positive test outcome, the Defendant terminated Roushkolb on or about July 11, 2018 because he tested positive for marijuana use consistent with his physician-recommended usage. *Id*.

III. ARGUMENT

A Nevada Rule of Civil Procedure 12(b)(5) motion must be granted "only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). Here, Plaintiff has presented a set of facts for which relief can be granted, and the claims of which are well-pled in Nevada law. Even the Ninth Circuit holds that "[a]ll allegations of material fact are taken as true and construed in the light most favorable to Petitioner." *Epstein v. Wash. Energy Co.,* 83 F.3d 1136, 1140 (9th Cir. 1996). A Court must take, "[a]ll allegations of material fact as true and construe[ ] them in the light most favorable to the nonmoving party." *Burgert v. Lokelani Bernice Pauhi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). Further, there is a strong presumption against dismissing an action for failure to state a claim. *Gilligan v. Jamco Dev. Corp.* 108 F.3d 246, 249 (9th Cir. 1997).

NRCP 8(a) dictates that a complaint shall contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement is necessary to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *William O. Gilley Enter, Inc. v. Atl. Richfield Co*., 588 F. 3d 659, 667 (9th Cir. 2009)(per curiam). Similarly, under *Twombly*, 550 U.S. 544, 555 (2007), the Complaint must give a defendant "fair notice of what the claim is and the grounds upon which it rests." Dismissal of a claim under Rule 12(b)(5) for failure to state a claim is appropriate

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only if the complaint fails to satisfy the requirements of NRCP 8(a), and here, the requirements of NRCP 8(a) are sufficiently met.

As stated in *Gilman v. Davis*, 690 F. Supp.2d 1105, 1115 (E.D. Cal. 2010), "'Plausibility,' as it is used in *Twombly* and *Iqbal*, does not refer to the likelihood that a pleader will succeed in proving the allegations. Instead, it refers to whether the non-conclusory factual allegations, when assumed to be true, allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

Further, the Supreme Court stated in *Iqbal* that the "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." 556 U.S. at 678.

Here, Plaintiff has met this lenient standard. As discussed below, Plaintiff's claims have been properly alleged and are firmly grounded in Nevada law. As such, Defendant's Motion fails in its entirety.

A. Plaintiff's Claims Should Not Be Dismissed As They Have Been Sufficiently Pleaded And Arise Under Nevada Law

Defendant attempts dismissal under Nev. R. Civ. P. 12(b)(5). As Defendant addresses each of Plaintiff's causes of action individually, for clarity and to assist this Court, Plaintiff will do the same.

1. Plaintiff's NRS § 613.333 claim has been sufficiently pleaded.

At the outset, Defendant contends, incorrectly, that Plaintiff's NRS § 613.333 claim should be dismissed because "as admitted in his Complaint, Plaintiff was discharged because the Company concluded that he was ***under the influence*** of marijuana when, while working as a rigger, he dropped a large plate of glass (emphasis added)…" See Defendant's July 31, 2020 Motion to Dismiss, p. 5, lines 18-21 ("Motion"). Of course, Plaintiff's Complaint alleges no such thing. Instead, Plaintiff properly pleaded he was terminated by Defendant "because he tested positive for marijuana use consistent with his physician-recommended usage." *See* Complaint, p. 7, lines 22-23. Notably, Plaintiff did not allege that he was "under the influence" at work, nor does he allege he was terminated

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by Defendant incorrectly concluding as such. To the contrary, Plaintiff's Complaint states "[a]t no time did Roushkolb work for Defendant under the influence of marijuana." *Id*. at lines 16-17.

Additionally, Defendant mistakenly relies on *James v. City of Costa Mesa* in support of its claim that Plaintiff is not entitled to "special deference" of his protected right to medical marijuana. Initially, it should be stated that Plaintiff is not requesting "special deference," but rather what should be standard consideration of his existing Constitutional rights. Further, *Costa Mesa* does not apply here, as Plaintiff has not brought claims under the Americans with Disabilities Act ("ADA"). In *Costa Mesa*, the Ninth Circuit held that the Plaintiff was not entitled to an exception under the ADA's "illegal drug exclusion." *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012). However, here, no such claims under the ADA have been asserted or brought by Plaintiff, and thus this argument is misplaced. As is discussed below, Nevada has taken careful steps to ensure that medical marijuana is recognized as lawful under our state laws, and not federal law.

Further, Defendant cites to *Coats v. Dish Network, LLC*, 350 P.3d 849 (2013), which held that medical marijuana was not lawful under a Colorado 'lawful use' statute because it is prohibited under federal law. *See* Motion at p. 6. However, *Coats* is inapplicable to Plaintiffs' NRS § 613.333 claim because the Colorado statute is distinguishable from Nevada's § 613.333. Further, unlike in Colorado, the Nevada Legislature intended to interpret medical marijuana laws under a state law.

Indeed, Nevada's lawful use statute is explicitly tailored to Nevada state law, unlike the Colorado statute examined in *Coats*. Colorado's statute prohibits an employer from terminating an employee for engaging in "any **lawful activity** off the premises . . . during nonworking hours," whereas Nevada's statute prohibits discrimination based on "the lawful use in **this state**." *See* NRS § 613.333 (emphasis added). Nevada's lawful use statute is more specific in that it restricts its reach to Nevada, and does not interfere with federal law. Additionally, unlike Colorado law, as discussed more fully below, Nevada law explicitly requires that an employer attempt to make reasonable accommodations for the medical

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needs of an employee who lawfully engages in the use of the medical marijuana. *See* NRS § 453A.800(3).

In *Coats*, the statute at issue precluded the termination of an employee, "due to that employees engaging in any lawful activity off the premises of the employer during nonworking hours." 350 P.3d at 852. The Colorado Supreme Court held that this 'lawful use' statute does not protect medical marijuana use because there was no evidence to demonstrate that the Colorado Legislature intended the word 'lawful' to be limited to state law. Thus, *Coats* held that absent any directive from the legislature, 'lawful' was to be interpreted as lawful under both federal and state law. *Id.*

The *Coats* holding was based on legislative intent. Particularly, *Coats* held, "we find nothing to indicate that the General Assembly [of Colorado] intended to extend . . . protection for "lawful" activities to activities that are unlawful under federal law." 350 P.3d at 853. *Coats* concluded that since federal law preempts state law, medical marijuana use is not protected under Colorado law. *Id.*

In Nevada, on the other hand, there is no absence of legislative intent. On the contrary, the Nevada Legislature explicitly expressed an intent to interpret "lawful" for marijuana laws under state law only. The Legal Division of the State of Nevada Legislative Counsel Bureau ("Legislative Counsel"), which acts as the legal adviser to the Nevada Legislature, responded to questions posed by Senator Segerblom in an advisory letter. *See* Ltr. to Senator Segerblom, p. 1 dated September 10, 2017, attached as Exhibit 4.[2]

Accordingly, on September 10, 2017, the Legislative Counsel responded with a statutory analysis of Chapter 453A. *Id.* The Legislative Counsel stated that the "lawful" language in Chapter 453A shall not be interpreted to include violations of federal law. Particularly, the Legislative Counsel explained that:

[2] This Court may consider such advisory letter for purposes of a motion to dismiss. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("[A] court may take judicial notice of matters of public record." (internal quotation marks omitted)); *see also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) ("[T]he court may take into account matters of public record…when ruling on a motion to dismiss.")

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> A court will strive to interpret these provisions in harmony with NRS 453.316. Id. If the word "unlawfully" in NRS 453.316 were interpreted in a way that includes a violation of federal law, such an interpretation would essentially render chapters 453A and 453D of NRS void by continuing to criminalize activities that the Legislature by statute or the people by initiative explicitly made legally permissible.

Id. at 3.

The Legislative Counsel further stated that when possible, a court "will avoid rendering any part of a statute inconsequential." *Id.* (citing *Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007)). The Legislative Counsel concluded that:

> "[s]ince considering whether a sale or use violates federal law for the purpose of determining whether the sale or use is "unlawful" . . . would have the effect of rendering entire chapters of NRS nugatory and that consequence can be avoided by considering only whether a sale or use violates the laws of this State[.]"

Id.

The Nevada Legislature clearly intends for "lawful" to mean lawful under Nevada state law. Thus, the analysis in *Coats* should not be followed in Nevada. Therefore, Plaintiff states a valid claim under NRS § 613.333.

In addition, since *Coats*, the case heavily relied upon by Defendant, three additional states have decided that similar 'lawful use' statutes, anti-discriminatory employment provisions, and reasonable accommodation laws for medical marijuana use, are not preempted by federal law.

On August 8, 2017, *Noffsinger v. SSC Niantic Operating Co. LLC*, held that a plaintiff who uses medical marijuana is protected under a Connecticut law that prohibits employers from terminating an employee who lawfully uses medical marijuana. No. 3:16-CV-01938(JAM), 2017 WL 3401260, at *2 (D. Conn. Aug. 8, 2017). The Controlled Substance Act ("CSA") does not preempt state "lawful use" and anti-discriminatory employment statutes, such as NRS 453A. *Id.*

Noffsinger explained that state anti-discriminatory medical marijuana laws are not preempted because the CSA

> does not make it illegal to employ a marijuana user. Nor does

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> it purport to regulate employment practices in any manner. It also contains a provision that explicitly indicates that Congress did not intend for the CSA to preempt state law 'unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.'

2017 WL 3401260, at *4 (quoting 21 U.S.C. § 903).

On May 23, 2017, the Superior Court of Rhode Island held that the CSA does not preempt the state anti-discrimination in employment medical marijuana statute because, "[t]o read the CSA as preempting [the anti-discriminatory statute] would imply that anyone who employs someone that violates federal law is thereby frustrating the purpose of the law." *Callaghan v. Darlington Fabrics Corporation*, 2017 WL 2321181, at *14 (R.I. Super. 2017). *Callaghan* further explained that, "it is a direct and unambiguous indication that Congress has decided to tolerate the tension," between state and federal marijuana laws. *Id.* at *15.

On July 17, 2017, the Massachusetts Supreme Court held that an employee could bring a claim under a state disability discrimination statute for refusing to accommodate her medical marijuana use. *Barbuto v. Advantage Sales & Mktg.*, LLC, 477 Mass. 456, 464, 78 N.E.3d 37, 45 (2017). *Barbuto* held:

> [I]n the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation.

Id.

Barbuto concluded that if an employer did not attempt to accommodate an employee's medical marijuana use, "the employee effectively would be denied this 'right or privilege' solely because of the patient's use of medical marijuana." *Id.*

Likewise and recently in *Whitmire v. Wal-Mart*, 3:17-cv-08109, (02/07/2019 J. Teilborg) the U.S. District Court for the District of Arizona upheld a claim and found a private cause of action involving the Arizona Medical Marijuana Act where an employee was terminated for testing positive for THC.

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In light of *Noffsinger*, *Whitmire, Callaghan*, and *Barbuto*, Plaintiff states a valid claim under NRS § 613.333. Thus, this Honorable Court should not dismiss Plaintiff's claim.

2. Plaintiff's Wrongful Discharge Claim Has Been Sufficiently Pleaded.

The Nevada Supreme Court has held that whether the type of employment is at-will is immaterial to a tortious discharge claim. *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1317, 970 P.2d 1062, 1064 (1998) (citing *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 216 (1991)). The Court recognizes such a claim in tort where an employer discharges an employee for reasons that violate public policy. *D'Angelo*, 107 Nev. at 718, 819 P.2d at 216. In *D'Angelo*, the Court stated that "[t]he essence of a tortious discharge is the wrongful, usually retaliatory, interruption of employment by means which are deemed to be contrary to the public policy of this state." *Id*. An employer may be liable for discharge if it terminates an employee for reasons that violate policy. *D'Angelo*, 107 Nev. at 704, 819 P.2d at 211.

This case is rare and exceptional because Defendant's actions violate the compelling public policy of favoring a patient's right to seek his or her own legal course of treatment for their serious disability, based upon their physician's professional medical judgment. *Whalen v. Roe*, 429 U.S. 589, 599–600, 603, 97 S. Ct. 869 (1977) (recognizing a constitutional "interest in independence in making certain kinds of important decisions," including a patient's "right to decide independently, with the advice of his physician, to acquire and use needed medication").

Furthermore, the public policy interest in compassion for patients with disabilities seeking medical marijuana treatment was expressed and recognized by the voters and the Legislature. In 2000, Nevada voters approved a constitutional initiative that added Article 4, Section 38, to the Nevada Constitution. Under Nev. Cons. Art. IV, § 38, the Legislature "shall provide by law . . . [t]he use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of . . . severe, persistent . . . chronic or debilitating medical conditions."

In 2001, the Legislature exercised its power under the initiative by passing A.B. 453,

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which established Nevada's laws, codified in NRS Chapter 453A. *See* A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66. Before A.B. 453 was passed by the Assembly, Assemblywoman Giunchigliani stated that "I think the public knew very well what they were voting on and recognized that under extreme medical conditions, they supported the issue of a registry card and allowing an individual to have access to this." *Assembly Daily Journal*, 71st Leg., at 41 (Nev. May 23, 2001). A.B. 453 was intended to "carry out the will of the people of this state and to regulate the health, medical practices and well-being of those people in a manner that respects their personal decisions concerning the relief of suffering through the medical use of marijuana." A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053. At the heart of the purpose and intent of Nevada's medical marijuana laws is compassion for those suffering from serious medical conditions and acknowledgement of the right to determine their own course of treatment.

Further, this right to medical marijuana use, without fear of termination, is such an essential public policy concern that Nevada law provides explicit statutory protection for this right. *See* NRS § 453.800. This argument is explored further, *infra*, in Section III.A.5.

This case also involves a public policy interest in protecting employees from termination for partaking in lawful activities outside of work. In this case, the lawful activity is Plaintiff's right to choose his medical treatment. In fact, this is a statutory right in Nevada. *See* NRS § 613.333.

Strangely, Defendant cites to *Whitfield v. Trade Show Servs.*, No. 2:10-CV-00905-LRH-VCF, 2012 U.S. Dist. LEXIS 26790, at *18 (D. Nev. Mar. 1, 2012) in its claim that courts in our State have not found medical marijuana use to qualify as a public policy violation. *See* Motion at 7, lines 19-23. *Whitfield* has absolutely no mention of marijuana, medical or otherwise, nor any other substance-related facts at issue. Rather, *Whitfield* considers the public policy of the right to vote in the context of the plaintiff's employment, of which the federal court declined to make findings. *Whitfield v. Trade Show Servs.*, No. 2:10-CV-00905-LRH-VCF, 2012 U.S. Dist. LEXIS 26790, at *18 (D. Nev. Mar. 1, 2012).

Additionally, preventing an employer from discharging or failing to hire an employee

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for the legal use of medical marijuana is a matter of public interest because such practice greatly affects the employee or prospective employee and the economy. If Nevada employees are not protected by Nevada's medical marijuana laws, such employees will be forced to choose between employment or effectively treating their serious medical condition. *See* Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE. W. RES. L. REV. 209, 222-24 (2015). Individuals should not be forced to choose between employment and their well-being, when such employee consumes medical marijuana outside of work.

Here, there is an existence of a clear public policy favoring a patient's right to seek his or her own legal course of treatment for their serious disability, and a public policy of allowing a patient to rely on and follow his physician's advice, and state law, without penalty. Plaintiff acted consistently with public policy when, after consultation and after the recommendation of his physician, he engaged in the lawful use of medical marijuana.

Here, when Defendant terminated Plaintiff because Plaintiff tested positive for a drug test when he was legally treating his disability, such termination violated public policy. Public policy was further violated because such withdrawal prevented Plaintiff from working.

Indeed, Defendant's reliance on *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 257 P.3d 586 (2011) is therefore misplaced. In short, the factual predicate of Nevada's public policy toward this exceptional case, as demonstrated above, was simply not present before the Washington court.

As a result, Plaintiff readily states a claim for tortious discharge here in Nevada. Further, and although not binding, our State Court has allowed such a claim to procced in *Nellis v. Sunrise Hospital and Medical Center,* A-17-761981, (Nev. Dist. Court 2018, J. Bailus), attached as Exhibit 5.[3] Thus, this Court should not dismiss Plaintiff's claim.

[3] This Court may consider such records for purposes of a motion to dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("[A] court may take judicial notice of matters of public record." (internal quotation marks omitted)).

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3. Plaintiff's Deceptive Trade Practices Claim Has Been Sufficiently Pleaded.

Defendant argues that employees are barred from bringing a claim under the Nevada Deceptive Trades Practice Act ("DTPA"). *See* Motion, p. 8. Defendant's argument is unpersuasive.

The Supreme Court clearly acknowledged that whether a statute provides for a private right of action is a matter of statutory construction. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S. Ct. 2479 (1979). If there is no express right of action provided by statute, then there are a number of factors used to determine whether or not a right of action may be implied from the statute. *Id.* Here, however, an analysis of these factors is not necessary because NRS provides an express right of action for victims of consumer fraud. The relevant statute, NRS § 41.600(1), states that "an action may be brought by any person who is a victim of consumer fraud." The statute further defines consumer fraud as "a deceptive trade practice as defined in NRS 598.0915 to 598.0925 inclusive." NRS § 41.600(2)(e).

The District Court of Nevada had the occasion to determine whether persons who are not consumers have standing to make a claim under the DTPA in *S. Serv. Corp. v. Excel Bldg. Services, Inc.,* 617 F. Supp. 2d 1097, 1099 (D. Nev. 2007). There, the Court determined that the language of the DTPA allowed for a business competitor to sue under the Act, because it was a victim, although not a consumer. While that decision did not discuss whether anyone other than a business competitor has a right to sue, it did specifically not exclude other persons from being classified as victims. *Id*.

The Ninth Circuit recently had an opportunity to discuss the matter in *Del Webb Communities, Inc. v. Partington* and also stated that a person does not have to be a traditional "consumer" in order to be a victim and have standing under the DTPA. 652 F.3d 1145, 1152 (9th Cir. 2011). The Court looked at the plain language of NRS § 41.600 and concluded that a person can be a victim of consumer fraud without being a consumer. *Id. Partington* very clearly acknowledged that standing hinges on if the company's

business practices directly harmed him, not his relationship to the company. *Id.* at 1153.

Even if the DTPA was created primarily for the protection of consumers, other parties do have standing to sue if they were harmed by a violation. The Court must look at the law first in its plain meaning, which here says that "any person" who is a victim of the DTPA may bring a claim for relief. It does not say "any person, except employees against their employers," and to find that the statute discriminates against this class of people would be absurd. Further, even our District Court, J. Jones, has allowed a DTPA claim to proceed in a wage and hour matter. See *Garcia v. Interstate Plumbing*, 10-cv-00410-RCJ-GWF Order of 02/04/2011 P. 12.

Additionally, Defendant has not cited any binding authority in this jurisdiction in which a court has specifically stated that an employee and employer can *never* have a relationship in which an employee can be harmed by the employer's violation of the DTPA. Neither has Defendant cited any binding authority that suggests that the facts of the present case, which show that Plaintiff was harmed by Defendant's violation of the DTPA, are barred from action.

In this case, Defendant essentially asserts that Plaintiff is not a "consumer" under DTPA. However, Plaintiff *is* a person who was a victim of Defendant's fraudulent and deceptive practices relating to the sale or lease of goods or services. It does not matter that Plaintiff and Defendant have an employer/employee relationship, as courts have determined that the relationship of the parties does not matter as long as the plaintiff is harmed by the defendant's violation of the DTPA.

Indeed, Defendant engaged in deceptive trade practices because it violated NRS §§ 613.333 and 453.800 when it failed to provide Plaintiff a reasonable accommodation and terminated Plaintiff' employment because of his lawful use of medical treatment.

As shown above, Defendant violated several different provisions of the DTPA. As a result, this Court should not dismiss Plaintiff's DTPA claim.

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4. Plaintiff Has Properly Pleaded His Claim for Negligent Hiring, Training, and Supervision.

Generally, to state a negligent hiring, training, and supervision claim, a claimant must show (1) a general duty on the employer to use reasonable care in the hiring, training and/or supervision of employees to ensure that they are fit for their positions; (2) breach; (3) injury; and (4) causation. *Okeke v. Biomat USA, Inc.*, 927 F. Supp. 2d 1021, 1028 (D. Nev. 2013). Such claims are based upon the premise that an employer will be held liable when it places an employee who it knows or should have known behaves wrongfully in a position in which that employee can harm another. *Id.* To that end, courts consider whether antecedent circumstances would "give[ ] the employer reason to believe that the person, by reason of some attribute of character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities." *Hall v. SSF, Inc.,* 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996).

Defendant argues that NRS § 613.330 *et seq*. preempts Plaintiff's claim for negligent hiring, training and supervision. This is wholly inaccurate. Under the theory of general negligence, upon which this cause of action is based, the standard is "the failure to use ordinary or reasonable care," and for the trier of fact to then decide the reasonableness of the acts in question. Nevada Negligence Instruction 4NG.12. Nowhere in the statutory scheme of NRS § 613.330 *et seq*. is an employer's negligence preempted.

To support its position, Defendant cites to *Brinkman v. Harrah's Operating Co., Inc.* and *Sands Regent v. Valgardson*. These cases are not analogous to Plaintiff's claims for negligence, and as such, do not apply. In these cases, the plaintiffs brought tort actions of discrimination, and did not allege further actions based in tort. For example, in *Brinkman* (a non-binding decision for this Court), the court found the plaintiff's claim was based *solely* in age discrimination. *Brinkman v. Harrah's Operating Co., Inc.*, 2:08-cv-00817-RCJPAL, 2008 U.S. Dist. LEXIS 123992 at *3 (D. Nev. October 16, 2008). Similarly, in *Valgardson*, the plaintiff brought an age discrimination claim in the context of tortious conduct and the court declined to find tortious discharge. *Valgardson*, 777 P.2d

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at 900.

Here, Plaintiff's Complaint alleges facts sufficient to show a plausible claim for negligent hiring, training, and supervision. For instance, Plaintiff's Complaint contains the following relevant allegations:

> 104. Defendant had a duty to exercise reasonable care to protect Roushkolb from negligent and/or careless actions of Defendant's own agents, officers, employees, and others.
> 105. Defendant owed a duty to Roushkolb to not hire individuals with a propensity towards committing unlawful acts against Roushkolb.
> 106. Defendant owed a duty to Roushkolb to adequately train and supervise its employees in regards to all correct policies and procedures relating to medical marijuana laws and/or termination policies and procedures.
> 107. Defendant breached its duty to protect Roushkolb by failing to properly hire, train, and/or supervise its employees, whereby a reasonable person could have foreseen the injuries of the type Roushkolb suffered would likely occur under the circumstances.
> 108. As a direct and proximate cause of the foregoing conduct, Roushkolb suffered harm including loss of income and benefits, severe emotional distress including but not limited to great mental and emotional harm, anguish, anxiety, insecurity, damage to self-esteem and self-worth, shame and humiliation, lack of appetite, and loss of sleep and/or anxiety.

See Complaint, p. 13, line 24 through p. 14, line 11.

Plaintiff readily prevails on such standard as articulated in *Okeke* and *Hall* and pursuant to *Twombly*. Plaintiff has undoubtedly alleged Defendant's duty, its breach of that duty, Plaintiff's injury, and causation thereof. Taking Plaintiff's allegations as true, Defendant knew or should have known that its agents could potentially harm Plaintiff if they were not adequately trained in in regards to correct policies and procedures relating to workplace safety, as well as employees' medical and workplace rights, including Constitutionally-protected rights, and/or termination policies and procedures.

Specifically, Defendant failed Plaintiff in its duty to provide safe workplace practices when its management forced Plaintiff and his coworker to remove the sheet of plexiglass without proper equipment, resulting in the aforementioned incident and Plaintiff's subsequent termination; and Defendant further failed to protect Plaintiff's Constitutionally-provided right, as provided by this State, to the protected use of medical

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marijuana.

Defendant falsely argues that Plaintiff only asserts that Defendant was negligent in hiring or training its employees "so they are aware of the complexities of medical marijuana law under state and federal standards." Motion at 10, lines 24-25. In no way has Plaintiff asserted that Defendant must train its employees in the "complexities" of medical marijuana law. However, Defendant, as a sophisticated actor, should endeavor to reasonably protect its employees from violations of all Constitutionally-protected rights. In fact, as mentioned above, Defendant was negligent in more than one way, including failing to reasonably protect Plaintiff from unsafe decisions of its management. Even though Defendant knew or should have known of these risks, Defendant negligently failed to correct this problem. As a direct and proximate result of this failure, Plaintiff suffered the damages alleged in his Complaint.

In addition, the Seventh Circuit recently held that an employer may be held liable for a claim of negligent hiring, supervision, or retention claim based on the supervisory authority an employer has over an employee. *Anicich v. Home Depot U.S.A., Inc.*, No. 16-1693, 2017 WL 1101090 (7th Cir. Mar. 24, 2017). Though not binding on this Court, the decision no less supports the basis that Defendant may be held liable for its own negligence in the hiring, training, and supervising of Plaintiff's former superiors at Defendant's business.

Indeed, as Plaintiff alleged sufficient facts to show that Defendant breached its duty of reasonable care, and should have known an employee might violate Plaintiff's rights, Plaintiff's fourth cause of action should not be dismissed.

5. Plaintiff Has Properly Pleaded His Claim for Violation of the Medical Needs of an Employee Who Engages in Medical Use of Marijuana

Plaintiff's fifth cause of action for failure to accommodate pursuant to NRS § 453A.010 readily states a claim for which relief may be granted. Bizarrely, Defendant claims that "Plaintiff plainly cannot claim that [Defendant] violated NRS 453A.800 by failing to grant an accommodation that he admittedly 'never requested.'" *See* Motion at p. 11,

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lines 11-12. Defendant ignores the entirety of the quoted sentence (despite inserting it into its Motion) which continues "…***other than a reasonable accommodation not to terminate him***, despite a positive indication for medical marijuana consistent with the recommended therapeutic usage for his serious medical condition (emphasis added)." Motion at p. 11, lines 9-12. Indeed, Plaintiff's Complaint undeniably includes the well-pleaded fact that Plaintiff requested a reasonable accommodation regarding his lawful, medical use of marijuana.

Defendant then presents the irrelevant argument that NRS § 453A.800(2) is in some ways similar to Montana's Medical Marijuana Act (the "MMA"). *See* Motion at p. 11. Defendant's reliance is misplaced.

First, although it is true the MMA may not be construed to require employers to accommodate medical marijuana use *within* the workplace (*Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 108N, ¶ 5, 350 Mont. 562, 213 P.3d 789), Plaintiff sought no such accommodation here. Instead, Plaintiff's sought the reasonable accommodation of simply not being terminated for his lawful use of medical marijuana outside the premises of the Defendant during his non-working hours. *See* Complaint at p. 14.

Second, unlike the MMA, NRS Chapter 453A allows a private right of action. Indeed, Plaintiff is the class of persons meant to be protected by the law, and allowing a private right of action under § 453.800 is consistent with the underlying purposes of the legislative scheme. As there is no administrative agency that could enforce Plaintiff's rights under § 453A.800, without a private remedy an employee would not have *any* recourse under the statute, and thus the statute would be rendered "inconsequential" and "nugatory." *Metz v. Metz*, 122 Nev. 786, 787, 101 P.3d 779, 792 (2004) ([N]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can be properly avoided.") Accordingly, no legitimate reason exists to eviscerate NRS Chapter 453A of its private right of action following the Nevada Supreme Court's directive toward Nevada statutes.

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CONCLUSION

For the reasons stated above, this Court should deny Defendant's Motion to Dismiss. Plaintiff respectfully attests this Court need not ignore the well-pleaded allegations and voter-approved, Constitutionally-provided claims that do appear on the face of the Complaint.

Instead, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion in its entirety so that his claims may proceed and be decided on the merits.

DATED this _7___ day of August 2020.

GABROY LAW OFFICES

By: _*/s/ Christian Gabroy*_____
Christian Gabroy (#8805)
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CERTIFICATE OF SERVICE

I, Christian Gabroy, this __7__ day of August 2020, served through the Electronic Case Filing system of the United States District Court, District of Nevada, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** addressed to:

Jackson Lewis P.C.
Paul T. Trimmer, Esq.
Lynne K. McChrystal, Esq.
Jackson Lewis P.C.
300 S. Fourth Street
Suite 900
Las Vegas, NV 89101
Attorneys for Defendant

GABROY LAW OFFICES

By: */s/ Christian Gabroy*
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES ROUSHKOLB, an individual; Plaintiff, vs. THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive; Defendant.	Case No: A-19-805268-C Dept.: VIII **DECLARATION OF CHRISTIAN GABROY IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

DECLARATION OF CHRISTIAN GABROY IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Christian Gabroy, an attorney duly admitted to practice law in the State of Nevada and a member of the bar of this Court, hereby affirms, per NRS §53.045 that:

1. I am counsel for Plaintiff James Roushkolb in this matter and am submitting this declaration in support of Plaintiff's Response in Opposition to Defendant's Motion to Dismiss.

2. A true and correct copy of the Defendant's Petition for Removal to federal court, dated December 5, 2019 is attached to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss as Exhibit 1.

3. A true and correct copy of the Defendant's Motion to Dismiss in federal court, dated January 21, 2020 is attached to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss as Exhibit 2.

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4. A true and correct copy of the Hon. Judge Mahan's Order Remanding to State Court and denying the motion as moot, dated July 7, 2020 is attached to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss as Exhibit 3.

5. A true and correct copy of the Ltr. to Senator Segerblom, dated September 10, 2017 is attached to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss as Exhibit 4.

6. A true and correct copy of the Order Granting in Part and Denying in Part in *Nellis v. Sunrise Hospital and Medical Center*, dated February 21, 2018 is attached to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss as Exhibit 5.

I declare under penalty as prescribed in NRS 53.045 that the foregoing is true and correct.

Affirmed this _7th___ day of August 2020 in Henderson, Nevada.

/s/ Christian Gabroy
Christian Gabroy, Esq.

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EXHIBIT I

Paul T. Trimmer
Nevada State Bar No. 9291
Lynne K. McChrystal
Nevada State Bar No. 14739
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Attorneys for Defendant
Freeman Expositions, LLC
Improperly Named The Freeman Company, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES ROUSHKOLB, Plaintiff, vs. THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, Inclusive, Defendants.	Case No. **NOTICE OF REMOVAL OF ACTION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA PURSUANT TO 28 U.S.C. §§ 1331 and 1441(a)** [Filed concurrently with Civil Cover Sheet and Certificate of Interested Parties]

Pursuant to 28 U.S.C. §§ 1331 and 1441(a), Defendant FREEMAN EXPOSITIONS, LLC improperly named as THE FREEMAN COMPANY, LLC ("Defendant") hereby notifies the Court of the removal of *JAMES ROUSHKOLB v. THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOE I-X, and ROE CORPORATIONS XI-SS, Inclusive*, Case No. A-19-805268-C, which was filed in the Eighth Judicial District Court in Clark County, Nevada. In support of said removal, Defendant states as follows:

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SERVICE AND PLEADINGS FILED IN STATE COURT

1. The Plaintiff, James Roushkolb, commenced this action in the Eighth Judicial District Court of Clark County, Nevada, entitled *JAMES ROUSHKOLB v. THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOE I-X, and ROE CORPORATIONS XI-XX, Inclusive.* A copy of the Complaint ("Compl.") that he filed on November 12, 2019 is attached hereto as **Exhibit A.**

2. Plaintiff served Defendant with a copy of the Complaint and a Summons on November 14, 2019. The Summons is attached hereto as **Exhibit B.**

3. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C. §1331, because, as described in more detail below, Plaintiff's First (Compl. ¶¶ 69-76), Second (Compl. ¶¶ 77-82), and Fourth claims (Compl. ¶¶ 103-108) are preempted by Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.SC. § 185(a).

4. In his Complaint, Plaintiff names The Freeman Company, LLC as his employer and the defendant. This is incorrect. Plaintiff was employed by Freeman Expositions, LLC ("Freeman Expositions"), which is a foreign limited liability company, organized under the law of Texas. Freeman Expositions is currently, and at the time of Roushkolb's employment, party to a collective bargaining agreement[1] with Plaintiff's collective bargaining representative, Teamsters Local 631.)[2]

5. The terms and conditions of Roushkolb's employment were governed by the collective bargaining agreement. That agreement contains an extensively negotiated drug and alcohol provision which prohibits employees, including Plaintiff, from using, possessing, or otherwise being under the influence of drugs at a job site. (**Ex. C** at Article 15.) The collective bargaining agreement also contains provisions which govern both the discipline, discharge, or issuance of a letter of no dispatch to employees (**Ex. C** at Article 14), as well as a dispute

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[1] A true and correct copy of the applicable collective bargaining agreement is attached as **Exhibit C.**

[2] Unless otherwise noted, the allegations contained herein are taken from Plaintiff's Complaint. Defendant's use of Plaintiff's allegations for that purpose is not an admission that one or any of them are true.

resolution provision which requires employees to challenge such adverse action by filing a grievance with the union and pursuing that claim through arbitration. (**Ex. C** at Article 13).

6. Plaintiff's First (Compl. ¶¶ 69-76), Second (Compl. ¶¶ 77-82), and Fourth claims (Compl. ¶¶ 103-108), concern Plaintiff's alleged right to use medical marijuana and the propriety of his discharge for such use under the collective bargaining agreement. Their resolution would require the Court to interpret, among others, Articles 13, 14 and 15 of the collective bargaining agreement. They are therefore completely preempted Section 301 of the LMRA, 29 U.S.C. § 185(a). *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403-04 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 451 (1957); *Young v. Anthony's Fish Grottos*, 830 F.2d 993, 997 (9th Cir. 1987)).

7. The Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367(a) because those allegations are related to Plaintiff's First, Second and Fourth claims and are part of the same case or controversy.

TIMELINESS OF REMOVAL

8. This Notice of Removal is being filed within thirty (30) days of receipt of any pleadings setting forth the claim for relief upon which the action is based and is, therefore, timely under 28 U.S.C. § 1331 and § 1446(b).

NOTICE TO ALL PARTIES AND STATE COURT

9. In accordance with 28 U.S.C. § 1446(d), the undersigned counsel certifies that a copy of this Notice of Removal and all supporting papers promptly will be served on Plaintiff's counsel and filed with the Clerk of the Eighth Judicial District Court of Clark County, Nevada. Therefore, all procedural requirements under 28 U.S.C. § 1446 have been satisfied.

VENUE

10. Venue is proper in this Court as this is the court for the district and division embracing the place where the action is pending in state court. 28 U.S.C. § 1391.

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

Dated this 5th day of December, 2019.

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer
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Lynne K. McChrystal, Bar #14739
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101

Attorneys for Defendant
Freeman Expositions, LLC
Improperly Named The Freeman Company, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 5th day of December, 2019, I caused to be served via the Court's CM/ECF, a true and correct copy of the above foregoing **NOTICE TO FEDERAL COURT OF REMOVAL OF CIVIL ACTION FROM STATE COURT** properly addressed to the following:

Christian Gabroy
Justin A. Shiroff
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, Nevada 89012

Attorney for Plaintiff James Roushkolb

/s/ Mayela E. McArthur
Employee of Jackson Lewis P.C.

4835-7522-5774, v. 1

EXHIBIT II

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Improperly Named The Freeman Company, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES ROUSHKOLB,

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, Inclusive,

Defendants.

Case No. 2:19-cv-02084-JCM-NJK

DEFENDANT'S MOTION TO DISMISS

Defendant Freeman Expositions, LLC improperly named as the Freeman Company, LLC ("Freeman" or "Defendant"), by and through its counsel, Jackson Lewis P.C., moves to dismiss Plaintiff James Roushkolb's ("Plaintiff") Complaint in its entirety. Plaintiff's first, second, third, fourth, and fifth causes of action, which he has entitled unlawful employment practices, tortious discharge, deceptive trade practices, and violation of the medical needs of an employee pursuant to NRS 453A.010 *et. seq*, respectively, are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and should be dismissed. In addition, even if the Court did not find that these claims are preempted, it must still dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The five causes of action fail to state claims upon which relief could be

granted.

This request is based on the attached Memorandum of Points and Authorities, all pleadings and documents on file with the Court, and any argument that the Court deems proper.

Dated this 21st day of January, 2020.

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer
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Lynne K. McChrystal, Bar #14739
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101

Attorneys for Defendant
Freeman Expositions, LLC
Improperly Named The Freeman Company, LLC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Freeman employed Plaintiff as a journeyman. As a journeyman, he was represented for purposes of collective bargaining by the Teamsters, Chauffeurs, Warehouseman and Helpers, Local 631, International Brotherhood of Teamsters (the "Union" or "Local 631"), and the terms and conditions of his employment were governed by the collective bargaining agreement (the "CBA" or the "Agreement") between Freeman and Local 631. *See* **Exhibit A** (relevant sections of the June 1, 2017-May 31, 2021 collective bargaining agreement).

Plaintiff's Complaint contains five causes of action: (1) unlawful employment practices, (2) tortious discharge, (3) deceptive trade practices, (4) negligent hiring, training, and supervision and (5) violation of the medical needs of an employee pursuant to NRS 453A.010 *et. seq*. Each of these claims, at its core, is predicated on the allegation that Plaintiff's July 11, 2018 discharge lacked just cause and violated the terms and conditions of the collective bargaining

agreement. The law is clear. Such claims are precluded by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, because the CBA "can reasonably be said to be relevant to the resolution of the dispute." *Firestone v. Southern California Gas Co.*, 281 F.3d 801, 802 (9th Cir. 2002). Given that Plaintiff did not exhaust his contractual remedies, and the claims would be time barred by Section 301's six-month statute of limitations, Roushkolb's lawsuit is preempted. As also explained below, even if the Court concludes that one or more the claims are not preempted, each also fails as a matter of law. Accordingly, on either ground, the Complaint should be dismissed with prejudice.

II. STANDARD OF REVIEW

A complaint should be dismissed if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That short and plain statement must amount to "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Dismissal of a complaint is appropriate when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Id.*

III. STATEMENT OF FACTS[1]

Plaintiff was terminated on July 11, 2018 following a workplace accident and subsequent drug test. Compl. ¶¶ 40-41, 54, 65; **Exhibit B**. His termination letter to the Union stated that

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[1] The attached collective bargaining agreement, **Exhibit A**, and the termination letter attached hereto as **Exhibit B** can be considered when a motion is brought pursuant to Section 301 of the LMRA. *See Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002) ("Under the 'incorporation by reference" rule of this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment.")

that Plaintiff was ineligible for dispatch. **Ex. B**.

The terms and conditions of Plaintiff's employment were governed by Freeman's collective bargaining agreement with the Union. *See* **Exs. A & B**. Articles 4, 13, 14 and 15 of are specifically relevant to this case. Article 4 vests Freeman with the "right to hire, promote, transfer, suspend, or discharge workers" for just cause. *Id.* Article 13 sets forth detailed grievance and arbitration procedures for resolving alleged violations of the CBA, including allegedly improper terminations. *Id.* Article 14 sets forth parallel, but equally mandatory, disciplinary procedures for casual employees such as Plaintiff, including when Freeman may issue a Letter of No Dispatch immediately rather than following the progressive discipline procedure.[2] *Id.* Article 14 also provides a procedure wherein a casual employee, such as Plaintiff, may challenge a Letter of No Dispatch[3] through his or her Union, which may in turn present the casual employee's challenge to a Joint Committee. *Id.* The Joint Committee, which is the "arbitrator" for purposes of resolving the matter, considers and ultimately makes a final determination as to whether the employee engaged in the alleged conduct and if a lesser penalty than a permanent Letter of No Dispatch is warranted. *Id.*

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[2] As described in the CBA, Freeman generally hires "casual employees" on a job-by-job basis by placing a call to the Union hall. The hall fills the labor order by identifying then unassigned journeyman teamsters who are qualified to perform the work described in the work call, and then dispatches the selected journeymen to Freeman. At the conclusion of the work call, the journeyman is released from Freeman's payroll and returns to the Union hall to await another call from Freeman or any other employer who has a collective bargaining relationship with the Union.

[3] Under the terms of the CBA, "regular employees" have seniority and are subject to discipline or discharge for "just cause." "Casual employees," in contrast, do not have seniority because they are employed periodically and then released back to the hall. Similarly, in the event casual employees perform poorly at the jobsite they are not typically subject to discipline or discharge. They are instead released and, when appropriate, Freeman sends to the Union a letter of "No Dispatch," memorializing the Company's determination that the employee will not be accepted for future labor calls. Like discipline or discharge, letters of No Dispatch are subject to the CBA's mandatory dispute resolution procedure.

Article 15 of the CBA contains a collectively bargained Drug and Alcohol Policy (the "Drug Policy"). The Drug Policy provides for post-accident testing for illegal drugs, including marijuana. *Id.* Employees who test above the listed cutoff for marijuana will be considered to have violated the Drug Policy. Any dispute between Freeman and the Union regarding the interpretation or application of the CBA is subject to mandatory arbitration. *Id.* If an employee disputes disciplinary action, including discharge, the CBA requires the employee to lodge a written claim within twelve days of the disciplinary action or the grievance is barred. *Id.*

Plaintiff's first cause of action is "unlawful employment practices" pursuant to "lawful use of a product outside premises." Compl. at ¶¶ 69-76. Plaintiff claims Freeman had "discriminatorily terminated [him], because [he] engaged in the lawful use of medical marijuana outside the premises...during his non-working hours." *Id.* at ¶ 71. Plaintiff alleges that his termination was "wrongful" because his "offsite use of medical marijuana [did] not adversely effect [his] ability to perform his job or the safety of other employees and requests an order reinstating his employment." *Id.* at ¶¶ 72, 75.

Plaintiff's second cause of action is for tortious discharge-violation of public policy. *Id.* at ¶¶ 77-82. It essentially duplicates Plaintiff's first claim. Plaintiff asserts Freeman "terminated [him] for reasons which violate public policy including...Nevada's public policy against terminating an employee for the lawful use of medical marijuana...." *Id.* at ¶ 78. The "public policy" Plaintiff refers to is the same statute, NRS 613.333(1)(b) cited in his first cause of action.

The third claim in the Complaint is for "deceptive trade practices." Compl. at ¶¶ 83-102. Again, the cause of action is based on Plaintiff's termination. *Id.* at ¶¶ 92, 96. He baldly alleges that "by engaging in the practices herein, and otherwise acting in a deceitful and fraudulent manner, [Freeman] violated the Nevada's Deceptive Trade Practices Act...." *Id.* at ¶89.

Plaintiff characterizes his fourth cause of action as negligent hiring, training, and supervision. *Id.* at ¶¶ 103-108. As with his first, second and third causes of action, the claim is

predicated on Plaintiff's discharge. *Id.* Plaintiff asserts Feeman "owed a duty to [Plaintiff] to adequately train and supervise its employees in regards to all correct policies and procedures related to medical marijuana laws and/or **termination polices or procedures**." *Id.* at ¶106 (emphasis added).

Plaintiff's fifth and final cause of action repackages his termination claim as an action for "violation of needs of employee who engages in medical use of marijuana to be accommodate by employer." *Id.* at ¶¶ 109-129. Plaintiff cites to NRS 453A.010 *et seq.* as the basis for this cause of action. This statue, however, does not provide for a private cause of action. *See* NRS 453A.010 *et seq.* Nonetheless, Plaintiff alleges Freeman "failed to provide [him] with a reasonable accommodation and subjected [him] to adverse employment actions, **including terminating [him]**." *Id.* at ¶ 127 (emphasis added).

IV. ARGUMENT

Plaintiff's five causes of action cannot be resolved without substantial interpretation and application of Articles 4, 13, 14, and 15 of the Agreement. They are therefore preempted by Section 301 and must be dismissed. If the Court determines that any of Plaintiff's claims are not preempted by Section 301, as set forth in more detail below, each of the claims must still be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

A. Plaintiff's Causes of Action Are Preempted By Section 301 of the LMRA.

Section 301 of the LMRA gives Federal district courts exclusive jurisdiction over suits for violations of collective bargaining agreements, and to that end, it preempts any state law claim that is "substantially dependent on the terms of an agreement made between parties to a labor contract[.]" *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). A plaintiff cannot avoid Section 301 preemption by withholding mention of the statute in his or her complaint. *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 498 (7th Cir. 1996). Similarly, a plaintiff cannot avoid the reach of Section 301 by failing to refer specifically to the CBA

governing his or her employment. *See Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1048 (9th Cir. 1987) (court's consideration of CBA is appropriate to investigate true nature of employees' allegations for preemption purposes).

When deciding whether a claim is preempted under Section 301 of the LMRA, a court must engage in a two-part analysis. *See Burnside v. Kiewit*, 491 F.3d 1053, 1059 (9th Cir. 2007). First, the court should make "inquiry into whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a result of the CBA, then the claim is preempted, and . . . [the court's] analysis ends there." *Id.* (citations omitted). Second, even if the right asserted "exists independently of the CBA, . . . [the court] must still consider whether it is nevertheless 'substantially dependent on analysis of a collective bargaining agreement.'" *Id.* (citation omitted). In short, state law claims like those asserted by Plaintiff are preempted "if the plaintiff['s] claim is either grounded in the provisions of the labor contract *or* requires interpretation of it." *Id.* at 1059; *see also Adkins v. Mireles*, 526 F.3d 531, 539 (9th Cir. 2008); *Firestone*, 281 F.3d at 802 (state law claims are preempted when interpretation of an existing provision of the CBA "can reasonably be said to be relevant to the resolution of the dispute"); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) (Section 301 preempts state claims based upon obligations created by a collective bargaining agreement).

1. Each of Plaintiff's five claims for relief is preempted because they require interpretation of the CBA.

Each of Plaintiff's five causes of action is subject to the same preemption analysis because all allege that Plaintiff's termination for use of marijuana was unlawful, wrongful, or in violation of a provision of the collective bargaining agreement. The Ninth Circuit has repeatedly held that such claims depend on allegations that the employee's termination violated the good cause provision in the relevant CBA – in this case, Articles 4 and 14, as well as the negotiated

Drug Policy in Article 15 – even in circumstances like this, where the employee has bracketed his contractual claims with references to common law tort theories or codified state employment statutes. *See, e.g., Hyles v. Mensing*, 849 F.2d 1213, 1216 (9th Cir. 1988). The claims are therefore "inextricably intertwined with consideration of the terms of the labor contract" and thus preempted by federal law. *See id.*; *see also Stallcop*, 820 F.2d at 1049 ("Resolution of [plaintiff's] claims [of intentional and negligent infliction of emotional distress] . . . necessarily entails examination and interpretation of the [collective bargaining] agreement, and these claims are also preempted."); *Grayson v. Titanium Metals Corp.*, Case No. 2:08-cv-1874-KJD-GWF, 2009 U.S. Dist. LEXIS 7235, at *2-3 (D. Nev. Jan. 30, 2009) (holding that although claims such as wrongful discharge "appear to be framed under state law, they are clearly preempted"). State law "must yield to the developing federal common law, lest common terms in bargaining agreements be given different and potentially inconsistent interpretations in different jurisdictions." *Firestone*, 281 F.3d at 802.

There are no unique allegations or circumstances in this case that would allow the Court to reach a different result. The factual contentions in Plaintiff's Complaint make it clear that he is alleging that Freeman's conduct was unlawful wrongful for one reason only:[4] Freeman terminated his employment based on his allegedly lawful use of medical marijuana outside of the premises during non-working hours. *See* Compl. ¶ 66 (Freeman "terminated [Plaintiff] because he tested positive for marijuana use consistent with his physician recommended usage."); ¶71 (Freeman "discriminatorily terminated [Plaintiff], because [Plaintiff] engaged in the lawful use of medical marijuana outside the premises...during his non-working hours."); ¶78 (Freeman

[4] Notably, despite Plaintiff's inclusion of exhaustive facts related to an alleged disability which precipitated his need to use medical marijuana, Compl. ¶¶ 7-11, Plaintiff does not allege disability discrimination under Nevada state law. Presumably this is because Plaintiff failed to exhaust his administrative remedy for any alleged disability discrimination by filing a charge of discrimination.

"terminated [Plaintiff] for reasons which violate public policy including...Nevada's public policy against terminating an employee for the lawful use of medical marijuana...."); ¶92 (Freeman "knowingly violated NRS § 613.333, *et seq.* and terminated [Plaintiff]."); ¶96 (Freeman "terminated [Plaintiff's] employment...and informed [Plaintiff] there would be no reconsideration of his employment."); ¶106 (Freeman "owed a duty to [Plaintiff] to adequately train and supervise its employees in regards to all correct policies and procedures relating to medical marijuana laws and/or termination policies and procedures,"); ¶123 ("[Plaintiff] never requested or accommodation other than a reasonable accommodation not to terminate him, despite a positive indication for medical marijuana...."); ¶127 (Freeman "failed to provide [Plaintiff] with a reasonable accommodation and subjected [Plaintiff] to adverse employment actions, including terminating [Plaintiff]."). Plaintiff's allegedly lawful use of marijuana is the predicate for every cause of action in his Complaint, and the resolution of the allegation requires assessment of, and interpretation of, the duties and obligations set forth in Articles 4, 14 and 15 of the collective bargaining agreement.

Artful pleading aside, the viability of Plaintiff's Complaint necessarily depends upon a finding that Freeman's application of the Drug Policy articulated in Article 15 of the CBA to his employment was unlawful, violative of public policy, and/or implicated a duty to accommodate him and train its employees to accommodate him. This requires the Court to determine, among other issues, whether the Drug Policy was a valid term and condition of Plaintiff's employment and assess whether Plaintiff's medical marijuana rights are "subject to negotiation and [can] be conditioned by the terms of the CBA." *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 694 (9th Cir. 2001);[5] *see also Schlacter-Jones General Tel.*, 936 F.2d 435, 441 (9th Cir. 1991) (plaintiff's claim preempted where examination of the CBA required to determine whether a

[5] In *Cramer*, the court found that the privacy rights at issue were *not* subject to and conditioned by the terms of the CBA. That is not the case here.

drug policy was a valid term and condition of employment); *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988) (upholding dismissal based on Section 301 preemption where employee challenged employer's drug and alcohol testing program and his suspension for refusal to participate). The Court would be required to interpret whether marijuana constituted an "illegal drug" pursuant to the CBA and/or was validly designated as such, whether Freeman may proscribe the misuse of legal drugs, that the post-accident drug testing was properly triggered, that Freeman properly exercised its right to discharge workers pursuant to the management rights clause, and that summary issuance of a Letter of No Dispatch rather than progressive discipline was the appropriate disciplinary measure pursuant to Article 14.

Other jurisdictions have found preemption appropriate in similar circumstances. In *Holmes v. National Football League*, 939 F. Supp. 517 (N.D. Tex. 1996), an NFL player who was suspended after testing positive for marijuana filed suit against the NFL alleging numerous state-law tort claims. The court found that the plaintiff's claims were preempted because their resolution was "inextricably intertwined and substantially dependent" upon an analysis of the provision in the collective bargaining agreement authorizing the team to conduct the drug test which prompted the claims. *Id.* In *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 120 (1st Cir. 1988), the court discussed that "other courts have also found claims that employers' drug-testing programs violated state tort laws to be preempted by section 301 because of the degree of imbrication between the claims and the collective bargaining agreements in force." *Id.* The *Jackson* court cited *Laws*, *supra*, and *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985) (ruling that challenged drug tests fell squarely within the scope of the company's "power....under the collective bargaining agreement to insist upon medical examinations....") in support of the proposition that such claims were termed "grist for the mill of grievance procedures and arbitration." *Jackson,* 863 F.2d at 120 (quoting *Strachan*, 768 F.2d at 705); *see also Association of Western Pulp & Paper Workers v. Boise Cascade Corp*, 644 F. Supp. 183,

186 (D. Or. 1986) (claim that drug-testing program violated state tort law preempted because it necessitated interpretation of contract provision allowing management to "institute reasonable work rules").

Uniformity is an especially compelling consideration which calls for preemption in this matter. "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104, 82 S. Ct. 571, 577, 7 L. Ed. 2d 593 (1962)). Marijuana use is a poster child for inconsistent rules at a local level. Multiple states have decriminalized the use of marijuana for medical purposes. Some have extended decriminalization to permit use for recreational purposes. Others have taken no action to decriminalize or otherwise legalize marijuana use. But regardless, both the possession and use or marijuana remains illegal under federal law pursuant to the Controlled Substances Act (21 U.S.C. §801 *et seq.*) Permitting claims such as Plaintiff's to proceed here would promote inconsistency because it would require that common terms in bargaining agreements (i.e. "illegal," "just cause," etc.) be "given different and potentially inconsistent interpretations in different jurisdictions." *Firestone*, 281 F.3d at 802.

Allowing Plaintiff's claims to survive would not merely promote inconsistency, however. Finding that he has stated a claim that survives preemption would place Nevada law in actual conflict with both the Controlled Substances Act and federal labor law. That conflict is fatal. As noted above, collective bargaining is governed by federal, not state law, and to that end, Section 301 vests U.S. District Courts with exclusive jurisdiction over disputes arising out of or concerning collective bargaining agreements. To the extent that enforcement of state law would preclude the parties' enforcement of the collective bargaining agreement, state law is preempted. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress"). Indeed, sustaining the validity of Plaintiff's claims would require a federal court to issue an order

validating and authorizing the use of a substance which is illegal under federal law. That is unconscionable. *Cf. Assenberg, et al. v. Anacortes Housing Authority*, 2006 U.S. Dist. LEXIS 34002 (W.D. Wash. 2006)("[T]o the extent that the state law legalizes marijuana use and prohibits the forfeiture of public housing, it conflicts with the CSA and the federal statutes and regulations that criminalize marijuana use and prohibit illegal drug use in public housing.").

Because Plaintiff's claims are inextricably intertwined with the CBA, and because any determinations regarding Freeman's ability to release Plaintiff because his use of medical marijuana led him to perform unsafely would require the Court to interpret and apply the collective bargaining agreement, each of Plaintiff's claims for relief is preempted. *See, e.g., Hyles*, 849 F.2d at 1216; *see also Sewell v. Genstar Gypsum Products Co., Div. of Domtar Gypsum, Inc.*, 699 F. Supp. 1443, 1449 (D. Nev. 1988) ("Plaintiff's wrongful discharge claim, whether framed in terms of breach of Collective Bargaining Agreement, breach of individual employment contract, or breach of implied covenant of job security, is governed by the terms of the Collective Bargaining Agreement, and is therefore preempted by § 301 of the LMRA.").

2. Plaintiff's five causes of action must be dismissed with prejudice.

For the reasons set forth above, there can be no dispute that each of Plaintiff's five causes of action depends on interpretation and application of the CBA for resolution. It is well-settled that such claims "must either be treated as a Section 301 claim . . . or [be] dismissed as preempted by federal law contract law." *Allis-Chalmers Corp*, 471 U.S. at 220. Even if Plaintiff had exhausted his contractual remedies, and his claims could be properly recharacterized as claims under Section 301, such claims would be time-barred. Section 301 has a six-month statute of limitations and Plaintiff was discharged more than a year ago on July 11, 2018. *See, e.g., DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151 (1983); *Inlandboatmen's Union of the Pacific v. Dutra Group*, 279 F.3d 1075, 1083-84 (9th Cir. 2002). Accordingly, the Complaint should be dismissed in its entirety.

B. Even If The Court Were To Conclude That One Or More Of Plaintiff's Causes Of Action Are Not Preempted, The Claims Must Still Be Dismissed As A Matter Of Law.

Even if one or more of Plaintiff's state law claims could survive preemption, they must still be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). In each case, the allegations set forth in the Complaint are insufficient to establish a plausible claim under Nevada law.

1. Plaintiff's unlawful employment practices claim fails as a matter of law.

Plaintiff's first cause of action alleges Freeman unlawfully discharged him in violation of NRS 613.333 *et seq*. The text of the statute does not support his claim. To begin with, and as admitted in his Complaint, Plaintiff was discharged because the Company concluded that he was under the influence of marijuana when, while working as a rigger, he dropped a large plate of glass which he was attempting to suspend from the ceiling. Further, this statute was enacted in 1991, prior to the enactment of the medical marijuana legislation cited in Plaintiff's Complaint. It provides:

> It is an unlawful employment practice for an employer to...[d]ischarge or otherwise discriminate against any employee concerning the employee's compensation, terms, conditions or privileges of employment, because the employee engages in the **lawful use in this state of any product** outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees.

NRS 613.333 (1)(b)(emphasis added). Plaintiff does not specifically allege that marijuana is a "product" contemplated by the statute but does allege that his use of marijuana is lawful. Compl. ¶ 71. There also is no legal precedent or legislative history (marijuana was not legalized until *after* NRS 613.333 was enacted) to support Plaintiff's repurposing of the statute, and Plaintiff accordingly fails to state a claim.

Analogous cases in the Ninth Circuit reject the idea that a medicinal marijuana user is entitled to any special deference under the law. In *James v. City of Costa Mesa*, 684 F.3d 825, 828 (9th Cir. 2012), the Ninth Circuit analyzed whether the City of Costa Mesa's decision to raid

medical marijuana facilities that are authorized under state law violate Title II of the Americans with Disabilities Act ("ADA"). The Court ruled that marijuana, even when legal under state law, still constituted "illegal drug use" under federal law and thus determined that "the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use." *Id.* at 828, n.3 (*citing* 42 U.S.C. § 12210(a)).

The Colorado Supreme Court effectively summarized the issue in *Brandon Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 18, 350 P.3d 849, 852 (2013):

> At the time of plaintiff's termination, all marijuana use was prohibited by federal law. *See* 21 U.S.C. § 844(a); *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (state law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting use and possession); *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." (citations omitted)). It remains so to date…Plaintiff acknowledges that medical marijuana use is illegal under federal law but argues that his use was nonetheless "lawful activity" for purposes of section 24-34-402.5 because the statutory term "lawful activity" refers to only state, not federal law. We disagree.

Id. As the court in *Coats* explained, it was not required to interpret lawful activity as including activity that is prohibited by federal law but is not prohibited by state law. This Court should reject Plaintiff's first cause of action on the same grounds.

2. Plaintiff's wrongful discharge claim fails as a matter of law.

Plaintiff's second cause of action, for wrongful termination, plainly fails to state a claim for relief under Nevada law. In this state, "tortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling policy." *Sands Regent v. Valgardson*, 105 Nev. 436, 440 (1989); *see also State v. Eighth Judicial District Court (Anzalone)*, 118 Nev. 151-52 (2002); *Bigelow v. Bullard*, 111 Nev. 1178, 1181 (1995) ("The only exception to the general rule that at-will employees can be dismissed without cause is the so-called public policy exception discussed in Western States, a case in which tort liability arose out of an employer's dismissing an employee for refusing to follow his employer's orders to work in an area that would have been dangerous to him.").

Here, Plaintiff alleged that he tested positive for marijuana following a post-accident drug test and that his use of marijuana was protected. Even if those allegations are true, however, they do not state a claim for tortious discharge as a matter of law. The Nevada Supreme Court has allowed wrongful discharge claims to proceed only when: 1) an employee was terminated for refusing to engage in unlawful conduct, *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1321 (1998); 2) an employee was terminated for refusing to work in unreasonably dangerous conditions, *Western States v. Jones*, 107 Nev. 704 (1991); or 3) when an employee was terminated for filing a workers compensation claim, *Hansen v. Harrah's*, 100 Nev. 70 (1984). Plaintiff's allegations do not fit within any of these protected categories and given the facts of this case, it is unlikely that the Nevada Supreme Court would expand a narrow exception to cover the Plaintiff's claim, particularly since it has rejected similar claims on a number of occasions. *See, e.g., Bigelow*, 111 Nev. at 1187. Nevada courts have never found that terminating an employee for using medical marijuana (in violation of state-adopted federal law) "constitutes a qualifying public policy violation and warrants an exception to the at-will employment doctrine." *Whitfield v. Trade Show Servs.*, No. 2:10-CV-00905-LRH-VCF, 2012 U.S. Dist. LEXIS 26790, at *18 (D. Nev. Mar. 1, 2012).

Other jurisdictions have rejected wrongful termination claims premised on the alleged lawful uses of marijuana. In *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 759, 257 P.3d 586, 597 (2011), the Washington Supreme Court noted that plaintiffs have no legal right to use marijuana under federal law pursuant to 21 U.S.C §§ 812, 844(a). The *Roe* court rejected plaintiff's contention that federal drug law could be completely separated from the state tort claim for wrongful discharge, and found that "holding a broad public policy exists that would require an employer to allow an employee to engage in illegal activity" would not be proper when assessing narrow exceptions to the at-will employment doctrine. *Id.* The Court should apply the same analysis here.

3. Plaintiff's deceptive trade practices claim fails as a matter of law.

Plaintiff's third cause of action, brought pursuant to the Nevada Deceptive Trade Practices Act ("NDTPA"), inappropriately attempts to bring his labor dispute under the auspices of a consumer protections statute. The NDTPA was enacted "primarily for the protection of consumers." *Sobel v. Hertz Corp.*, 698 F.Supp.2d 1218, 1224 (D. Nev. 2010) (grant of summary judgment overturned on non-DPTA claim by *Sobel v. Hertz Corp*, 674 Fed. Appx. 663 (9th Cir. 2017)). It also provides protection for businesses against unfair competition. *See Southern Service Corp. v. Excel Bldg. Services, Inc.*, 617 F.Supp.2d 1097, 1099 (D. Nev., 2007) (citing NRS 598.0953(1)). To that end, Courts in this district have held that the elements of a NDTPA violation are as follows: (1) an act of consumer fraud by the defendant (2) causing plaintiff (3) damage. *Govereau v. Wellish*, 2012 U.S. Dist. LEXIS 151494, Case No. 2:12-CV-00805-KJD-VCF *4-5, 2012 WL 5215098 (D. Nev. 2012) (noting that neither this Court nor any other jurisdiction had ever permitted an "employee to sue an employer under this theory" and citing *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 652 (D. Nev. 2009). None of those facts are alleged here and dismissing Plaintiff's claims would be consistent with the majority approach adopted in other jurisdictions. *See, e.g., Anderson v. Sara Lee Corp.*, 508 F.3d 181, 190 (4th Cir. 2007) (North Carolina deceptive trade practices act does not extend to employment disputes); *Dobbins v. Scriptfleet, Inc.*, 2012 U.S. Dist. LEXIS 23131, 2012 WL 601145, 4 (M.D. Fla. 2012) (Florida's deceptive trade practices act does not apply where there is no consumer relationship between employee and employer).

Moreover, Plaintiff's cause of action under the NDTPA fails the requirement that fraud be pled with particularity. *See George v. Morton,* 2007 U.S. Dist. LEXIS 15980, *11 (D. Nev. Mar 1, 2007) (NRS § 598 statements that rely on fraud must satisfy the pleading requirements of Rule 9(b)). Rule 9(b) requires pleading fraud with particularity; a plaintiff's allegations must contain the "time, place, and specific content of the false representations as well as the identities

of the parties to the misrepresentations." *Swartz v. KPMG LLP,* 476 F.3d 756, 764 (9th Cir. 2007). Plaintiffs must also set forth "what is false or misleading about a statement, and why it is false." *Ebeid ex rel. U.S. v. Lungwitz,* 616 F.3d 993, 998 (9th Cir. 2010). Here, Plaintiff fails to satisfy the heightened pleading standards. He merely alleges that "by engaging in the practices herein, and otherwise acting in a deceitful and fraudulent manner, [Freeman] violated the Nevada's Deceptive Trade Practices Act...." *Id.* Compl., ¶89. NRS Chapter 598 itself is forty-five pages and contains ten definitions of "deceptive trade practice" by itself. *See, e.g.,* NRS 598.0915 to NRS 598.0925. None of them equate a job offer with an "advertisement" as Plaintiff alleges in his Complaint. Compl. ¶ 87. Plaintiff's additional bulk citations to portions of NRS 598 does not satisfy the heightened pleading standards. The lack of specificity in Plaintiff's Complaint mandates this claim be dismissed.

4. Plaintiff's claim for negligent hiring, training, and supervision fails as a matter of law.

Plaintiff's fourth cause of action for negligent hiring, training, and supervision (hereinafter "negligent hiring") fails to state a claim because it is preempted by NRS 613.330, *et seq.*, which provides the exclusive remedy for tort claims premised on illegal employment practices. "NRS § 613.330 *et seq.* provides the exclusive remedy for tort claims premised on illegal employment practices. The Nevada Supreme Court, as well as the District Court for the District of Nevada, have held that tort claims premised on discrimination in employment are remedied under the statute." *Brinkman v. Harrah's Operating Co., Inc.*, 2:08-cv-00817-RCJ-PAL, 2008 U.S. Dist. LEXIS 123992 at*3 (D. Nev. October 16, 2008); *see also Valgardson,* 777 P.2d at 900.

In *Valgardson*, 777 P.2d at 900, the Nevada Supreme Court ruled that an employee could not maintain separate tort claims premised upon discriminatory conduct that was subject to the comprehensive statutory remedies provided by NRS 613.310 *et seq.* The Nevada Supreme Court subsequently clarified and strengthened this holding in *D'Angelo v. Gardner*, 107 Nev. 704 (1991), explicitly confirming that the statutory scheme set forth in NRS 613.310 *et seq.* was the

sole remedy available for claims of discrimination, displacing potentially overlapping common law torts. Because there is an adequate statutory remedy for unlawful discrimination, Nevada courts will not permit a plaintiff to recover in tort for the same claims. The U.S. District Court for the District of Nevada has applied the same rationale and dismissed state tort claims when such claims were premised upon discriminatory conduct covered by state or federal statutes with adequate remedies. *See Jackson v. Universal Health Servs.*, No. 2:13-cv-01666-GMN-NJK, 2014 U.S. Dist. LEXIS 129490 (D. Nev. Sept. 15, 2014) (dismissing negligent hiring, supervision and training claim based on alleged race and gender discrimination when there is an exclusive statutory remedy for these claims); *Westbrook v. DTG Operations, Inc.*, No. 2:05-cv-00789-KJD-PAL, 2007 U.S. Dist. LEXIS 14653, at *19 (D. Nev. Feb. 28, 2007) (dismissing negligence *per se* claim based on violations of the Americans with Disabilities Act); *Colquhoun v. BHC Montevista Hospital, Inc.*, No. 2:10-cv-0144-RLH-PAL, 2010 U.S. Dist. LEXIS 57066 (D. Nev. June 9, 2010) (dismissing negligent hiring, supervision and training claim based on alleged discrimination, stating "the fact that an employee acts wrongfully does not in and of itself give rise to a claim for negligent hiring, training or supervision"); *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442 (D. Nev. 1996) (the court dismissed the plaintiff's public policy wrongful discharge claim concluding that an available statutory remedy existed under federal law in the Americans With Disabilities Act ("ADA")).

Moreover, even if the Court were inclined to consider the claim, the allegations in the Complaint – that Freeman failed to ensure that managers are familiar with state marijuana law – do not establish a claim. "The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996). There is no common law duty to hire and/or train employees so that they are aware of the complexities of medical marijuana law under state and federal standards. Indeed, it would be strange, at the least, to hold an employer liable for hiring "unfit" employees when the employer merely acted in accordance with its Drug Policy and federal law. Accordingly, Plaintiff's fourth cause of action must be dismissed for failure to state a cognizable claim for relief.

5. Plaintiff's Fifth Cause of Action fails to state a claim for "violation of the medical needs of an employee who engages in medical use of marijuana to be accommodated by employer."

Plaintiff's fifth cause of action is for failure to accommodate pursuant to NRS 453A.10, *et seq.* But the allegations in the Complaint do not state a claim. The statute does not contain a private right of action, and Plaintiff's citation to NRS 453A.800(3), which falls under section entitled in part "medical use of marijuana **not required** to be allowed in workplace," conflicts with his contention that his termination for use of marijuana was unlawful. (emphasis added). Plaintiff's other allegations, on their face, render a cause of action based on this statute impossible. Plaintiff claims "**he never requested an accommodation** other than a reasonable accommodation not to terminate him, despite a positive indication for medical marijuana...." Compl., ¶123 (emphasis added). Plaintiff plainly cannot claim that Freeman violated NRS 453A.800 by failing to grant an accommodation that he admittedly "never requested."

Even if Plaintiff's allegations were reframed and recharacterized to fit with the ambit of the statutory text, the claim still fails. A decision by the Supreme Court of Montana is instructive. In *Johnson v. Columbia Falls Aluminum Co.*, LLC, 2009 MT 108N, P5, 2009 Mont. LEXIS 120, *5, the Supreme Court of Montana held that Montana's Medical Marijuana Act ("MMA") does not provide an employee with an express or implied private right of action against an employer. *Id.* Instead, the MMA specifically provided that it cannot be construed to require employers to accommodate the medical use of marijuana in any workplace. *Id.*

NRS 453A.800(2) similarly does not "require an employer to allow the medical use of marijuana in the workplace." NRS 453A.800(3) expressly does not "require an employer to modify the job or working conditions of an employee who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer...." The business purposes of Freeman's Drug Policy are clearly articulated in the CBA and the law does not require accomodation. **Ex. A.** Accordingly, even if this Court were to construe Plaintiff's

fifth cause of action in the light most favorable to Plaintiff, he cannot state a claim as a matter of law.

V. CONCLUSION

For the reasons set forth above, Plaintiff's five causes of action are preempted by Section 301 of the LMRA and must be dismissed with prejudice. If the Court concludes otherwise, it must still dismiss the Complaint in its entirety because, based on the allegations in the Complaint, Plaintiff's claims fail as a matter of law.

Dated this 21st day of January, 2020.

JACKSON LEWIS P.C.

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Attorneys for Defendant
Freeman Expositions, LLC
Improperly Named The Freeman Company, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 21st day of January 2020, I caused to be served via the Court's CM/ECF, a true and correct copy of the above foregoing **DEFENDANT'S MOTION TO DISMISS** properly addressed to the following:

Christian Gabroy
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, Nevada 89012

Attorney for Plaintiff James Roushkolb

/s/ Kelley Chandler
Employee of Jackson Lewis P.C.

4812-9412-2674, v. 2

EXHIBIT III

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JAMES ROUSHKOLB,

Plaintiff(s),

v.

FREEMAN COMPANY, LLC,

Defendant(s).

Case No. 2:19-CV-2084 JCM (NJK)

ORDER

Presently before the court is the Freeman Company's ("defendant") motion to dismiss. (ECF No. 13). James Roushkolb ("plaintiff") filed a response (ECF No. 15), to which defendant replied (ECF No. 16).

I. Background

The instant action arises from an employment dispute. Plaintiff regularly used medical marijuana at night to treat post-traumatic stress disorder ("PTSD") pursuant to a doctor's recommendation. (ECF No. 1-1 at 2). Plaintiff, a member of the Teamsters, Chauffeurs, Warehousemen, and Helpers, Local 631, International Brotherhood of Teamsters ("the union"), worked as a journeyman. (*Id.* at 6; ECF No. 13 at 2). Defendant hired him as temporary labor. (ECF No. 1-1 at 6).

Plaintiff was working with another employee to remove a piece of plexiglass from the ceiling when he dropped the plexiglass, causing it to shatter. (*Id.* at 6–7). Following the accident, defendant requested that plaintiff take a drug test, which he failed on account of his medical marijuana use the previous night. (*Id.* at 7). Plaintiff claims he was not under the influence on the job site. (*Id.*) Defendant fired plaintiff as a result of his failed drug test. (*Id.*)

Plaintiff now brings claims under several Nevada employment statutes claiming that defendant did not accommodate his disability. (ECF No. 1–1). Defendant moves to dismiss all claims. (ECF No. 13).

II. Legal Standard

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the

line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

III. Discussion

A. Preemption

Plaintiff, as a union member, is subject to a collective bargaining agreement ("CBA"). (*See* ECF No. 13 at 2). Defendant argues that plaintiff's claims require the court to interpret the CBA. (*Id* at 7). Thus, plaintiff's state law claims are preempted by the federal Labor Management Relations Act ("LMRA") § 301. (*Id.*) This court disagrees.

The LMRA gives federal courts exclusive jurisdiction over violations of collective bargaining agreements. 29 U.S.C. § 185. It also preempts any state law claim that is "substantially dependent on the terms of an agreement made between parties to a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). There is a two-step test to determine if the LMRA preempts a state claim. *See Burnside v. Kiewit*, 491 F.3d 1053, 1059 (9th Cir. 2007). First, the court must determine whether the cause of action results from a right granted under state law or by the CBA. *See id.* Second, the court must determine whether the claim requires interpretation of the CBA. *See id.*

Plaintiff fails to mention the CBA in his complaint. Certainly, he does not avoid preemption by withholding mention of the CBA or § 301. *See Stallcorp v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1048 (9th Cir. 1987). However, where the complaint alleges rights that exist generally, independent of the CBA, § 301 does not apply. *See Livadas v. Bradshaw*,

512 U.S. 107, 124 (1994); *Davies v. Premier Chemicals, Inc.*, 50 Fed. App'x 811, 812 (9th Cir. 2002) (holding that § 301 did not preempt a tortious discharge claim under Nevada law).

Here, plaintiff does not allege any claims wholly dependent on the CBA. (ECF No. 1-1). Plaintiff's claims all arise under Nevada law and are available for pursuit by anyone, not just members of the union subject to the CBA. *See Davies*, 50 Fed. App'x 811, 812 (9th Cir. 2002).

Further, adjudicating this matter does not require the court to interpret the CBA. "[T]he need to interpret the CBA must inhere in the nature of the plaintiff's claim." *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691–92 (9th Cir. 2001). Defendant cannot defensively rely on the CBA's terms to trigger preemption. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001). Here, the CBA is asserted only defensively. (*See* ECF No. 15 at 6–12). Defendant argues that the court must interpret articles 4 (employer's rights), 14 (discipline procedures), and 15 (drug policy) to adjudicate plaintiff's claims. (*See* ECF No. 13 at 6). But plaintiff does not challenge any of the policies contained in these sections of the CBA. Nowhere in plaintiff's complaint is there an inherent need to consult or interpret the terms of the CBA.

Because plaintiff raises claims arising under state law, and the court will not have to interpret the CBA, plaintiff's claims are not preempted by the LMRA.

B. Jurisdiction

A federal court must possess jurisdiction over an action to hear the dispute. *Weeping Hollow Avenue Trust v. Spencer*, 831 F.3d 1110, 1112 (9th Cir. 2016). If a court determines at any time that it lacks subject matter over an action, it must dismiss or remand the case as appropriate. See *id.* at 1114 (reversing and remanding with instructions to remand the case to state court, as the district court lacked subject matter jurisdiction over the claims).

Here, the defendant removed the case to federal court based on federal question jurisdiction pursuant to the LMRA. (ECF No. 1). The court has determined the LMRA is inapplicable to plaintiff's claims. Therefore, the court no longer holds subject matter jurisdiction by virtue of federal question. Defendant, despite being a Texas corporation, specifically

disclaims diversity jurisdiction, presumptively due to the amount in controversy, which is never mentioned. (ECF No. 10 at 2). Therefore, the court, *sua sponte*, remands this suit to state court.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to dismiss (ECF No. 13) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that this matter be, and the same hereby is, REMANDED to the state court due to this court's lack of subject matter jurisdiction.

DATED July 2, 2020.

James C. Mahan
UNITED STATES DISTRICT JUDGE

EXHIBIT IV

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September 10, 2017

Senator Richard "Tick" Segerblom
701 East Bridger Avenue, # 520
Las Vegas, Nevada 89101-5554

Dear Senator Segerblom:

You have asked this office whether a business may establish and operate a lounge or other facility or special event at which patrons of the business are allowed to use marijuana and, if so, whether counties, cities and towns may require a business license or permit and impose regulations and other restrictions on the manner in which the lounge or other facility or special event is operated. You have also asked whether the failure of the Nevada Legislature to enact Senate Bill No. 236 of the 79th Session, which would have placed certain limitations on the powers of counties and cities to license and regulate such businesses, will affect our analysis of these issues.

The statutory provisions governing the possession, sale and use of marijuana in Nevada are provided in two separate chapters of NRS. Chapter 453A of NRS contains the provisions governing the possession, sale and use of medical marijuana and chapter 453D of NRS contains the provisions governing the possession, sale and use of marijuana by adults. A person who holds a valid registry identification card or letter of approval is exempt from state prosecution for possession, delivery and production of marijuana. NRS 453A.200 and 453A.205. The purchase, possession and use of marijuana and marijuana paraphernalia is also generally decriminalized for persons who are 21 years of age or older. NRS 453D.110, 453D.120 and 453D.130. However, certain limitations are placed on the consumption of marijuana by a person who is otherwise authorized to possess marijuana. Such a person is prohibited from driving, operating or being in actual physical control of a vehicle or vessel under power or sail while under the influence of marijuana. NRS 453A.300 and 453D.100. Such a person is also prohibited from possessing or consuming marijuana at a school or correctional facility. NRS 453A.300 and 453D.100. A person who holds a valid registry identification card or letter of approval is prohibited from possessing or consuming marijuana in "any public place or in any place open to the public or exposed to public view." NRS 453A.300. A person who is 21 years of age or

older is prohibited from consuming marijuana "in a public place, in a retail marijuana store or in a moving vehicle." NRS 453D.400. The provisions of chapter 453D of NRS, which concern the adult use of marijuana, define a "public place" as "an area to which the public is invited or in which the public is permitted regardless of age" and specifically exclude a retail marijuana store. NRS 453D.030. The provisions of chapter 453A of NRS, which concern the medical use of marijuana, do not define "public place," but use the term in a manner which is consistent with the definition in chapter 453D of NRS to create a similar prohibition on the possession and consumption of marijuana. Pursuant to the rules of statutory construction, if the Legislature does not expressly define a term, a court may supply a definition by referring to the definitions of similar terms found in related statutes. *See* Univ. and Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 199-201 (2001); Advanced Sports Info., Inc. v. Novotnak, 114 Nev. 336, 341 (1998). Additionally, "when the same word is used in different statutes that are similar with respect to purpose and content, the word will be used in the same sense, unless the statutes' context indicates otherwise." Savage v. Pierson, 123 Nev. 86, 94 (2007).

Notably, neither chapter of NRS limits the possession or consumption of marijuana to only certain enumerated locations; rather, both chapters broadly exempt the possession and consumption of marijuana from state prosecution, then prohibit only certain enumerated manners or locations of possession or consumption. Based upon the rules of statutory construction, criminal statutes are strictly construed against the state, and any ambiguities in criminal statutes must be resolved in favor of the accused. Knight v. State, 116 Nev. 140, 146-47 (2000). As a result, both chapters must be construed to permit any possession or consumption of marijuana not expressly prohibited by statute. Further, when two or more statutes seek to accomplish the same purpose or object, a court will interpret those statutes "harmoniously with one another to avoid an unreasonable or absurd result." Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n, 126 Nev. 74, 84 (2010). Thus, unless one chapter expressly imposes a restriction on the possession or consumption of marijuana that the other does not, chapters 453A and 453D of NRS should be read together to permit the possession or consumption of marijuana in similar circumstances.

When read together, the relevant provisions of chapters 453A and 453D of NRS prohibit the possession or consumption of marijuana at a place where the public is invited or in which the public is permitted regardless of age or a place exposed to public view. NRS 453A.300, 453D.030 and 453D.400. This language would not prohibit the possession or use of marijuana at a place to which the public is not invited or permitted, including a person's home or a lounge or other facility with restricted access, such as a private lounge or other facility, which is closed to the public and only allows entry to persons who are 21 years of age or older, so long as the possession or consumption of marijuana at such a location is not exposed to public view. Similarly, possession or consumption of marijuana would not be prohibited at an event which imposes restrictions for entry on the basis of age so long as the possession or consumption of marijuana is not

exposed to public view during the event. However, while a retail marijuana store would fall into this category of businesses which impose restrictions for entry on the basis of age, consumption of marijuana within a retail marijuana store is specifically prohibited by NRS 453D.400.

In addition to the more recently approved statutes specifically relating to marijuana, there is an additional statute which merits discussion. NRS 453.316 prohibits a person from opening or maintaining "any place for the purpose of unlawfully selling, giving away or using any controlled substance." Additionally, to sell marijuana a person is required to hold a medical marijuana establishment registration certificate or a license for a marijuana establishment. A person who sells marijuana without such a certificate or license remains subject to state prosecution for the sale of or trafficking in marijuana pursuant to chapter 453 of NRS. *See* NRS 453A.200, 453D.100 and 453D.120. Because it is presumed that the Legislature intended for its legislative enactments to be read as part of a larger statutory scheme, a court will strive to interpret statutes relating to the same subject in such a manner as to render the statutes compatible with each other whenever possible. State v. Rosenthal, 93 Nev. 36, 45 (1977). Here, the provisions of chapters 453A and 453D of NRS allow a person holding the appropriate registration certificate or license to lawfully sell marijuana under the laws of this State, despite the fact that such a sale remains prohibited by federal law. Similarly, the provisions of chapters 453A and 453D of NRS allow a person holding a registry identification card or letter of approval or who is 21 years of age or older, respectively, to lawfully possess and consume marijuana under the laws of this State, despite the fact that such possession or consumption remains prohibited by federal law. A court will strive to interpret these provisions in harmony with NRS 453.316. Id. If the word "unlawfully" in NRS 453.316 were interpreted in a way that includes a violation of federal law, such an interpretation would essentially render chapters 453A and 453D of NRS void by continuing to criminalize activities that the Legislature by statute or the people by initiative explicitly made legally permissible. Whenever possible, a court "will avoid rendering any part of a statute inconsequential." Savage v. Pierson, 123 Nev. 86, 94 (2007). As a result, "no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." Metz v. Metz, 120 Nev. 786, 787 (2004). Since considering whether a sale or use violates federal law for the purpose of determining whether the sale or use is "unlawful" for the purposes of NRS 453.316 would have the effect of rendering entire chapters of NRS nugatory and that consequence can be avoided by considering only whether a sale or use violates the laws of this State, chapters 453A and 453D of NRS must be read in harmony with NRS 453.316 to render a sale or use which is lawful under the laws of this State to be similarly lawful for the purpose of not creating a violation of NRS 453.316.

Similarly, a business that operates a lounge or other facility or special event in which the business allows the consumption of marijuana would not violate NRS 453.316 because the person operating the business or special event would not be maintaining the

place "for the purpose of *unlawfully*...using any controlled substance" (emphasis added). However, as marijuana may only be sold to a consumer by a medical marijuana dispensary or a retail marijuana store, and consumption of marijuana in a medical marijuana dispensary or retail marijuana store is prohibited by NRS 453A.352 and 453D.400, a business where the consumption of marijuana is allowed could not hold a registration certificate as a medical marijuana dispensary or license as a retail marijuana store and thus could not also lawfully sell marijuana.

Therefore, because we have established that the laws of this State generally authorize the possession and consumption of marijuana by certain persons and prohibit the possession and consumption of marijuana only in certain enumerated circumstances or locations, it is the opinion of this office that a business may establish and operate a lounge or other facility or special event at which patrons of the business are allowed to use marijuana.

You have also asked whether counties, cities and towns may require a business license or permit and impose requirements and restrictions on the operation of a lounge or other facility or special event at which patrons of the business are allowed to use marijuana. The Legislature has chosen to expressly grant counties, incorporated cities and unincorporated towns the power to impose a license tax upon and regulate, subject to limitations for certain kinds of businesses, all manner of lawful businesses which are conducted within the jurisdiction of the county, city or town. NRS 244.335, 268.095 and 269.170. In Nevada, local governments derive their powers from state law and, as applicable, their charters. *See* Ronnow v. City of Las Vegas, 57 Nev. 332, 341-43 (1937); Sadler v. Board of County Comm'rs, 15 Nev. 39, 42 (1880). Since the Legislature has chosen to expressly grant counties, cities and towns the power to generally license and tax businesses within the jurisdiction of the county, city or town, these local governments clearly have the power.

Therefore, it is the opinion of this office that counties, cities and towns may require a business that wishes to operate a lounge or other facility or special event at which patrons of the business are allowed to use marijuana to secure a license or permit before commencing operation. It is further the opinion of this office that the county, city or town may impose restrictions and otherwise regulate such businesses so long as the regulations or other restrictions do not violate state law.

You have also asked whether the failure of the Nevada Legislature to enact Senate Bill No. 236 of the 79th Session will affect our analysis of whether counties, cities or towns may require a business license or permit and impose requirements and restrictions on the operation of a lounge or other facility or special event at which patrons of the business are allowed to use marijuana.

Senate Bill No. 236 of the 79th Session would have placed various specific limitations on the power of counties and cities to license and regulate businesses and

special events in which the possession and consumption of marijuana is allowed by establishing certain minimum requirements for such a business or special event. In the absence of Senate Bill No. 236, as explained earlier in this opinion, the provisions of NRS 244.335, 268.095 and 269.170 grant counties, cities and towns the power to license such businesses or special events on whatever terms they determine to be appropriate and to impose a tax on such businesses or special events in an amount determined by the county, city or town. Notably, the power of a county, city or town to license and regulate businesses is limited to "lawful" businesses, so the county, city or town must at a minimum require such a business to comply with the provisions of state law as described in the previous section.

When interpreting constitutional provisions and amendments, the Nevada Supreme Court applies the same rules of construction that are used to interpret statutes. Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 538 (2001). Under those rules of construction, the Nevada Supreme Court generally gives limited weight to subsequent legislative proposals when determining the meaning of existing language, especially when the subsequent legislative proposals are defeated. See Great Basin Water Network v. Taylor, 126 Nev.Adv.Op. 20, 234 P.3d 912, 918 n.8 (2010) (following Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)). As further explained by the U.S. Supreme Court:

> But subsequent legislative history is a "hazardous basis for inferring the intent of an earlier" Congress. United States v. Price, 361 U.S. 304, 313 (1960). It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. See, e.g., United States v. Wise, 370 U.S. 405, 411 (1962). Congressional inaction lacks "persuasive significance" because "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change." Id.

Pension Benefit Guar. Corp., 496 U.S. at 650. Thus, "[t]he interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here." Wise, 370 U.S. at 411.

Additionally, pursuant to the rules of statutory construction, repeal by implication is "heavily disfavored," and a court will not consider a prior statute to be repealed by implication by a later statute unless there is no other reasonable construction of the two statutes. Washington v. State, 117 Nev. 735, 739 (2001). Here, the Legislature did not choose to enact a later statute to repeal the existing power of counties, cities and towns to license and regulate businesses, including, without limitation, businesses where the possession or consumption of marijuana is allowed. Because repeal by implication in a statute later enacted by the Legislature is heavily disfavored, it would create an

unreasonable and absurd result to allow the choice of the Legislature not to enact a later statute to itself repeal a provision of existing law by implication, and courts will strive to avoid any interpretation which leads to unreasonable or absurd results. Nev. Tax Comm'n v. Bernhard, 100 Nev. 348, 351 (1984). The more reasonable interpretation of the choice of the Legislature not to enact Senate Bill No. 236 of the 79th Session would be that the Legislature intended to allow the provisions of NRS 244.335, 268.095 and 269.170, which already grant counties, cities and towns to determine the circumstances under which they will license and tax businesses within their jurisdiction, to stand without the imposition of further restraints on particular kinds of businesses.

In conclusion, it is the opinion of this office that under current law: (1) a business may establish and operate a lounge or other facility or special event at which patrons of the business are allowed to use marijuana in compliance with state law; and (2) a county, city or town may adopt and enforce an ordinance which requires such a business to purchase a business license or permit and comply with any applicable regulations or other restrictions imposed by the county, city or town.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

Brenda J. Erdoes
Legislative Counsel

Asher A. Killian
Principal Deputy Legislative Counsel

AAK:jlw
Ref No. 170607094911
File No. OP_Segerblom17072610641

EXHIBIT V

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Attorneys for Defendant
Sunrise Hospital and Medical Center, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

Scott Nellis, an individual

Plaintiff,

vs.

Sunrise Hospital and Medical Center, LLC., a Foreign Limited-Liability Company; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive;

Defendant.

CASE NO. A-17-761981-C
Dept. No.: XVIII

NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that an Order Granting In Part And Denying In Part Defendant's Motion to Dismiss Plaintiff's Complaint was filed on February 20, 2018, a true and correct copy

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LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

4840-6843-2734.1

of which is attached hereto.

Dated: February 21, 2018

LEWIS BRISBOIS BISGAARD & SMITH, LLP

BRUCE C. YOUNG, ESQ.
SCOTT H. BARBAG, ESQ.

Attorneys for SUNRISE HOSPITAL AND MEDICAL CENTER, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 21st day of February, 2018, a true copy of **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** was served electronically with the Court using the Odyssey eFile NV Electronic Service system and addressed as follows:

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SUNRISE HOSPITAL AND MEDICAL
CENTER, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

SCOTT NELLIS, an individual, Plaintiff, vs. SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, a Foreign Limited-Liability Company; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive, Defendants.	Case No. A-17-761981-C Dept. No. XVIII **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

On January 24, 2018 at 9:00 a.m., Defendant SUNRISE HOSPITAL AND MEDICAL CENTER, LLC's Motion to Dismiss came up on hearing in Department 18 of the above entitled Court, the Honorable Mark B. Bailus presiding. Bruce C. Young of LEWIS BRISBOIS BISGGARD & SMITH, LLP appeared on behalf of Defendant SUNRISE HOSPITAL AND MEDICAL CENTER, LLC and Christian Gabroy of GARBOY LAW OFFICES appeared on behalf of Plaintiff SCOTT NELLIS.

After due consideration of the Motion, Opposition and Reply, and following oral argument, the Court ruled as follows:

1. Defendant's Motion to Dismiss is DENIED as to Counts 1, 3, 4 and 5 of the Complaint;

2. Defendants Motion to Dismiss is GRANTED as to Count 2, with leave to amend; and

3. Plaintiff shall have forty-five (45) days to file an Amended Complaint, or until on or before March 12, 2018.

IT IS SO ORDERED.

DATED: February 13, 2018

HON. MARK B. BAILUS
Eighth Judicial District Court Judge

Respectfully Submitted by:

Dated this 25th day of January, 2018

By _____
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Approved as to form and content:

Dated this 21st day of January, 2018

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Attorneys for Defendant
Freeman Expositions, LLC
Improperly Named The Freeman Company, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES ROUSHKOLB,

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, Inclusive,

Defendants.

Case No. A-19-805268-C

FREEMAN EXPOSITIONS, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS

Hearing Date: September 15, 2020

Defendant Freeman Expositions, LLC improperly named as the Freeman Company, LLC ("Freeman" or "Defendant"), by and through its counsel, submits this Reply in Support of Motion to Dismiss ("Motion"). This Reply is supported by the attached memorandum of points and authorities, the pleadings and papers on file herein, and any other evidence and oral argument this Court may entertain.

I. INTRODUCTION

There is no dispute that Freeman terminated Roushkolb because he tested positive for

marijuana in a post-accident drug test. Article 15 of Freeman's collective bargaining agreement[1] with Teamsters Local 631 specifically provides for discharge under such circumstances. Motion, Ex. A at pp. 38-42. It adopts federal Department of Transportation "cut off levels," identifies marijuana as an "illegal drug," and establishes that blood concentrations of more than 50 ng/ml will lead to immediate termination. *Id.* at p. 41. Roushkolb's post-accident test exceeded that cut-off level – which is subject to and governed by federal, **not** state law – so he was discharged.

Roushkolb failed to plead that he pursued his rights to challenge his termination as provided by the collective bargaining agreement. *See* Compl. He also failed to plead exhaustion of any administrative remedies he may have had with the Nevada Equal Rights Commission relating to an alleged disability. *Id.* Instead, he has cobbled together several novel causes of action which would require this Court to create new law to sustain. To be clear, there is no statute that explicitly permits the claims Plaintiff seeks to bring here, and no judicial authority that weighs in Plaintiff's favor. Further, to sustain any of Plaintiff's claims, the Court would also be required to find that employers and labor organizations may not bargain over marijuana usage in Nevada, which directly contradicts the expressed intent of the Nevada legislature to exempt collective bargaining agreements from the prohibition that employers may not discriminate against employees based on drug screening results for marijuana. *See* NRS § 613.132(4)(a) (the provisions of this section do not apply "[t]o the extent that they are inconsistent with or otherwise conflict with the provisions of and employment contract or collective bargaining agreement").

For these reasons and the reasons set forth in more detail below, Freeman's Motion should be granted, and the Complaint should be dismissed with prejudice.

---

[1] Although Plaintiff's Complaint avoids reference to the collective bargaining agreement, this is not dispositve under the "artful pleading" doctrine, and this Court may consider the extensive terms and conditions governing Plaintiff's employment as expressed therein without converting the Motion to Dismiss to one for summary judgment. *See, e.g., Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1048, 1987 U.S. App. LEXIS 7900, *7 (9th Cir. 1987) ("[plaintiff] does not reveal that her employment is governed by a collective bargaining agreement, but this is not dispositive under the "artful pleading" doctrine) *Marcoz v. Summa Corp*., 106 Nev. 737, 748, 801 P.2d 1346, 1354 fn. 9 (1990) (discussing "artful, tactical pleading" and interplay with federal preemption of state law claims.)

II. LEGAL ARGUMENT

A. Plaintiff's Opposition Fails to Demonstrate that His Five Causes of Action Should Not Be Dismissed for Failure to State a Claim.

1. Plaintiff's claim pursuant to NRS § 613.333 fails as a matter of law.

The bulk of Plaintiff's Opposition consists of an attempt to extend the bounds of Nevada law to salvage his claim under NRS § 613.333. Opp. at 7:15-11:11. There is no judicial precedent or statutory language that authorizes this cause of action. Plaintiff's theory of relief would import the intent of Nevada's medicinal marijuana decriminalization statute (NRS § 453A), into a statute enacted 10 years prior (NRS § 613.333). It is simply impossible that the Nevada legislature could have intended to provide employees with blanket protection for medical marijuana use, in contradiction with the express terms of a collective bargaining agreement, **ten years before** medical marijuana use was decriminalized in the state.

Critically, Plaintiff's Complaint alleges "[t]here are no laws regulating the use of drug and alcohol testing by private employers currently in effect." Compl., ¶ 32. This is no longer true as NRS § 613.132, which regulates drug testing by private employers, went into effect on January 1, 2020. This statute, which is the most recent and clear expression of the Nevada state legislature's intent to prohibit marijuana discrimination in the workplace, **specifically permits employers to use the presence of marijuana in drug screenings in adverse actions where a collective bargaining agreement provides employers that right under the contract.** *See* NRS § 613.132[2]. In other words, the Nevada legislature expressly recognized the importance of exempting drug and alcohol policies in collective bargaining agreements from the prohibition against using marijuana drug screenings to make employment decisions. This Court's analysis

---

[2] NRS 613.132 provides:

1. It is unlawful for any employer in this State to fail or refuse to hire a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana.

…

4. The provisions of this section do not apply:
(a) To the extent that they are inconsistent or otherwise in conflict with the provisions of an employment contract or collective bargaining agreement.

need not proceed any farther than recognizing that there is no Nevada statute which permits abrogation of Freeman's collective bargaining agreement with Plaintiff's union, and that the Nevada legislature made a conscious exemption to reinforce the primacy of collectively bargained drug and alcohol testing provisions.

Again, although Plaintiff relies on a statute enacted in 1991, which has not since been amended even though marijuana use subsequently became legal in the state of Nevada, the text of the statute does not support Plaintiff's claim. Further, there is no legal precedent or legislative history to support Plaintiff's repurposing of the statute. As noted in the Motion, *Brandon Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2013) provides compelling guidance: "[i]n this case, we find nothing to indicate that the General Assembly intended to extend section 24-34-402.5's protection for "lawful" activities to activities that are unlawful under federal law." *Id.* at 853; Opp. at 8:20-24. Here, the Court should similarly reject Plaintiff's claim. Any lack of clarity regarding what the Nevada legislature meant by

Plaintiff's attempt to respond to the foregoing analysis is not persuasive. He provides a September 10, 2017 legal opinion from the State of Nevada's Legislative Counsel Bureau, Opposition, Ex. IV. A memo issued years after the statute's enactment is not legislative intent. Moreover, the opinion analyzes only whether business may operate a facility at special events where guests are permitted to use marijuana. It does not contain a single reference to NRS § 613.333, nor purport to address the employee/employer relationship. *Id.* Its analysis of the term "unlawful" is limited to the decriminalization of marijuana use related to the "unlawful sale, gift or use of controlled substance" and accordingly has no bearing on the insufficiency of Plaintiff's NRS § 613.333 claim. *Id.* at p. 4; NRS § 453.316.

The Connecticut, Rhode Island, Massachusetts, and Arizona cases relied upon by Plaintiff are equally unavailing due to the dissimilarity of the statutes at issue in those cases and NRS § 613.333. Opp. at 9:22-11:11. In Connecticut, the Palliative Use of Marijuana Act ("PUMA") "includes a provision that explicitly prohibits discrimination against qualifying patients and primary caregivers by schools, landlords, and employers." *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 331 (D. Conn. Aug. 8, 2017) (referencing Conn. Gen.

Stat. § 21a-408p(b)). NRS § 613.333 does not contain a provision expressly prohibiting discrimination against medical marijuana patients by employers. In Rhode Island, the Hawkins-Slater Act, which addresses medical marijuana use, also has a specific anti-discrimination provision: "[n]o school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder." *Callaghan v. Darlington Fabrics Corp*., 2017 R.I. Super. LEXIS 88, *5-6 (R.I. Super. 2017). No similar, express language is present in NRS § 613.333. In Arizona, the Medical Marijuana Act ("AMMA") likewise contains an affirmative anti-discrimination provision. *Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761, 774 (D. Az. 2019) (AMMA includes an anti-discrimination provision, A.R.S. § 36-2813(B), which provides that an employer may not discriminate based on a registered qualifying patient's positive drug test). Again, NRS § 613.333 does not contain a similar provision. Finally, the Massachusetts authority Plaintiff cites in his Opposition,[3] wherein the Massachusetts Supreme Court permitted an employee to bring a claim of disability discrimination based on her medical marijuana use, only serves to highlight what Plaintiff failed to do here: pursue a claim of disability discrimination with the proper administrative agency.

2. Plaintiff's wrongful discharge claim fails as a matter of law.

Plaintiff's termination in accordance with the collective bargaining agreement negotiated between his union and Freeman is not a rare, exceptional, or unlawful occurrence. Indeed, Plaintiff's allegations do not establish a "rare and exceptional case[] where the employer's conduct violates strong and compelling policy." *Sands Regent v. Valgardson*, 105 Nev. 436, 440 (1989). To be clear, there are three express categories of wrongful discharge recognized by Nevada law: 1) refusing to engage in unlawful conduct, *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1321 (1998); 2) refusing to work in unreasonably dangerous conditions, *Western States v. Jones*, 107 Nev. 704 (1991); or 3) filing a workers compensation claim, *Hansen v. Harrah's*, 100 Nev. 70 (1984). Plaintiff's assertion that "the heart of the purpose and intent of Nevada's medical marijuana laws is compassion for those suffering from serious medical

[3] *Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456, 464, 78 N.E.3d 37, 45 (2017).

conditions and acknowledgment of the right to determine their own course of treatment," Opp. at 11:10-12, does not change that fact. Whatever "the heart of the purpose" of NRS § 459A may be, it is not sufficient to establish a brand new exception to Nevada's at-will employment doctrine.

Plaintiff's contention that his case is in fact "rare and exceptional" because his "right to seek his or her own legal course of treatment for [his] serious disability, based upon [his] physician's professional medical judgment" was violated is meritless. Opp. at 10:14-17. It is a transparent attempt to recharacterize a statutory disability claim, which was not exhausted with the Nevada Equal Rights Commission, as a wrongful discharge claim. The Nevada Supreme Court has already found that such public policy-based allegations fail to state a claim. *See Chavez v. Sievers*, 118 Nev. 288, 293 (2002). *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869 (1977), which concerns constitutional rights to privacy, has no bearing on the issue of whether Plaintiff's termination for medical marijuana use in accordance with a collectively bargained drug and alcohol policy violated the strong and compelling policy of the State of Nevada.

Finally, as discussed above, the legislature has already expressed **a clear public policy to exempt collective bargaining agreements** from the prohibition against using marijuana drug screening in making adverse employment decisions, *see* NRS § 613.132, which belies Plaintiff's argument that "preventing an employer from discharging or failing to hire an employee for the legal use of medical marijuana is matter of public interest." Opp. at 11:28-12:1. In fact, the Nevada legislature's actions have demonstrated that the public interest favors the continued application of collectively bargained agreements over an individual's use of marijuana.

3. Plaintiff's deceptive trade practices claim fails as a matter of law.

In his Opposition, Plaintiff argues that the Nevada Deceptive Trade Practices Act ("NDTPA") should be expanded to encompass his employment-based claims because he "is a person who was a victim of Defendant's fraudulent and deceptive sales practices relating to the sale or lease of goods of services." Opp. at 14:16-18. This is nonsensical. There are no allegations in Plaintiff's Complaint that Freeman sold or leased goods or services to Plaintiff. Neither is Plaintiff is a "business competitor" of Freeman's or a "victim" of a sales practice. The

relationship between Plaintiff and Defendant, as alleged in the Complaint is clearly an employment relationship, not a sales relationship. Further, the absence of any relevant transaction involving goods or services also undermines Plaintiff's attempt to rely on *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145 (9th Cir. 2011) to salvage his NDTPA claim. The basis for the claims in *Partington* involved a third party's illegal structural inspections and provision of misleading inspection reports to homebuilder's customers, which damaged the homebuilder's relationship with these consumers. *Id.* at 1153. The *Partington* court clarified that the homebuilder could pursue its claims because misrepresentations were in fact made to consumers, and the damages stemming from the misrepresentation extended to the homebuilder's business interests; it certainly never contemplated applying the NDTPA to the employer/employee relationship.

Plaintiff's suggestion that the United States District Court of Nevada "has allowed a DTPA claim to proceed in a wage and hour matter" is both unavailing and misleading. Opp. at 15:7-9. In *Garcia v. Interstate Plumbing & Air Conditioning, LLC*, 2011 U.S. Dist. LEXIS 14701, *23, 2011 WL 468439 (D. Nev. 2011), the court granted plaintiff leave to amend his complaint in order to add new claims, including claims arising under the Nevada Deceptive Business Practices Act. *Id.* It did not assess the viability of any such claims. *Id.*

Finally, Plaintiff's Opposition fails to address Freeman's well-founded argument that the Complaint fails to plead the alleged fraud underlying the NDTPA claim with particularity. *See George v. Morton*, 2007 U.S. Dist. LEXIS 15980, *11 (D. Nev. Mar 1, 2007) (NRS § 598 statements that rely on fraud must satisfy the pleading requirements of Rule 9(b)). Plaintiff does not specify the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Plaintiff also fails to set forth "what is false or misleading about a statement, and why it is false." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). NRS Chapter 598 itself is forty-five pages and contains ten definitions of "deceptive trade practice" by itself. *See, e.g.*, NRS 598.0915 to NRS 598.0925. Plaintiff utterly fails to allege with the appropriate specificity which portion of the NDTPA was allegedly violated or who specifically made any

allegedly deceptive statements. The lack of specificity in Plaintiff's Complaint mandates this claim be dismissed.

4. Plaintiff's claim for negligent hiring, training, and supervision fails as a matter of law.

Plaintiff's Opposition argues for a "general negligence" standard that would override every other statutory claim and judicial authority regarding the causes of action applicable to the employee-employer relationship. Opp. at 15:14-18. This is contrary to binding Nevada authority. "NRS § 613.330 *et seq*. provides the exclusive remedy for tort claims premised on illegal employment practices. Plaintiff does not dispute that the basis for his Complaint is alleged illegal employment practices. The Nevada Supreme Court, as well as the District Court for the District of Nevada, have held that "tort claims premised on discrimination in employment are remedied under the statute." *Brinkman v. Harrah's Operating Co., Inc*., 2:08-cv-00817-RCJ-PAL, 2008 U.S. Dist. LEXIS 123992 at*3 (D. Nev. October 16, 2008). The U.S. District Court for the District of Nevada has applied the same rationale and dismissed state tort claims when such claims were premised upon discriminatory conduct covered by state or federal statutes with adequate remedies. *See Jackson v. Universal Health Servs.*, No. 2:13-cv-01666-GMN-NJK, 2014 U.S. Dist. LEXIS 129490 (D. Nev. Sept. 15, 2014) (dismissing negligent hiring, supervision and training claim based on alleged race and gender discrimination when there is an exclusive statutory remedy for these claims); *Westbrook v. DTG Operations, Inc.*, No. 2:05-cv-00789-KJD-PAL, 2007 U.S. Dist. LEXIS 14653, at *19 (D. Nev. Feb. 28, 2007) (dismissing negligence *per se* claim based on violations of the Americans with Disabilities Act); *Colquhoun v. BHC Montevista Hospital, Inc.*, No. 2:10-cv-0144-RLH-PAL, 2010 U.S. Dist. LEXIS 57066 (D. Nev. June 9, 2010) (dismissing negligent hiring, supervision and training claim based on alleged discrimination, stating "the fact that an employee acts wrongfully does not in and of itself give rise to a claim for negligent hiring, training or supervision").

Plaintiff's attempt to repurpose his alleged discriminatory termination, which was in reality no more than an application of the express terms of the collective bargaining agreement, into a negligence claim fails a matter of law, notwithstanding his bare pleading of the elements of a negligence claim. Opp. at 16:5-16. It is facially implausible that a company would have a

duty of care to "train and supervise its employees in regards to all correct policies…relating to medical marijuana laws," Compl. ¶ 106, when doing so would conflict with the applicable collective bargaining agreement and Nevada law exempting collective bargaining agreements from drug screening prohibitions. *See* NRS § 613.132. Such an interpretation would require stretching the doctrine of negligence to its breaking point.

Finally, Plaintiff's attempt to salvage his negligence-based claims by claiming Freeman was negligent in multiple ways "including failing to reasonably protect Plaintiff from unsafe decisions of management" is undermined by the allegation in the Complaint that "[n]o one, including [Plaintiff] and [coworker], was injured in any way by the plexiglass falling to the floor." Compl. ¶ 55. Plaintiff's claim is either a negligent hiring, training, or supervision claim, OR a standard negligence claim. He cannot have it both ways within a single cause of action. If his claim is standard negligence claim, it is preempted by Nevada's Industrial Insurance Act, ("NIIA") which covers "'injuries' resulting from 'accidents' at work and may preempt negligence claims." *Painter v. Atwood*, 912 F. Supp. 2d 962, 966 (D. Nev. 2012); *see also Racalde v. Marriott Ownership Resorts, Inc.*, No. 2:15-CV-1627 JCM (NJK), 2016 WL 1449603 at *3 (D. Nev. Apr. 11, 2016).

5. Plaintiff's Fifth Cause of Action fails to state a claim for "violation of the medical needs of an employee who engages in medical use of marijuana to be accommodated by employer."

In his Opposition, Plaintiff contends that Nevada's medical marijuana statute "allows a private right of action." Opp. 18:17. However, Plaintiff does not cite to, reference, or otherwise indicate *where* within the statute the legislature expressly provided employees with a private right of action. Opp. 18:17-27; NRS § 453A. The only reference to employers in the statute is NRS § 453A.800(3)'s discussion of accommodation in the workplace. However, Plaintiff does not allege that he requested an accommodation prior to undergoing a post-accident drug test. *See generally* Compl. Plaintiff does not allege he disclosed his medical marijuana use to anyone at Freeman. *Id.* Indeed, the allegations in Plaintiff's Complaint are identical to those rejected by the Montana Supreme Court in *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 108N, P5, 2009 Mont. LEXIS 120, *5 (Mont. 2009), which concerned an employee who began using

medical marijuana after sustaining a workplace injury and who was terminated after failing a drug test in violation of the drug and alcohol policy contained within a collective bargaining agreement. *Id.* at *1-2. The *Johnson* court rejected the plaintiff's attempt to pursue a cause of action under his state's medical marijuana statute. The same result is called for here.

Further, Plaintiff's argument that the alleged accommodation which implicates NRS § 453A is a "reasonable accommodation not to terminate him" contradicts the text of the statute. NRS § 453A provides: "the employer must make reasonable accommodations for the medical needs of an employee." *Id.* The statute does not contemplate a prohibition against termination for drug policy violations. *Id.* It does not contain a "penalty" provision or other provision allowing a private right of action against employers. Declining to create new law to allow Plaintiff to circumvent the collective bargaining process and the administrative agency process for the alleged failed accommodation of disabilities would not render NRS § 453A nugatory as Plaintiff argues. NRS § 453A is a primarily a decriminalization and licensing statute and is grouped with NRS Chapter 453-Controlled Substances. There are 13 provisions within NRS § 453A on exemptions from state prosecution, affirmative defenses, and search and seizure. There are approximately 22 provisions on the licensing and operation of medical marijuana establishments and agents and 4 provisions on research. There is a single reference under "Miscellaneous Provisions" regarding employers. Should this Court rightfully refuse to create a private right of action as Plaintiff urges, where none exists in the text of the statute, the Court would merely be following the express terms of the statute, rather than rendering the statute nugatory. Accordingly, even if this Court were to construe Plaintiff's fifth cause of action in the light most favorable to Plaintiff, he cannot state a claim as a matter of law.

III. CONCLUSION

For the reasons set forth above, Plaintiff's five causes of action fails to state a claim. and must be dismissed with prejudice.

Dated this 8th day of September, 2020.

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer
Paul T. Trimmer, Bar #9291
Lynne K. McChrystal, Bar #14739
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101

Attorneys for Defendant
Freeman Expositions, LLC
Improperly Named The Freeman Company, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 8th day of September 2020, I caused to be served via the Court's Odyssey File and Serve, a true and correct copy of the above foregoing **FREEMAN EXPOSITIONS, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS** properly addressed to the following:

Christian Gabroy
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, Nevada 89012

Attorney for Plaintiff James Roushkolb

/s/ Wende Hughey
Employee of Jackson Lewis P.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

Employment Tort	**COURT MINUTES**	**September 15, 2020**

A-19-805268-C James Roushkolb, Plaintiff(s)
vs.
Freeman Expositions LLC, Defendant(s)

September 15, 2020 **09:30 AM** **Freeman Expositions, LLC's Motion to Dismiss**

HEARD BY: Atkin, Trevor **COURTROOM:** Phoenix Building 11th Floor 110

COURT CLERK: Castle, Alan

RECORDER: Kirkpatrick, Jessica

REPORTER:

PARTIES PRESENT:

Christian Gabroy	**Attorney for Plaintiff**
Lynne McChrystal	**Attorney for Defendant**
Paul T. Trimmer	**Attorney for Defendant**

JOURNAL ENTRIES

Arguments by counsel. COURT ORDERED, Defendant's Motion to Dismiss is DENIED, except for deceptive trade claim. Court Finds remaining claims survive as provable. Mr. Gabroy to prepare the order within 10 days have Ms. McChrystal review as to form and content and distribute a filed copy to all parties involved in this matter.

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12/7/2020 2:41 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES ROUSHKOLB, Plaintiff, vs. FREEMAN EXPOSITIONS LLC, Defendant,	CASE#: A-19-805268-C DEPT. VIII

BEFORE THE HONORABLE TREVOR L. ATKIN, DISTRICT COURT JUDGE

TUESDAY, SEPTEMBER 15, 2020

RECORDER'S TRANSCRIPT OF HEARING:
FREEMAN EXPOSITIONS, LLC'S MOTION TO DISMISS

APPEARANCES: [All appearance via videoconference]

For the Plaintiff: CHRISTIAN GABROY, ESQ.

For the Defendant: PAUL T. TRIMMER, ESQ.
LYNNE McCHRYSTAL, ESQ.

.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Las Vegas, Nevada, Tuesday, September 15, 2020

[Hearing began at 9:53 a.m.]

THE RECORDER: Page 5, A805268, James Roushkolb versus Freeman Expositions. We have Christian Gabroy, Paul Trimmer, and Lynne McChrystal.

THE COURT: Okay. Thank you.

MR. GABROY: Good morning, Judge.

THE COURT: Okay. So, let me just make -- I was transitioning over to this case. I have Christian Gabroy, correct?

MR. GABROY: Correct. Good morning, Judge.

THE COURT: Good morning. I have Mr. Trimmer, correct?

MR. TRIMMER: Yes. Good morning.

THE COURT: And Lynne McChrystal, correct?

MS. McCHRYSTAL: That's correct, Your Honor, thank you.

THE COURT: Okay. Thank you. I just wanted to make sure I had that straight.

All right. This is Freeman Exposition's motion to dismiss. It's a rather interesting matter. I've reviewed the motion, the opposition thereto, and then the reply. Who's going to be arguing this, Mr. Trimmer or Ms. McChrystal?

MS. McCHRYSTAL: Your Honor, this is Lynn McChrystal. I'll be arguing for defendant.

THE COURT: Okay. Thank you. Please go ahead.

MS. McCHRYSTAL: Thank you, Your Honor. Preliminarily, I

just want to cover one issue that came up in the opposition plaintiff. It's sort of implied that this is defendant's second bite at the apple, referencing what happened in Federal Court. To be clear, the Federal Court, Judge Mahan, essentially punted on the state law claims. So, this is our first chances to really address the merits of those claims in the context of the motion to dismiss in substance.

THE COURT: I understand. I understand that.

MS. McCHRYSTAL: Great, thank you, Your Honor.

THE COURT: Uh-huh.

MS. McCHRYSTAL: First, what we essentially have is a critical fact, which to be quite frank, discovery won't change this fact, is that the company issued a no dispatch letter or a termination letter to Mr. Free - or Mr. Roushkolb for violating its drug policy as contained in the collective bargaining agreement with Mr. Roushkolb's union, which is the Teamsters.

Mr. Roushkolb did not plead that he pursued the remedies that are provided in that collective bargaining agreement related to the negotiated drug policy and discharge procedures. He did not plead that he exhausted administrative remedies with the NIRK. And although NIRK has stated it won't touch the medical marijuana statute per se, it has indicated that it will investigate a failure to accommodate any underlying disability which the medical marijuana is being used for. And the complaint is chopped full of allegations regarding an underlying disability.

THE COURT: I saw that --

MS. McCHRYSTAL: But --

THE COURT: -- and let me, let me interrupt. When I first saw this and you were going through what this covered. I thought this was going to be a motion to force mandate -- arbitration under the collective bargaining agreement. But go ahead.

MS. McCHRYSTAL: Yes, Your Honor. Well, and to be frank, if Mr. Roushkolb has pursued those available to him, though any arbitration claim he would try at this point would be untimely and it would have to be lodged through his union rather than this kind of roundabout path he's taking now.

So, the complaint essentially has it all backwards as to what the basis for the accommodation is. It's a disability accommodation not a blanket accommodation for marijuana. And Mr. Roushkolb simply doesn't plead failure to exhaust administrative remedies for a disability discrimination. So, he didn't take advantage of the two proper channels available to him through the CBA, which has a very extensive kind of list of procedures of how to address this issue or through NIRK. So, we have them essentially cobbling together some statutory claims and tort claims to try and obfuscate his failure to pursue the remedies that were available to him.

But if Your Honor sustains these causes of action it essentially is an expansion of the scope of liability and employment law as we know it. There's no statutory test. There's no judicial authority and there's no expressed legislative intent to support Mr. Roushkolb's advancement of his claim.

The only Nevada statute that specifically and intentionally addresses drug testing for marijuana in employment is the most recent statute, NRS 613.132 and it prohibits employers from refusing to hire prospective employees based on the marijuana positive drug test. But that same statute expressly exempts collective bargaining agreements from this prohibition.

So, if Mr. Roushkolb were to reapply to Freeman today and have a marijuana positive at the drug screen. Freeman could lawfully refuse to hire him on that basis. So how can we now turn around and have Mr. Freeman -- or excuse me, Mr. Roushkolb challenge his termination under a collective bargaining agreement for these same exact drug screenings? It doesn't make any sense and it stretches the law that we know at this point to its breaking point.

A final point just on the equities and the novel nature of Mr. Roushkolb's claims that as you indicated, Your Honor, they are interesting and they seek to expand the scope of employment law. And if he wants to take that up to the Supreme Court he surely will, but to require Freeman at this stage to incur further litigation expenses is simply not equitable.

You know, Freeman has been unfortunately forced to furlough and lay off the majority of its employees given the nature of the economic situation right now. It shouldn't be required to defend against these novel claims which quite frankly have no support in our current case law. And it's all in the briefs and I know Your Honor has covered those. And so, on that basis, Freeman is asking that Your Honor

dismiss the complaint.

THE COURT: All right. Thank you. And just, plaintiff's counsel, just so you know, and defense counsel, the financial condition of the Freeman Company isn't playing any part of my analysis in this one way or the other. I appreciate the factual background, but that's obviously not determinative of anything relative to the subject motion. All right.

MR. GABROY: And, Your Honor, I appreciate that on behalf of the plaintiff because it wasn't disclosed that there is insurance here for this coverage.

THE COURT: All right, Mr. Gabroy, go ahead.

MR. GABROY: Your Honor, I first begin with the argument and I think what defense counsel is trying to state here is an exhaustion requirement. What Your Honor has pointed out is, at first, I thought this was a motion to compel a grievance under the CBA. Let me begin and let me state the defendant, in this case a multijurisdictional defendant, and the plaintiff suffers from a medical condition which he has a medical marijuana card as imbued in the Nevada constitution.

613.333 is the lawful use statute. The lawful use statute in this case says that the employer can't do exactly what the employer did in this situation, is terminate an employee for the lawful use of a product in this state. And, Your Honor, the statute, as written, provides a private cause of action. The CBA exhaustion component here is not an issue in this case. They would try to make the same type of argument then, if you believe their argument, that anybody that brings a sexual

harassment case under Title 7 would have to exhaust their remedies under the CBA. It is not required, Your Honor. All claims were timely made.

The 613.333 cause of action alleges violation of my client, which is prescribed medical marijuana because he suffers PTSD because of an incident where he was attacked as a correctional officer. Also, in his dealings as a journeyman for the defendant here, they violated the law. And the law as imbued under the wrongful discharge or tortious public policy discharge. What is more of a public policy discharge than an amendment to the constitution? The people voted in medical marijuana. It is embedded as amendment to the constitution.

Freeman chose to terminate my client for exercising his lawful right under the constitution in count 1. Count 2, the lawful use of a product, which explicitly grants a private cause of action, Your Honor. Then we have the negligent hiring, training, and supervision that Freeman did not adequately train, adequately supervise or adequately retain its employees to properly advise them of law in the state of Nevada and terminate an employee wrongfully for having THC in his system.

Also, what you have to understand here, Your Honor, is that there is no question of impairment. The defendant brings up in the brief that my client was impaired. There's no showing of any impairment whatsoever. THC as, we all know, has different types of drug tests and different types of showings. But there was no showing of an impairment. There were no impairment tests that were done before the termination.

He was wrongfully terminated under Nevada law.

Then we have also the Consumer Deceptive Business Practices Act that Freeman chose to intentionally violate a statute which is meant to protect the plaintiff as the plaintiff is a victim as defined by the Ninth Circuit, Your Honor.

Then we also have the Reasonable Accommodation Statute and the provisions of 453A.010 and the reasonable accommodations basis that Freeman decided to terminate my client in violations of his ability to have a reasonable accommodation for his medical marijuana usage. There is no requirement that he goes to the CBA first. There is no requirement that exhaust his remedies through NIRK. We're not bringing those claims. We're not bringing those causes of action.

The cause actions that we have brought are sound, are in violation of Nevada law and we've met the prerequisite. And Freeman, in the writing, Your Honor, has terminated my client in violation of this law. Therefore, this motion to dismiss the same thing that Judge Mahan, respectfully -- that we respectfully ask is to deny it, Your Honor, because we look forward to presenting this to the jury.

THE COURT: All right. Thank you. Ms. McChrystal, last word.

MS. McCHRYSTAL: Thank you, Your Honor. Just briefly if plaintiff is essentially conceding that these claims are arbitrable, then essentially is shouldn't have been remanded from Federal Court. The Labor Management Relations Act would control any dispute under the CBA.

I'm not going to go into the point by point response as to each cause of action. I think our brief adequately go into how each of those is insufficient as a matter of law. I will point out regarding the lawful use statute, great source of debate here. We don't have any precedent that says it applies to marijuana. If you shepardize the statute itself you get a few cases on cigarettes and alcohol. And it was enacted years before the medical marijuana statute, so you know, the import intent back 10 plus years just isn't sufficient as a matter of law to sustain the claims here.

THE COURT: Okay. Thank you. Just my thoughts behind this and that is -- well I'll give you my ruling and then I'll give the basis. I am going to deny the motion to dismiss, save and except for the claim of deceptive trade claim. I don't think that makes it any way you look at it under a Rule 12 analysis. The other claims under a Rule 12 analysis, I think survive under those -- under that guideline of what I am to accept is true and provable.

I thought the distinctions that were raised by plaintiff's counsel in the opposing brief distinguishing Nevada's statute from the Colorado statute and from some other statutes, it referred to this state. And I think our -- the legislative history and intent is important in this regard. Their intent was to legalize marijuana for medical purposes and to hold otherwise in this matter for this particular motion would be nullifying the essential intent of the statue. So, I'm denying the motion, save an except for the deceptive trade claim. I'm going to have Mr. Gabroy prepare the order and run it by Ms. McChrystal.

MS. McCHRYSTAL: Thank you, Your Honor.

THE COURT: Thank you.

MR. GABROY: And, Your Honor, Christian Gabroy. Thank you for spending the time and researching this matter. I understand it is a novel issue --

THE COURT: No, it's a novel issue --

MR. GABROY: -- and we appreciate it.

THE COURT: -- and I'm sure I haven't seen the end of it. And thank you, counsel, for being so well prepared. It was very well briefed on both sides. Thank you. I appreciate it.

MR. GABROY: We appreciate it. Thank you, Your Honor.

MS. McCHRYSTAL: Thank you.

THE COURT: Thank you.

[Hearing concluded at 9:52 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

ORDR

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

JAMES ROUSHKOLB, an individual;

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive;

Defendant.

Case No.: A-19-805268-C
Dept.: VIII

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Hearing: 9/15/2020
Time: 9:30 am

On September 15, 2020 at 9:30 a.m., Defendant FREEMAN EXPOSITIONS, LLC's ("Freeman") Motion to Dismiss came up on hearing in Department 8 of the above

entitled Court, the Honorable Trevor L. Atkin presiding. Lynne K. McChrystal, Esq. and Paul Trimmer, Esq. of JACKSON LEWIS P.C. appeared on behalf of Defendant FREEMAN, and Christian Gabroy of GABROY LAW OFFICES appeared on behalf of Plaintiff JAMES ROUSHKOLB.

After due consideration of the Motion, Opposition, and Reply, and following oral argument, the Court ruled as follows:

1. It is hereby ORDERED Defendant's Motion to Dismiss is DENIED as to Counts 1, 2, 4 and 5.

2. It is hereby ORDERED Defendant's Motion to Dismiss is GRANTED as to Count 3.

IT IS SO ORDERED.

DATED this 18th day of September 2020.

Dated this 22nd day of September, 2020

DISTRICT COURT JUDGE
939 2FE FDFA CF37
Trevor Atkin
District Court Judge

Respectfully submitted by:

By _____
Christian Gabroy (#8805)
Kaine Messer (#14240)
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Approved as to form and content:

By */s/Lynne K. McChrystal*
Paul T. Trimmer (#9291)
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JACKSON LEWIS P.C.
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101
Tel: (702) 921-2460
Fax: (702) 921-2461
Attorneys for Defendant

GABROY LAW OFFICES
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Henderson, Nevada 89012
(702) 259-7777 FAX: (702) 259-7704

Gmail Gabroy Law <clerk@gabroy.com>

Proposed Order/MTD

McChrystal, Lynne K. (Las Vegas) <Lynne.McChrystal@jacksonlewis.com> Fri, Sep 18, 2020 at 9:05 AM
To: Christian Gabroy <christian@gabroy.com>, "Trimmer, Paul T. (Las Vegas)" <Paul.Trimmer@jacksonlewis.com>, Gabroy Law Assistant <assistant@gabroy.com>, Gabroy Law <clerk@gabroy.com>, Kaine Messer <kmesser@gabroy.com>

Hi Christian,

This looks fine, you may e-sign for me and file.

Thanks,

Lynne

Lynne K. McChrystal
Attorney at Law
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Lynne.McChrystal@jacksonlewis.com | www.jacksonlewis.com

From: Christian Gabroy <christian@gabroy.com>
Sent: Thursday, September 17, 2020 12:01 PM
To: Trimmer, Paul T. (Las Vegas) <Paul.Trimmer@jacksonlewis.com>; McChrystal, Lynne K. (Las Vegas) <Lynne.McChrystal@jacksonlewis.com>; Gabroy Law Assistant <assistant@gabroy.com>; Gabroy Law <clerk@gabroy.com>; Kaine Messer <kmesser@gabroy.com>
Subject: Proposed Order/MTD

[EXTERNAL SENDER]

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

James Roushkolb, Plaintiff(s) vs. Freeman Expositions LLC, Defendant(s)	CASE NO: A-19-805268-C DEPT. NO. Department 8

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/22/2020

Christian Gabroy	christian@gabroy.com
Katie Brooks	assistant@gabroy.com
Kaine Messer	kmesser@gabroy.com
Lynne McChrystal	lynne.mcchrystal@jacksonlewis.com
Mayela McArthur	mayela.mcarthur@jacksonlewis.com
Las Vegas Docket	LasVegasDocketing@jacksonlewis.com
Paul Trimmer	paul.trimmer@jacksonlewis.com
Misha Ray	clerk@gabroy.com
Wende Hughey	wende.hughey@jacksonlewis.com

Electronically Filed
9/24/2020 9:07 AM
Steven D. Grierson
CLERK OF THE COURT

NOTC
Christian Gabroy, Nev. Bar No. 8805
christian@gabroy.com
Kaine Messer, Nev. Bar. No. 14240
kmesser@gabroy.com
GABROY LAW OFFICES
170 S. Green Valley Pkwy, Suite 280
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Tel. (702) 259-7777
Fax. (702) 259-7704
Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES ROUSHKOLB, an individual;

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive;

Defendant.

Case No.: A-19-805268-C
Dept.: VIII

NOTICE OF ENTRY OF ORDER

COMES NOW Plaintiff James Roushkolb by and through his attorneys of record, CHRISTIAN GABROY and KAINE MESSER of GABROY LAW OFFICES, and hereby notices the Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's Complaint *(See Exhibit I)*.

DATED this 24th day of September 2020.

Respectfully submitted by:

GABROY LAW OFFICES

By _/s/ Christian Gabroy_____

GABROY LAW OFFICES
CHRISTIAN GABROY (#8805)
KAINE MESSER (#14240)
The District at Green Valley Ranch
170 South Green Valley Parkway
Suite 280
Henderson, Nevada 89012

GABROY LAW OFFICES
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CERTIFICATE OF SERVICE

I, Christian Gabroy on the 24th day of September 2020 deposited in the U.S. Mail and facsimile, postage prepaid, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** addressed to:

Jackson Lewis P.C.
Paul T. Trimmer, Esq.
Lynne K. McChrystal, Esq.
Jackson Lewis P.C.
300 S. Fourth Street
Suite 900
Las Vegas, NV 89101
Attorneys for Defendant

_____/s/ Christian Gabroy_____

An employee of GABROY LAW OFFICES

EXHIBIT I

ELECTRONICALLY SERVED
9/22/2020 3:12 PM

Electronically Filed
09/22/2020 3:12 PM
CLERK OF THE COURT

ORDR

GABROY LAW OFFICES
Christian Gabroy (#8805)
Kaine Messer (#14240)
The District at Green Valley Ranch
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Henderson, Nevada 89012
Tel (702) 259-7777
Fax (702) 259-7704
christian@gabroy.com
kmesser@gabroy.com
Attorneys for Plaintiff James Roushkolb

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

JAMES ROUSHKOLB, an individual;

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive;

Defendant.

Case No.: A-19-805268-C
Dept.: VIII

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Hearing: 9/15/2020
Time: 9:30 am

On September 15, 2020 at 9:30 a.m., Defendant FREEMAN EXPOSITIONS, LLC's ("Freeman") Motion to Dismiss came up on hearing in Department 8 of the above

entitled Court, the Honorable Trevor L. Atkin presiding. Lynne K. McChrystal, Esq. and Paul Trimmer, Esq. of JACKSON LEWIS P.C. appeared on behalf of Defendant FREEMAN, and Christian Gabroy of GABROY LAW OFFICES appeared on behalf of Plaintiff JAMES ROUSHKOLB.

After due consideration of the Motion, Opposition, and Reply, and following oral argument, the Court ruled as follows:

1. It is hereby ORDERED Defendant's Motion to Dismiss is DENIED as to Counts 1, 2, 4 and 5.

2. It is hereby ORDERED Defendant's Motion to Dismiss is GRANTED as to Count 3.

IT IS SO ORDERED.

DATED this 18th day of September 2020.

Dated this 22nd day of September, 2020

DISTRICT COURT JUDGE
939 2FE FDFA CF37
Trevor Atkin
District Court Judge

Respectfully submitted by:

By _____
Christian Gabroy (#8805)
Kaine Messer (#14240)
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Pkwy, Suite 280
Henderson, Nevada 89012
Tel (702) 259-7777
Fax (702) 259-7704
Attorneys for Plaintiff

Approved as to form and content:

By */s/Lynne K. McChrystal*
Paul T. Trimmer (#9291)
Lynne K. McChrystal (#14739)
JACKSON LEWIS P.C.
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101
Tel: (702) 921-2460
Fax: (702) 921-2461
Attorneys for Defendant

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(702) 259-7777 FAX: (702) 259-7704

Gmail Gabroy Law <clerk@gabroy.com>

Proposed Order/MTD

McChrystal, Lynne K. (Las Vegas) <Lynne.McChrystal@jacksonlewis.com> Fri, Sep 18, 2020 at 9:05 AM
To: Christian Gabroy <christian@gabroy.com>, "Trimmer, Paul T. (Las Vegas)" <Paul.Trimmer@jacksonlewis.com>, Gabroy Law Assistant <assistant@gabroy.com>, Gabroy Law <clerk@gabroy.com>, Kaine Messer <kmesser@gabroy.com>

Hi Christian,

This looks fine, you may e-sign for me and file.

Thanks,

Lynne

Lynne K. McChrystal
Attorney at Law
Jackson Lewis P.C.
300 S. Fourth Street, Suite 900
Las Vegas, NV 89101
Direct: (702) 921-2456 | Main: (702) 921-2460
Lynne.McChrystal@jacksonlewis.com | www.jacksonlewis.com

From: Christian Gabroy <christian@gabroy.com>
Sent: Thursday, September 17, 2020 12:01 PM
To: Trimmer, Paul T. (Las Vegas) <Paul.Trimmer@jacksonlewis.com>; McChrystal, Lynne K. (Las Vegas) <Lynne.McChrystal@jacksonlewis.com>; Gabroy Law Assistant <assistant@gabroy.com>; Gabroy Law <clerk@gabroy.com>; Kaine Messer <kmesser@gabroy.com>
Subject: Proposed Order/MTD

[EXTERNAL SENDER]

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

James Roushkolb, Plaintiff(s) vs. Freeman Expositions LLC, Defendant(s)	CASE NO: A-19-805268-C DEPT. NO. Department 8

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Service Date: 9/22/2020

Christian Gabroy	christian@gabroy.com
Katie Brooks	assistant@gabroy.com
Kaine Messer	kmesser@gabroy.com
Lynne McChrystal	lynne.mcchrystal@jacksonlewis.com
Mayela McArthur	mayela.mcarthur@jacksonlewis.com
Las Vegas Docket	LasVegasDocketing@jacksonlewis.com
Paul Trimmer	paul.trimmer@jacksonlewis.com
Misha Ray	clerk@gabroy.com
Wende Hughey	wende.hughey@jacksonlewis.com

ELECTRONICALLY SERVED
12/14/2020 11:43 AM

Electronically Filed
12/14/2020 11:43 AM
CLERK OF THE COURT

GABROY LAW OFFICES
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Tel (702) 259-7777
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christian@gabroy.com
Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES ROUSHKOLB, an individual;

Plaintiff,

vs.

THE FREEMAN COMPANY, LLC, a Domestic Corporation; EMPLOYEE(S)/AGENT(S) DOES I-X; and ROE CORPORATIONS XI-XX, inclusive;

Defendant.

Case No.: A-19-805268-C
Dept.: VIII

STIPULATION AND ORDER TO (1) AMEND THE CASE CAPTION

GABROY LAW OFFICES
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Henderson, Nevada 89012
(702) 259-7777 FAX: (702) 259-7704

STIPULATION AND ORDER TO AMEND THE CASE CAPTION

Defendant Freeman Expositions, LLC, erroneously named as "The Freeman Company, LLC," and Plaintiff James Roushkolb, by and through their respective counsel of record, hereby stipulate as follows:

Plaintiff was employed by Freeman Expositions, LLC during the time period of the events alleged in his Complaint, but erroneously named as "The Freeman Company, LLC" as a defendant. In the interest of judicial economy, and to avoid the unnecessary time and cost of motion practice, the parties have agreed to correct this mistake by correcting the caption to reflect the correct entity. Defendant Freeman Expositions LLC is the correct entity Defendant in this matter and named insured.

Defendant Freeman Expositions, LLC stipulates, agrees, and states that it was

Plaintiff's employer for the time period alleged in the Complaint and has previously appeared in this matter. This stipulation is made solely for the purposes of identifying the correct defendant employer entity (Plaintiff's former employer), and nothing in this stipulation is to be construed as an admission of liability or of any allegations in the Complaint, nor as a responsive pleading to the Complaint.

Further the parties agree that the caption be revised to reflect Defendant Freeman Expositions, LLC as the true and correct defendant.

This request is made in good faith, in the interest of judicial economy and to save the Parties the time and expense of motion practice to name the proper Defendant and correct the caption, and is not for the purpose of delay.

Dated this 11th day of December 2020.

GABROY LAW OFFICES

/s/ Christian Gabroy
Christian Gabroy, Bar #8805
Kaine Messer, Bar #14240
170 South Green Valley Parkway, Suite 280
Henderson, Nevada 89012
Attorneys for Plaintiff

JACKSON LEWIS P.C.

/s/ Lynn K. McChrystal
Paul T. Trimmer, Esq.
Lynne K. McChrystal, Esq.
Jackson Lewis P.C.
300 S. Fourth Street, Suite 900
Las Vegas, NV 89101
Attorneys for Defendant

/ / /

/ / /

GABROY LAW OFFICES
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Henderson, Nevada 89012
(702) 259-7777 FAX: (702) 259-7704

ORDER

Based upon the stipulation of the parties hereto, and good cause appearing therefrom:

1. The caption is revised to reflect Defendant's name as "Freeman Expositions, LLC"

Dated: _____, 2020.

Dated this 14th day of December, 2020

District Court Judge

27B 2AF 1BCE 5558
Trevor Atkin
District Court Judge

RESPECTFULLY SUBMITTED,

GABROY LAW OFFICES.

By ___/s/ Christian Gabroy_____
Attorneys for Plaintiff
GABROY LAW OFFICES
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Lynne

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Direct: (702) 921-2456 | Main: (702) 921-2460
Lynne.McChrystal@jacksonlewis.com | www.jacksonlewis.com

Visit our resource page for information and guidance on COVID-19's workplace implications

[Quoted text hidden]
[Quoted text hidden]

Christian Gabroy <christian@gabroy.com> Thu, Dec 10, 2020 at 4:36 PM
To: "McChrystal, Lynne K. (Las Vegas)" <Lynne.McChrystal@jacksonlewis.com>
Cc: "Trimmer, Paul T. (Las Vegas)" <Paul.Trimmer@jacksonlewis.com>, Gabroy Law Assistant <assistant@gabroy.com>, Gabroy Law <clerk@gabroy.com>, Kaine Messer <kmesser@gabroy.com>

Lynne,
Please see attached SAO to amend caption to reflect Freeman Expositions LLC. Thanks
Christian
[Quoted text hidden]
--

Christian J. Gabroy, Esq.
GABROY LAW OFFICES
The District at Green Valley Ranch
170 S. Green Valley Pkwy. Ste. 280 | Henderson, NV 89012
Office: (702) 259-7777 | Facsimile: (702) 259-7704
1 North LaSalle St. Ste. 1775 | Chicago, IL 60602
Office: (312) 872- 0515 | Fax: (312) 872-0520

SAO to Amend Caption.doc
68K

McChrystal, Lynne K. (Las Vegas) <Lynne.McChrystal@jacksonlewis.com> Fri, Dec 11, 2020 at 11:38 AM
To: Christian Gabroy <christian@gabroy.com>
Cc: "Trimmer, Paul T. (Las Vegas)" <Paul.Trimmer@jacksonlewis.com>, Gabroy Law Assistant <assistant@gabroy.com>, Gabroy Law <clerk@gabroy.com>, Kaine Messer <kmesser@gabroy.com>

Thanks Christian,

This looks fine-you can e-sign for me and file. What did you want to do about requesting the settlement conference?

We will have the Writ Petition with the Supreme Court filed before the holiday. At that time I will send an SAO over for your review to stay discovery.

[Quoted text hidden]

Christian Gabroy <christian@gabroy.com> Fri, Dec 11, 2020 at 12:34 PM
To: "McChrystal, Lynne K. (Las Vegas)" <Lynne.McChrystal@jacksonlewis.com>
Cc: "Trimmer, Paul T. (Las Vegas)" <Paul.Trimmer@jacksonlewis.com>, Gabroy Law Assistant <assistant@gabroy.com>, Gabroy Law <clerk@gabroy.com>, Kaine Messer <kmesser@gabroy.com>

I think once you file the writ petition, we can request the supreme court settlement program, that may be the easiest route. Ella/Misha-please e-sign the sao in previous email and submit to judge for signature. thanks
[Quoted text hidden]
--

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

James Roushkolb, Plaintiff(s) vs. Freeman Expositions LLC, Defendant(s)	CASE NO: A-19-805268-C DEPT. NO. Department 8

AUTOMATED CERTIFICATE OF SERVICE

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Las Vegas Docket	LasVegasDocketing@jacksonlewis.com
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Misha Ray	clerk@gabroy.com
Wende Hughey	wende.hughey@jacksonlewis.com
Ella Dumo	assistant@gabroy.com