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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JOSEPH MITCHELL,

PLAINTIFF,

VS.

**C&S WHOLESALE GROCERS, JOHN
DOES 1-10, AND XYZ CORP. 1-10,**

DEFENDANTS.

Honorable Jose L. Linares, U.S.D.J.

Civil Action No.: 2:10-cv-02354-JLL-CCC

**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO RULE 12(b)(6)**

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On the Brief

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PRELIMINARY STATEMENT

Plaintiff Joseph Mitchell ("Plaintiff" or "Mitchell") was terminated by C&S Wholesale Grocers, Inc. ("Defendant") for repeatedly asserting his legal rights and thwarting Defendant's pattern and practice of committing continual workplace violations.

Plaintiff's Complaint sets forth a meticulously detailed factual basis for Plaintiff's claims. Since the commencement of his employment, Plaintiff was not paid overtime despite working in excess of 61 hours per week. In 2007, Plaintiff cooperated with an audit and investigation performed by the U.S. Department of Labor, Wage and Hour Division ("DOL"). Based on its findings, DOL determined that for several years since the commencement of his employment, Defendant intentionally misclassified Plaintiff as an employee who is exempt from being paid overtime and intentionally failed to pay Plaintiff for overtime Plaintiff worked.

Subsequently, in 2008, Plaintiff suffered from renal failure due to his demanding work schedule. Plaintiff was forced to go out on medical leave. Instead of accommodating his disability, Defendant was determined to be free of Plaintiff's incessant pursuit of his legal rights and thus Defendant terminated Plaintiff's employment while he was on leave.

As demonstrated below, Plaintiff's Complaint is replete with more than enough facts to support to Plaintiff's claims. Plaintiff's Complaint meets the applicable standard and establishes the plausibility that Defendant committed numerous violations of applicable laws. Also, Plaintiff fully anticipates that further supporting documentation and proofs will be uncovered during discovery.

Accordingly, Plaintiff respectfully submits that Defendant's motion to dismiss should be denied.

LEGAL ARGUMENT

In his Complaint, Plaintiff meticulously provides a step-by-step factual basis to establish that he has plausible claims against Defendant. In Point A below, Plaintiff establishes the plausibility that Defendant: (1) violated the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 210 *et seq.* and violated the New Jersey Wage and Hour Law ("NJWHL"), N.J.S.A. 34:11-56a *et seq.*; (2) violated the New Jersey Wage Payment Act ("NJWPA"), N.J.S.A. 34:11-4.1 *et seq.*; (3) breached an express contract with Plaintiff, breached an implied contract with Plaintiff, and breached Defendant's implied covenant of good faith and fair dealing; (4) violated common law obligations under *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980); and (5) violated the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 *et seq.*, by engaging in disability discrimination and by retaliating against Plaintiff.

In Point B below, Plaintiff established that he filed timely claims under the FLSA and NJWHL, as Defendant's unlawful conduct caused the applicable statutes of limitations to be tolled under Federal regulations and pursuant to equitable considerations. Additionally, the FLSA statute of limitations applicable here is three years because Defendant engaged in willful FLSA violations. Thus, Plaintiff's April 10, 2010 Complaint was filed within the requisite time frame and his claims for unpaid overtime cannot be dismissed on statute of limitations grounds.

In addition, Defendant initially disputes the existence of an employer-employee relationship with Plaintiff. However, Defendant simultaneously relies on the Certification of Lydia Vicki Pennington, "HR Supervisor for C&S Wholesale Grocers, Inc.," in which Ms. Pennington certifies that the two attached C&S Wholesale Grocers, Inc. employee handbooks were applicable to Plaintiff during his employment. Thus, Defendant's argument denies being Plaintiff's employer, but argues that Defendant's handbooks set forth the terms and conditions of Plaintiff's employment. This

obvious inconsistency does not support Defendant's argument, and in fact further establishes that Defendant was Plaintiff's employer. In the event that further discovery reveals a necessity to add additional entities, or to amend claims asserted against entities, Plaintiff will proceed as necessary. In any event, at this time Defendant itself establishes that dismissal of claims against Defendant would be highly inappropriate.

Plaintiff meticulously sets forth facts to show the plausibility of Defendant's liability for each cause of action alleged in the Complaint. Defendant's argument that Plaintiff's Complaint is insufficient to put Defendant on notice of Plaintiff's claims clearly lacks merit, as Plaintiff has plead each claim with detailed factual specificity. Moreover, Plaintiff's allegations contained in the Complaint are timely. Plaintiff should thus be granted the opportunity proceed with this litigation and to engage in further discovery to further determine Defendant's liability.

Accordingly, Plaintiff respectfully requests that the Court deny Defendant's motion to dismiss in full, and allow Plaintiff to proceed with the instant litigation.

**POINT A PLAINTIFF PROVIDED A SUFFICIENT FACTUAL BASIS
FOR EACH ALLEGATION AGAINST DEFENDANT AND
THEREBY ESTABLISHED THE PLAUSIBILITY OF HIS
RIGHT TO RELIEF**

A Fed. R. Civ. P. 12(b)(6) motion to dismiss must be denied if the complaint, on its face, contains sufficient factual matter to show that a claim to relief is "plausible." *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The "plausibility standard" does not require the Plaintiff to establish a probability of liability, only more than a mere possibility. *Id.*

(citing *Twombly*, 550 U.S. at 556-57, 570).

This analysis calls upon the reviewing court to "draw upon its judicial experience and common sense" in making this determination, and to consider the complaint as a whole and in context. *Id.* at 1950. The Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the Plaintiff, and determine whether, under any reasonable reading of the complaint, the Plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holding Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

Thus, the Court determines whether the plaintiff is entitled to offer evidence in support of the allegations, and not whether the plaintiff will ultimately prevail. *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

As set forth below, Plaintiff successfully establishes the plausibility of each allegation contained within his Complaint, and thus respectfully requests that Defendant's motion to dismiss the Complaint be denied.

**1. PLAINTIFF PROVIDES SUFFICIENT FACTUAL
SUPPORT FOR HIS CLAIMS UNDER THE
FEDERAL FAIR LABOR STANDARDS ACT AND THE
NEW JERSEY WAGE AND HOUR LAW**

Under the FLSA, an employer is required to pay "a rate not less than one and one-half times the regular rate at which he is employed" to any employee who works in excess of 40 hours in a workweek. 29 U.S.C. 207(a). Likewise under the NJWHL, an employer is required to pay each employee a minimum wage "for 40 hours of working time in any week and 1 ½ time such employee's regular hourly wage for hour working time in excess of 40 hours in any week." N.J.S.A.

34:11-56a.

Plaintiff began his employment for Defendant as an Occupational Health Nurse on January 20, 2003. [Szyba Cert. Ex. 1 ¶ 10 (hereinafter "Complaint")]. Plaintiff should have received payment for overtime because he was not exempt pursuant to any of the statutorily created exemptions, which Plaintiff explains in detail in the Complaint. [Complaint ¶¶ 31, 36-46]. Throughout Plaintiff's employment, he worked in excess of 61 hours per week. [Complaint ¶ 11]. Thus, each week, Plaintiff worked over 21 hours of overtime. [Complaint ¶ 47]. Plaintiff provides full and meticulous detail of his hourly rate of pay, as well as all raises in pay Plaintiff received during his employment. [Complaint ¶¶ 48-55, 59]. Thus, Plaintiff provides the calculation to a reasonable degree of certainty of the exact amounts that Plaintiff is owed. [*Id.*]. Defendant failed to pay Plaintiff for these overtime hours worked. [Complaint ¶ 58]. The DOL conducted an audit and investigation in October 2007 and determined based on information obtained that Defendant intentionally misclassified Plaintiff as an employee exempt from receiving pay for overtime worked, so that Defendant could avoid paying Plaintiff. [Complaint ¶ 13].

These specifics and details provide more than adequate factual support to establish the plausibility that Defendant is liable, and thus Plaintiff should be permitted to proceed with this litigation.

2. PLAINTIFF PROVIDES SUFFICIENT FACTUAL SUPPORT FOR HIS CLAIMS UNDER THE NEW JERSEY WAGE PAYMENT ACT

New Jersey's Wage Payment Act protects covered employees from certain abuses is payments of wages by employers. N.J.S.A. 34:11-4.1 *et seq.* Plaintiff sufficiently establishes the plausibility of Defendant's liability, warranting Plaintiff be allowed to proceed with discovery, and be given the opportunity to offer further evidence establishing Defendant's liability.

The NJWPA mandates that an employer "pay the full amount of wages" due to the employee. N.J.S.A. 34:11-4.2. Employers are required to pay an employee "all wages due not later than the regular payday for the pay period during which the employee's termination, suspension or cessation of employment . . . took place." N.J.S.A. 34:11-4.3. Employers are prohibited from withholding or diverting "any portion of an employee's wages" unless required or authorized to do so in specific circumstances provided for by the NJWPA which are not applicable here. N.J.S.A. 34:11-4.4. Employers are required to post notices in the workplace of employees' rights under the NJWPA and notify employees of rates of pay, pay dates, changes in compensation, and provide explanations of any deductions made to employees' pay. N.J.S.A. 34:11-4.6. In the event of a dispute over wages, employers are required to pay all wages conceded to be due within the time frame set by the NJWPA. N.J.S.A. 34:11-4.8.

There is no question that Defendant is covered by the NJWPA, and that Plaintiff was employed by Defendant within the meaning of the NJWPA. There is likewise no question that the instant dispute is over Defendant's violation in payment of Plaintiff's "wages," defined as "the direct monetary compensation for labor or services rendered by an employee." N.J.S.A. 34:11-4.1. Defendant's only dispute herein is whether Plaintiff provided sufficient facts to establish the

"plausibility" that Defendant violated the provisions of the NJWPA and put Defendant on notice of what Plaintiff's claim is.

Plaintiff meticulously details the facts establishing Defendant's violation of N.J.S.A. 34:11-4.2 in the Complaint, showing that Defendant failed to "pay the full amount of wages" due to Plaintiff. Plaintiff was employed as an Occupations Health Nurse by Defendant starting in January 2003. [Complaint ¶¶ 4, 10]. Plaintiff's job description indicated that he should not have been classified as an exempt employee and thus should have received overtime pay. [Complaint ¶¶ 30-31]. Plaintiff "consistently worked in excess of 61 hours per week." [Complaint ¶ 11]. Plaintiff worked in excess of 21 hours of overtime each and every week while he was employed by Defendant. [Complaint ¶¶ 47, 57]. Plaintiff was a non-exempt employee and should have paid overtime. [Complaint ¶ 46]. Defendant intentionally failed to pay Plaintiff for overtime worked between January 2003 and approximately November 2007. [Complaint ¶¶ 12, 29]. Between December 2004 and July 2005, Defendant should have paid Plaintiff \$39 per hour for the approximately 21 hours of overtime per week that he worked. [Complaint ¶¶ 47-49]. Between July 2005 and July 2006, Defendant should have paid Plaintiff \$40.50 per hour for the approximately 21 hours of overtime per week that he worked. [Complaint ¶¶ 47, 50-51]. Between July 2006 and July 2007, Defendant should have paid Plaintiff \$49.50 per hour for the approximately 21 hours of overtime per week that he worked. [Complaint ¶¶ 47, 52-53]. Between July 2007 and November 2007, Defendant should have paid Plaintiff \$52.56 per hour for the approximately 21 hours of overtime per week that he worked. [Complaint ¶¶ 47, 54-55]. Defendant did not pay Plaintiff for these overtime hours from the commencement of Plaintiff's employment until November 2007. [Complaint ¶¶ 12, 57-58]. Following a determination that Defendant intentionally failed to pay

Plaintiff overtime, Defendant admitted liability in approximately October 2007 and began paying Plaintiff for the overtime he worked. [Complaint ¶¶ 13, 56]. Defendant's failure to pay overtime violates the NJWPA because Defendant intentionally did not "pay the full amount of wages due" to Plaintiff. N.J.S.A. 34:11-4.2. As set forth herein, Plaintiff provides a sufficiently detailed factual basis to establish the plausibility of Defendant's liability. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

Plaintiff meticulously details the facts establishing Defendant's violation of N.J.S.A. 34:11-4.3 in the Complaint, in that Defendant failed to pay Plaintiff all wages due to Plaintiff within the regular pay period at the time of Plaintiff's termination. *See Bintliff-Ritchie v. American Reinsurance Co.*, 285 Fed. App'x 940, 943 (3d Cir. 2008). Defendant advised Plaintiff in correspondence dated November 13, 2008 that because he was out of work due to his disability, his employment with Defendant would be "inactivated" effective November 23, 2008. [Complaint ¶ 21]. Approximately one year prior to Plaintiff's termination, Defendant had conceded that Plaintiff was intentionally misclassified and admitted that Plaintiff should have been, but was not, paid overtime. [Complaint ¶¶ 13, 56]. Defendant did not pay Plaintiff the sum that Defendant clearly and admittedly owed to Plaintiff within the NJWPA's deadline or thereafter, and has forced Plaintiff to file the instant litigation to recover those monies owed as damages. [Complaint ¶¶ 29, 32, 57, 60]. Thus, in his Complaint Plaintiff provides a sufficiently detailed factual basis to establish the plausibility of Defendant's liability for Defendant's violation of N.J.S.A. 34:11-4.3. *See Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

Plaintiff provides meticulous factual detail establishing Defendant's violation of N.J.S.A.

34:11-4.4 in his Complaint, showing that Defendant withheld and/or diverted Plaintiff's wages without proper reason or authorization. While Plaintiff was employed by Defendant, Plaintiff worked in excess of 61 hours per week. [Complaint ¶¶ 10-11]. From approximately January 2003 until approximately November 2007, Defendant withheld and/or diverted payment for hours worked in excess of 40 hours per week. [Complaint ¶¶ 12, 29-32, 57-58]. Although the NJWPA permits withholding or diversion of compensation in specified circumstances, none of those circumstances are applicable here, as Defendant was found to have intentionally violated applicable wage and hour laws. [Complaint ¶ 13]. Subsequent to this finding, Defendant proceeded to pay Plaintiff overtime beginning in approximately November 2007, but despite conceding liability has failed to rectify prior unlawful withholding. [Complaint ¶¶ 56-58]. Thus, in his Complaint Plaintiff provides a sufficiently detailed factual basis to establish the plausibility of Defendant's liability for Defendant's violation of N.J.S.A. 34:11-4.4. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

In his Complaint, Plaintiff provides a detailed factual account that establishes Defendant's violation of N.J.S.A. 34:11-4.6 by failing to post notices in the workplace of employees' rights under the NJWPA and notify employees of rates of pay, pay dates, changes in compensation, and provide explanations of any deductions made to employees' pay. Plaintiff began working for Defendant in January 2003 as an Occupational Health Nurse. [Complaint ¶ 10]. During Plaintiff's employment, Defendant failed to post notices in the workplace pertaining to any of Plaintiff's and other employees rights. [Complaint ¶ 33]. Defendant failed to advise employees, including Plaintiff, of overtime rights. [Complaint ¶ 34]. Defendant otherwise failed to train employees, including Plaintiff, regarding his overtime rights. [Complaint ¶ 35]. Further, despite Defendant's description of Plaintiff's duties indicating he was entitled to overtime, Defendant provided no explanation of the

reason why Plaintiff was not paid the full amount due to him under applicable laws. [Complaint ¶¶ 31-32]. Thus, in his Complaint Plaintiff provides a sufficiently detailed factual basis to establish the plausibility of Defendant's liability for Defendant's violation of N.J.S.A. 34:11-4.6. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

In his Complaint, Plaintiff provides a detailed factual account that establishes Defendant's violation of N.J.S.A. 34:11-4.8 by showing that following Defendant's dispute with Plaintiff over wages owed, Defendant failed to pay Plaintiff the sum that Defendant admitted was due to Plaintiff. Since the commencement of his employment by Defendant, Plaintiff worked in excess of 61 hours per week every week that he worked. [Complaint ¶¶ 11, 47]. Plaintiff should have been paid overtime because his position was non-exempt. [Complaint ¶¶ 13, 31, 36-46]. Defendant was aware of its obligation to pay overtime but intentionally failed to pay Plaintiff for overtime worked until about November 2007. [Complaint ¶¶ 13, 32]. In November 2007, after the DOL uncovered Defendant's intentional refusal to pay Plaintiff overtime, Defendant conceded its liability and admitted that Plaintiff should be paid overtime, and began thereafter paying Plaintiff overtime. [Complaint ¶¶ 13, 32, 56]. Defendant has failed to pay any wages owed despite its concession and despite numerous opportunities during Plaintiff's attempts to recover monies due. [Complaint ¶¶ 19, 20]. Thus, in his Complaint Plaintiff provides a sufficiently detailed factual basis to establish the plausibility of Defendant's liability for Defendant's violation of N.J.S.A. 34:11-4.8. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

Accordingly, Plaintiff provides sufficient factual bases establishing the plausibility of

Defendant's violations of several provisions of the NJWPA. Plaintiff therefore requests that Defendant's motion to dismiss Plaintiff's claims under the NJWPA be denied.

3. PLAINTIFF ESTABLISHES VALID CLAIMS FOR BREACH OF EXPRESS CONTRACT, BREACH OF IMPLIED CONTRACT, AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The New Jersey Supreme Court in *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, *modified*, 101 N.J. 10 (1985), held that, in appropriate circumstances, representations made in employee handbooks are enforceable. The Court in *Woolley* merely acknowledged "basic contract principles concerning acceptance of unilateral contracts." *See McQuitty v. General Dynamics Corp.*, 204 N.J. Super. 514, 520 (App. Div. 1985). The "key consideration in determining whether an employment manual gives rise to contractual obligations is the reasonable expectations of the employees." *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 392 (1994).

To be enforceable, a manual must have been distributed or generally disseminated to all or a relevant portion of the workforce. *See Falco v. Community Medical Center*, 296 N.J. Super. 298, 324 (App. Div. 1997) (stating that the preparation or distribution of the employee handbook are factors to consider in determining the reasonableness of an employee's belief that a handbook created a binding, legally enforceable commitment). Further, provisions that are comprehensive and detailed, rather than vague and indefinite, creates a likelihood that employees could reasonably rely upon the provisions as legally binding. *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401, 408 (1994); *see also Kane v. Milikowsky*, 224 N.J. Super. 613, 616 (App. Div. 1988).

The mere presence of a disclaimer by itself is insufficient to find that a contract has not been

created. *See Weber v. LDC/Milton Roy*, 42 FEP 1507, 1518 (D.N.J. 1986) (finding that a contract did not exist based on a disclaimer coupled with the absence of a specific promise of permanent employment or the availability of any termination procedure). Further, a disclaimer that is unclear or containing confusing legalese may be ineffective. *Nicosia*, 136 N.J. at 413-14. Likewise, disclaimers that are intermingled within other sections of the employment manual, as opposed to being set off to be made prominent, are not likely to prevent contract formation. *Id.* at 414-15; *see also Sellitto v. Litton Systems, Inc.*, 881 F. Supp. 932, 937 (D.N.J. 1994) (finding disclaimers ineffective because they were not "separated from or set off in a way to attract attention").

Further, a new manual containing a new disclaimer issued to replace a preexisting manual will not automatically extinguish a contract. *Preston v. Claridge Hotel & Casino, Ltd.*, 231 N.J. Super. 81 (App. Div. 1989) (upholding the contract based upon a previous employment manual because the employer did not reorient or otherwise call attention to the new disclaimer in the new handbook, despite asking employees to sign an acknowledgement form upon picking up the new handbook). Thus, the court should look at the document as a whole and the circumstances surrounding the dissemination and use of the document to determine whether a contract has been created.

Here, Defendant's "Employment Guide" and later Defendant's "Employment Policies Handbook" served as Defendant's handbooks with respect to Plaintiff's employment. The Court should consider both documents in determining the instant motion, as Defendant argues.

As relevant here, Defendant's "Employment Guide" applied to Plaintiff from approximately 2004 to June 2008, and lays out detailed policies and procedures with respect to, *inter alia*, "Employment Practices," "Company Guidelines," "Company Rules," "Employment Status

Information" pertaining to, *inter alia*, employee classifications, "Pay Practices" pertaining to, *inter alia*, deductions and overtime, "Compensation/Performance Management" pertaining to performance reviews, "Employee Benefits," and "Time Off/Leave" pertaining to, *inter alia*, sick time and leaves of absence. These detailed policies and procedures laid out the terms and conditions of Plaintiff's employment with regard to hiring, pay, employee rights, discipline, and termination of employment, as well as benefits to which employees were entitled. These detailed provisions created a reasonable expectation that the handbook created contractual obligations between Defendant and Plaintiff.

In a section entitled "Leaving C&S" Defendant's handbook states, "Based on varying state and local laws, any final monies owed, less debt owed to the Company, where applicable, will be paid within the defined legal limits." Further, Defendant's handbook provides guidelines on classification of exempt and non-exempt employees, as well as Defendant's policies with regard to overtime.

Plaintiff's job description indicated that he was a non-exempt employee. [Complaint ¶ 31]. Further, Plaintiff was not a supervisor, had no supervisory duties, was not employed in an executive, administrative, or professional capacity, had no management duties, did not direct the work of other employees, did not have authority to hire and fire other employees, had no authority to give input on employment decisions pertaining to other employees, had no discretionary powers and had no authority to exercise independent judgment, and was not engaged in management policies or business operations—factors clearly indicating that Plaintiff was a non-exempt employee. [Complaint ¶¶ 36-46]. Defendant's intentional misclassification of Plaintiff was thus a statutory violation as well as a violation of the terms and conditions contained in the "Employment Guide."

Further, at the time of Plaintiff's termination, Defendant owed Plaintiff monies for unpaid

overtime as a result of Defendant's intentional misclassification of Plaintiff as exempt. [Complaint ¶ 29, 57-58, 60]. However, Defendant failed to pay "any final monies owed" at the time of Plaintiff's termination, as Defendant promised to do in the "Employment Guide." [Complaint ¶ 58, 60].

Despite language in the "Employment Guide" regarding Plaintiff's statute as an at-will employee, no valid "disclaimer" exists. As explained by the *Nicosia* Court, unclear and confusing legalese will not have the effect of a disclaimer where potentially confusing and conflicting obligations and promises are intermingled. *Nicosia*, 136 N.J. at 413-14. This language is included at the bottom of a generalized "Statement of Purpose" section, and are not set off or otherwise made prominent in any manner, and therefore fail to apprise a reasonable reader/employee of its meaning. *See id.* at 414-15. The comprehensive and detailed policies and procedures pertaining to Plaintiff's employment could not be negated by a general, vague, and needlessly "legalese" statement purporting to be a disclaimer.

The disclaimer contained in Defendant's "Employment Policies Handbook" is equally ineffective in extinguishing Defendant's obligations under the prior "Employment Guide." The "Employment Policies Handbook" became effective in July 2008. At the time, Plaintiff was on medical leave and was not present to be reoriented or otherwise retrained with regard to Defendant's policies and procedures. [Complaint ¶ 18]. As explained in *Preston*, an employer's failure to "reorient" employees with regard to new terms, including a new disclaimer, in a handbook constitutes a failure to inform of a significant change and calls into question the employer's basic honesty.

Lastly, New Jersey recognizes an implied covenant of good faith and fair dealing in every

contract, including employment contracts. *Onderdonk v. Presbyterian Homes of N.J.*, 85 N.J. 171, 182 (1981); *Noye v. Hoffman-La Roche, Inc.*, 238 N.J. Super. 430 (App. Div. 1989), *certif. denied*, 122 N.J. 146 (1990). The covenant is broken when an employer acts without an honest belief that good cause exists for doing so. *Wade v. Kessler Institute*, 172 N.J. 327, 345 (2002).

Once again, Defendant was aware of its own policies and procedures with regard to classification of employees, overtime, discrimination, medical leave, and termination. First, Defendant's intentionally misclassified Plaintiff to avoid paying him overtime, as confirmed by the DOL's audit. [Complaint ¶¶ 13, 29-32]. After admitting liability, Defendant then proceeded to stall resolution of the dispute and has still failed to satisfy its debt to Plaintiff. [Complaint ¶¶ 19, 56, 60]. Defendant's could not have acted with "an honest belief that good cause exist[ed]" for Defendant's intentional misclassification of Plaintiff and subsequent failure to pay sums that Defendant admitted to owing.

Accordingly, Plaintiff respectfully requests that the Court deny Defendant's motion for to dismiss his claims for breach of contract and breach of the covenant of good faith and fair dealing.

4. PLAINTIFF PROVIDES SUFFICIENT FACTUAL SUPPORT FOR HIS WHISTLEBLOWER RETALIATION CLAIMS UNDER *PIERCE*

In his Complaint, Plaintiff provides a sufficient factual basis to establish that, *inter alia*, (1) Plaintiff engaged in protected whistle-blowing activity implicating a clear mandate of public policy, and (2) that an adverse employment action was taken against him as a result of that activity, as prohibited by *Pierce v. Ortho Pharmaceuticals Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

"[O]utright violations of criminal and civil statutes invariably will constitute practices

incompatible with clear mandates of public policy." *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 187, 707 A.2d 1000 (1998). Objection to practices violating public policy can be made to an external authority, or can be made internally to a person of authority to constitute "whistle-blowing activity." *Tartaglia v. UBS PaineWebber Inc.*, 197 N.J. 81, 109, 961 A.2d 1167, 1183 (2008) (stating that complaints to outside agencies and senior corporate management suffice).

Here, Plaintiff objected to Defendant's violations of applicable wage and hour statutes, Defendant's intentional misclassification of Plaintiff, and subsequently Defendant's refusal to pay overtime which was clearly owed to Plaintiff. [Complaint ¶¶ 14, 20, 28]. These statutory violations constitute violations of "public policy." Plaintiff made his objection known when he provided information to the DOL during its audit and investigation. [Complaint ¶ 14]. Plaintiff also objected to the violations to Defendant's management when he refused to enter into an agreement whereby he would release Defendant from all liability. [Complaint ¶¶ 20, 28]. Each of these acts constituted whistle-blowing activity within the requirements of *Pierce* and *Tartaglia*.

With regard to causation, Plaintiff provides sufficient factual details in the Complaint which establish a causal link between his whistle-blowing activity and his termination. Specifically, Plaintiff was employed by Defendant for well over 4 years before the DOL determined that Defendant intentionally misclassified Plaintiff. [Complaint ¶¶ 10, 13]. Plaintiff cooperated in the DOL's audit and investigation by providing information to the DOL. [Complaint ¶ 14]. Following the DOL's determination, Defendant waited approximately 7 months before trying to obtain from Plaintiff a release of liability for all of Defendant's overtime violations for which Defendant was clearly liable. [Complaint ¶ 19]. Plaintiff outright refused the paltry sum offered by Defendant in exchange for a waiver of all of his rights. Four months later, and shortly before Plaintiff's disability

leave was schedule to end, Defendant terminated Plaintiff's employment so that Plaintiff would not return to work. [Complaint ¶ 21-22, 28]. This indicates that Plaintiff's termination resulted from his objection to Defendant's unlawful practices and his refusal to back down from asserting his rights. Despite the passing of several months while Plaintiff was not physically present on Defendant's premises, Defendant terminated Plaintiff's employment to prevent Plaintiff from returning to work.

Accordingly, in his Complaint, Plaintiff provides factual support in support of his claim against Defendant under *Pierce*. Thus Plaintiff respectfully requests that Defendant's motion to dismiss be denied.

5. PLAINTIFF ESTABLISHES PLAUSIBLE GROUNDS FOR RELIEF FOR DEFENDANT'S DISCRIMINATION AND RETALIATION UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION

Plaintiff carries his burden in establishing sufficient factual basis to show the plausibility of Defendant's liability for engaging in discrimination based on disability and retaliation under the NJLAD.

First, Plaintiff establishes a prima facie case of disability discrimination by proving that Plaintiff (1) had a disability, (2) was qualified to perform the essential functions of the job, with or without accommodation, and (3) suffered an adverse employment action because of the disability. *Bosshard v. Hackensack Univ. Med. Ctr.*, 345 N.J. Super. 78, 91, 783 A.2d 731 (App. Div. 2001).

Here, Plaintiff establishes that he is disabled by showing that he suffered complete renal failure, requiring dialysis, in March 2008. [Complaint ¶ 15]. Plaintiff's renal failure qualifies as a

disability.

Plaintiff establishes that he was qualified to perform the essential functions of his job. Following Plaintiff's renal failure, he resumed working after a three-day period. [Complaint ¶ 16, 17]. He was able to perform the essential functions of his job without issue, but had difficulty working the excessive amount of hours demanded by Defendant. Further, Plaintiff was able to work from home for some of the time without issue, but again had difficulty with the long hours demanded by Defendant.

Plaintiff requested accommodation in the form of working fewer than the approximately 61 hours that were required, but instead Defendant required that Plaintiff work a portion of each workday from home so that Plaintiff could maintain his long work hours. [Complaint ¶ 17, 97]. This ultimately forced Plaintiff to go out on medical leave. [Complaint ¶ 18]. Defendant's refusal to accommodate Plaintiff constituted an adverse employment action. [Complaint ¶ 17-18].

While Plaintiff was on medical leave, Defendant terminated Plaintiff's employment. [Complaint ¶¶ 21-22]. Plaintiff's termination while he was on disability leave constituted an adverse employment action. [Complaint ¶ 25, 26, 97].

Accordingly, Plaintiff establishes a sufficient factual basis showing the plausibility that Defendant is liable for engaging in discrimination based on disability.

Next, Plaintiff establishes a prima facie case of retaliation because Plaintiff shows that he was (1) engaged in protected activity known to Defendant, (2) subjected to an adverse employment action by Defendant, and (3) there was a causal link between the two. *Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 274, 675 A.2d 684 (App. Div. 1996).

Following Plaintiff's renal failure, Plaintiff resumed working his regular schedule after three

days because Plaintiff was fearful that he would be terminated due to his disability. [Complaint ¶ 16]. Instead of reducing Plaintiff's hours as an accommodation, Defendant insisted that Plaintiff maintain his long hours even if it meant that Plaintiff work while he was at home due to his disability. [Complaint ¶ 17]. Thereafter, on May 20, 2008, Plaintiff was forced to go out on disability leave because he could no longer maintain the required long hours. [Complaint ¶ 18]. Plaintiff's request for an accommodation constituted protected activity. Defendant knew that Plaintiff made this request. Plaintiff further engaged in protected activity when he went out on disability leave. Defendant likewise knew that Plaintiff was on disability leave.

On November 13, 2008, Defendant sent Plaintiff a letter stating that *because he was out on disability*, his employment would be "inactivated," meaning terminated. [Complaint ¶ 21]. This termination occurred while Plaintiff was on disability leave, and only several days prior to when his disability leave would end. [Complaint ¶ 22]. Defendant's November 13 letter explicitly stated that Plaintiff's disability was the causal factor leading to his termination, and that Plaintiff was being terminated because of his disability. [Complaint ¶ 21].

Accordingly, Plaintiff establishes the plausibility of Defendant's liability for discrimination based on disability and retaliation under the NJLAD. Thus, Plaintiff respectfully requests that Defendant's motion to dismiss Plaintiff's claims be denied.

**POINT B PLAINTIFF'S WAGE AND HOUR CLAIMS FOR UNPAID
OVERTIME ARE TIMELY AFTER APPLICABLE**

TOLLING AND SHOULD PROCEED

Plaintiff's wage and hour claims against Defendant are timely and cannot be dismissed at this stage in the litigation.

First, in filing his Complaint on April 10, 2010, Plaintiff asserts his claims within two years since the beginning of the running of the statute of limitations in July 2008. Leading up to July 2008, the statute of limitations is tolled for the duration of Defendant's continuous violation of requirements to post mandatory notices of employees' rights in the workplace. Further, the doctrine of equitable tolling is triggered by Defendant's persistent delays and continued failure to settle the matter following the DOL's determination that Defendant intentionally violated applicable wage and hour laws. This tolls the statute of limitations until the time Defendant made it clear on July 3, 2008 that Defendant would not resolve the matter with Plaintiff. Thus, Plaintiff's Complaint filed on April 10, 2010 is within two years of July 3, 2008, and Plaintiff's wage and hour claims against Defendant should proceed as they have been filed in a timely fashion.

Even if the Court declines to equitably toll the statute of limitations during the time that Defendant persisted in failing to settle the matter, Plaintiff's April 10, 2010 Complaint is within the FLSA's three year statute of limitations for Defendant's willful violation of the FLSA. The DOL's determination that Defendant's violation was intentional shows that Defendant knew of the applicable law, knew that Plaintiff was entitled to overtime, and Defendant purposefully and willfully failed to pay Plaintiff overtime in violation of the FLSA. The DOL's determination in or about October 2007 resulted in Defendant admitting liability for misclassifying Plaintiff, and correcting Plaintiff's misclassification. Thus, Plaintiff's Complaint filed on April 10, 2010 is within the three year statute of limitations for willful violations of the FLSA, and should proceed as timely.

For the foregoing reasons, the Court should deny Defendant's motion to dismiss Plaintiff's wage and hour claims against Defendant, Counts I and III, since Plaintiff's claims are filed within the applicable statute of limitations.

**1. PLAINTIFF ASSERTS HIS CLAIMS UNDER THE FAIR
LABOR STANDARDS ACT AND NEW JERSEY
WAGE AND HOUR LAW WITHIN TWO YEARS OF THE
TOLLED STATUTE OF LIMITATIONS**

Plaintiff's claims under the FLSA and NJWHL are timely, as Plaintiff is entitled to tolling of the statute of limitations until July 2008 due to Defendant's actions.

Both the FLSA and NJWHL provide Plaintiff a two-year statute of limitations. 29 U.S.C. § 255(a); N.J.S.A. 34:11-56a25.1. Normally, a separate cause of action for overtime accrues, and thus the statute of limitations begins to run, at each regular pay day where the employee is paid in violation of the applicable wage and hour laws. *Henchy v. City of Absecon*, 148 F. Supp. 2d 435, 437 (D.N.J. 2001) (citations omitted). However, under 29 C.F.R. § 516.4, employers are required to post mandatory notices of workers' statutory minimum wage and overtime rights, and "an employer's failure to post a statutorily required notice of this type tolls the running of any period of limitations." *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984) (citing *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1977)).

Additionally, courts automatically read every federal statute of limitations, including that of the FLSA, as including the equitable tolling doctrine. *Henchy*, 148 F. Supp. 2d at 438 (D.N.J. 2001) (citing *Kamens*, 586 F. Supp. at 328; *Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 845 (3d Cir. 1992)); see *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L. Ed. 743 (1946); see

also *Staub v. Eastman Kodak Co.*, 320 N.J. Super. 34, 52-54 (App. Div. 1999) (recognizing that "New Jersey law has been hospitable to equitably purposed procedural devices," such as equitable tolling, to constrain application of statutes of limitations to prevent individual injustice). The equitable tolling doctrine applies when "defendant has actively misled the plaintiff." *Henchy*, 148 F. Supp. 2d at 438 (citing *Miller*, 977 F.2d at 845). The Third Circuit has instructed that equitable tolling is triggered when "the employer's own acts or omissions have lulled the plaintiff into forgoing prompt attempts to vindicate his rights," although the employer's actions need not be egregious acts of active deception. *Id.* (citing *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 309 (3d Cir. 1983)).

As noted in *Balzano v. Township of North Bergen*, 649 F. Supp. 807, 811 (D.N.J. 1986), "[i]t would be highly inequitable to preclude plaintiff from suing to recover the back pay allegedly owed him because of the [Defendant]'s continued failure to settle the matter." In *Balzano*, the defendant admitted liability but stalled for extra time, citing budget difficulties and lack of proper documentation. *Id.* at 809. The Court tolled the statute of limitations "until the date plaintiff became aware of the [defendant]'s refusal to pay him." *Id.* at 811.

Here, Defendant failed to post the mandatory notices regarding Plaintiff's statutory wage and hour rights at earliest October 2007. In addition to Defendant's failure to post the mandatory notices, Defendant did nothing to otherwise make Plaintiff aware of his statutory wage and hour rights until at earliest October 2007. Even assuming, *arguendo*, that Plaintiff was suspicious that Defendant's policy was unlawful, "the Third Circuit explained in *Meyer v. Riegel Prod. Corp.*, 720 F.2d 303, 308 (3d Cir. 1983) [that] a plaintiff's contemporaneous suspicion as to the legality of his employer's actions does not in itself preclude the invocation of equitable tolling." *Henchy*, 148 F. Supp. 2d at

439. Thus, the statute of limitations for each violation of the FLSA is automatically tolled until Defendant put up the mandated notices in, at earliest, October 2007.

Further, the DOL performed an audit of Defendant and uncovered that Plaintiff, among others, was intentionally misclassified as an exempt employee. At that time, Defendant admitted liability and began paying Plaintiff overtime. Plaintiff actively sought to recover the sum of his damages from Defendant's wage and hour violations, giving the Defendant a good faith opportunity to resolve the matter. Defendant, however, allowed the process to drag on despite: (1) a finding that Plaintiff was intentionally misclassified and thus a finding of clear liability, and (2) Defendant's admission that Plaintiff had been misclassified and should have been paid overtime for the work he had performed. Among Defendant's other delay tactics, Defendant allowed Plaintiff's attention to be diverted to the medical conditions Plaintiff developed as a result of the work conditions he was made to endure. It was not until Defendant's July 2008 demand, in the form of a "settlement offer," that Plaintiff waive all rights to the money to which he was lawfully entitled, in exchange for a paltry sum, that Plaintiff realized Defendant was disputing the money owed and was outright refusing to pay.

Thus, Plaintiff is entitled to equitable tolling of the statute of limitations for the time period during which Defendant tried to lull Plaintiff into a false sense that further action was not necessary, which lasted until July 2008, as this is the exact behavior that this Court refused to reward in *Balzano*. Further, Defendant cannot claim prejudice or inequity based on passage of time because Defendant's wage and hour violations were intentional, Defendant caused delays in settlement of the claims, and Defendant has been aware since, at minimum, approximately October 2007 that Plaintiff was owed unpaid overtime and that Plaintiff wished to enforce his rights.

The statutes of limitations for each and every of Defendant's wage and hour violations dating back to the commencement of Plaintiff's employment should be tolled until July 3, 2008. Plaintiff filed the instant lawsuit on April 10, 2010, which is within two years of July 3, 2008 and thus timely.

Accordingly, Plaintiff's claims thus fall within the applicable two-year statute of limitations applicable under both the FLSA and the NJWHL, after application of the appropriate tolls.

2. PLAINTIFF ASSERTS HIS CLAIMS UNDER THE FAIR LABOR STANDARDS ACT WITHIN THE THREE-YEAR STATUTE OF LIMITATIONS APPLICABLE TO DEFENDANT'S WILLFUL VIOLATIONS

Plaintiff's claims for Defendant's willful violations of the FLSA are timely filed within the applicable three-year statute of limitations, and thus the Court should deny Defendant's motion to dismiss Plaintiff's FLSA claims.

Under 29 U.S.C. 255(a), a three-year statute of limitations applies to willful violations of the FLSA. The Supreme Court of the United States has established that a violation of the FLSA is "willful" if the employer knows or shows a reckless disregard as to whether its conduct violates the statute. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 1681, 100 L. Ed. 2d 115 (1988) (interpreting and applying the "willful" standard of *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)). This includes an employer's "intentional" conduct. *Id.*

Here, the DOL performed an audit of Defendant in approximately October 2007. Based upon its findings during that audit, the DOL determined that Defendant knew it was violating the FLSA and that it intentionally misclassified Plaintiff, among other employees, as exempt from

overtime. Subsequently, Defendant admitted that Plaintiff was misclassified, and reclassified Plaintiff as non-exempt. Although Plaintiff concedes that the NJWHL claims are subject to only a two-year statute of limitations, Defendant's intentional violation triggers the FLSA's three-year statute of limitations.

As discussed at Point B.1 *supra*, Defendant's failure to post mandatory notices of Plaintiff's statutory rights, as required by regulation, automatically tolls the statute of limitations for Defendant's wage and hour violations. The statute of limitations for each and every violation that occurred during the time that no mandatory notices were posted is thus tolled until Defendant corrected its violation in October 2007. Accordingly, even if the Court determines that equitable tolling does not apply to toll the statute of limitations until July 2008, the statute of limitations for each of Defendant's violations since the commencement of Plaintiff's employment by Defendant did not begin to run until or about October 2007.

Plaintiff's Complaint, filed on April 10, 2010 is thus within the three-year statute of limitations even if the statute began to run in October 2007. Thus, Plaintiff's FLSA claims are timely filed, and Defendant's motion to dismiss Plaintiff's FLSA claims must be denied.

Thus, Plaintiff is entitled to recover for all his unpaid overtime from the commencement of his employment in January 2003 until his termination. Plaintiff's FLSA and NJWHL claims are filed within the two-year statute of limitations, which must be tolled based on Defendant's failure to post mandatory notices and the time during which Defendant stalled Plaintiff. Alternatively, Defendant's motion to dismiss Plaintiff's FLSA claims must be denied, as Plaintiff filed his complaint within the three-year statute of limitations, which was triggered by Defendant's willful violations of the FLSA.

For all the foregoing reasons, Defendant's motion to dismiss must be denied.

CONCLUSION

As set forth above, it is clear that Defendant's arguments lack merit. Plaintiff therefore respectfully requests that Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) be denied in full.

Respectfully submitted,
HYDERALLY & ASSOCIATES, P.C.

BY: s/ Ty Hyderally
TY HYDERALLY, ESQ.