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

WAYLON UNDERWOOD,

Plaintiff,

vs.

KMC ENTERPRISES, INC.,

Defendant.

Civil Action No. 17-cv-02615 (NLH) (JS)

**NOTICE OF MOTION TO DISMISS OR
STAY AND TO COMPEL ARBITRATION**

Electronically Filed

**TO: R. Andrew Santillo, Esq.,
WINEBRAKE & SANTILLO, LLC
Twining Office Center, Suite 211
715 Twining Road
Dresher, Pennsylvania 19025
Attorneys for Plaintiff**

COUNSEL:

PLEASE TAKE NOTICE that upon the accompanying (1) Defendant KMC Enterprises, Inc.'s Brief in Support of its Motion to Dismiss or Stay and to Compel Arbitration, with Exhibit 1, and (2) Certification of John W. Clowar, with Exhibit A, by and through its attorneys, Littler Mendelson, P.C., will move this Court, before the Honorable Noel L. Hillman, U.S.D.J., and/or the Honorable Joel Schneider, U.S.M.J. at the United States District Courthouse, District of New

Jersey, Mitchell H. Cohen U.S. Courthouse, 1 John F. Gerry Plaza, 4th & Cooper Streets, Camden, New Jersey 08101, on a date and time to be designated by the Court, for an Order pursuant to 9 U.S.C. §§ 2-4 and Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing and/or staying this action and compelling arbitration, along with such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith.

PLEASE TAKE FURTHER NOTICE that oral argument is requested.

LITTLER MENDELSON, P.C.
Attorneys for Defendant
KMC Enterprises, Inc.

By: /s/ William P. McLane
William P. McLane

Dated: June 13, 2017
Newark, New Jersey

CERTIFICATION OF SERVICE

I hereby certify that on June 13, 2017, I caused the following documents to be served via electronic mail and FedEx, upon R. Andrew Santillo, Esq., Winebrake & Santillo, LLC, 715 Twining Road, Dresher, Pennsylvania 19025:

- (1) Defendant KMC Enterprises, Inc.'s Brief in Support of its Motion to Dismiss or Stay and to Compel Arbitration, with Exhibit 1;
- (2) Certification of John W. Clowar, with Exhibit A;
- (3) Proposed Order; and
- (4) this Certification of Service.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: June 13, 2017
Newark, New Jersey

/s/ William P. McLane

William P. McLane

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

WAYLON UNDERWOOD, on behalf of
himself and similarly situated employees,

Plaintiff,

vs.

KMC Enterprises, Inc.,

Defendant.

Case No. 1:17-cv-02615-NLH-JS

**CERTIFICATION OF JOHN W. CLOWAR IN
SUPPORT OF DEFENDANT'S MOTION TO
DISMISS OR TO STAY AND TO COMPEL
ARBITRATION**

I, John W. Clowar, certify as follows:

1. I am an owner of defendant KMC Enterprises, Inc. ("KMC" or the "Company"). I make this Certification in Support of KMC's Motion to Dismiss or Stay and to Compel Arbitration. I have personal knowledge of the facts set forth in this Certification and, if called upon, could and would provide competent testimony in support of these facts.

2. KMC owns and operates a restaurant in Mount Laurel, New Jersey called "Prospector's Steakhouse and Saloon" ("Prospector's"). I am actively involved in Prospector's operation and maintain an office there. I am on site approximately seven days per week for approximately 30-40 hours per week. I am available to employees at any time to discuss any issues or concerns.

3. According to the personnel records maintained by KMC in its ordinary course of business, Plaintiff Waylon Underwood worked as a server and bartender at Prospector's from March 25, 2016, until his employment ended voluntarily in May 2016.

4. I distribute our employee handbook to all new employees and conduct new-hire training on all of the terms and conditions of employment contained therein. A true and exact copy of the

employee handbook, entitled "Prospector's Grille & Saloon Company Employee Manual" is attached to this Certification as Exhibit A (arbitration agreement located at pp. 23-24).

5. I hold meetings with all KMC employees at their time of hire and review in detail all policies and procedures, including our arbitration policy. New hires are informed that these policies are mandatory conditions of employment, and that they should read and familiarize themselves with every policy. They are also told that all disputes stemming from their employment will be resolved through binding arbitration. New hires are encouraged to raise any questions or issues they may have about any of the policies that I cover in my orientation meeting. At the conclusion of the meeting and after any and all questions or concerns are addressed, new employees will sign their handbooks acknowledging and accepting our policies and procedures. Approximately, 20% of those who attend new hire orientation do not return to accept employment.

6. At the time of plaintiff's hire, in addition to myself, the new-hire meetings were conducted by a former manager, Sid Riemer at my direction and in the same manner that I conduct them today as explained in detail above.

7. On March 25, 2016, Riemer met with plaintiff to review KMC's policies and terms and conditions of employment, as contained in KMC's handbook, including our arbitration policy and answered any questions plaintiff or other new hires may have had.

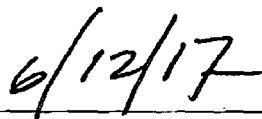
8. To my knowledge, plaintiff had no concerns regarding his execution of the handbook and arbitration policy and he never came to me or any of my managers to indicate he did not agree with or consent to any of our policies.

Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.



John W. Clowar

Firmwide:148132563.1 068301.1002



Date

EXHIBIT A

Waylon

**PROSPECTOR'S
GRILLE & SALOON COMPANY**

EMPLOYEE HANDBOOK

PROSPECTORS GRILLE & SALOON

EMPLOYEE WELCOME FORM

Dear New Employee:

Welcome to the Prospector's Grille & Saloon (K.M.C. Enterprises, Inc.) We are pleased to have you join the Prospector's team. The success of our organization has been built through the significant contributions of employees. Our reputation and continued success will depend upon exemplary work from you and other employees.

Attached to this letter is an Employee Manual, which provides information about your employment at Prospector's Grille & Saloon. If you have any questions about any employment matters, please discuss them with your supervisor. It is your responsibility to read and understand this Employee Manual. I ask that you sign the attached acknowledgment, indicating that you received and read the Manual, so that we may keep it in your employee file for future reference.

Please accept my best wishes for your success at Prospector's Grille & Saloon. It is our hope that you will find personal and professional satisfaction at Prospector's Grille & Saloon.

Sincerely,


Owner

ORIENTATION GUIDE FOR NEW HIRES:

The points listed below are to be reviewed with the new hire on the first day of employment. Be sure the individual understands each one. Cover each point thoroughly. Obtain the necessary signature and file with employee's application and I-9 form.

[Handwritten checkmarks and initials on the left side of the list items]

- 1. Welcome employee.
- 2. Overview of the Company.
- 3. Work Schedule.
- 4. Job assignment and employee's supervisor.
- 5. Loyalty Program
- 6. Store hours (if applicable)
- 7. Pay procedures - Payday including first paycheck, overtime, payroll deduction, delivery of paycheck when absent.
- 8. Tip declaration (if applicable) Form 4070
- 9. Emergency / Accident / Injury procedures.
- 10. Attendance and punctuality.
- 11. Smoking rules.
- 12. Using cell phones (Signed Cell Phone Form)
- 13. Uniform maintenance and dress code.
- 14. Employee parking.
- 15. Employee entrance/exists.
- 16. Switching stations and transferring checks
- 17. Grievance procedure.
- 18. Outline of training program.
- 19. Probation period and evaluation procedures.
- 20. Procedure for name and address change.
- 21. Tour of facility.
- 22. Guest Complaints
- 23. Hourly wage to be paid.
- 24. On call / call in procedures.
- 25. Equal Opportunity Employment Policy: "It is the Company's policy to ensure equality in employment of all applicants regarding of race, color, religion, creed, sex, age, and/or national origin."
- 26. Answering of employee's questions.

[Handwritten signature of Manager]

Manager's Signature


[Handwritten signature of Employee]

Employee's Signature


Date: 3/25/11

MANAGERS CHECKLIST

- Orientation Guide for New Hire
- Master Employee New Hire/Rehire Sheet
- Prospectors Welcome Form
- Alcohol Responsibility
- Uniform Responsibility Form
- Employee Acknowledgment
- Application
- W-2 Form
- I-9 Form (filled out with D.L. and SS card)
- Work Permit (if applicable)
- Bartender Agreement (if applicable)
- Host Guidelines (if applicable)
- Host Need To Know (if applicable)
- Cell Phone Form
- Insurance Form

Employee's Signature: 

Print Name: Waylon Underwood

Manager's Signature: 

Date: 3/25/16

INTRODUCTION

This employee manual has been prepared as a guide to the employment policies of Prospector's Grille & Saloon (KMC Enterprises, Inc.). This Manual supersedes all previous employee manuals and memos that may have been issued from time to time on subjects covered in this Manual.

It is not possible to anticipate every situation which may arise in the workplace, or to provide information that answers every possible question. In addition, policies and procedures described in this manual may change from time to time. Accordingly, Prospector's has the right to modify, supplement, rescind, or revise any of the provisions in the manual as Prospector's deems necessary or appropriate in its discretion.

Prospector's is constantly striving to improve its policies and procedures and the services and products that Prospector's provides its customers. You are encouraged to bring suggestions for improvement to the attention of your supervisor, or the owners of the business.

If you have questions concerning the manual or the policies, please contact your supervisor. Prospector's will gladly assist any employee who is unable to understand Prospector's policies.

I have completed the following forms form employment and returned them to the Management:

- Master Employee New Hire/Rehire Sheet
- Prospectors Welcome Form
- Alcohol Responsibility Form
- Uniform Responsibility
- Employee Acknowledgement
- Application
- W-2
- I-9 Form (filled out with D.L. and SS card)
- Work Permit (if applicable)
- Bartender Agreement (if applicable)
- Host Guidelines (if applicable)
- Host Need to Know (if applicable)
- Cell Phone Form
- Insurance Form

Employee Signature *[Signature]* Date 3/25/16

Managers Signature *[Signature]* Date 3/25/16

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ATTACHMENTS (Please sign and return):

- Alcohol Responsibility
- Uniform Responsibility Form
- Employee Acknowledgment
- Introduction

I. COMPLIANCE WITH LAWS AND STATUTES

A. POLICY AGAINST UNLAWFUL DISCRIMINATION:

In order to provide equal employment and advancement opportunities to all individuals, employment decisions at Prospector's will be based on merit, qualifications, and abilities. Prospector's does not discriminate in employment opportunities or practices because of race, color, religion, sex, national origin, age or disability.

Prospector's prohibits discrimination against any employee or applicant on the basis of race, color, sex, age, religion, national origin, marital status, ancestry, citizenship, veteran status, pregnancy, medical condition, physical or mental disability, sexual orientation or any other characteristics to the extent protected by law.

Prospector's is committed to complying with all laws in every area of employment, including recruitment, hiring, development, promotion, transfer, termination, layoff, compensation, benefits, and all other conditions and privileges of employment.

Each of us shares in the responsibility of assuring that our policies are effective and apply uniformly to everyone. Thus, Prospector's expects each employee to treat colleagues, customers and vendors with respect and sensitivity and report to management if they observe or learn of any discriminatory conduct.

Any employee who engages in an unlawful discriminatory practice will be subject to disciplinary action, up to and including termination of employment. Prospector's has a zero tolerance for any form of unlawful discrimination.

Any employee who wants additional information about Prospector's policy against unlawful discrimination or has a complaint about unlawful discrimination should contact her/his supervisor. If you feel that you are not getting the results you need, you may contact one of the owners of the Company.

B. POLICY AGAINST HARASSMENT:

The employees of Prospector's are the most value asset of the Company. All employees are entitled to be treated with respect, and to work in an environment that is not offensive, abusive, intimidating or hostile. Prospector's is committed to providing a work environment free of conduct which causes humiliation or fear. In keeping with this commitment, Prospector's prohibits all forms of unlawful harassment, including, but not limited to, sexual harassment.

Harassment for any discriminatory reason, such as sex, race, national origin, disability, religion, sexual orientation or same-sex harassment, is violative of various state and federal laws. Harassment of any sort - verbal, physical or visual - will not be tolerated.

C. REPORTING UNLAWFUL DISCRIMINATION OR HARASSMENT:

All of us at Prospector's have a responsibility to keep our work environment free from unlawful discrimination and harassment. Any employee who believes s/he has been subjected to objectionable conduct is urged to contact her/his supervisor or one of the owners of the Company. Remember Prospector's cannot be responsible or fix a problem unless they know about it.

In addition, an employee who believes s/he has been subjected to unlawful discrimination or harassment may file a complaint with the local office of the United States Equal Employment Opportunity Commission (EEOC) or State Department of New Jersey. Each federal or state office has authority to remedy violations.

If you are found to have engaged in, ratified or condoned unlawful discrimination or harassment, you may be personally liable for monetary damages. Prospector's may decide not to pay personal damages assessed against you. Any employee who becomes aware of an incident of unlawful discrimination or harassment by any employee, customer or vendor, whether by witnessing the incident or being told of it, must report it to her/his supervisor or to one of the owners of the Company to assure that such conduct does not continue.

1. **Reporting.** All reports of unlawful discrimination or harassment will be promptly investigated with special attention to the privacy of everyone involved. If you are found to have acted improperly towards another employee, customer, or vendor, you will be subject to disciplinary action, up to and including termination of employment. Prospectors' will also take any additional action necessary to appropriately address employee concerns about unlawful discrimination or harassment.

No employee will be retaliated against who makes a good faith effort to report alleged unlawful discrimination or harassment, or for participating in any investigation, proceeding or hearing conducted by the EEOC or any state agency. If an employee believes s/he is being retaliated against, s/he should promptly contact her/his supervisor or one of the owners of the Company so an investigation can be conducted.

Any employee who knowingly provides a false report of unlawful discrimination or harassment will be subject to disciplinary action, up to and including termination of

employment. Any employee who makes such a false statement shall be personally liable for any legal action taken by another employee in response to a false report.

D. DISABILITY ACCOMMODATION:

Prospectors' will seek to provide reasonable accommodation for the known physical or mental limitations of a qualified disabled employee or applicant as required by law. Reasonable accommodation varies from case to case and is evaluated on an individual basis.

An employee who believes that s/he has a disability that affects her ability to perform a job-related function should notify her/his supervisor or one of the owners of the Company about the disability.

E. IMMIGRATION COMPLIANCE

Prospectors' employs only United States citizens and those non-U.S. citizens authorized to work in the United States in compliance with the Immigration Reform and Control Act of 1986.

Each new employee, as a condition of employment, must complete the Employment Eligibility Verification Form I-9 and present documentation establishing identity and employment eligibility. Former employees who are rehired must also complete the form if they have not completed an I-9 within the past three years or if their previous I-9 is no longer retained or valid.

F. DRUG AND ALCOHOL USAGE IN THE WORKPLACE:

The Company is concerned with its employee's safety and realizes that the state of an employee's health can affect job performance, productivity and safety. Employees impaired by the use of alcohol or drugs while on the job pose serious safety and health risks to themselves, co-workers, and the public.

We want to emphasize that it is not our intention to catch an individual doing something wrong. Rather, our intention is to discourage the use of and possession of these substances in order to protect the safety and health of everyone working here, as well as our customers. It is only those whose disregard or abuse this policy that needs to be concerned. This is a benefit to you and the Company and the concept behind the policy is deterrent not punishment.

The manufacture, distribution, dispensing, possession or use of unlawful drugs or substances by employees while on Company premises, is prohibited. No employee

shall report to work or remain on duty while impaired (as hereinafter defined) by the use of alcohol or while retaining a detectable amount of any unlawful drug in his/her system.

- A. "ALCOHOL" means ethyl alcohol (ethanol) and includes any liquid containing ethyl alcohol.
- B. "DRUG" means any substance or chemical that has mind or function altering effects on the human body, including prescription and over-the-counter medications.
- C. "POSSESSION" means on one's person, in one's personal effects, in one's vehicle, or under one's control.
- D. "SALE" means any exchange, transfer, or sharing, whether for money or otherwise.
- E. "IMPAIRED" means, for the purposes of alcohol usage, the retention by the employee, of a blood alcohol content of .05% or more upon testing by Breathalyzer or blood test.
- F. "USE" means any form of consumption, ingestion, or inhaling.

1. Legally Prescribed Medication:

Use of legally obtained drugs (including alcohol or other chemicals) which may adversely affect job performance or safety is prohibited. An employee with a current and valid prescription by a qualified physician for the use of a drug must notify their supervisor of such use and the possible side effect of any such drug or medication where the employee may be impaired by the use of such drug. An opinion may require the physician prescribing the medication that such will not impair the employee's performance of his/her normal duties. The Company may, as its discretion, require an employee to refrain from working while impaired by any drug or medication.

The Company may, from time to time, upon reasonable suspicion of use and/or possession of drugs, conduct searches of an employee and/or his/her possessions or vehicles on Company premises. All employees are expected to consent to such searches as a precondition of employment and as a condition of continued employment. Refusal to permit such a search shall be grounds for disciplinary action.

G. FAMILY CARE LEAVE OF ABSENCE:

An employee may take an unpaid family care leave in accordance with the following guidelines, which are intended to and will be interpreted to comply with applicable federal and state law.

1. Eligibility for Family Care Leave:

An employee is eligible for family care leave is she/he:

1. Has been employed by Prospector's for at least one year.
2. Has worked at least 1,250 hours during the preceding 12 months.
3. Is employed at a location which has 50 employees within 1 75 -mile radius, and
4. Requires a leave either:

a. to attend her/his child's birth, adoption, placement into her/his home, or because of a serious health condition. A leave taken for his/her child's birth, adoption or placement must be concluded within 12 months of the date of birth, adoption or placement. In addition, s/he may only take a leave with respect to the adoption or placement of a child, or serious health condition if her/his child is either under the age of 18 or a disabled dependent.

Note: A child is defined as a natural, adopted or foster child, a stepchild or a legal ward.

- b. to attend to a parent's or spouse's serious health condition:
 - i. as a caregiver; or
 - ii. during a period of care by a health care provider; and
 - iii. whether on an inpatient or outpatient basis.

Note: The terms "parents" includes biological, foster or adoptive parents, stepparents and legal guardians. In-laws are excluded.

2. Procedure for Requesting Family Care Leave:

If you would like to submit a request for Family Leave Care, then:

1. Promptly complete Prospector's "Leave of Absence Request" and submit it to your supervisor of office 30 days in advance of the requested leave date if

possible. If a 30 day advance notice cannot be given, please notify the office or supervisor.

2. Provide Prospector's with medical verification of the need for Family Care Leave. This medical verification must be issued by a certified health care provider and must include the following information if the leave is for reasons other than birth, adoption or placement of a child:

- a. the date on which the serious health condition commenced;
- b. the probable duration of the serious health condition;
- c. the time required for you to attend to the family member;

and

d. a statement that the serious health condition warrants a family member's care or supervision during the period of treatment.

3. Leave taken under this policy does not need to be taken in one continuous time period. You may request leave intermittently or on a reduced work schedule. However, such intermittent leave must be scheduled in cooperation with Prospector's to minimize the disruption to the workplace. In order to grant your leave request, it may be necessary to transfer you to another position of equal pay and benefits. Intermittent leave or a reduced work schedule may only be taken if Prospector's consents.

4. Prospector's may require supplemental information if any additional leave is requested. Any misrepresentation made to obtain or continue leave is grounds for discharge.

3. Terms of the Leave of Absence:

1. Prospector's will grant eligible employees Family Care Leave without pay up to a maximum of 12 work weeks in any twelve-month period. However, such 12 week period for Family Care Leave shall be reduced by any time taken during the 12 month period for the employee's own medical leave, except pregnancy disability leave which is in addition to such 12 week leave.

2. If both you and your spouse work for Prospector's, your combined leave for the birth, adoption or placement of a child may not exceed 12 work weeks in any 12 month period, you need to maintain your portion of benefits.

3. You will continue to be responsible for any medical or dental premiums for which you were previously responsible. These payments must be received in the office prior to the first of each month for which the coverage applies.

The Company is entitled to reimbursement of health insurance premiums during your leave should you not return to work for reasons other than a continuing health problem or a reason beyond your control.

4. You must apply for accrued paid vacation towards any leave taken under this policy. You do not earn additional vacation time, seniority or other benefits while on leave.

4. Returning from Leave:

1. You must notify Prospector's at least 2 weeks before your scheduled return date.

2. If you return on or before the expiration of your approved Family Care Leave, you will be returned to your former position or one with equivalent duties, pay, geographic location, and terms and conditions unless a reduction in force or other reorganization has taken place during your leave which eliminated your former position, in which case you will be treated as if you had been working rather than on leave.

3. Reinstatement to your former position may be denied if your compensation is among the top 10% for all employees who work at the same location.

4. Employees who do not report for work at the end of their approved Family Care Leave will have their employment terminated.

H. EDUCATION LEAVE:

Regular full-time employees who wish to improve their skills may be granted an unpaid educational leave to further their education or training. An employee desiring an educational leave must submit a request for each leave in writing.

An educational leave request must be approved by the employee's supervisor. Leave may only be granted at the sole discretion of Prospector's. Prospector's may consider factors such as the employee's length of service, employee's job performance, the relevance of the training to the employee's job, and Prospector's operational and administrative needs. Completion of a course of study or an educational program shall not be a guarantee of advancement or promotion.

I. MILITARY LEAVE OF ABSENCE:

The Company provides military leaves of absence to all regular and part-time employees in compliance with applicable federal and state laws.

Your request for military leave should be submitted promptly and accompanied by a copy of your military orders indicating the beginning the end dates of your duty period.

J. JURY DUTY:

Should you be called for jury duty, Prospector's will grant you a leave of absence in accordance with applicable law. You must inform your supervisor within 7 days of your receipt of notice to appear for jury duty.

Upon completion of jury duty, a verification of attendance form from the court must be provided to your supervisor. If you are excused from jury duty for the day, or are excused early, you should report to work when practical to do so, unless you have taken the time as an earned vacation.

If you are called to serve on a jury at a time that would unreasonably interfere with normal business operations, Prospector's may request that the jury service be rescheduled for a later date.

II. POLICIES RELATED TO CUSTOMER SERVICE

A. RESERVATIONS:

All reservations are to be taken **BY A MANANGER ONLY**. When taking the reservation we must have the first and last name of the guest and their phone number in order to enter the reservation correctly in to our Open Table System.

B. TELEPHONE PROCEDURES:

The proper way to answer the telephone at Prosecutor's is: "(Time of day) good afternoon/good evening, thank you for calling Prospector's, your name (ex. Beverly is speaking), how may I help you? If you are answering the phone, please refer emergency, sick and/or late calls to the manager on duty **ONLY**."

C. COMMUNICATION:

The frontline monitor and kitchen coordinator (usually a manager) are the link between the front and back of the house. When you have a problem with an order, communicate with one of these two people. Re-cook slips are to be used on all re-cooks. Fill them out entirely. **MANAGERS MUST RUN ALL RE-COOKS OUT TO TABLE.**

D. GUEST COMPLAINTS:

Minor: apologize and take care of the problem yourself. (Example: cold coffee)
Major: apologize and get a manager. (Example: unsatisfactory food)

E. RUNNING FOOD:

Everyone is a food runner! Serving hot food to our customers is crucial for return business and gratuities for the staff. When serving the food, treat the guest as if you were their waiter or waitress. Never leave a table before saying, "Is there anything else I can get for you?" All food runners are responsible to serve food according to the pivot point system.

F. TO GO ORDERS:

Prospector's authorized personnel will take TO GO orders over the phone. If you are authorized, you must get the following information (use Prospector's to go order forms):

1. Name
2. Phone number
3. Correct order (repeat back to customer)

All our food is prepared in 15 minutes or less, and by knowing the arrival time, we can assure that we serve a quality product. It is the employees' responsibility to make sure all items are complete for that TO GO order. Staple the kitchen pre check terminal check to bag. Print the check and staple to the Prospector's order form. Staple the check to the order form and hang in the window until the check is paid out.

G. BEVERAGE AND FOOD SERVICE:

Servers and cocktail waitress: All beverages must go out on a serving tray. No beverage should be carried in hand. All food items over two plates need to be served from a tray. Follow your pivot point system left to right. Do not auction off food. Use a tray jack to serve food from tray. Do NOT use a nearby table.

H. TEN-MINUTE RULE:

We continue to seat and serve our guests at least ten minutes after our advertised closing time in the dining room. If you are scheduled to close in the dining room or

kitchen realize that this means ten minutes past the hour. This allows us an advantage over most restaurants who even try to close early if business is slow.

K. GRATUITY:

Adding gratuity to any parties check is not permitted by Prospectors unless the guest asks you to include it on their check. This amount is taken on the subtotal amount of the check. It is not taken on the taxable amount. Any employee caught putting gratuity on a check without the consent of the guest can have their employment terminated.

J. SUPPLIES; EXPENDITURES; OBLIGATING THE COMPANY

Only authorized persons may purchase supplies in the name of Prospectors. No employee whose regular duties do not include purchasing shall incur any expense on behalf of Prospectors or bind Prospectors by any promise or representation without written approval.

K. CHECK CASHING POLICY:

1. No personal pay check will be cashed at the restaurant.
2. No customer checks (without management approval).
3. Traveler's checks may be accepted for payment.
(Remember to watch the customer sign the traveler's check and compare the two signatures.)

III. POLICIES GOVERNING EMPLOYEES

A. PERSONNEL DATA CHANGES

It is the responsibility of each employee to promptly notify their supervisor of any changes in personnel data such as:

- Mailing address,
- Telephone numbers,
- Name and number of dependents, and
- Individuals to be contacted in the event of an emergency.

An employee's personnel data should be accurate and current at all times.

B. AVAILABILITY:

Monday		Tuesday		Wednesday		Thursday		Friday		Saturday		Sunday	
AM	PM	AM	PM	AM	PM	AM	PM	AM	PM	AM	PM	AM	PM

Once an employee has provided their availability, it cannot be changed, unless it is approved by a manager. If an employee changes their availability without managerial approval, it is grounds for termination. A new availability form must be filled out and signed by both the employee and the manager if you request a change in schedule. Changing your availability can violate your employment status or position at Prospectors. Employers are hired based, in part, upon their present availability. Therefore, the agreement needs to be honored by both parties.

C. PARKING:

The immediate parking is for our customer’s convenience. AM employees may park in the parking lot along Ark Road. PM employees must park in the lot behind Walgreens. During special events parking will change. Example: For concerts the managers will inform you where to park.

D. ENTERING THE BUILDING AND PERSONAL BELONGINGS:

For security reasons, our back door stays locked the majority of the time. You will need to enter the building through the front door or Patio door.. You should be fully dressed for work. No changing in the restaurant. No backpacks or duffel bags in the restaurant. Leave them in your car. Coats need to be hung on coat rack. Any personal belongings need to be locked up in the locker (pocketbooks, keys, etc.) No pocketbooks, etc. at the hostess stand or behind the bar. This Company is not responsible for person belongings which are brought in this restaurant. Any bartender with a pocketbook or duffel bag behind the bar can have their employment terminated.

E. PRE-MEAL:

Pre-meal starts at the time of your scheduled shift. **BE ON TIME FOR WORK.** Clock in at your designated scheduled time only, unless asked to clock in earlier by a manager. If you forget to clock in, let a manager know so we can adjust your clock in status. Be dressed and ready to go on the floor. If you are 10 to 15 minutes late, you get double silverware, if later then all the silverware.

F. PAY DATE:

Employees will be paid every FRIDAY. Checks may be picked up at the restaurant between 2 p.m. and 5 p.m. only. All tipped employees are required to claim all their cash tips, minus their tip out on IRS form 4070. All Wait Staff is required to tip 3% of their sales at lunch, 4% of their sales at dinner, and 4% of their sales at brunch to the Busboys and Expeditors who bus your tables, assemble your food, and run your food. Expeditors are also responsible for running food.

G. PERSONAL PHONE CALLS:

Because we are a Service Industry, our customers must be able to contact by phone. Therefore, No **PERSONAL PHONE CALLS** will be accepted. If you get an emergency phone call, we will take the phone number for you to return their call. If you need to make a phone call let a manger know.

H. CELL PHONES:

No cell phones use is permitted in the restaurant at any time. We suggest you leave your cell phone in your automobile when you enter the building or locked in an employee locker. Any employee that is found using a cell phone while on the premise and clocked in can be suspended for up to a month or have their employment terminated.

I. OPEN DOOR POLICY:

In any Company, there are times when people may not see eye to eye about particular issues. You should see your Manager in the event that you have a problem. If you are not satisfied with the response, you may take your problem to the next level of Management. This Company cannot fix a problem unless we know about it.

J. BEVERAGES:

Employees may drink coffee, tea or soda. They must drink from a cone cup provided in the wait-stand. **NO GLASSES** or **COFFEE MUGS** are to be used. Bartenders may drink from a glass but they must discard the glass after they take a drink. They are not to keep glasses or mugs of drinks behind the bar while they are working. **NO EXCEPTIONS.**

K. GENERAL DRESS CODE POLICIES:

All employees should arrive at work dressed in the appropriate uniform for their shift. ALL employees must keep uniforms **CLEAN** and **PRESSED** at all times! See Uniform dress code.

1. Clothes should be neat in appearance, fit properly, be clean and pressed.
2. No excessive jewelry. No facial (ex. Large Nose, eyebrow, etc.)
3. Hands are to be cleaned and well-manicured at all times.
4. Hair is to be neat, clean and, where required by law, use a proper hair restraint.
5. No gum chewing.

L. SERVERS:

See server dress code form.

M. KITCHEN, DISH AND EXPO:

Appropriate dress for all kitchen employees is a black or red Prospector's T-shirt, hat, chef pants or black pants. Hats are required on all kitchen employees while on duty. For your protection, no canvas shoes please. We **STRONGLY RECOMMEND NON-SLIP FOOTWEAR!**

N. BARTENDERS:

See bartender dress code form.

O. BUSSERS:

See busboy dress code form.

P. BREAK POLICY:

1. While at work, you should never leave your station or bar for a break without notifying a Manager.
2. In the restaurant, to ensure proper customer service, breaks or smoking are not allowed between the hours of 11:45 - 2:00 and 5:00 - 9:45; or until the restaurant comes off the wait or slows down.
3. In the Saloon bar and nightclub, hours will be different. Breaks will be according to peak times. Managers have to approve all breaks.
4. If you need to use the restroom, **LET THE MANAGER ON DUTY KNOW.** Please refrain from using the bathroom during peak times.

5. Non-compliance can result in suspension or termination.

Q. SMOKING IN THE WORKPLACE POLICY:

Prospector's is dedicated to providing a safe, healthy and productive work environment for all employees. Tobacco use is prohibited in all enclosed areas of this Company, including: all production areas, bathrooms, break-rooms, and offices. The use of tobacco is allowed outside of the Company buildings in certain designated areas. Employees are expect to keep the designated areas free of debris and to use the disposal containers that have been provided. This policy applies to all employees, clients, independent contractors and visitors. **Smoke breaks must be approved by a manager.**

R. ALCOHOLIC BEVERAGE PRIVILEGES (OFF DUTY):

Off duty employees cannot drink at the bar in Prospector's. **NO EXCEPTIONS.** If you are a guest eating dinner at Prospector's, you may not drink at your table. While you are off duty, you are expected to stay out of the kitchen. No drinking while working split shifts. Anyone who has been drinking before or during their shift will be terminated immediately. If you are a bartender, no husbands, wives, girlfriends, or boyfriends are permitted at the bar while you are working.

S. MEAL PRIVILEGES

1. 20% off your check for you and your guest (up to four people) during your days off. Liquor will be not discounted to your family.
2. Anyone who violates this privilege will result in their meal privileges to be revoked.
3. Employees may receive a 50% discount if working a double shift. Steaks and discounted food items are not available for the discount. All food items need to be accounted for or the employee meal privilege will be revoked.

T. WORK TRANSFER (Shift Change Book):

All shift trades must be written in the shift change book and initialed by all parties concerned and approved by the manager. Shift changes cannot be done over the telephone. Both parties must be present to sign the book with a manager. If an employee is coming in to pick up a shift it must first be approved by a manager and

they must be there no later than the last shift for that particular staff. **THIS APPLIES TO ALL STAFF.** Management reserves the right to approve or disapprove of all shift changes. NOTE: Most shift changes may result in a trade in shifts only.

U. MISSING WORK:

If you are unable to fulfill your shift obligations for that particular shift, you must call **AT LEAST 2 HOURS PRIOR TO YOUR SHIFT, AND SPEAK DIRECTLY TO THE MANAGER ON DUTY.** If you are out due to illness, you must have a doctor's note to return to work. You are the only one who can call out for yourself. We do not take calls from friends or family members. If you are missing work for any other reason, documentation must be provided. (personal reasons) **YOU** are responsible for covering your own shifts. If you are going to miss more than one shift for which you are scheduled, then you must call in 2 hours prior to each shift. Communication is important for scheduling each day.

V. TARDINESS:

If you are going to be late for your shift, you must talk to the manager on duty. Continual tardiness will not be tolerated. Let the manager on duty know how long it will be before you will get there. If you do not call, it is not fair to the **ON CALL** that will be called in because you are late.

W. SCHEDULES:

At Prospector's, we use a **master schedule.** This gives the employee a good idea when they are going to work each week, so they can plan their days off. Schedules will be posted Saturday prior to that week. Schedules are written around the convenience of the customer. Requests for time off will only be granted for **weddings, child visitation, doctors' visits, court dates, Company paid vacations, baby showers, funerals, and graduations.** Requests for time off must be in by 5:00 p.m. Tuesday the week prior to the schedule going up. Any other requests are at the sole discretion of management, and are not guaranteed. All other times off is the employee's responsibility to cover their shifts. Employees in school must have their schedules in 2 weeks prior to the beginning of that semester. School schedules must be approved by your supervisor. A new availability form does not guarantee employment. If you change your availability it must be approved by a manager. Availability is based on the needs of the restaurant. **Employees are expected to work all holidays.**

X. PROBATION PERIOD:

The first 90 days of employment are considered probationary because you are learning. If for some unforeseeable reason, you cannot meet the performance level expected of you for the job function for which you were hired, management has the right to terminate your employment without notice, or assign you to a job which you are more capable of doing. Employment during and after the probationary period is, and always will be, "AT WILL". Successful completion of the probationary period does not alter the employee's "AT WILL" status.

Y. AT WILL EMPLOYMENT:

Our employment relationship is, and always will be, "AT WILL". This means that you or Prospector's may terminate our employment relationship at any time, for any reason, with or without cause and with or without notice. This at-will relationship also applies to, and cannot be changed by, other employment decision made by Prospector's in the normal course of business, such as promotions, demotions, transfers, discipline, layoff or recall, rules and standards of conduct, work assignments, production standards, subcontracting, changes in number of work hours, salary increases, or the sale, relocation, merger, or consolidation of operations. Nothing in this manual creates an expressed or implied contract. Any written employment policies, notices, or bulletins are provided for informational purposes only and are not intended to create a legal contract. No employee or Company representative, other than Prospector's owners, can change the nature of the "at will" employment relationship. The owner can change the "at will" relationship only if she/he does so in an express written agreement which is signed by the owner and the employee. If for some unforeseeable reason, you cannot meet the performance level, management has the right to terminate your employment without notice.

Z. THEFT:

Any employee caught stealing will be prosecuted to the fullest extent of the law. No taking of or giving away Company property or giving away **FOOD OR ALCOHOLIC BEVERAGES**. **NO EXCEPTIONS**. This also means credit card fraud.

AA. REPORTING TIPS

Each tipped employee needs to submit a "tip report" each week. The information required to be reported is:

- Employee's name, address and SS number
- Employer's Name
- Period Covered and Date Reported
- Total Amount of Cash Tips Received by the Employee minus cash tipped out.

- Employee's Signature
- Note: Credit card tips are reported for you through the Micros.

There are form 4070's available to all servers and must be filled out each week. Prospectors' is not responsible for unreported/under-reported tips and the corresponding tax liability for the servers and other tipped employees.

BB. COUNTING TIPS:

Employees are not to count tips on the floor or behind the bar. Discussion of tip compensation on the floor is prohibited.

CC. BATHROOM BREAKS:

Employees who need to use the restroom facilities need to use the bathrooms in the restaurant. Restrooms in the CLUB are **NOT TO BE USED**. Remember to check with your manager for breaks. There will be a minimum of one week suspension if this policy is violated or possible termination.

DD. SHOPPERS REPORTS:

All servers will be routinely shopped by an outside service. The service is a benefit for the Company in order to provide information on a service provided to our guests. If a cocktail server, server or bartender receives a bad review from our guest book services or one of our smart audits that employee may subject to be suspension or have their employment terminated.

EE. CONFIDENTIALITY OF COMPANY INFORMATION:

The Company has developed certain unique proprietary products and processes. Keeping such information from competitors is critical to our success. Employees are asked to cooperate in protecting Company technology by refraining from releasing proprietary information to unauthorized parties.

By accepting employment with Prosecutor's you agree not to disclose, during the course of your employment or after employment has ended, any information concerning the trade secrets, receipts, processes, financial data, methods of conducting business or any other Company information of a restricted or confidential nature, unless you have received written authorization from an officer of the Company to disclose such information.

FF. CONFLICT OF INTEREST:

A conflict of interest exists when an employee's loyalties become divided between the Company's interest and those of another, such as a competitor, supplier, colleague, associate or customer. Employees are expected to devote their best efforts and attention to the performance of their jobs. Employees are also expected to use good judgment, to adhere to high ethical standards, and to avoid situations that create an actual or potential conflict between the employee's personal interests and the interests of the Company. Employees must refrain from taking part in, or exerting influence over, any transactions in which their own interests may conflict with the best interests of the Company.

Management reserves the right to determine when an employee's activities represent a conflict with the Company's interest and to take whatever action is necessary to resolve a conflict of interest, including discharge of an employee. The list below provides examples of some activities that would reflect negatively on an employee's ability to perform job duties and responsibilities in an ethical manner:

1. Accepting substantial personal gifts or excessive entertainment from competitors, customers, suppliers, colleagues, associates or potential suppliers;
2. Working for a competitor, supplier, colleague, associate or customer while simultaneously employed by this Company;
3. Engaging in competition with the Company;
4. Having a director in indirect financial interest in the business of a competitor, customer, supplier or associate, except that ownership of less than 2% of the publicly traded stock of a corporation will not be considered a conflict of interest;
5. Using Company assets or labor for personal use;
6. Borrowing money from competitors, suppliers, customers, associates or potential suppliers other than recognized loan institutions (i.e., banks); or
7. Misusing one's position in the Company for personal gain to the detriment of the Company.

Employees that are uncertain whether a transaction, activity or relationship may create a conflict of interest should discuss the situation with their supervisor for feedback.

Employees should be aware that if they enter into a personal relationship with a subordinate employee or with an employee of a competitor, customer, supplier,

associate or potential supplier, a conflict of interest may exist that will require full disclosure to the Company.

GG. EMPLOYEE MEETINGS:

Employee meetings are a scheduled shift. If you miss a meeting without prior approval, you will be suspended for seven working days or until the makeup meeting. If you miss another within six months, you will be terminated.

HH. ON CALL POLICY:

On call shifts are used to cover employees who are too sick to come to work. All employees who are **ON CALL** must call in **NO MORE** than 15 minutes after the last scheduled shift. They must only ask for a manager, **NOT AN EMPLOYEE**. If a scheduled **ON CALL** employee does not call in for their scheduled **ON CALL** shift or calls later than 15 minutes after the last shift, they will get one verbal warning. If the employee does not call in a second time for that on call shift, that employee could be suspended for one week. If it continues then that employee will be terminated.

II. EMPLOYEE VACATION POLICY:

This policy applies to all full-time permanent employments. It is the policy of the Company to provide an annual paid vacation to employees who are permanent and full-time. A permanent, full-time employee is one who has been employed by the Company for a continuous 52 week period during which the employee averaged at least 35 hours per week. Continuous employment means no break or leaves, or request off for more than 5 days in a given week.

1. Employees who meet the permanent, full-time requirement stated above may take a paid vacation of one week during the year beginning on their anniversary date with the Company. Two weeks after 5 consecutive years.

2. Vacation pay will be calculated as follows: average hours per week during preceding 52 weeks x hourly rate (must be 35 hours or more).

3. Vacation pay for tipped employees will be calculated as follows: minimum wage times average hours worked.

4. Vacation must be scheduled at least 30 days in advance and approved by the employee's immediate supervisor.

5. A time off request form must be filled out 30 days before designated date. Unless the form is approved and signed, there will be no paid vacation.

6. Due to the size of some staffs only one employee can go on vacation at the same time (example: host, bar, kitchen, expo, and bus).

JJ. EMPLOYEE MEDICAL LEAVE OF ABSENCE:

Employees may take unpaid medical leave in accordance with the following guidelines, which are intended to and will be interpreted to accomplish compliance with applicable federal and state laws.

1. Procedure:

As soon as you become aware that you are, or will become, temporarily unable to work for more than 5 consecutive days, for any medical reason, you must promptly complete Prospector's "Leave of Absence Request form" and submit it to the office or supervisor to advise the Company of the anticipated commencement date and duration of your proposed leave. In the event that you are incapable of completing the "Leave of Absence Request form," then a relative or guardian may complete the form for you. The leave request must be verified by your health care provider. In addition, you may request intermittent leave or reduce hours for a serious health condition that impairs your ability to perform the tasks of your position. Any misrepresentations made in a leave request will be grounds for termination of employment.

2. Approval and Duration of Leave:

After the Company verifies the reason for the requested leave, it will grant eligible employees leave without pay for up to a maximum of 12 work weeks in any consecutive twelve month period. Employees who are unable to work due to a pregnancy-related disability will be granted leave as required by state law.

All other employees will be granted leave only where Prospector's determines the leave to be required by law, or where Prospector's Family Care Leave Policy, discussed below.

3. Benefits:

Each employee must use any earned vacation benefits during the period of approved medical leave. Any employee on medical leave will continue to be responsible for any medical premiums for which s/he is already responsible during the period of leave.

These payments must be received in the office prior to the first of each month for which the coverage applies.

4. Returning from Leave:

Each employee must notify Prospector's of her/his intention to return to work at least **TWO WEEKS** before the scheduled return date. Each employee on medical leave also must provide Prospector's with a certification from her/his health care provider that s/he is **ABLE TO RESUME WORK**.

If an employee:

Has been employed with Prospector's for 12 months or more, has worked at 1,560 hours in the year preceding the beginning of a medical leave, has worked at a location which has at least 50 employees within a 75-mile radius, is not a salaried employee who is among the (10%) of all employees of Prospector's and return to her/his former position or one with equivalent duties, pay, terms and conditions. All other employees who report for work by the end of their approved medical leave will be returned to their former position if such an opening exists, or the next comparable opening for which s/he is fully qualified.

In addition, employees on an approved pregnancy-related disability leave who return to work by the end of their medical disability leave will be allowed to return to their former or a substantially similar position in accordance with state law. An employee who is at the end of her pregnancy disability leave may request and take any additional leave to which she is entitled under the Family Medical Leave Act (FMLA). Pregnancy disability leave can be taken either before, concurrently with, or as an extension, of Family Care Leave, as discussed below.

However, if a reduction in force or other reorganization takes place while you are on leave, you will be treated as if you had been working rather than on leave. For example, you will be laid off if you would have been laid off if you had been at work. Please contact your supervisor or one of the owners of the Company if you have questions concerning the policy.

5. Extended Leave:

Employees who do not return to the end of their authorized leave will have their employment terminated. Employees may receive an extension beyond the maximum employment medical leave period only if required by law, and only if the employee provides medical information as required by Prospector's to support the requested extension of time. The required medical information must be submitted in writing AT

LEAST 2 WEEKS prior to the expiration of the medical leave. An employee who is granted extended medical leave beyond the normal maximum period, who later is able to report for work, will be offered the next opening for each s/he is the best qualified applicant.

KK. UNPAID LEAVE OF ABSENCE:

Occasionally, for personal reasons, an employee may need to be temporarily relieved from the duties of her/his job, but she/he may not wish to submit a resignation. Under certain circumstances, an employee may be eligible for an unpaid leave of absence. There are several types of unpaid leave for which an employee may be eligible.

The following provisions apply to all unpaid leaves of absence:

1. The length of service and anniversary date of an employee, who is on an unpaid leave of absence which exceeds 10 calendar days, will be adjusted by the number of days of unpaid leave taken.

2. If an employee seeks and/or accepts other employment during a leave, or does not return to work by the expiration date of a leave, the employee will be considered to have voluntarily resigned from her/his employment.

3. Any misrepresentation of the reason for her/his leave request will be grounds for discharge.

4. During any leave of absence, an employee must keep Prospector's apprised of her/his leave status by contacting her/his supervisor.

LL. RESIGNATION/VOLUNTARY TERMINATION:

Termination is considered voluntary when an employee elects to end her/his employment with Prospector's. Whenever possible, the employee who desires to terminate her/his employment is requested to submit, in writing, a signed statement of resignation which identifies the reason for resignation, the anticipated date of resignation, and the name and address of any new employer if the employee has found other employment.

If you plan to leave the employment of the Company, the Company encourages you to provide at least two weeks of advance notice in writing although notice is not required. This notification is requested so that the Company will have the opportunity to make scheduling adjustments to meet customer needs.

An employee who fails to report for work for 2 consecutive work days without contacting her/his supervisor, or who fails to return from a leave of absence on the designated date, is considered to have voluntarily resigned for reasons of job abandonment.

MM. INVOLUNTARY TERMINATION:

Prospector's will determine, in its sole discretion, when to discharge an employee. An involuntary termination may be based upon, but is not limited to, the occurrence of any of the following: misconduct, poor performance or any other work and/or business related reason. When immediate action is warranted, you may be suspended pending an investigation. Prospectors reserves the right to decide if employees who leave under bad circumstances will be permitted in the building.

NN. CREDIT CARDS:

Any employee caught changing (**tampering**) with a credit card total will be prosecuted to the fullest extent. Tips and charge totals cannot be changed. When any customer runs a tab, it is the employees' responsibility to take a credit card for authorization. Employees cannot run a credit card for more than the amount of the check. The financial responsibility falls on the employee if they do not follow these procedures.

OO. EMPLOYMENT ARBITRATION CLAUSE

Should any dispute between Employee and Employer arise at any time out of any aspect of the employment relationship, including, but not limited to, the hiring, performance or termination of employment and/or cessation of employment with the Employer and/or against any employee, officer, alleged agent, director, affiliate, subsidiary or sister company relationship, or relating to an application for employment, Employee and Employer will confer in good faith to resolve promptly such dispute. In the event that Employer and Employee are unable to resolve their dispute, and should either desire to pursue a claim against the other party, both Employer and Employee agree to have the dispute resolved by final and binding Arbitration.

The Employee and Employer agree that the Arbitration shall be held in the County and State where Employee currently works for Employer or most recently worked for Employer. The Arbitration shall be conducted by an Arbitrator(s) provided by an impartial third-party Arbitration provider.

All previously unasserted claims arising under federal, state or local statutory or common law and all disputes relating to the validity of this this Arbitration provision, shall be decided by final and binding Arbitration. Any award of the Arbitrator(s), is

final and binding, and may be entered as a judgment in any court of competent jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain in effect.

PP. EMPLOYEE SAFETY:

Any restaurant can be a hazardous place to work or visit, if we, the employees of Prospector's fail, to keep our restaurant safe. Injuries to customers and employees will result. Most accidents in restaurants do not just happen, they are caused. Some leading causes of accidents:

1. Carelessness (not paying attention to what you are doing).
2. Performance job functions in an improper manner or with improper tools and NOT wearing "non-slip" footwear.
3. Engaging in some unauthorized activity such as "horse play", running, etc.
4. A bad attitude. (Utter disregard for others and the consequences.)
5. Working while under the influence of drugs, alcohol, or medicines.

If an accident is caused because of one of the above actions, this could prevent our worker's comp carrier from covering the accident.

QQ. FINAL PAYCHECK:

Employees who quit or who are terminated will receive their final paycheck on the normal payday (SEE PAYDAY). No exceptions will be made to pay the employee earlier than the normal payday.

RR. ACKNOWLEDGMENT:


I have read and I understand the Prospector's Company Employee Manual.

I understand that this is a guide only, and that if I need further information, I may obtain it from the Human Resources Department. I also realize that the policies in the employee manual are under continual review and are subject to change at management's discretion. I will make myself aware of such changes, whether or not published in this guide.

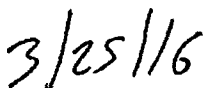
I acknowledge that all formal employment disputes will be resolved by final and binding arbitration as set forth in the Employee Manual.

I FURTHER UNDERSTAND THAT THIS MANUAL IS NOT INTENDED IN ANY WAY TO CREATE AN EMPLOYMENT CONTRACT.

My employment with the Company IS AT-Will, and I am free to resign at any time. Similarly, the Company is free to conclude our employment relationship if management believes that it is in the best interests of the Company. I acknowledge that no written policy of the Company is a contract or other legal guarantee that the Company will continue any practices described in such written policy. I further acknowledge that no officer, supervisor or employee of the Company, other than the President of the Company, has the authority to promise or create any substantive terms or conditions of employment different from those stated in any written policies.



EMPLOYEE SIGNATURE



DATE

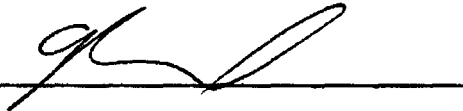
ALCOHOL RESPPONSIBILITY:

As a part of my employment by Prosecutor's,

I, Waylen Underwood, understand and agree to the following rules and procedures concerning the sale and service of alcoholic beverages:

1. I will not sell beer, wine, or liquor to any person under 21 years of age.
2. If any customer does not clearly appear to be at least 30 years old, I will ask for, look at and read a driver's license, a passport or military ID card. I will NOT accept a social security card, student identification card, voters' registration card, work ID card, birth certificate, marriage certificate, alien registration card or any other form of identification as the primary source to verify age.
3. I will not knowingly sell or serve beer, wine or liquor to any adult for use by any underage person, including parents, spouses or relatives.
4. I will not sell or serve beer, wine or liquor to any person who is obviously intoxicated or acting disorderly.
5. I will not sell or serve beer, wine or liquor to anyone during restricted hours.
6. I will not use or allow the sale, delivery, storage or use of any unlawful drugs in my work area. If I witness or suspect any such unlawful activity, I will immediately notify my supervisor or the manager or the owner.
7. I will not allow any illegal activity such as gambling or prostitution in my work area. If I witness or suspect such activity, I will immediately notify my supervisor, the manager or the owner.

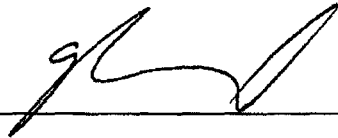
Employee Signature :

A handwritten signature in black ink, appearing to read 'Waylen Underwood', is written over a horizontal line.

UNIFORM RESPONSIBILITY FORM

I, Waylon Underwood, am fully aware that I am responsible for the apron and shirt that has been issued to me on _____ (date). I understand that I am accountable for care of the apron and the shirt while it is in my possession. It must be cleaned and maintained by me while I am in the employment of Prospector's. I also understand that upon my termination, whether voluntary or involuntary, I will be responsible for returning the apron and shirt issued to me for which I did not pay (CLEANED). I understand that the shirt and the apron must be returned before I pick up my last check.

Employee Signature _____

A handwritten signature in black ink, appearing to read 'Waylon Underwood', is written over a horizontal line. The signature is stylized and cursive.

EMPLOYEE ACKNOWLEDGMENT

I have read the Employee Policies and Procedures and have talked with Management and understand the work rules of Prospector's.

I understand that my employment application and any other company documents, including the Employee Handbook, are not a contract of employment and that any individual who is hired may voluntarily leave employment upon proper notice and may be terminated by the employer at any time and for any reason or no reason.

I understand that any oral or written statements to the contrary are hereby expressly disavowed and should not be relied upon by a prospective or existing employee. I understand that the first 90 days of my employment are probationary, and that I may be dismissed if I do not meet the requirements of the company.

I understand that you rely upon the accuracy of information contained in the employment application and accuracy of other data presented throughout the hiring process and employment. Any misrepresentations, falsifications or material omissions in any of this information or data may result in my exclusion from further consideration for employment or if I have been hired, termination from employment.

I UNDERSTAND I AM AN EMPLOYEE AT WILL AND THAT THIS DOES NOT CONSTITUTE A CONTRACT OF EMPLOYMENT.

Employee's Signature:



Print Name:

Waylon Underwood

Manager's Signature:



Date:

3/26/11

Tips on Tips

**for Employees
Who Receive Tip Income**

What tips do I have to report?

Do I have to report *all* my tips to my boss?

If you received \$20.00 or more in tips in any one month, you should report all your tips to your employer so that federal income tax, social security and Medicare taxes, and maybe state income tax can be withheld.



Do I have to report *all* my tips on my tax return?

Yes. All tips are taxable income and should be reported on your tax return.



I was told that I had to report only a certain percentage of my total sales as tips. Is this true?

No. You must report to your employer all (100%) tips you receive, except for the tips from any month that do not total at least \$20.00.

Sometimes I don't get tips directly from customers, but rather from another employee. Do I need to report those tips?

Yes. Employees who receive tips from another employee are required to report "tip-outs." Employees often disburse tips out of their earned tips to another employee (tip-outs). Remember, all tips are taxable income.



Do I have to report tip-outs that I pay to other employees?

No. You report to your employer only the amount of tips you retain. However, you must maintain records of tip-outs with your other tip income (cash tips, charged tips, split tips, tip pool).

What records do I need to keep?

What type of records do I have to keep?

You must keep a running daily log of all your tip income. You can use Publication 1244, *Employee's Daily Record of Tips and Report to Employer*, to record your tip income for one year. Publication 1244 includes Form 4070, *Employee's Report of Tips to Employer*, and Form 4070A, *Employee's Daily Record of Tips*. These forms have spacing for you to log your name, the employer's name and address, date tips were received, date of entry, tips received, tips paid out, and name of employee paid. Your daily log would be your best proof should your income tax return be questioned. For a free copy of Publication 1244, call the IRS at 1-800-829-5676.



What can happen if I do not keep a record of my tips?

If it is determined in an examination that you underreported your tip income, the IRS will assess the taxes you owe based on the best available records of your employer. Tip income adds up. Underreporting could result in you owing substantial taxes, penalties, and interest.

If I report all my tips to my employer, do I still have to keep records?

Yes. You should keep a daily log of your tips so that in case of an examination, you can substantiate the actual amount of tips received. There are a number of reasons why you might need records:

- Your return could be randomly selected for a federal income tax examination.

For example: Your Form 1040, *U.S. Individual Income Tax Return*, establishes that you have your own home, two cars, and three exemptions, and your Form W-2 shows that you earned only \$10,000 in income. In this scenario, an examination may occur if the examiner determines that income may have been underreported.

- A tip examiner could review your employer's books and records. The examination could reveal unreported tip income that you may later need to verify.

- An Internal Revenue Service Center may run a match of your income information from your Form 1040, *U.S. Individual Income Tax Return*, with the income information from your Form W-2. If these figures do not match, you could receive a notice about the discrepancy and a possible examination of your tax return.

How does this affect my income tax filing?

I forgot to report my tip income to my employer, but I remembered to record it on my federal income tax return. Will that present a problem?

If you do not report your tip income to your employer, but you do record the tip income on your federal income tax return, you may owe a 50% social security and Medicare tax penalty and be subject to a negligence penalty and possibly an estimated tax penalty. When you do not report your tips to your employer, it places your employer at risk of possible assessment of the employer's share of social security and Medicare taxes.



If I report all my tips but my taxes on the tips are greater than my pay from my employer, how do I pay the remaining taxes?

You can either pay the tax when you file your federal income tax return or you can reach into your tip money and give some to your employer to be applied to those under-withheld taxes. The employer will then record these taxes and you will get credit on your Form W-2. If you wait to pay when you file your tax return, you may be subject to an estimated tax penalty.

What can happen if I don't report my tips to the IRS?

If the IRS determines through an examination that you underreported your tips, you could be subject to additional federal income tax, social security and Medicare taxes, and maybe state income tax. Also, a penalty of 50% of the additional social security and Medicare taxes, and a negligence penalty of 20% of the additional income tax, plus interest, may apply.



What's in it for me if I report all my tip income?

There are many good reasons why you want to report all your tip income:

- Increased income may improve financing approval when applying for larger loan amounts (mortgage, car, and other loans)
- Increased worker's compensation benefits, should you get hurt on the job
- Increased unemployment compensation benefits
- Increased social security and Medicare benefits (the more you pay, the greater your benefits)
- Increased employee pension, annuity, or 401(k) participation
- Check with your employer for other increased benefits (based on pay) that your company may offer, such as life insurance, disability payments, and the right to purchase stock options
- Compliance with the tax law

Is tip reporting unique to a specific industry?

Does tip income reporting apply only to employees in a specific industry?

No. Anyone who receives tip income is required by law to report it to his or her employer. The Tip Rate Determination/Education Program (TRD/EP) was first promoted in the gaming industry (casino industry) in Las Vegas, Nevada, and subsequently to the food and beverage industry. Other individuals that receive tip income include airport sky-caps, bartenders, hair stylists, bellhops, casino workers, delivery service people, golf caddies, hotel housekeepers, manicurists, masseuses, parking attendants, railroad redcaps, and taxi drivers.

Why has tip reporting become such an issue?

To report all tip income has always been the law. The IRS has put greater emphasis on reporting tip income over the past few years because a significant number of taxpayers are not reporting all their tip earnings as taxable income.



Why should I report my tips to my employer?

When you report your tip income to your employer, the employer is required to withhold federal income taxes, social security and Medicare taxes, and maybe state income tax.

Tip reporting may increase your social security credits resulting in greater social security and Medicare benefits when you retire. Tip reporting may also increase other benefits to which you may become entitled, such as unemployment benefits, worker's compensation, or retirement benefits. Additionally, a greater income may improve financing approval for mortgage, car, and other loans.

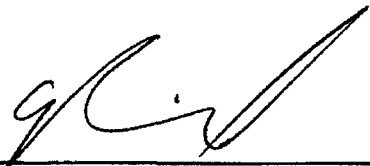
IT IS YOUR RESPONSIBILITY AS AN EMPLOYEE WHO RECEIVES TIPS TO CLAIM YOUR CASH TIPS MINUS THE AMOUNT TIPPED OUT FOR EACH WEEKLY PAY PERIOD. YOUR CREDIT CARD TIPS WILL BE DECLARED FOR YOU THROUGH THE MICROS SYSTEM.

FORM 4070 IS KEPT NEXT TO THE OFFICE DOOR AND IS REQUIRED TO BE FILLED OUT AT THE END OF YOUR LAST SCHEDULED SHIFT FOR THE PAY PERIOD OR BY 10PM SUNDAY EVENING. CALLING IN MONDAY MORNING WILL NOT BE ACCEPTED. ONLY A SIGNED 4070 FORM WILL BE ACCEPTED.

THIS FORM IS FOR CASH TIPS ONLY

IF YOU HAVE ANY QUESTIONS PLEASE ASK A MANAGER.

SIGN _____

A handwritten signature in black ink, appearing to be initials or a stylized name, is written over a horizontal line.

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

WAYLON UNDERWOOD, on behalf of
himself and similarly situated employees,

Plaintiff,

vs.

KMC Enterprises, Inc.,

Defendant.

Case No. 1:17-cv-02615-NLH-JS

**DEFENDANT'S BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS OR STAY AND TO COMPEL ARBITRATION**

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I. PRELIMINARY STATEMENT

This action arises out of plaintiff Waylon Underwood's employment as a server and bartender at Prospector's Steakhouse and Saloon a restaurant and lounge ('Prospector's') owned and operated by defendant KMC Enterprises, Inc. (hereinafter "defendant" or "KMC") located in Mount Laurel, New Jersey. Plaintiff alleges that his customer tips were improperly shared with expeditors, pursuant to an otherwise valid tip pool pursuant to the New Jersey Wage and Hour Law ("the NJWHL") and the Fair Labor Standards Act ("the FLSA"). Defendant now moves to compel arbitration of these claims. At the time of his hire, plaintiff agreed to submit all claims arising out of his employment to binding arbitration in lieu of litigation, and his claims, therefore, per his agreement cannot proceed in this Court. Accordingly, defendants respectfully move this Court, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 2-4, and Federal Rules of Civil Procedure 12(b)(1) and (6), to dismiss or stay this action and to compel arbitration.

II. STATEMENT OF FACTS

A. Plaintiff Agreed to Submit All Employment Disputes to Arbitration As A Condition of His Employment.

Plaintiff, Waylon Underwood, was hired as a server and bartender on March 25, 2016. (Certification of John W. Clowar, hereinafter, "Clowar Cert.", at ¶ 3). On that same day, plaintiff met with a manager to review the terms and conditions of his employment. (Clowar Cert. at ¶ 7). Managers extensively review the employee handbook with new employees as to advise them as to the terms and conditions of his employment, and to answer any questions he may have. (Clowar Cert. at ¶¶ 5-6). Plaintiff underwent this review with Sid Riemer (hereinafter, "Mr. Riemer"). (Clowar Cert. at ¶ 7). Plaintiff was further instructed as to KMC's Employment Arbitration Clause (the "Arbitration Policy"), and was advised that, pursuant to this policy, all claims arising out of the parties' employment relationship would be resolved via

binding arbitration. (Clowar Cert. at ¶¶ 5-7; Exhibit A to Clowar Cert, hereinafter “Exhibit A”, Employee Handbook, at pp. 23-24). Plaintiff was advised that his acceptance of employment constituted an agreement to be bound by all policies contained in the handbook, including the Arbitration Policy. (Clowar Cert. at ¶¶ 5-7). Plaintiff accepted the offer of employment, and also executed an acknowledgment that he read and understood the handbook. Exhibit A, at pp. 24-25. Plaintiff thus stated that he “ **acknowledge[d] that all formal disputes will be resolve[d] by final and binding arbitration as set forth in the Employee Manual.**” (Exhibit A, at p. 24-25 (emphasis in original)).

B. Defendant’s Arbitration Agreement Requires Arbitration of All Claims Arising Out of Plaintiff’s Employment.

KMC maintains a an Arbitration Policy under which employees and KMC waive their right to pursue employment-related claims in court, agreeing instead to submit such disputes to binding arbitration. The Arbitration Policy states, in pertinent part:

OO. EMPLOYMENT ARBITRATION CLAUSE

Should any dispute between Employee and Employer arise at any time out of any aspect of the employment relationship, including, but not limited to, the hiring, performance or termination of employment and/or cessation of employment with the Employer and/or against any employee, officer, alleged agent, director, affiliate, subsidiary or sister company relationship, or relating to an application for employment Employee and Employer will confer in good faith to resolve promptly such dispute. In the event that Employer and Employee are unable to resolve theft dispute, and should either desire to pursue a claim against the other party, both Employer and Employee agree to have the dispute resolved by final and binding Arbitration.

The Employee and Employer agree that the Arbitration shall be held in the County and State where Employee currently works for Employer or most recently worked for Employer. The Arbitration shall be conducted by an Arbitrator(s) provided by an impartial third-party Arbitration provider.

All previously unasserted claims arising under federal, state or local statutory or common law and all disputes relating to the

validity of this this Arbitration provision, shall be decided by final and binding Arbitration. Any award of the Arbitrator(s), is final and binding, and may be entered as a judgment in any court of competent jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain in effect.

(Exhibit A at pp. 23-24). This policy is further emphasized and reinforced with a statement just three paragraphs above plaintiff's signature stating: "**I acknowledge that all formal disputes will be resolve by final and binding arbitration as set forth in the Employee Manual.**".

(Exhibit A, at p. 24 (emphasis in original)). Plaintiff spoke with manager regarding the policy, which was described to him in detail. (Clowar Cert. at ¶¶ 5-7). The Manager explained that arbitration is a mandatory condition of employment, and that pursuant to the arbitration program, all disputes, past, present and future, would be resolved through binding arbitration. (Clowar Cert. at ¶¶ 5-7; Exhibit A at pp. 23-24). The Manager also advised him that under the policy, all disputes between Underwood and KMC would be resolved via binding arbitration. (Clowar Cert. at ¶¶ 5-7; Exhibit A at pp. 23-24). Plaintiff did not raise any questions or concerns regarding the arbitration policy. (Clowar Cert. at ¶ 8). After being informed about the details of the policy, among others contained in the handbook, plaintiff signed an acknowledgment on March 25, 2016 indicating that he read the policy and spoke with management. (Exhibit A at pp. 25, 28). Not once did he indicate to a manager that he did not consent to the policy, or had any issue with its application to him and any potential employment disputes. (Clowar Cert. at ¶ 8).

C. Plaintiff's Complaint Falls Squarely Within the Parameters of Defendant's Arbitration Policy.

Plaintiff Waylon Underwood, a former employee at Prospectors located at 3050 NJ-38 in Mount Laurel, alleges that his tips were improperly pooled with non-tip employees in violation of the FLSA and the NJWHL. *See* Exhibit 1, Complaint, at ¶¶ 15-18. He claims that expeditors

do not receive tips directly from customers because they are required to physically work in the kitchen and do not interact with restaurant customers. *See* Exhibit 1 at ¶¶ 17-18. This claim clearly arises out of his employment relationship with KMC, and accordingly is subject to final and binding arbitration per the terms of his agreement.

III. LEGAL ARGUMENT

Federal and state policies favoring arbitration require enforcement of the arbitration agreement between plaintiff and KMC, and compel plaintiff to arbitrate his claims here. The United States and New Jersey Supreme Courts have repeatedly adopted a broad reading of the Federal Arbitration Act (FAA) in enforcing arbitration agreements. The Arbitration Policy between the parties in this case is a valid arbitration agreement that places plaintiff's claims directly within its scope. Accordingly, this Court should dismiss or stay this action and should compel arbitration of plaintiff's claims.¹

A. This Court Lacks Jurisdiction Over Plaintiff's Claims as They Are Subject to Arbitration.

KMC moves to dismiss plaintiff's complaint pursuant to 12(b)(1) of the Federal Rules of Civil Procedure. When a defendant moves to dismiss a case pursuant to 12(b)(1), the central issue is the trial court's jurisdiction, its very power to hear the case. *Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997) (quoting *Mortensen v. First Fed. Savings & Loan Ass'n.*, 549 F.2d 884, 891 (3d Cir. 1977)). The Court does not focus on whether the factual allegations would entitle the plaintiff to relief, but rather whether the Court has jurisdiction to hear the claim and grant the relief. *See New Hope Books, Inc. v. Farmer*, 82 F.Supp.2d 321, 324 (D.N.J. 2000). The burden of establishing this Court's subject matter jurisdiction is the plaintiff's to bear.

¹ Because the Complaint does not, on its face, reference the arbitration agreement entered into between plaintiff and KMC, this Court must apply a summary judgment standard to defendants' motion to compel arbitration. *See Cook v. Nordstrom, Inc.*, No. 13-5402(RBK/AMD), 2013 WL 6633522, *1-2, *4 (D.N.J. Dec. 17, 2013).

Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936)).

Plaintiff is incapable of demonstrating this Court's jurisdiction because he was informed orally and in writing that all employment-related claims were required to be resolved via arbitration. Further, he signed an acknowledgment of receipt of this program, which expressly bound him to the Arbitration Policy's terms. Accordingly, he cannot demonstrate that this Court has jurisdiction, or that it can take any action other than to enforce the agreement. The Court must dismiss plaintiff's complaint, or, in the alternative, stay the matter pending its resolution pursuant to the Arbitration Policy.

B. The Federal Arbitration Act Mandates Enforcement of Defendant's Arbitration Agreements.

Under the FAA, arbitration clauses such as the one at issue here "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA was enacted by Congress to reverse decades of "widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 272 (1995); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). The FAA establishes a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Concepcion*, 563 U.S. at 345 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Indeed, the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344. The United States has held that employment contracts, except those covering workers engaged in transportation, are covered by the FAA. See *Circuit City Stores, Inc. v.*

Adams, 532 U.S. 105 (2001). As the pending motion centers on the arbitration agreement between plaintiff and his former employer, it falls within the scope of and is controlled by the FAA.

Guided by the FAA, the United States Supreme Court has repeatedly held that arbitration agreements are to be read liberally to effectuate their purpose. *Moses H. Cone*, 460 U.S. at 25; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000). Indeed, the FAA requires courts to “rigorously enforce” arbitration agreements. *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Moreover, because arbitration is a highly favored means of settling disputes, the Court has held that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone*, 460 U.S. at 24-25. A court may not deny arbitration “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986).²

C. The Parties Entered Into A Valid Agreement to Arbitrate Employment Disputes, Including the Wage and Hour Claims Alleged Here.

The Third Circuit has confirmed that “district courts need only engage in a limited review to ensure that the dispute is arbitrable.” *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998). In order to compel a matter into arbitration, a court need only engage in a limited review to determine: (1) whether a valid agreement to arbitrate exists between the parties;

² Although the FAA applies to KMC’s Arbitration Policy, it is worth noting that New Jersey also has a strong policy favoring arbitration as a tool to resolve disputes. *See, e.g., Martindale v. Sandvik, Inc.*, 173 N.J. 76, 84-85 (2002); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 131 (2001); *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 281 (1993); *see also* N.J.S.A. 2A:23B-1, *et seq.* An agreement to arbitrate disputes is enforceable to the same extent as all other contracts under state law and cannot be subjected to more burdensome requirements. *See Leodori v. CIGNA Corp.*, 175 N.J. 293, 301-02 (2003).

and (2) whether the specific dispute falls within the scope of that agreement. *See Mitsubishi Motors*, 473 U.S. at 626; *see also Sarbak v. Citigroup Global Markets, Inc.*, 354 F.Supp.2d 531, 538 (D.N.J. 2004); *Nascimento v. Anheuser-Busch Companies, LLC*, No. 2:15-02017 (CCC) (MF), 2016 WL 4472955, at *3 (D.N.J. Aug. 24, 2016). In conducting this limited review, the court “must apply ordinary contractual principles, with a healthy regard for the strong federal policy in favor of arbitration. *John Hancock*, 151 F.3d at 137 (citations omitted). As the underlying agreement herein is valid, and plaintiff’s dispute clearly falls within the scope of that agreement, this Court should stay or dismiss plaintiff’s claims in favor of arbitration.

1. There Is a Valid Agreement to Arbitrate.

State law contract principles apply when evaluating the validity of an arbitration agreement. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). New Jersey courts apply basic contract law principles, including concepts of offer, acceptance and consideration, to determine whether a valid arbitration agreement exists. *See Martindale v. Sandvik, Inc.*, 173 N.J. 76, 87-88 (2002). As a matter of law, such agreement need not be evidenced by a signed document, but may be determined by “the record as a whole”. *Leodori v. CIGNA Corp.*, 175 N.J. 293, 305-06 (2003); *see also Forsyth v. First Trenton Indemn. Co.*, No. A-5080-08T2, 2010 N.J. Super. Unpub. LEXIS 1183, at **15-16 (App.Div. May 28, 2010) (quoting *Leodori*, 175 N.J. at 306-07) (reminding that under *Leodori*, arbitration may be compelled even absent a signed agreement, and even under an oral agreement, where there is “some other unmistakable indication that the employee affirmatively had agreed to arbitrate his claims.”). Generally, the Court will determine an agreement’s validity “by considering the intentions of the parties as reflected in the four corners of the written instrument.” *Leodori*, 175 N.J. at 302. Here, the parties entered an agreement that clearly mandates arbitration.

It is beyond dispute that a valid contract exists here. Through the Agreement, and discussions with his manager, KMC offered plaintiff and its other employees the opportunity to participate in its arbitration program in order to have any dispute arising at any time out of the employment relationship resolved through arbitration. Plaintiff and KMC's other employees were explicitly advised what such participation meant. Plaintiff's acceptance was evidenced by his employment. By accepting his job after notice of the arbitration policy, plaintiff (along with other employees) accepted KMC's offer and became bound by the Arbitration policy, which makes it clear that "Employee and Employer will confer in good faith to resolve promptly such dispute" via arbitration, and that any arbitration award is "final and binding, and may be entered as a judgment in any court of competent jurisdiction".

Moreover, while the FAA requires arbitration agreements to be in writing, that writing, as a matter of law, does not have to be signed by the parties. *See* 9 U.S.C.A. § 2; *Venuto v. Ins. Co. of North Am.*, No. 98-96, 1998 U.S. Dist. LEXIS 11050, at *10-11 (E.D.Pa. July 22, 1998) (*citing Genesco. Inc. v. T. KaKiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987)); *see also Eichenlaub v. Anheuser-Busch, Inc.*, No. HNT-L-274-04, 2005 WL 3113561 (Law Div. Oct. 19, 2005) (dismissing discrimination claims of three employees for failing to utilize company's dispute resolution program, even though employees never provided a written signature indicating agreement to the program). Plaintiff was advised both verbally and in writing as to the arbitration policy, and his behavior offered no indication that he did anything but accept the terms of the agreement. To the contrary, he signed an acknowledgment that he read and understood the handbook, which detailed the terms and conditions of his employment, including the arbitration policy, and that he spoke with Management. *See* Exhibit A, pp. 25, 28. Further, unlike 20% of defendant's potential

new hires, plaintiff returned to accept employment following his orientation, further indicating his consent to the terms of the arbitration policy. (Clowar Cert. at ¶ 5).

Lastly, this Agreement is supported by adequate consideration. Not only did plaintiff accept employment where this was a term and condition of his employment, but the Agreement contained a mutual obligation to arbitrate. The fact that KMC also gave up the right to assert claims arising out of the employment relationship also evidences consideration supporting plaintiff's agreement to arbitrate all such claims. *See Descafano v. BJ's Wholesale Club, Inc.*, No. 15-cv-7883 (PGS)(DEA), 2016 WL 1718677, at *3 (D.N.J. April 28, 2016); *Jayasundera v. Macy's Logistics & Operations*, No. 14-CV-7455(SDW)(SCM), 2015 WL 4623508, at *8 (D.N.J. Aug. 3, 2015); *see also Oscar v. Simeonidis*, 352 N.J. Super. 476, 485 (App.Div. 2002) ("Mutual promises are sufficient consideration one for the other."). The Arbitration Agreement between KMC and its employees, including plaintiff, is valid and enforceable, and encompasses all claims arising out of the employment relationship, including those plaintiff asserted in his complaint.

2. Plaintiff's Wage and Hour Claims Are Squarely Within the Scope of the Arbitration Agreement.

As the parties have entered into a valid and binding arbitration agreement, the Court must then determine whether plaintiff's claims asserted in the Complaint fall within the scope of that agreement. That "answer is found simply by analyzing what the parties have agreed should be submitted to arbitration." *In re Arbitration between Grover & Universal Underwriters Ins. Co.*, 80 N.J. 221, 228 (1979). The New Jersey Supreme Court states that an employee knowingly waives right to proceed to court on certain claims where the agreement provides "that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. "It should also reflect the employee's general understanding of the type of claims

included in the waiver. . .” *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 135 (2001). Plaintiff’s agreement agrees to arbitrate “any dispute”, including, but not limited to, those related to “hiring, performance or termination of employment and/or cessation of employment”, as well as theft. Parties do not need to refer to specific statutes by name in order for it to be understood that they are included within the scope of the agreement. *See ibid.* Plaintiff’s wage claims are clearly encompassed within the parties agreement to arbitrate any dispute arising out of the employment relationship. Courts have held similarly broad arbitration agreements to encompass plaintiff’s wage and hour claims. *See Vilches v. The Travelers Companies, Inc.*, 413 F.App’x 487 (3d Cir. 2011); *Morando v. NetWrix Corp.*, No. 11-5075 (SDW), 2012 WL 140229 (D.N.J. Apr. 24, 2012). Plaintiff’s wage and hour claims are directly related to his employment with KMC. Accordingly, these claims fall squarely within the terms of the arbitration agreement, and are subject to arbitration. Plaintiff’s complaint is not properly before the Court, but belongs before an arbitrator. His complaint must therefore be dismissed, or stayed at a minimum pending the outcome of arbitration.

D. The Court Should Dismiss or Stay the Action Because Arbitration Is a Condition Precedent to Filing an Action.

Section 4 of the FAA empowers the Court to compel arbitration when one party has failed or refused to comply with the arbitration agreement. 9 U.S.C. § 4. Under the FAA, if a party brings an action “referable to arbitration,” the court “shall on application of one of the parties stay the trial of action until such arbitration has been had in accordance with the terms of the agreement.” 9 U.S.C. § 3. As demonstrated above, the parties have entered into a valid, enforceable arbitration agreement and plaintiff’s claims fall within the scope of that agreement. As such, a dismissal or stay of this action is appropriate and plaintiff should be ordered to arbitrate if he wishes to pursue his claims.

IV. CONCLUSION

For the foregoing reasons, KMC respectfully requests that the Court grant its motion to dismiss or stay judicial proceedings and to compel arbitration of Plaintiff's claims as Plaintiff agreed to do.

s/William P. McLane
William P. McLane, Esq.
LITTLER MENDELSON, P.C.
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Newark, New Jersey 07102
(973) 848-4700
Attorneys for Defendants

Dated: June 13, 2017
Newark, NJ

Firmwide:148124807.1 068301.1002

EXHIBIT 1

WINEBRAKE & SANTILLO, LLC
R. Andrew Santillo, Esq. (NJ ID #025512004)
Mark J. Gottesfeld, Esq. (NJ ID #027652009)
Twining Office Center, Suite 211
715 Twining Road
Dresher, PA 19025
(215) 884-2491

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

<hr/>		:
WAYLON UNDERWOOD, on behalf of	:	CIVIL ACTION
himself and similarly situated employees,	:	
	:	NO. _____
Plaintiff,	:	
v.	:	JURY TRIAL DEMANDED
	:	
KMC ENTERPRISES, INC.,	:	(Document Filed Electronically)
	:	
Defendant.	:	
<hr/>		:

COMPLAINT - CLASS/COLLECTIVE ACTION

Waylon Underwood (“Plaintiff”), on behalf of himself and similarly situated employees, brings this class/collective action lawsuit against KMC Enterprises, Inc. (“Defendant”), seeking all available relief under the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. §§ 201, *et seq.*, and the New Jersey State Wage and Hour Law (“NJWHL”), N.J.S.A. 34:11-56A, *et seq.* Plaintiff asserts his FLSA claim as a collective action under 29 U.S.C. § 216(b) and asserts his NJWHL claim as a class action under Federal Rule of Civil Procedure 23.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over the FLSA claim pursuant to 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.
2. This Court has subject matter jurisdiction over the NJWHL claim pursuant to 28 U.S.C. § 1367.

3. Venue is proper pursuant to 28 U.S.C. § 1391.

PARTIES

4. Plaintiff is an individual residing in Cherry Hill, New Jersey (Camden County).

5. Defendant is a corporate entity headquartered in Mount Laurel, New Jersey (Burlington County).

6. Defendant employs individuals, including Plaintiff, engaged in commerce or in the production of goods for commerce and/or handling, selling, or otherwise working on goods or materials that have been moved in or produced in commerce by any person.

7. Defendant is an employer covered by the FLSA and the NJWHL.

FACTS

8. Defendant owns and operates a restaurant called Prospectors Steakhouse & Saloon located in Mount Laurel, New Jersey ("the Restaurant").

9. During the past three years, Defendant, upon information and belief, has employed well over 50 servers and bartenders at the Restaurant.

10. Servers and bartenders are primarily responsible for taking customers' food and drink orders, serving food and drinks to customers, and otherwise waiting on customers at the restaurant tables.

11. Plaintiff was employed by Defendant as a server and bartender at the Restaurant from approximately February 2016 until approximately May 2016.

12. Defendant paid Plaintiff and other servers and bartenders at the Restaurant an hourly wage below \$7.25/hour.

13. Defendant paid its servers \$2.13/hour and paid its bartenders approximately \$4.00/hour.

14. In seeking to comply with the FLSA's mandate that employees receive a minimum wage of \$7.25/hour and the NJWHL's mandate that employees receive a minimum wage of \$8.38/hour, Defendant has utilized a "tip credit" for each hour worked by Plaintiff and other servers and bartenders. Thus, under the FLSA, Defendant has enjoyed the benefit of a \$5.12/hour tip credit (\$7.25 minus \$2.13) for servers and a tip credit of approximately \$3.25/hour (\$7.25 minus \$4.00) for bartenders. Meanwhile, under the NJWHL, Defendant has enjoyed the benefit of a \$6.25/hour tip credit (\$8.38 minus \$2.13) for servers and a tip credit of approximately \$4.38/hour (\$8.38 minus \$4.00) for bartenders.

15. Defendant has maintained a common policy of requiring Plaintiff and other servers and bartenders to contribute a portion of their tips to "Expeditors" (a.k.a. "Expos").

16. Expeditors' duties primarily consist of readying food orders for pick-up by the servers.

17. Expeditors do not receive tips directly from customers.

18. This is because Expeditors are required by Defendant to physically work in the Restaurant's kitchen and do not interact with restaurant customers.

COLLECTIVE AND CLASS ALLEGATIONS

19. Plaintiff brings his FLSA claim pursuant to 29 U.S.C. § 216(b) on behalf of all individuals who, during any time within the past three years, have been employed as servers and/or bartenders at the Restaurant.

20. Plaintiff's FLSA claim should proceed as a collective action because Plaintiff and other potential members of the collective, having worked pursuant to the common policies described herein, are "similarly situated" as that term is defined in 29 U.S.C. § 216(b) and the associated decisional law.

21. Plaintiff brings his NJWHL claim pursuant to Federal Rule of Civil Procedure 23 on behalf of all individuals who, during any time within the past two years, have been employed as servers and/or bartenders at the Restaurant.

22. The putative class, upon information and belief, includes over 50 individuals, all of whom are readily ascertainable based on Defendant's standard timekeeping and payroll records, and, as such, is so numerous that joinder of all class members is impracticable.

23. Plaintiff is a class member, his claims are typical of the claims of other class members, and he has no interests that are antagonistic to or in conflict with the interests of other class members.

24. Plaintiff will fairly and adequately represent the class members and their interests, and he has retained competent and experienced counsel who will effectively represent the class members' interests.

25. Questions of law and fact are common to all class members, since, *inter alia*, this action concerns the legality of Defendant's standardized compensation practices, including Defendant's practices of using the tip credit to satisfy its minimum wage obligations and requiring class members to share tips with Expeditors.

26. Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions of law and fact predominate over any questions affecting only Plaintiff and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

COUNT I
(Alleging Violations of the FLSA)

27. All previous paragraphs are incorporated as though fully set forth herein.

28. The FLSA entitles employees to a minimum hourly wage of \$7.25.

29. While restaurants may utilize a tip credit to satisfy their minimum wage obligations to servers and bartenders, they forfeit the right to do so when they require servers and bartenders to share tips with other restaurant employees who do not “customarily and regularly receive tips.” See 29 U.S.C. § 203(m). Federal courts interpreting this statutory language hold that restaurants lose their right to utilize a tip credit when tips are shared with employees – such as Defendant’s Expeditors – whose direct customer interaction is minimal. See, e.g., *Montano v. Montrose Restaurant Associates, Inc.*, 800 F.3d 186 (5th Cir. 2015); *Ford v. Lehigh Valley Restaurant Group, Inc.*, 2014 U.S. Dist. LEXIS 92801 (M.D. Pa. July 9, 2014).

30. By requiring Plaintiff and other servers and bartenders to share tips with Expeditors, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations to Plaintiff and other servers and bartenders. As such, Defendant has violated the FLSA’s minimum wage mandate by paying Plaintiff and other servers and bartenders an hourly wage below \$7.25.

31. In violating the FLSA, Defendant acted willfully and with reckless disregard of clearly applicable FLSA provisions.

COUNT II
(Alleging Violations of the NJWHL)

32. All previous paragraphs are incorporated as though fully set forth herein.

33. The NJWHL entitles employees to a minimum hourly wage of \$8.38.

34. While restaurants may utilize a tip credit to satisfy their minimum wage obligations to servers and bartenders, they forfeit the right to do so when they require servers and bartenders to share tips with other restaurant employees who do not customarily and regularly receive tips.

35. By requiring Plaintiff and other servers and bartenders to share tips with individuals performing the work of Expeditors, Defendant has forfeited its right to utilize the tip credit in satisfying its minimum wage obligations to Plaintiff and other servers and bartenders. As such, Defendant has violated the NJWHL's minimum wage mandate by paying Plaintiff and other servers and bartenders an hourly wage below \$8.38.

36. In violating the NJWHL, Defendant has acted willfully and with reckless disregard of clearly applicable NJWHL provisions.

JURY TRIAL DEMAND

Plaintiff demands a jury trial as to all claims so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and other members of the class and collective, seeks the following relief:

- A. Unpaid minimum wages equaling the value of the tip credit for every hour worked;
- B. Prejudgment interest;
- C. Liquidated damages;
- D. Litigation costs, expenses, and attorneys' fees; and
- E. Such other and further relief as this Court deems just and proper.

Date: April 17, 2017

s/ R. Andrew Santillo
Peter Winebrake*
R. Andrew Santillo, Esq. (NJ ID #025512004)
Mark J. Gottesfeld, Esq. (NJ ID #027652009)
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**Pro Hac Vice admission anticipated*
Attorneys for Plaintiff

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

WAYLON UNDERWOOD,
Plaintiff

V.

SUMMONS IN A CIVIL CASE

KMC ENTERPRISES, INC.,
Defendant

CASE NUMBER: 1:17-CV-02615-NLH-JS

TO: *(Name and address of Defendant):*

KMC Enterprises, Inc.
3050 Route 38
Mount Laurel, NJ 08054

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States Agency, or an office or employee of the United States described in Fed. R. civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Mark J. Gottesfeld, Esq.
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

WILLIAM T. WALSH

CLERK

JAIME KASSELMAN

(By) DEPUTY CLERK



ISSUED ON 2017-04-18 08:38:43, Clerk
USDC NJD

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

WAYLON UNDERWOOD,

Plaintiff,

vs.

KMC ENTERPRISES, INC.,

Defendant.

Civil Action No. 17-cv-02615 (NLH) (JS)

**[PROPOSED] ORDER DISMISSING CASE
ADMINISTRATIVELY AND
COMPELLING ARBITRATION**

Electronically Filed

THIS MATTER, having been opened to the Court by Littler Mendelson, P.C., attorneys for Defendant KMC Enterprises, Inc. ("KMC" or "Defendant"), on notice to Plaintiff, and the Court having considered the papers offered in support thereof and the opposition of plaintiffs, if any, and for good cause shown;

IT IS on this ____ day of _____, 2017,

ORDERED that Defendant's Motion to Dismiss the Complaint be, and the same hereby is granted, in its entirety; and it is further

ORDERED that plaintiff's Complaint against defendant be, and the same hereby is, dismissed with prejudice.

OR IN THE ALTERNATIVE, IT IS:

ORDERED that Defendant's Motion to Stay the Action and Compel Arbitration be, and the same hereby is granted, in its entirety; and it is further

ORDERED that this action be stayed pending arbitration; and it is further

ORDERED that if plaintiff chooses to pursue his claims against defendant, he must do so in arbitration as he agreed at the outset of his employment.

Hon. Noel L. Hillman, U.S.D.J.