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**IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

CHRISTOPHER JOLLY, KEVIN
KLEINMAN, JAMES PETERSON, and
MITCH WILBERT, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

XPO LOGISTICS, INC., and DOES 1 through
50, inclusive,

Defendant(s).

Case No.:

Dept. No.:

CLASS ACTION COMPLAINT

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

- 1) Failure to Pay Overtime in Violation of NRS 608.140 and 608.018; and
- 2) Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050.

JURY TRIAL DEMANDED

COMES NOW Plaintiffs CHRISTOPHER JOLLY, KEVIN KLEINMAN, JAMES PETERSON, and MITCH WILBERT, on behalf of themselves and all others similarly situated and allege the following:

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

JURISDICTION AND VENUE

1
2 1. This Court has original jurisdiction over the state law claims alleged herein
3 because the amount in controversy exceeds \$10,000 and because Plaintiff has a private right of
4 action for the Nevada statutory claims alleged herein. *See Neville v. Terrible Herbst, Inc.*, 133
5 Nev. Adv. Op. 95 (Dec. 7, 2017).

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

PARTIES

9
10 3. Plaintiff CHRISTOPHER JOLLY (hereinafter individually referred to as
11 “Plaintiff Jolly” or “JOLLY”) is a natural person who is and was a resident of the State of
12 Nevada and was employed by Defendant during the relevant time period alleged herein.

13 4. Plaintiff KEVIN KLEINMAN (hereinafter individually referred to as “Plaintiff
14 Kleinman” or “KLEINMAN”) is a natural person who is and was a resident of the State of
15 Nevada and was employed by Defendant during the relevant time period alleged herein.

16 5. Plaintiff JAMES PETERSON (hereinafter individually referred to as “Plaintiff
17 Peterson” or “PETERSON”) is a natural person who is and was a resident of the State of
18 Nevada and was employed by Defendant during the relevant time period alleged herein.

19 6. Plaintiff MITCH WILBERT (hereinafter individually referred to as “Plaintiff
20 Wilbert” or “WILBERT”) is a natural person who is and was a resident of the State of Nevada
21 and was employed by Defendant during the relevant time period alleged herein.

22 7. Defendant XPO LOGISTICS, INC. (hereinafter referred to as “Defendant” or
23 “XPO”) is a foreign corporation incorporated in the state of Delaware, with a principle place of
24 business in Greenwich, Connecticut, and doing business in the state of Nevada. Defendant is an
25 employer under NRS 608.011.

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

1 omissions, or representations alleged herein and any reference to “Defendant,” “Defendants,” or
2 “XPO” herein shall mean “Defendants and each of them.”

3 **FACTUAL ALLEGATIONS**

4 **A.**

5 **The Named-Plaintiffs**

6 9. Plaintiff JOLLY was employed by Ozburn Hessey Logistics from May 23, 2011
7 until October 2012, when Ozburn Hessey Logistics was acquired by Defendant. Plaintiff
8 JOLLY was then employed by Defendant from on or about October 2012 to on or about
9 February 9, 2017. During his employment, Plaintiff JOLLY held the following job positions:
10 Account Executive, Carrier Procurement Representative, and Sales & Operations Manager. An
11 Account Executive is an exempt inside sales position. As an Account Executive, Plaintiff
12 JOLLY routinely worked 50-60 hours per workweek during his employment with XPO. The
13 position of Carrier Procurement Representative was also an exempt position. Plaintiff JOLLY
14 worked approximately 50-60 hours per workweek when he was employed in the Carrier
15 Procurement position with XPO. Plaintiff JOLLY did not receive overtime compensation when
16 he worked over 40 hours in a workweek when he worked as an Account Executive or Carrier
17 Procurement Representative. XPO did not track or otherwise record the number of hours that
18 Plaintiff JOLLY worked in either of those two positions. Upon information and belief, Plaintiff
19 JOLLY is owed at least \$183,018.72.

20 10. Plaintiff KLEINMAN was employed by Defendant from on or about October
21 2015 to on or about February 2, 2017. Plaintiff KLEINMAN held the job position of Account
22 Executive during his employment with Defendant. An Account Executive is an exempt inside
23 sales position with XPO. Plaintiff KLEINMAN was compensated on a salary basis plus
24 commission. Plaintiff KLEINMAN regularly worked 55-60 hours per workweek during his
25 employment with XPO. Plaintiff KLEINMAN did not receive overtime compensation when he
26 worked over 40 hours in a workweek. XPO did not track or otherwise record the number of
27 hours that Plaintiff KLEINMAN worked. Upon information and belief, Plaintiff KLEINMAN is
28 owed at least \$47,759.45.

1 11. Plaintiff PETERSON was employed by Defendant from on or about September
2 8, 2015 to on or about July 8, 2016. Plaintiff PETERSON held the job position of Account
3 Executive during his employment with Defendant. An Account Executive is an exempt inside
4 sales position with XPO. Plaintiff PETERSON was compensated on a salary basis plus
5 commission. Plaintiff PETERSON regularly worked 50-60 hours per workweek during his
6 employment with XPO. Plaintiff PETERSON did not receive overtime compensation when he
7 worked over 40 hours in a workweek. XPO did not track or otherwise record the number of
8 hours that Plaintiff PETERSON worked. Upon information and belief, Plaintiff PETERSON is
9 owed at least \$30,274.80.

10 12. Plaintiff WILBERT was employed by Ozburn Hessey Logistics from May 23,
11 2011 until October 2012, when Ozburn Hessey Logistics was acquired by Defendant. Plaintiff
12 WILBERT was then employed by Defendant from on or about October 2012 to on or about
13 December 9, 2015. Plaintiff WILBERT held the job position of Carrier Procurement
14 Representative during his employment with Defendant. Carrier Procurement Representative is
15 an exempt position with XPO. Plaintiff WILBERT was compensated on a salary basis plus
16 commission. Plaintiff WILBERT regularly worked 50-60 hours per workweek during his
17 employment with XPO. Plaintiff WILBERT did not receive overtime compensation when he
18 worked over 40 hours in a workweek. XPO did track or otherwise record the number of hours
19 that Plaintiff WILBERT worked. Upon information and belief, Plaintiff WILBERT is owed at
20 least \$153,844.31.

21 **B.**

22 **XPO Freight Brokerage**

23 13. According to its own website, "XPO Logistics (NYSE: XPO) is a top ten global
24 logistics company. We run our business as one highly integrated network of people, technology
25 and physical assets in 34 countries, with over 89,000 employees and 1,431 locations. We use
26 our network to help customers manage their goods more efficiently throughout their supply
27 chains."
28

1 14. XPO is, in part, a freight brokerage firm: “XPO is the second largest freight
2 brokerage provider worldwide, with deep capacity and industry-leading technology. In North
3 America, we have approximately 7,000 trucks under contract for drayage, expedite and last
4 mile, and carrier relationships representing another million trucks. In Europe, we have a billion-
5 euro brokerage business that benefits from our cross-fertilization of best practices. Our
6 proprietary Freight Optimizer technology provides powerful tools to source the optimal capacity
7 for each load, based on a bird’s eye view of lanes, pricing, carrier ratings and market
8 conditions.”

9 15. XPO’s brokerage department advises its customers on available shipping
10 solutions and then arranges shipments with carriers to meet customer needs. This process
11 involves a two-step process. **First**, XPO obtains the customer's agreement to ship a product
12 using XPO’s services. **Second**, XPO finds carriers who will agree to ship the products
13 according to the needs of its customer.

14 16. In other words, XPO’s freight brokers match businesses in need of shipping
15 goods with carriers to ship the goods. For instance, XPO facilitates the shipment of these
16 goods for business:

17 **TYPES OF GOODS**

18 **Consumer goods** between manufacturers, warehouses, distributors
19 and retailers.

20 **Industrial flows** of inbound raw materials and parts, and outbound
21 finished goods.

22 **Temperature-sensitive goods**, such as climate-controlled
23 movements of pharmaceutical, medical and other sensitive freight.

24 **High value, high security goods** transported with capabilities for
25 special handling **Government freight**, commodities and second
26 destination shipments.

27 See http://www.xpo.com/sites/default/files/heros/XPO_Sell-Sheet_Freight%20Brokerage.pdf
28 (last visited July 28, 2017).

1 17. XPO’s business model is simple—it profits when its customers pay XPO more
2 than XPO pays its carriers. The difference between what the customer pays and what XPO pays
3 the carrier is called the “gross margin”.

4 18. XPO employs persons who work in similarly situated jobs throughout the United
5 States. The Plaintiffs named herein all worked out of XPO’s brokerage office in Reno, Nevada
6 but all other similarly situated individuals performed the same job duties as Plaintiffs and were
7 similarly classified as exempt employees.

8 **C.**
9 **Inside Sales Positions**
10 **(Senior Account Executives, Account Executives, Inside Sales Representatives, and other**
11 **similar job positions)**

12 19. Plaintiffs JOLLY, KLEINMAN, and PETERSON all worked as inside
13 salespersons at XPO. These Plaintiffs and all other similarly situated employees performed the
14 **first** step in the brokerage process. Their primary duty was to contact businesses (i.e., shippers)
15 to match their shipping needs by finding a carrier (i.e., transportation) to deliver the businesses
16 goods to the desired destination. Plaintiffs would contact businesses to assess their shipping
17 needs and quote them a price to have those needs fulfilled. Upon coming to an agreement with
18 the business, Plaintiffs would then hand off the client’s information to the Carrier Procurement
19 Representative find a carrier to deliver the goods.

20 **D.**
21 **Carrier Procurement Representatives**
22 **(and other similar job positions)**

23 20. Plaintiffs JOLLY and WILBERT worked as Carrier Procurement
24 Representatives. These Plaintiffs and all other similarly situated employees performed the
25 **second** step in the brokerage process. Carrier Procurement Representatives would assist the
26 inside sales position by matching the business with the carrier. Plaintiffs would post the desired
27 shipment details on a third party posting site and facilitate the delivery of the shipment with the
28 carrier. Carrier Procurement Representatives did not have any authority to negotiate the cost of

1 the transportation. The cost was already negotiated by the inside sales employees. The Carrier
2 Procurement Representative could only find carriers that were willing to perform under the
3 negotiated sale price between the inside sales employee and the business customer.

4 **E.**

5 **These Job Positions Are Non-Exempt**

6 21. The Inside Sales Positions (Senior Account Executives, Account Executives,
7 Inside Sales Representatives, and other similar job positions) are all non-exempt inside sales.

8 A. These positions do not qualify for the inside sales exemptions under NRS
9 608.018(3)(c), as guided by 29 U.S.C. § 207(i),¹ because freight brokers are not
10 involved in “retail” sales. This is a threshold requirement to be classified as an exempt
11 employee under (7)(i). See 29 C.F.R. § 779.317 (The retail concept does not apply to
12 “Brokers, custom house; **freight brokers**; insurance brokers, stock or commodity
13 brokers”) (emphasis added).

14 B. These positions likewise do not qualify for the administrative exemption
15 under NRS 608.018(3)(d), as guided by 29 U.S.C. § 213(a)(1),² for two independent
16 reasons. First, the primary duty of these employees is not related to the performance of
17 office or non-manual work directly related to the management or general business
18 operations of the employer or the employer's customers. The primary duty of these
19 employees is to produce sales that are the core of XPO's business. Indeed, XPO entire
20 brokerage business is based upon being the “middle man” between business customers
21 and carriers. This type of sales activity relates directly to producing services that are the
22 primary output of plaintiff's business—connecting customers with carriers—and
23 therefore is not administrative. Second, employees in these positions do not exercise
24 discretion and independent judgement with respect to matters of significance. XPO

25 _____
26 ¹ See e.g., *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951
(2014) (looking to the FLSA when the Nevada Revised Statutes are substantially similar)

27 ² NAC 608.125 provides that (“The Commissioner will refer to 29 C.F.R. §§ 541.1 and
28 541.2 to determine if an employee is employed in a bona fide executive or administrative
capacity for the purposes of paragraph (d) of subsection 3 of NRS 608.018.”)

1 maintains a complex software system that generates customer quotes based upon
2 customer shipment specifications. Employees have little to no discretion to
3 independently negotiate sales outside of the amount quoted by XPO's software
4 program.

5 22. Carrier Procurement Representatives (and other similar positions) are non-
6 exempt positions because they are the labor behind XPO's brokerage business—they facilitate
7 the shipment of goods by matching the customer with the carrier and making sure the
8 transportation of goods is shipped according to the customer's specifications. They likewise do
9 not have exercise any discretion or independent judgment—they post the customer's shipment
10 on a carrier posting site and arrange for the carrier to pick up and deliver the customer's goods
11 according to the customer's requirements.

12 **CLASS ACTION ALLEGATIONS**

13 23. Plaintiffs reallege and incorporate by reference all the paragraphs above in the
14 Complaint as though fully set forth herein.

15 24. Plaintiffs bring the action on behalf of themselves and all other similarly situated
16 and typical employees a class action under Nevada law.

17 25. The **NEVADA CLASSES** are defined as follows:

18 A. **NEVADA INSIDE SALES CLASS:** All Inside Sales Positions (Senior
19 Account Executives, Account Executives, Inside Sales Representatives, and other
20 similar job positions) employed by Defendant in the State of Nevada at any time within
21 three years immediately preceding the filing of this action until the date of judgement in
22 this action who were classified as exempt employees and who worked over 8 hours in a
23 workday and/or over 40 hours in a workweek.

24 B. **NEVADA CARRIER PROCUREMENT REPRESENTATIVE**
25 **CLASS:** All Carrier Procurement Representatives (and other similar job positions) who
26 were employed by Defendant in the state of Nevada at any time within three years
27 immediately preceding the filing of this action until the date of judgement in this action
28

1 who were classified as exempt employees and who worked over 8 hours in a workday
2 and/or over 40 hours in a workweek.

3 C. **WAGES DUE AND OWING CLASS:** All members of the NEVADA
4 CLASSES who are former employees.

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

7 A. **The NEVADA CLASS and each SUB-CLASS is Sufficiently**
8 **Numerous.** Upon information and belief, Defendant employs, and has employed,
9 in excess of 100 NEVADA CLASS Members within the applicable statute of
10 limitations. Because Defendant is legally obligated to keep accurate payroll
11 records, Plaintiffs allege that Defendant's records will establish the identity and
12 ascertainably of members of the NEVADA Class as well as their numerosity.

13 B. **Plaintiff's Claims are Typical to Those of Fellow Class and**
14 **Members.** Each NEVADA CLASS Member is and was subject to the same
15 practices, plans, and/or policies as Plaintiffs, as follows: 1) Defendant classified
16 all Plaintiffs as exempt employees under Nevada wage-hour law; and 2) as a
17 result of Defendant's misclassification, Defendant failed to pay Plaintiffs and
18 WAGES DUE AND OWING CLASS Members all overtime wages due and
19 owing at the time of their termination or separation from employment.

20 C. **Common Questions of Law and Fact Exist.** Common questions
21 of law and fact exist and predominate as to Plaintiff and the NEVADA CLASS,
22 including all sub-classes, including, without limitation the following: 1) Whether
23 Defendant can meet its burden that Plaintiffs were properly classified as exempt
24 employees under Nevada law and 2) Whether Defendant delayed final payment to
25 Plaintiffs and WAGES DUE AND OWING CLASS Members in violation of
26 NRS 608.020-050.

27 D. **Plaintiffs Are Adequate Representative of the Classes.** Plaintiffs
28 will fairly and adequately represent the interests of the NEVADA CLASS and

1 because Plaintiffs are members of the NEVADA CLASSES, they have issues of
2 law and fact in common with all members of the NEVADA CLASSES, and they
3 do not have any interests antagonistic to the members of the NEVADA
4 CLASSES. Plaintiffs and their counsel are aware of their fiduciary responsibilities
5 to Members of the NEVADA CLASSES and are determined to discharge those
6 duties diligently and vigorously by seeking the maximum possible recovery for
7 the Class.

8 **E. Class Claims Predominate and A Class Action Is A Superior**
9 **Mechanism to Hundreds Of Individual Actions.** Class claims as to whether
10 Plaintiffs and all other putative Class members were correctly classified as being
11 exempt from overtime predominate over individualized issues. A class action is
12 also superior to other available means for the fair and efficient adjudication of
13 their controversy. Each Member of the NEVADA CLASSES has been damaged
14 and is entitled to recovery by reason of Defendant's illegal policy and/or practice
15 of classifying Plaintiffs and members of the NEVADA CLASSES as exempt
16 employees. The prosecution of individual remedies by each member of the
17 NEVADA CLASSES will be cost prohibitive and may lead to inconsistent
18 standards of conduct for Defendant and result in the impairment of the rights and
19 the disposition of their interest through actions to which they were not parties.

20 **FIRST CAUSE OF ACTION**

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

22 (On Behalf of Plaintiff and all members of the NEVADA CLASSES)

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

25 28. NRS 608.140 provides that an employee has a private right of action for unpaid
26 wages under NRS 608.018. *See Neville v. Terrible Herbst, Inc.*, 133 Nev. Adv. Op. 95 (Dec. 7,
27 2017).

28 29. NRS 608.018(1) provides as follows:

An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works: (a) More than 40 hours in any scheduled week of work; or (b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

30. NRS 608.018(2) provides as follows:

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

31. Nevada's retail or service exemption are the same as the 7(i) exemption under federal law. *See* NRS 608.018(3)(c).

32. Nevada's white-collar exemption requirements are the same as the white-collar exemption requirements under federal law. *See* NRS 608.018 (3)(c); NAC 608.125.

33. Defendant misclassified Plaintiffs and all members of the NEVADA CLASSES as exempt from mandated premium pay for overtime worked. By doing so, Defendant has failed to pay Plaintiffs and all members of the NEVADA CLASSES overtime compensation of 1 1/2 times their respective regular rate of pay when they worked over 8 hours in a workday and/or over 40 hours in a workweek in violation of NRS 608.018.

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

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SECOND CAUSE OF ACTION

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

(On Behalf of Plaintiffs and the WAGES DUE AND OWING CLASS)

35. Plaintiffs reallege and incorporate by reference all the paragraphs above in the Complaint as though fully set forth herein.

36. NRS 608.140 provides that an employee has a private right of action for unpaid wages under NRS 608.020-.050. *See Neville v. Terrible Herbst, Inc.*, 133 Nev. Adv. Op. 95 (Dec. 7, 2017).

37. NRS 608.020 provides that “[w]henver an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately.”

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

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

40. By misclassifying Plaintiff and all members of the NEVADA CLASSES as overtime exempt employees, Defendant has failed to pay Plaintiff and all members of the NEVADA CLASSES overtime compensation of 1 ½ times their respective regular rate of pay when they worked over 8 hours in a workday and/or over 40 hours in a workweek.

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AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court of the State of Nevada, County of Washoe, does not contain the social security number of any person.

DATED: February 15, 2018

Respectfully Submitted,

THIERMAN BUCK LLP

/s/Mark R. Thierman

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

Attorneys for Plaintiff