IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILLY SHEPARD, STACIE ALLEN, MICHAELA DEVINE, KARINA STRELKOVA and DANIELLE LAMAR, INDIVIDUALLY, AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS,

Appellants,

vs.

RUSSELL ROAD FOOD AND BEVERAGE, LLC,

Respondents.

Case No. 74332

District Court Case No. A-14-709372-C

Appeal from the Eighth Judicial District Court, Clark County, Nevada

JOINT APPENDIX – VOLUME I

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DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CLARK COUNTY

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA STEWART, DANIELLE LAMAR, and DIRUBIN TAMAYO, individually, and on behalf of a class of similarly situated individuals, Plaintiffs, v. RUSSELL ROAD FOOD AND BEVERAGE, LLC, SN INVESTMENT PROPERTIES, LLC (both d/b/a Crazy Horse III Gentlemen's Club), DOE CLUB OWNERS I-X, and DOE CLUB EMPLOYERS I-X, Defendants.	CASE NO.: A-14-709372-C DEPT. 31 **PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT FOR:** FAILURE TO PAY WAGES; UNJUST ENRICHMENT; ATTORNEY FEES DEMAND FOR JURY TRIAL ARBITRATION EXEMPTION: CLASS ACTION

Plaintiffs, on behalf of themselves and a class of all persons similarly situated (collectively, the "Dancers"), allege as follows:

JURISDICTION AND PARTIES

1. This Court has jurisdiction over the subject matter and the person of defendants. Venue is proper in Clark County.

2. Defendants Russell Road Food and Beverage and SN Investment Properties are Nevada limited liability companies.

3. Russell Road Food and Beverage and SN Investment Properties own and operate "Crazy Horse III Gentlemen's Club" (the "Club"). The Club is a Las Vegas strip club.

4. On information and belief, Defendants Doe Club Owners I-X are residents of Clark County, Nevada, and are owners or operators of the Club.

5. On information and belief, Defendants Doe Club Employers I-X are residents of Clark County, Nevada, and employed Dancers at the Club.

6. Plaintiffs do not know at this time the true names and capacities of defendants Doe Club Owners I-X and Doe Club Employers I-X, but these defendants may include other owners, operators, shareholders, officers, directors, or agents of the Club.

7. The defendants are referred to collectively in this complaint as "Crazy Horse."

8. Plaintiffs Jacqueline Franklin, Ashleigh Park, Lily Shepard, Stacie Allen, Michaela Divine, Veronica Van Woodsen, Samantha Jones, Karina Strelkova, LaShonda Stewart, Danielle Lamar, and Dirubin Tamayo were, at times relevant to this action, residents of Clark County, Nevada. Each Plaintiff has worked at the Club as an exotic dancer at various relevant times, including times within all applicable statutes of limitations.

CLASS ACTION ALLEGATIONS

9. This proposed class action is brought under NRCP 23(a) and 23(b)(3).

10. The proposed class consists of all persons who work or have worked at the Club as dancers at any time during the time period prescribed by applicable statutes of limitations and going forward until the entry of judgment in this action..

11. The proposed class is so numerous that joinder of all members is impracticable.

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The exact number of class members is unknown, but is believed to be in excess of 3000 dancers.

12. There are questions of law and fact common to the class that predominate over any questions solely affecting individual class members including, but not limited to, whether Crazy Horse violated Nev. Const. Art. XV, Sec. 16 (the "Minimum Wage Amendment") by not paying the class members any wages, and whether Crazy Horse was unjustly enriched at the expense of class members.

13. Plaintiffs, like other members of the class, claim they were harmed in the same manner and to the same extent by Crazy Horse's illegal employment practices, and have the same interest in the outcome of the litigation.

14. Each class member's claim against Crazy Horse arises from the same course of conduct by Crazy Horse.

15. Plaintiffs will fairly and adequately protect the interests of the class. There are no conflicts between the Plaintiffs' claims and the claims of other class members.

16. Plaintiffs have retained competent counsel experienced in class action litigation, and they will vigorously pursue the class claims throughout this litigation.

17. Individual class members have little interest in controlling the prosecution of separate actions since the amounts of their claims are too small to warrant the expense of prosecuting litigation of this volume and complexity.

18. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

19. Plaintiffs anticipate no difficulty in the management of this litigation. Crazy Horse's business records should permit identification of and notice to the class members.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

20. Crazy Horse heavily monitors its dancers, including dictating their appearance, interactions with customers, and work schedules.

21. An exotic dancer's opportunity for profit or loss working at the Club does not depend upon her managerial skill, even though individual dancers may use their interpersonal

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skills to solicit larger tips.

22. Crazy Horse provides all the risk capital, funds advertising, and covers facility expenses for its strip club.

23. Working as an exotic dancer at the Club does not require the kind of initiative demonstrated by an independent business owner.

24. Exotic dancers are integral to the operation and business success of the Club.

25. Exotic dancers are employees of the Nevada strip clubs in which they work under Nevada law.

26. The Minimum Wage Amendment requires Nevada employers to pay their employees at least a minimum hourly wage.

27. Tips or gratuities given to employees by an employer's patrons cannot be credited as being a part of or offset against the wage rates required by the Minimum Wage Amendment.

28. A Nevada employer cannot require employees contractually to waive their right to a minimum wage.

29. At no time has Crazy Horse paid its Dancers a minimum wage as required by Nevada law.

30. Crazy Horse imposed various monetary fines on the Dancers for failure to comply with its rules and regulations.

31. Crazy Horse imposed various fees on the Dancers as a condition of employment, such as fees to work a shift and fees for declining to dance on the stage during a shift.

32. Crazy Horse required its Dancers, as a condition of employment, to pay fixed sums to Crazy Horse management and other employees, including but not limited to, the "house mom," the DJ, the manager, the bartenders and the bouncers.

33. Crazy Horse has retained benefits, including unpaid wages and improper fees and fines described in this complaint. These benefits, in equity and good conscience, belong to the Dancers.

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34. Crazy Horse has a statutory duty to inform its employees of their legal rights guaranteed under Nevada law. Crazy Horse failed and continues to fail to comply with this statutory duty.

35. Crazy Horse, willfully and for its own pecuniary benefit, has refused to pay wages due and payable to its Dancers when demanded.

36. Crazy Horse, willfully and for its own pecuniary benefit, failed to pay wages due to its Dancers upon resignation or discharge.

37. Crazy Horse intentionally has refused to recognize the Dancers' clear legal status and rights as employees so that it can reap financial benefit at its employees' expense.

38. Crazy Horse intentionally has refused to pay its employees a minimum wage so that it can reap financial benefit at its employees' expense.

39. Crazy Horse imposes illegal fines and fees on its employees as a condition of employment so that it can reap financial benefit at its employees' expense.

40. Crazy Horse intentionally has concealed from its employees their status and rights as employees under Nevada law so that it can reap financial benefit at its employees' expense.

41. Crazy Horse's conduct as described herein constitutes oppression, fraud or malice as defined by NRS 42.005.

COUNT ONE

(Nev. Const. Art. XV, Sec. 16 – Failure to Pay Wages)

42. Plaintiffs incorporate the foregoing allegations as though fully set forth herein.

43. Crazy Horse owes the Dancers a sum, to be proven at trial, representing unpaid wages for each hour worked at no less than the hourly rate specified in the Minimum Wage Amendment, plus applicable penalty wages specified by NRS 608.040 for failure to pay wages to discharged or resigning employees when due.

44. The Minimum Wage Amendment entitles plaintiffs to an award of their reasonable attorney fees and costs.

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COUNT TWO

(Unjust Enrichment)

45. Plaintiffs incorporate the foregoing allegations as though fully set forth herein.

46. The fees and fines paid by the Dancers to Crazy Horse as described in this Complaint constitute a benefit conferred on Crazy Horse by the Dancers. Crazy Horse appreciated, accepted, and retained this benefit.

47. The wages earned by Dancers but not paid by Crazy Horse as described in this complaint constitute a benefit conferred on Crazy Horse by the Dancers. Crazy Horse appreciated, accepted, and retained this benefit.

48. Crazy Horse has been unjustly enriched by accepting and retaining benefits from its Dancers, including the unpaid wages, fees and fines described in this complaint. These benefits, in equity and good conscience, belong to the Dancers.

REQUEST FOR RELIEF

Plaintiffs request an award of:

A. Damages for all unpaid wages for each Plaintiff and class member, in an amount to be determined at trial;

B. Damages for additional penalty wages specified by Nevada law for failure to pay wages to discharged or resigning employees when due, in an amount to be determined at trial;

C. Restitution to the Dancers of all fees, fines, and other monies improperly extracted or withheld from them by Crazy Horse and not otherwise accounted for as damages for failure to pay wages;

D. Pre-judgment and post-judgment interest due on such sums at the highest rate permitted by law;

E. Reasonable attorney fees and costs; and

F. Such other and further relief as may be fair and equitable under the circumstances.

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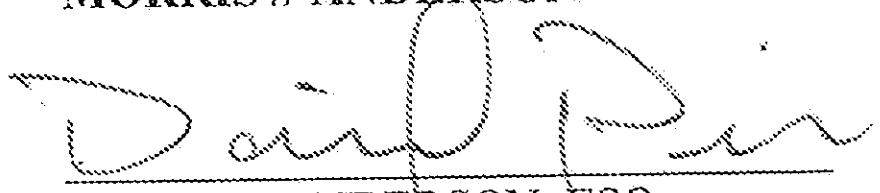
REQUEST FOR CLASS ACTION CERTIFICATION

Plaintiffs further request that the Court certify this action as a class action pursuant to NRCP 23, and designate plaintiffs as class representatives and their counsel as class counsel.

DATED this 16 day of September, 2015.

MORRIS // ANDERSON



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DISTRICT COURT
CLARK COUNTY, NEVADA

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DEFENDANT, RUSSELL ROAD FOOD AND BEVERAGE, LLC'S ANSWER TO PLAINTIFF'S THIRD AMENDED CLASS ACTION COMPLAINT AND COUNTERCLAIMS

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COMES NOW, Defendant, RUSSELL ROAD FOOD AND BEVERAGE, a Nevada limited liability, dba CRAZY HORSE III GENTLEMEN'S CLUB (the "Defendant"), by and through its attorney of record, GREGORY J. KAMER, ESQ., of KAMER ZUCKER ABBOTT, and JEFFERY A. BENDAVID, ESQ., of MORAN BRANDON BENDAVID MORAN, hereby submit its ANSWER TO PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT AND COUNTERCLAIM.

JURISDICTION AND PARTIES

1. As to Paragraph 1 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

2. As to Paragraph 2 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby admits Russell Road Food and Beverage is a Nevada limited liability company. As to the remaining allegations, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

3. As to Paragraph 3 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby admits Russell Road Food and Beverage owns and operates "Crazy Horse III Gentlemen's Club (the "Club"). As to the remaining allegations Defendant hereby denies the allegations contained therein and therefore denies the same.

4. As to Paragraph 4 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

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5. As to Paragraph 5 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

6. As to Paragraph 6 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

7. As to Paragraph 7 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

8. As to Paragraph 8 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

CLASS ACTION ALLEGATIONS

9. As to Paragraph 9 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

10. As to Paragraph 10 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

11. As to Paragraph 11 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

12. As to Paragraph 12 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

13. As to Paragraph 13 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

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14. As to Paragraph 14 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

15. As to Paragraph 15 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

16. As to Paragraph 16 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

17. As to Paragraph 17 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

18. As to Paragraph 18 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

19. As to Paragraph 19 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

20. As to Paragraph 20 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

21. As to Paragraph 21 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

22. As to Paragraph 22 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

23. As to Paragraph 23 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

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24. As to Paragraph 24 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

25. As to Paragraph 25 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

26. As to Paragraph 26 of Plaintiffs' Third Amended Class Action Complaint on file herein, the Minimum Wage Amendment speaks for itself.

27. As to Paragraph 27 of Plaintiffs' Third Amended Class Action Complaint on file herein, the Minimum Wage Amendment speaks for itself.

28. As to Paragraph 28 of Plaintiffs' Third Amended Class Action Complaint on file herein, the Minimum Wage Amendment speaks for itself.

29. As to Paragraph 29 of Plaintiffs' Third Amended Class Action Complaint on file herein, the Dancers were and/are not employees as such, were not required to be paid minimum wage.

30. As to Paragraph 30 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

31. As to Paragraph 31 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

32. As to Paragraph 32 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

33. As to Paragraph 33 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

34. As to Paragraph 34 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

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35. As to Paragraph 35 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

36. As to Paragraph 36 of Plaintiffs' Third Amended Class Action Complaint on file herein, Dancers are not and were not employees, as such, were not required to be paid minimum wage.

37. As to Paragraph 37 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

38. As to Paragraph 38 of Plaintiffs' Third Amended Class Action Complaint on file herein, Dancers are not and were not employees, as such, were not required to be paid minimum wage.

39. As to Paragraph 39 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

40. As to Paragraph 40 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

41. As to Paragraph 41 of Plaintiffs' Third Amended Class Action Complaint on file herein, all punitive damage claims have been dismissed and struck and therefore, all such allegations and pleadings should be struck in accordance with the Court's Order. Defendant hereby denies the allegations contained therein.

COUNT ONE
(NEV. Const.Art. XV, Sec. 16-Failure to Pay Wages)

42. As to Paragraph 42 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby repeats and re-alleges their prior responses to Plaintiffs' Third Amended Class Action Complaint in Paragraphs 1 through 41.

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43. As to Paragraph 43 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

44. As to Paragraph 44 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

COUNT TWO
(Unjust Enrichment)

45. As to Paragraph 45 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby repeats and re-alleges their prior responses to Plaintiffs' Third Amended Class Action Complaint in Paragraphs 1 through 44.

46. As to Paragraph 46 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

47. As to Paragraph 47 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

48. As to Paragraph 48 of Plaintiffs' Third Amended Class Action Complaint on file herein, Defendant hereby denies the allegations contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Third Amended Class Action Complaint fails to state a claim against Defendant, Russell Road Food and Beverage upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs lack standing to bring their claims asserted in this lawsuit against the Defendant, Russell Road Food and Beverage.

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THIRD AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage denies the allegations of Plaintiffs' Third Amended Class Action Complaint and demand strict proof thereof.

FOURTH AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage pleads the applicable statute of limitation to each of Plaintiffs' claims.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the Doctrine of Estoppel and Waiver.

SIXTH AFFIRMATIVE DEFENSE

There is no basis in law or facts for Plaintiffs' claims for punitive damages asserted in Plaintiffs' Third Amended Class Action Complaint.

SEVENTH AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage is not guilty of any of the allegations made against them in Plaintiffs' Third Amended Class Action Complaint.

EIGHTH AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage's actions were justified and Defendant, Russell Road Food and Beverage's actions are therefor, immune from liability.

NINTH AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage has complied with all requirements of Federal and State law with respect to the transactions with the Plaintiffs who bring suit against Defendant, Russell Road Food and Beverage.

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TENTH AFFIRMATIVE DEFENSE

Some or all of Plaintiffs' claims are barred by the Doctrines of Set Off and Recoupment.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the Doctrine of Unclean Hands.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the Doctrines of Consent.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the Doctrines of Ratification and Acquiescence.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have not suffered any injury by reason of any act, or omission, by the Defendant, Russell Road Food and Beverage; therefore, they do not have any right or standing to assert the claims at issue.

FIFTEENTH AFFIRMATIVE DEFENSE

This action cannot be maintained as a class action under Rule 23 of the Nevada Rules of Civil Procedure because: (i) the questions of law and fact are not common to the class, the legal issues differ from class member to class member, and the factual issues will differ depending on a number of different facts applicable to the various punitive class members; and (ii) the claims or defenses of the representative are not typical of the claims or defenses of the class; and (iii) the Plaintiffs will not fairly and adequately protect the interest of the class.

SIXTEENTH AFFIRMATIVE DEFENSE

This class is not certifiable as a class action.

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SEVENTEENTH AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage denies that Plaintiffs are adequate class representatives.

NINETEENTH AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage is not liable because they acted in good faith in conformity with applicable rules, regulations, and statutory interpretations.

TWENTIETH AFFIRMATIVE DEFENSE

The actions alleged in the Plaintiffs' Third Amended Class Action Complaint are barred, in whole or in part, by the Doctrine of Latches because Plaintiffs, having notice of the facts constituting the basis of the alleged causes of action, nevertheless delayed institution of the lawsuit, and such delay has worked to the disadvantage and prejudice of the Defendant, Russell Road Food and Beverage.

TWENTY FIRST AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage alleges that the actions, communications, and conduct of the Defendant, Russell Road Food and Beverage alleged in the Plaintiffs' Third Amended Class Action Complaint were ratified, approved and/or agreed to by Plaintiffs.

TWENTY SECOND AFFIRMATIVE DEFENSE

Any Plaintiffs who performed at Russell Road Food and Beverage's business establishment entered into an Entertainment Agreement with Russell Road Food and Beverage, by its terms, covenants, conditions, and provisions, established the legal relationship between the Russell Road Food and Beverage and Plaintiffs as being that of Independent Contractor and Entertainer and further establishes that Plaintiffs' are not any

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other legal relationship of any type or kind. The Entertainment Agreement expressly provides and the Plaintiffs who entered into such an Agreement expressly acknowledged and agreed that by signing the Agreement they were not employees or agents of Russell Road Food and Beverage, and are therefore, not entitled to minimum wages or other employment compensations. Accordingly, Plaintiffs are not entitles to invoke Nevada Minimum Wage Amendment.

TWENTY THIRD AFFIRMATIVE DEFENSE

Any and all Plaintiffs performing on the business premises of the Defendant, Russell Road Food and Beverage did so as an Independent Contractor and are therefore, precluded from evoking any of the provisions of Nevada Minimum Wage Amendment.

TWENTY FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' Third Amended Class Action Complaint is barred by the Principle of Unjust Enrichment.

TWENTY FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' Causes of Action for Equitable Relief are barred for the reasons that Plaintiffs' have adequate remedies at law.

TWENTY SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' Third Amended Class Action Complaint is frivolous, in that at the time that any Plaintiffs who performed at the Russell Road Food and Beverage entered into an Entertainment Agreement with the Russell Road Food and Beverage, such Plaintiff specifically chose to enter into an Independent Contractor relationship and disclaimed any desire to enter into an employment arrangement, thereby subjecting Plaintiffs', Unnamed Class Members, and their counsels to sanctions, costs, and attorney fees.

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TWENTY SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' Third Amended Class Action Complaint is barred for the reason that Plaintiffs' have failed to mitigate their damages.

TWENTY EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' Third Amended Class Action Complaint is barred by the Principle of Payment.

TWENTY NINTH AFFIRMATIVE DEFENSE

Plaintiffs' Third Amended Class Action Complaint under Nevada Minimum Wage Amendment is barred as the result of the Plaintiffs failure to comply with the legal obligations of employees.

THIRTIETH AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage contends that Plaintiffs would not make fair and adequate representatives of any proported class, in that, their specific circumstances are significantly different that most other members of any potential class.

THIRTY FIRST AFFIRMATIVE DEFENSE

Defendant, Russell Road Food and Beverage contends that Plaintiffs would not make a fair and adequate representative of any proported class, in that, there would be conflicts between their interest and the interest of many other members of any potential class.

THIRTY SECOND AFFIRMATIVE DEFENSE

Any claims of specific Plaintiffs' not common to the entire class of Plaintiffs' are barred.

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THIRTY THIRD AFFIRMATIVE DEFENSE

The acts of Defendant, Russell Road Food and Beverage were neither willful, wanton, intentionally improper, nor taken in reckless disregard of the rights of the Plaintiffs and others.

THIRTY FOURTH AFFIRMATIVE DEFENSE

Any of the Plaintiffs' claims which seek avoidance of the terms of the Entertainment Agreement are barred as a result of the Plaintiffs' violations of the implied covenants of good faith and fair dealing applicable to each such Agreement.

THIRTY FIFTH AFFIRMATIVE DEFENSE

If Plaintiffs are found to be entitled to minimum wage and/or other monetary compensation under Nevada Minimum Wage Claim, Russell Road Food and Beverage is entitled to a set-off against such obligations for all amounts earned by Plaintiffs for their performances at Russell Road Food and Beverage's establishment, exclusive of tips received by Plaintiffs; these amounts being the income and property of the Russell Road Food and Beverage if any employment relationship is determined to exist – the existence of which the Russell Road Food and Beverage specifically denies.

THIRTY SIXTH AFFIRMATIVE DEFENSE

By bringing this suit as a Class Action proceeding pursuant to Rule 23 of Nevada Rules of Civil Procedures, the Plaintiffs' are barred and estopped from later seeking, in this action or otherwise, entitlement to any rights, privileges, benefits, or protections that are contained in the Federal Fair Labor Standards Act; 29 USC Section 201, et. Seq.

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THIRTY SEVENTH AFFIRMATIVE DEFENSE

Some or all of the claims are barred by the Doctrines of Accord and Satisfaction, Settlement, Payment, Release, Judicial Estoppel, and Res Judicata.

THIRTY EIGHTH AFFIRMATIVE DEFNSE

Plaintiffs' claims for unjust enrichment and conversion are barred because Plaintiff's and any putative class members, who performed as an entertainer at Defendant's business establishment, entered into agreements with Defendant, agreeing that the business relationship between Defendant and entertainers were not that of employee-employer.

THIRTY NINTH AFFIRMATIVE DEFENSE

Plaintiffs' Third Amended Class Action Complaint, and each purported cause of action therein, is barred because Plaintiffs (and any putative class member) who performed at Defendant's business premises, did so as a independent contractor, and are therefore precluded from invoking the provisions of the Nevada wage laws.

FORTEITH AFFIRMATIVE DEFENSE

Plaintiffs' claims and each purported cause of action therein, are barred due to Plaintiffs' and putative class members' breaches of contract.

FORTY FIRST AFFIRMATIVE DEFENSE

No actual, justiciable controversy exists between Defendant and Plaintiffs, and thus Plaintiffs' Third Amended Class Action Complaint must be dismissed as to Defendant.

FORTY SECOND AFFIRMATIVE DEFENSE

Plaintiffs and any putative class member are barred from obtaining relief due to unjust enrichment.

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FORTY THIRD AFFIRMATIVE DEFENSE

Plaintiffs' damages and claims are barred to the extent that Defendant is entitles to offset monies already received by Plaintiffs.

FORTY FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred to the extent that Plaintiff and putative class members consented to or requested the alleged conduct of Defendant and accepted the benefit of the non-employee status without complaint during the time that they performed at Defendant's establishment.

FORTY FIFTH AFFIRMATIVE DEFENSE

That is has been necessary of the Defendant, Russell Road Food and Beverage to employ the services of attorneys to defend the action and a reasonable sum should be allowed Defendant, Russell Road Food and Beverage for attorney's fees, together with costs of suit incurred herein.

FORTY SIXTH AFFIRMATIVE DEFENSE

Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendant, Russell Road Food and Beverage's Answer, and therefore, Defendant, Russell Road Food and Beverage reserves the right to amend this Answer to allege additional affirmative defenses if subsequent investigation warrants.

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WHEREFORE, Defendant Russell Road Food and Beverage, prays for the following:

1. That Plaintiffs takes nothing by way of their Third Amended Class Action Complaint on file herein;

2. For reasonable attorneys' fees and costs of suit incurred herein; and

3. For such other and further relief as this Court may deem just and proper in the premises.

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COUNTERCLAIMS

Comes now, Defendant/Counterclaimant, RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability company, dba CRAZY HORSE III GENTLEMEN'S CLUB ("Russell Road"), by and through its attorneys of record, GREGORY J. KAMER, ESQ., of KAMER ZUCKER ABBOTT, and JEFFERY A. BENDAVID, ESQ., of MORAN BRANDON BENDAVID MORAN, hereby asserts the following Counterclaims against Plaintiffs/Counterdefendants, JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA STEWART, DANIELLE LAMAR, DIRUBIN TAMAYO, DOES I through XX, and ROE BUSINESS ENTITIES I through XX (collectively, the "Counterdefendants").

I. PARTIES

1. Defendant/Counterclaimant, Russell Road Food and Beverage, LLC, is a Nevada limited liability company, dba Crazy Horse III Gentlemen's Club, properly conducting business in Clark County, Nevada.

2. Upon information and belief, Plaintiff/Counterdefendant, Jacqueline Franklin, at all times relevant to this action, was and is a resident of Clark County, Nevada.

3. Upon information and belief, Plaintiff/Counterdefendant, Ashleigh Park, at all times relevant to this action, was and is a resident of Clark County, Nevada.

4. Upon information and belief, Plaintiff/Counterdefendant, Lily Shepard, at all times relevant to this action, was and is a resident of Clark County, Nevada.

5. Upon information and belief, Plaintiff/Counterdefendant, Stacie Allen, at all times relevant to this action, was and is a resident of Clark County, Nevada.

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6. Upon information and belief, Plaintiff/Counterdefendant, Michaela Divine, at all times relevant to this action, was and is a resident of Clark County, Nevada.

7. Upon information and belief, Plaintiff/Counterdefendant, Veronica Van Woodsen, at all times relevant to this action, was and is a resident of Clark County, Nevada.

8. Upon information and belief, Plaintiff/Counterdefendant, Samantha Jones, at all times relevant to this action, was and is a resident of Clark County, Nevada.

9. Upon information and belief, Plaintiff/Counterdefendant, Karina Strelkova, at all times relevant to this action, was and is a resident of Clark County, Nevada.

10. Upon information and belief, Plaintiff/Counterdefendant, LaShonda Stewart, at all times relevant to this action, was and is a resident of Clark County, Nevada.

11. Upon information and belief, Plaintiff/Counterdefendant, Danielle Lamar, at all times relevant to this action, was and is a resident of Clark County, Nevada.

12. Upon information and belief, Plaintiff/Counterdefendant, Dirubin Tamayo, at all times relevant to this action, was and is a resident of Clark County, Nevada.

13. The true names and capacities whether individual, corporate, associate or otherwise of Counterdefendants named herein as DOES I through XX, inclusive, and ROE BUSINESS ENTITIES I through XX, inclusive, and each of them, are unknown to Russell Road who therefore sues these Counterdefendants by such fictitious names. Russell Road is informed, believes and thereon alleges that each of the Counterdefendants designated herein as a DOE or ROE BUSINESS ENTITY are agents, employees, servants and representatives of the named Counterdefendant or persons and entities answering in concert with the named Counterdefendant with respect to the allegations herein pled, who are liable to Russell Road

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by reason thereof, and Russell Road prays leave to amend these Counterclaims to insert their true names or identities with appropriate allegations when same become known.

14. At the time of Russell Road's Counterclaims, the individual Plaintiff/Counterdefendants have alleged, but have not certified a class pursuant to N.R.C.P. 23. In the event that such an alleged class is certified pursuant to N.R.C.P. 23, Russell Road reserves the right to amend its Counterclaims to include a Counterdefendant class.

II. JURISDICTION AND VENUE

15. Jurisdiction is properly before this Court as Counterdefendants, upon information and belief, are residents of Clark County, Nevada, and the contracts and related acts allegedly performed or required to be performed occurred and were to occur in Clark County, Nevada.

16. Venue is proper in this Court pursuant to NRS 13.010(1) in that this is the Nevada County in which Counterdefendants contracted with Russell Road and were required by such contract to perform certain obligations in Clark County, Nevada. Venue is also proper pursuant to NRS 13.040, in that this is the Nevada County in which Counterdefendants, upon information and belief, reside.

GENERAL ALLEGATIONS

17. The allegations of paragraphs 1 through 16 of these Counterclaims are incorporated by reference herein with the same force and effect as set forth in full below.

18. Russell Road owns and operates the adult entertainment venue known as Crazy Horse III ("Crazy Horse III").

19. Crazy Horse III is a venue for exotic dancers to perform exotic dances and entertain customers who patronize Crazy Horse III.

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20. Exotic dancers who desire to perform at Crazy Horse III enter into individual Entertainers Agreements (the "Entertainers Agreement") with Russell Road where pursuant to the terms and conditions of the Entertainers Agreement each exotic dancer is granted the privilege to perform at Crazy Horse III.

21. Pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants agreed that each was not an employee of Russell Road and was not entitled to receive by law or pursuant to the terms and conditions of the Entertainers Agreement any of the benefits or privileges provided employees of Russell Road.

22. As consideration for the privilege to perform at Crazy Horse III, each exotic dancer agreed to pay a fee for such privilege as provided in the Entertainers Agreement (the "House Fee").

23. In return for the payment of the House Fee, each exotic dancer retained all fees they generated and gratuities paid to them by patrons of Crazy Horse III for the performance of individual dances.

24. The Entertainers Agreement also permitted each exotic dancer to redeem "Dance Dollars" issued to the patrons of Crazy Horse III for a percentage fee based on the face value of the Dance Dollars redeemed.

25. Counterdefendants each entered into an individual Entertainers Agreement and agreed to be bound by the terms and conditions of the Entertainers Agreement, including, but not limited to, the payment of a House Fee for the privilege of performing at Crazy Horse III.

26. While performing at Crazy Horse III, Counterdefendants performed individual dances for patrons in exchange for a minimum fee (the "Dance Fee").

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27. At all times, Counterdefendants collected and retained the "Dance Fee," along with any gratuity paid by each patron receiving an individual dance.

28. At all times, Counterdefendants also redeemed from Crazy Horse III and retained the face value of the "Dance Dollars" provided to them by patrons less a percentage redemption fee paid.

29. At no time while performing at Crazy Horse III has any Counterdefendant refused to collect and retain the Dance Fees paid to them by patrons.

30. At all times while performing at Crazy Horse III has any Counterdefendant refuse to redeem the face value of any Dance Dollars collected from Crazy Horse III less the percentage redemption fee.

31. Upon information and belief, the amount of Dance Fees paid by patrons to each Counterdefendant and the amount of Dance Dollars redeemed by each Counterdefendant, exclusive of any gratuities paid by patrons, far exceeded the minimum wage required under Nevada law.

32. At all times relevant to this matter, Russell Road complied with and performed as required by every term and condition of each Entertainers Agreement entered into by the Counterdefendants.

33. After retaining the full benefit of Russell's performance of the terms and conditions of the Entertainers Agreement, including, but not limited to, the receipt and retention of the Dance Fees and the redemption of the face value of the Dance Dollars issued to patrons of Crazy Horse III, Counterdefendants now desire to repudiate the Entertainers Agreement.

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34. Counterdefendants now demand that they be declared employees and be returned the House Fees each paid to Russell Road for the privilege of performing at Crazy Horse III while at the same time retaining the all of the monies retained or redeemed by each Counterdefendant for the performance of their individual dances for patrons that they were permitted to retain under the terms of their respective Entertainers Agreement.

III. FIRST COUNTERCLAIM
(Breach of Contract-Offset)

35. The allegations of paragraphs 1 through 34 of these Counterclaims are incorporated by reference herein with the same force and effect as set forth in full below.

36. Russell Road entered into an individual and separate Entertainers Agreement with each Counterdefendant wherein each Counterdefendant acknowledged and agreed to bound by the terms and conditions of their respective Entertainers Agreement.

37. Pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants agreed to pay Russell Road an individual House Fee for the privilege of performing as an exotic dancer at the Crazy Horse III Gentlemen's Club owned and operated by Russell Road.

38. In exchange for the payment of the House Fee and pursuant to the terms and conditions of the Entertainers Agreement, Russell Road agreed that each Counterdefendant would retain the Dance Fees and gratuities paid to them by patrons of Crazy Horse III for the performance of individual exotic dances.

39. Such Dance Fees otherwise would be income owed to Russell Road.

40. In exchange for the payment of the House Fee and pursuant to the terms and conditions of the Entertainers Agreement, each Counterdefendant could redeem the "Dance

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Dollars" issued to the patrons of Crazy Horse III for a percentage fee based on the face value of the Dance Dollars redeemed.

41. The redemption of Dance Dollars issued to patrons otherwise also would be income owed to Russell Road.

42. Pursuant to the terms and conditions of the Entertainers Agreement, Counterdefendants paid the House Fee to Russell Road and retained the Dance Fees paid by patrons of Crazy Horse III as well as retained the face value of the Dance Dollars redeemed by each Counterdefendant less the required redemption fee.

43. At all times, Russell Road complied with and performed as required by the terms and conditions of each Entertainers Agreement entered into with Counterdefendants.

44. At all times, Counterdefendants retained all Dance Fees paid to them by patrons of Crazy Horse III and retained the face value of the Dance Dollars redeemed less the agreed upon redemption fee.

45. Counterdefendants never refused to collect, accept, or retain any Dance Fees paid to them by patrons of Crazy Horse III.

46. Counterdefendants never refused to accept the redemption value of the Dance Dollars redeemed by each Counterdefendant.

47. Counterdefendants now seek to repudiate their respective Entertainers Agreement and have each declared an employee of Russell Road under Nevada law entitled to receive minimum wage for work allegedly performed for Russell Road.

48. Further, Counterdefendants demand the return of all House Fees paid to Russell Road pursuant to the terms and conditions of the Entertainers Agreement while retaining the Dance Fees and face value of Dance Dollars redeemed.

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49. By claiming employee status, Counterdefendants have breached the terms and conditions of their respective Entertainers Agreement.

50. Counterdefendants also have breached the terms and conditions of their respective Entertainers Agreement by refusing to return the Dance Fees paid Counterdefendants by patrons of Crazy Horse III and retained by Counterdefendants since Counterdefendants now seek to be deemed employees of Russell Road.

51. Counterdefendants also have breached the terms and conditions of their respective Entertainers Agreement by refusing to return the cash value of the Dance Dollars each redeemed from Russell Road.

52. In the event that Counterdefendants are deemed employees of Russell Road entitled to the payment of Nevada's minimum wage, and/or entitled to receive the return of the House Fees paid to Russell Road, the monies each retained pursuant to the terms and conditions of the Entertainers Agreement should be offset against such amounts awarded Counterdefendants.

53. In addition, Russell Road is entitled to receive any amount in excess of Counterdefendants' claims.

54. As a result of Counterdefendants' breach of the Entertainers Agreement, Russell Road was damaged in excess of $10,000.

55. It has also become necessary for Russell Road to retain the services of an attorney to assert these Counterclaims, and Russell Road is therefore entitled to reasonable attorney's fees and the costs of this suit.

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IV. SECOND COUNTERCLAIM
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

56. The allegations of paragraphs 1 through 55 of these Counterclaims are incorporated by reference herein with the same force and effect as set forth in full below.

57. Russell Road entered into an individual and separate Entertainers Agreement with each Counterdefendant wherein each Counterdefendant acknowledged and agreed to bound by the terms and conditions of their respective Entertainers Agreement.

58. Consequently, Counterdefendants had a duty, under the implied covenant of good faith and fair dealing, to comply, at all times and in good faith, with each terms and condition of their respective Entertainers Agreement.

59. Counterdefendants have breached the implied covenant of good faith and fair dealing by accepting and retaining the benefits of their respective Entertainers Agreement while seeking to repudiate each Entertainers Agreement and have each declared an employee of Russell Road contrary to the express terms and conditions of Counterdefendants' respective Entertainers Agreement.

60. As a result of Counterdefendants' breach of Implied Covenant of Good Faith and Fair Dealing present in each of Counterdefendants' respective Entertainers Agreement, Russell Road was damaged in excess of $10,000.

61. It has also become necessary for Russell Road to retain the services of an attorney to assert these Counterclaims, and Russell Road is therefore entitled to reasonable attorney's fees and the costs of this suit.

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V. THIRD COUNTERCLAIM
(Conversion)

62. The allegations of paragraphs 1 through 61 of these Counterclaims are incorporated by reference herein with the same force and effect as set forth in full below.

63. Russell Road entered into an individual and separate Entertainers Agreement with each Counterdefendant wherein each Counterdefendant acknowledged and agreed to bound by the terms and conditions of their respective Entertainers Agreement.

64. Pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants acknowledged and agreed that each was not an employee or agent of Russell Road and was not entitled to receive any benefits or privileges owed employees.

65. In reliance of Counterdefendants' acknowledgement that each was not an employee of Russell Road and pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants were permitted to collect, accept, and retain Dance fees from patrons of Crazy Horse III that otherwise would be lawful income of Russell Road.

66. In reliance of Counterdefendants' acknowledgement that each was not an employee of Russell Road and pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants also were permitted to collect, accept, and redeem Dance Dollars, which the cash value otherwise was lawful income of Russell Road.

67. In the event that Counterdefendants are deemed employees of Russell Road, Counterdefendants are not entitled to the retention of such Dance Fees or the cash value of any redeemed Dance Dollars as such Dance Fees and redeemed Dance Dollars are the exclusive personal property of Russell Road and not of its employees.

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68. As such, Counterdefendants have intentionally and wrongfully exercised dominion over Russell Road's personal property by retaining and continuing to retain such Dance Fees and the cash value of any redeemed Dance Dollars.

69. Counterdefendants' intentional and wrongful dominion was in denial of, or inconsistent with, Russell Road's rightful title and rights to the Dance Fees and the cash value of the redeemed Dance Dollars.

70. Therefore, Counterdefendants have intentionally and wrongfully converted Russell Road's personal property.

71. As a result of Counterdefendants' Conversion of Russell Road's personal property, Russell Road was damaged in excess of $10,000.

72. It has also become necessary for Russell Road to retain the services of an attorney to assert these Counterclaims, and Russell Road is therefore entitled to reasonable attorney's fees and the costs of this suit.

VI. FOURTH COUNTERCLAIM
(Unjust Enrichment)

73. The allegations of paragraphs 1 through 72 of these Counterclaims are incorporated by reference herein with the same force and effect as set forth in full below.

74. Russell Road entered into an individual and separate Entertainers Agreement with each Counterdefendant wherein each Counterdefendant acknowledged and agreed to bound by the terms and conditions of their respective Entertainers Agreement.

75. Pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants acknowledged and agreed that each was not an employee or agent of Russell Road and was not entitled to receive any benefits or privileges owed employees.

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76. In reliance of Counterdefendants' acknowledgement that each was not an employee of Russell Road and pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants were permitted to collect, accept, and retain Dance fees from patrons of Crazy Horse III that otherwise would be lawful income of Russell Road.

77. In reliance of Counterdefendants' acknowledgement that each was not an employee of Russell Road and pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants also were permitted to collect, accept, and redeem Dance Dollars, which the cash value otherwise was lawful income of Russell Road.

78. In the event that Counterdefendants are deemed employees of Russell Road, Counterdefendants are not entitled to the retention of such Dance Fees or the cash value of any redeemed Dance Dollars.

79. As such, Counterdefendants have been unjustly enriched to Russell Road's detriment by collecting, accepting, and retaining Dance Fees paid to each Counterdefendant that Counterdefendants, as employees of Russell Road, were not entitled to retain.

80. Counterdefendants also have been unjustly enriched to Russell Road's detriment by retaining the cash value of Dance Dollars each redeemed from Russell Road, as employees of Russell Road, were not entitled to retain.

81. Fundamental principles of justice, equity, and good conscience preclude Counterdefendants preclude Counterdefendants from retaining Dance Fees and redeemed Dance Dollars.

82. As a result of Counterdefendants' Unjust Enrichment, Russell Road was damaged in excess of $10,000, or is entitled to an award in equity for Dance Fees and redeemed Dance Dollars unjustly retained by Counterdefendants in excess of $10,000.

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83. It has also become necessary for Russell Road to retain the services of an attorney to assert these Counterclaims, and Russell Road is therefore entitled to reasonable attorney's fees and the costs of this suit.

VII. FIFTH COUNTERCLAIM
(Declaratory Judgment)

84. The allegations of paragraphs 1 through 83 of these Counterclaims are incorporated by reference herein with the same force and effect as set forth in full below.

85. Russell Road entered into an individual and separate Entertainers Agreement with each Counterdefendant wherein each Counterdefendant acknowledged and agreed to bound by the terms and conditions of their respective Entertainers Agreement.

86. Pursuant to the terms and conditions of each Entertainers Agreement, Counterdefendants agreed that each was not an employee of Russell Road and was not entitled to receive by law or pursuant to the terms and conditions of the Entertainers Agreement any of the benefits or privileges provided employees of Russell Road.

87. Counterdefendants have now sought to repudiate the terms and conditions of their respective Entertainers Agreement and obtain a judicial determination that Counterdefendants were employees of Russell Road entitled to the benefits and privileges afforded such employees.

88. A justiciable controversy therefore has arisen between Counterdefendants and Russell Road regarding the validity and enforceability of Counterdefendants' Entertainers Agreement.

89. Russell Road is entitled pursuant to NRS 30.040(1) to a Declaratory Judgment determining that each Entertainers Agreement with Counterdefendants is valid and enforceable and each Counterdefendant was not an employee of Russell Road.

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90. It has also become necessary for Russell Road to retain the services of an attorney to assert these Counterclaims, and Russell Road is therefore entitled to reasonable attorney's fees and the costs of this suit.

WHEREFORE, Russell Road prays for the following:

1. For Declaratory Judgment pursuant to NRS 30.040(1), declaring or determining the Entertainers Agreement entered into with each Counterdefendant is valid and enforceable;

2. For actual damages in excess of Ten Thousand Dollars ($10,000) to be determined at trial;

3. For reasonable attorney's fees and costs of suit; and

4. For any other such relief as this Court deems just and proper.

DATED this 19th day of October 2015.

KAMER ZUCKER ABBOTT

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DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CLARK COUNTY

Jacqueline Franklin *et. al*., individually, and on behalf of a class of similarly situated individuals,

Plaintiffs/Counterdefendants,

v.

Russell Road Food And Beverage, LLC, *et.al*.,

Defendants/Counterplaintiffs.

CASE NO.: A-14-709372-C
DEPT. 31

PLAINTIFFS' ANSWER TO DEFENDANT RUSSELL ROAD'S COUNTERCLAIM

Counterdefendants Jacqueline Franklin, Ashleigh Park, Lily Shepard, Stacie Allen, Michaela Divine, Veronica Van Woodsen, Samantha Jones, Karina Strelkova, Lashonda Stewart, Danielle Lamar, and Dirubin Tamayo, individually and all on behalf of a class of similarly-situated individuals (the "Dancers") answer Russell Road Food and Beverage LLC's counterclaim as follows:

PARTIES

1. Admit paragraphs 1-12.

2. Lack sufficient information to admit or deny paragraph 13.

3. Deny paragraph 14, except admit that, at the time of Russell Road's counterclaim, the Dancers have alleged but not certified a class pursuant to NRCP 23.

JURISDICTION AND VENUE

4. As to paragraph 15, the Dancers reallege and incorporate herein by reference their answers in the preceding paragraphs as if fully set forth herein.

5. Paragraph 16 states a legal conclusion to which no response is required.

GENERAL ALLEGATIONS

6. As to paragraph 17, the Dancers reallege and incorporate herein by reference their answers in the preceding paragraphs as if fully set forth herein.

7. Admit paragraphs 18 and 19.

8. Deny paragraphs 20-34, and affirmatively allege that:

a. The Entertainer Agreements speak for themselves;

b. The Dancers' Complaint speaks for itself;

c. The Dancers received no wages or other compensation from Russell Road at any time and were required to pay substantial fees and fines to Russell Road;

d. The minimum hourly wage Russell Road is required to pay the Dancers under Nevada law (net of fees and fines) is much more than what the Dancers actually received from Russell Road (nothing);

e. Patrons at Crazy Horse III gave tips to the Dancers, either in cash or in the form of "Dance Dollars."

FIRST COUNTERCLAIM

(Breach of Contract – Offset)

9. As to paragraph 35, the Dancers reallege and incorporate herein by reference their answers in the preceding paragraphs as if fully set forth herein.

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10. Deny paragraphs 36-55, and affirmatively allege that the Entertainer Agreements speak for themselves.

SECOND COUNTERCLAIM

(Breach of Implied Covenant of Good Faith & Fair Dealing)

11. As to paragraph 56, the Dancers reallege and incorporate herein by reference their answers in the preceding paragraphs as if fully set forth herein.

12. Deny paragraph 57-60, and affirmatively allege that the Entertainer Agreements speak for themselves.

13. Deny paragraph 61.

THIRD COUNTERCLAIM

(Conversion)

14. As to paragraph 62, the Dancers reallege and incorporate herein by reference their answers in the preceding paragraphs as if fully set forth herein.

15. Deny paragraphs 63-72, and affirmatively allege that the Entertainer Agreements speak for themselves.

FOURTH COUNTERCLAIM

(Unjust Enrichment)

16. As to paragraph 73, the Dancers reallege and incorporate herein by reference their answers in the preceding paragraphs as if fully set forth herein.

17. Deny paragraphs 74-83, and affirmatively allege that the Entertainer Agreements speak for themselves.

FIFTH CLAIM FOR RELIEF

(Declaratory Relief)

18. As to paragraph 84, the Dancers reallege and incorporate herein by reference their answers in the preceding paragraphs as if fully set forth herein.

19. Deny paragraphs 85-89, except admit that a justiciable controversy has arisen regarding the validity and enforceability of the Entertainer Agreements.

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GENERAL DENIAL

20. The Dancers deny each and every allegation of the counterclaim not specifically admitted herein.

AFFIRMATIVE DEFENSES

21. The counterclaims are barred in whole or in part by the following affirmative defenses: illegality, unclean hands, estoppel, laches, statute of limitations, recoupment, lack of harm and/or damages, failure to state a claim upon which relief may be granted.

22. The counterclaims are not ripe.

23. The counterclaims are contrary to Nevada public policy and contravene the remedial purposes of Nevada's minimum wage laws.

24. The Dancers preserve any affirmative defense that may be applicable, but which presently is unknown, and reserve the right to amend this answer to assert additional affirmative defenses supported by facts obtained through discovery.

REQUESTED RELIEF

25. The Dancers request that Russell Road take nothing by its counterclaim, that the counterclaim be dismissed, and that the Dancers be awarded costs and attorney fees incurred in defending this action. The Dancers further request a jury trial on all counterclaims for which a jury trial is permitted.

DATED this 3rd day of November, 2015.

MORRIS ANDERSON LAW

By: /s/ Daniel R. Price
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of MORRIS ANDERSON LAW, and that on this 3rd day of November, 2015, I served a copy of the foregoing **PLAINTIFFS' ANSWER TO DEFENDANT RUSSELL ROAD'S COUNTERCLAIM** by serving a true copy thereof via the Court's electronic system upon the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA STEWART, DANIELLE LAMAR and DIRUBIN TAMAYO individually, and on behalf of Class of similarly situated individuals, Plaintiffs, v. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB) SN INVESTMENT PROPERTIES, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, DOE EMPLOYER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X, Defendants.	CASE NO.: A-14-709372-C DEPT. NO.: XXXI

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs, individually and on behalf of all persons similarly situated, hereby move the Honorable Court for an Order Certifying this Action as a Class Action under NRCP 23(b)(3), designating Plaintiffs as the Class Representatives, and Appointing Plaintiffs' Attorneys of Record as Class Counsel.

This Motion is based upon the following Memorandum of Points and Authorities and any oral argument this Court may wish to entertain at the hearing of this Motion.

DATED this 26th day of April, 2016.

MORRIS//ANDERSON

By: */s/ Daniel R. Price*
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Attorneys for Plaintiff

NOTICE OF MOTION

To: ALL PARTIES AND THEIR COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the foregoing **MOTION** will come on for hearing before the above entitled Court on the 31 day of May, 2016, at 9:00 A.m., or as soon thereafter as counsel can be heard.

DATED this 26th day of April, 2016.

MORRIS//ANDERSON

By: */s/ Daniel R. Price*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a proposed class action by exotic dancers against the owners of Crazy Horse III Gentlemen's Club (the "Club"), a Las Vegas strip club, for failure to pay a minimum hourly wage as required by Nevada's constitution (Count 1) and for unjust enrichment (Count 2). The original complaint was filed on November 4, 2014. The operative Third Amended Complaint ("3AC") was filed on October 2, 2015. The applicable statute of limitations is two years for the minimum wage claim and four years for the unjust enrichment claim. *See* NRS 608.260 and 11.190(2)(c). Plaintiffs propose the following class:

> **All persons who work or have worked at the Club as dancers at any time on or after November 2, 2010 and going forward until the entry of judgment in this action.**

This case, which is similar to many employee misclassification cases that have been certified as class actions across the country (including many by exotic dancers against the clubs in which they work), is particularly suited for certification under NRCP 23(b)(3) because (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, and (3) a class action would not prejudice Defendants' rights in any way. *See Deal v. 999 Lakeshore Association*, 94 Nev. 301, 306, 579 P.2d 775, 778-79 (1978) ("[T]he determination to use the class action is a discretionary function wherein the district court must pragmatically determine whether it is better to proceed as a single action, or many individual actions in order to redress a single fundamental wrong.").

II. FACTUAL BACKGROUND[1]

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[1] "In analyzing whether it should certify a class, the court should generally accept the allegations of the complaint as true. An extensive evidentiary showing is not required." *Meyer v. District Court*, 110 Nev. 1357, 1364, 885 P.2d 622, 626 (1994) (citations omitted).

Defendants are the owners and operators of the Club (3AC at ¶¶3-5). Plaintiffs worked as dancers at Defendants' strip club at various times during the class period (*id.* at ¶8). At no time were dancers paid any wages by Defendants (*id.* at ¶29). To the contrary, Defendants charged their dancers a fee to perform at the club, required dancers to make regular payments to management staff, the disc jockey, and other employees, and assessed fines against the dancers purportedly in order to enforce various club rules (*id.* at ¶¶30-33). This system has enabled Defendants to benefit for years from labor that not only is free, but that pays to work. It is a lucrative business model, but it is illegal and exploitative. The law is clear: exotic dancers are a club's employees and are entitled to all constitutional and statutory rights flowing therefrom, including a minimum wage. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 954 (2014), *reh'g denied* (Jan. 22, 2015) (holding exotic dancers are club's employees as a matter of law and noting this decision "is in accord with the great weight of authority" across the country).

III. ARGUMENT

A. Rule 23 is Favored and Liberally Construed for Claims of This Nature

The Nevada Supreme Court has noted the valuable function of class actions, and Nevada's strong public policy in favor of them. *See Picardi v. Eighth Judicial Dist. Court of State, ex rel. Cnty. of Clark*, 251 P.3d 723, 727 (Nev. 2011) ("class actions serve a valuable function in Nevada's judicial system by increasing efficiency because the courts do not have to use their limited resources deciding a litany of cases that stem from a single incident and present similar issues.").

A class action is particularly appropriate in cases, like this one, that seek to enforce employment laws. *Monterrubio v. Best Buy Stores*, L.P., 291 F.R.D. 443, 451 (E.D. Cal. 2013) (noting "public policy supports using class actions to enforce statutes that focus on the workplace). *See also St. Marie v. Eastern RR Assn.*, 72 F.R.D. 443, 449 (S.D.N.Y. 1976) ("[T]he risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted

to speak for others when the vocal ones are otherwise fully qualified"). As such, wage and employee misclassification actions against employers regularly are certified as class actions. *See Ramirez v. Riverbay Corp.*, 39 F.Supp.3d 354, 364 (S.D.N.Y.2014) (collecting cases).

Courts in Nevada and across the country routinely have certified class actions under Rule 23(b)(3) in employment misclassification cases by dancers against strip clubs. *See* Order Granting Motion to Re-certify Class in *Terry v. Sapphire Gentlemen's Club*, Case No. A602800 (attached as **Exhibit 1**). *See also Espinoza v. Galardi S. Enterprises, Inc., 2016 WL 127586, (S.D. Fla. Jan. 11, 2016), Flynn v. N.Y. Dolls Gentlemen's Club*, 2014 WL 4980380 (S.D.N.Y. Oct. 6, 2014); *In re Penthouse Exec. Club Comp. Litig.*, 2014 WL 185628 (S.D.N.Y. Jan. 14, 2014); *Ruffin v. Entm't of the E. Panhandle*, 2012 WL 5472165 (N.D. W. Va. Nov. 9, 2012); *Trauth v. Spearmint Rhino Cos. Worldwide, Inc.*, 2012 WL 4755682 (C.D. Cal. Oct. 5, 2012); *Hart v. Rick's Cabaret Int'l Inc.*, 2010 WL 5297221 (S.D.N.Y. Dec. 20, 2010). As the court noted in the *Espinoza* case, "Defendants have not cited to any decision with different results — denying the Rule 23 class certification motion. And the Court has not been able to uncover one either. To be sure, the above cases are not binding on this Court. But they are persuasive authority." *Espinoza*, 2016 WL 127586, at *3.

B. The Rule 23(a) Prerequisites Of Numerosity, Commonality, Typicality And Adequacy Are Met

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. The numerosity requirement is a "generally low hurdle," and "a plaintiff need not show the precise number of members in the class." *Vega v. T–Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009). "A putative class of forty or more generally will be found 'numerous.'" *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 537 (2005). *See also Newberg* § 3:12 ("As a general guideline . . . a class that encompasses fewer than 20 members will

likely not be certified absent other indications of impracticability of joinder, while a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.").

Crazy Horse III, one of the biggest Las Vegas strip clubs, is open 24 hours a day, seven days a week. *See* http://crazyhorse3.com/faq/ (last visited April 20, 2016). Plaintiffs, based on their personal experiences, conservatively estimate that scores if not hundreds of dancers work at the Club in any given week, and that hundreds if not thousands of dancers have worked there during the class period. This estimate is confirmed on the Club's website. *See* https://crazyhorse3.lvticket.com/crazy-deals/ (claiming Club offers "[h]undreds of the sexiest dancers in Las Vegas") (last visited April 20, 2016).

The class size alone justifies class certification, but additional factors relating to the impracticability of joinder also support certification. *See Hernandez v. Alexander*, 152 F.R.D. 192, 194 (D. Nev. 1993) ("factors relevant to the joinder impracticability issue include judicial economy arising from avoidance of a multiplicity of actions, geographic dispersement of class members, size of individual claims, financial resources of class members [and] the ability of claimants to institute individual suits.") (*quoting* Newberg on Class Actions § 3.06). Here, considerations of judicial economy favor class certification because the key issue of liability is common to all class members. The court also may take judicial notice of the fact that class members may be reluctant individually to sue their putative employer. *See Horn v. Associated Wholesale Grocers*, 555 F.2d 270 (10th Cir. 1977) (joinder impracticable, in part, because employees were apprehensive about loss of jobs, welfare of their families, and of offending employer as result of taking stand against it). *See also Newberg on Class Actions* § 3:12 (noting fear of retaliation in employment cases is an additional factor supporting class certification "as such a fear might deter potential plaintiffs from suing individually, making a representative action especially pertinent.") (collecting cases).

2. Commonality and Typicality

The claims of each individual class member need not be identical, but a class action must present "questions of law or fact common to the class," NRCP 23(a)(2), and the class representative's claims or defenses must be "typical of the claims or defenses of the class" NRCP 23(a)(3). As courts have noted, these requirements "tend to merge" because "[b]oth serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982). "This requirement is liberally construed; the question is whether there is a 'unifying thread' among the claims alleged by members of the class." *Hart v. Rick's Cabaret Int'l Inc.*, 2010 WL 5297221, at *6 (S.D.N.Y. Dec. 20, 2010) (certifying FRCP 23(b)(3) class of dancers in wage claim against club).

Where, as here, "a general corporate policy is the focus of litigation, class status for those adversely affected by the policy is appropriate." *Meyer v. Eighth Judicial Dist. Court,* 110 Nev. 1357, 1364, 885 P.2d 622, 626 (1994) (concluding that landlord's allegedly illegal pattern of keeping tenants who were late in paying rent out of their apartments satisfied commonality and typicality requirement for class certification). *See also Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 848-49, 124 P.3d 530, 538-39 (2005) (class certification appropriate where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.").

Courts routinely have held that commonality and typicality are satisfied in employer-employee wage disputes. *See, e.g., Ramirez v. Riverbay Corp., 39 F.Supp.3d 354, 364 (S.D.N.Y.2014)* (noting courts routinely find commonality and typicality "where employees claim that they were denied minimum wage or overtime compensation as a result of a corporate employment policy.") (collecting cases); *Garcia v. E.J. Amusements of New Hampshire, Inc.,* 98 F. Supp. 3d 277, 286 (D. Mass. 2015) (finding commonality and typicality where employees alleged

per se illegal wage policies that violated the rights of all class members); *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 606-07 (N.D. Cal. 2014) (finding commonality and typicality where putative class members allege denial of denied wage and hour laws on basis that they were misclassified as independent contractors);

Here, the commonality and typicality requirements clearly are met. Plaintiffs do not seek recovery on the basis of individualized treatment; rather, they allege they, like all members of the proposed class, were victims of the same common course of conduct and "single fundamental wrong." *Deal*, 94 Nev. at 306, 579 P.2d at 778-79. The dancers' claims hinge upon a common question of law, *i.e.*, whether a strip club is the employer of its dancers. The answer to this legal question will be determined with reference to common questions of fact, *i.e.*, "the totality of the circumstances of the working relationship's economic reality." *Terry*, 130 Nev. Adv. Op. 87, 336 P.3d at 960 (reviewing undisputed facts relating to dancers' work to determine that strip club is the employer of its dancers as a matter of law).

3. Adequacy of Representation

NRCP 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Courts ask two questions when reviewing this requirement: First, do the proposed class representative and class counsel "have any conflicts of interest with other class members?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Second, will the proposed class representative and class counsel "prosecute the action vigorously on behalf of the class?" *Id.* The adequacy requirement is satisfied where, as here, nothing in record "indicat[es] that Plaintiffs or their counsel have a conflict of interest with the putative class members" and where "the record reveals that Plaintiffs and their counsel have prosecuted this action vigorously on behalf of the class." *Tijero v. Aaron Bros., Inc.*, 301 F.R.D. 314, 322 (N.D. Cal. 2013).

With respect to the first question, there is no suggestion that any conflict of interest may exist. The named plaintiffs, all former dancers at the club, unquestionably are capable of fairly and

adequately representing a class consisting of both former and current employees of the Defendants because "both former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint." *Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 455 (9th Cir. 2009).

With respect to the second question, each Plaintiff understands what is at stake in this lawsuit and is willing and able to perform their duties as class representatives. Plaintiffs' attorneys have extensive experience in employment, class action, and complex business litigation. As demonstrated by their handling of the case thus far, most notably in briefing, arguing, and defeating a motion to dismiss the complaint, Plaintiffs' counsel is competent to undertake this litigation and vigorously will continue to pursue the action on behalf of the class. *See Johnson v. Shreveport Garment Co.*, 422 F. Supp. 526, 535 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978) ("Counsel need not come to court with a résumé and character references with which to prove his effectiveness; rather, his or her conduct in pretrial matters, discovery and the trial itself will be evidence of his or her capability adequately to represent the class.").

C. Certification is Appropriate Under NRCP 23(b)(3)

Class certification is appropriate under NRCP 23(b)(3) if (a) common questions of law or fact predominate over any questions affecting only individual members, and (b) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. NRCP 23(b)(3).

Courts routinely certify class actions by current and former employees against their employer seeking to recover wages under NRCP 23(b)(3) (or its federal analog), including in cases, like this one, involving allegations of employee misclassification. *See, e.g., Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 608 (N.D. Cal. 2014) (certifying class under FRCP 23(b)(3) because threshold question regarding employee status susceptible to common proof, the case involves common policies and practices by putative employer, and because individual issues (*e.g.*,

damages) not so significant as to outweigh benefits of class treatment). *See also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (district court abused discretion in denying class certification under FRCP 23(b)(3) in putative class action by current and former employees against employer seeking to recover wages).

1. Predominance requirement is met

Liability in this case (*i.e.*, the lawfulness of Defendants' policy of not treating its dancers as employees) is an issue common to the class. As other courts previously have found, where the "liability issue is common to the class, common questions are held to predominate over individual ones." *Ruffin v. Entm't of the E. Panhandle*, 2012 WL 5472165, at *10 (N.D.W. Va. Nov. 9, 2012) (certifying class under FRCP 23(b)(3) where common liability question whether defendant strip club legally misclassified its dancers as independent contractors). Indeed, one court even declared that the common liability issue of whether class members "were supposed to be paid the minimum wage as a matter of law and were not" is "about the most perfect question[] for class treatment." *Iglesias–Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y.2007). *See also Williams-Green v. J. Alexander's Restaurants, Inc.*, 277 F.R.D. 374, 383 (N.D. Ill. 2011) (certifying FRCP 23(b)(3) class of waiters in class action against employer for tip pool violations where "controlling substantive issue" was propriety of employer's policy); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 89 (S.D.N.Y. 2001) (finding predominance where central issues were whether plaintiffs were employees as matter of law and consequences of resolution of that issue in relation to minimum wage).

The fact that each dancers' damages will need to be calculated on an individual basis is of no moment."The amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975). *See also Brinker Rest. Corp. v. Superior Court*, 139 Cal.Rptr.3d 315, 273 P.3d 513, 546 (2012) ("In almost every class action, factual determinations of damages to individual class members must be made. Still we

know of no case where this has prevented a court from aiding the class to obtain its just restitution.").

2. Superiority requirement also is met

The other requirement of NRCP 23(b)(3) is that a class action must be superior to other available methods for fair and efficient adjudication of the controversy. Rule 23(b)(3) provides several criteria for the court to use when considering this question: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. See NRCP 23(b)(3)(A)-(D).

As described in Section C.1, above, common questions of law and fact predominate over any other questions and can be resolved for all members of the class in a single adjudication. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir.1998) (internal quotation omitted).

A class action also is superior to piecemeal individual litigation because: (1) each member of the class pursuing a claim individually would burden the judiciary and run afoul of Rule 23's focus on efficiency and judicial economy. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir.2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."); (2) a class action concentrates the litigation in this forum where the Defendants' places of business is located and where a large number of putative class members presumably reside; (3) upon information and belief there is no other litigation concerning the controversy already commenced by members of the class; (4) many

potential plaintiffs are current employees of Defendants and thus may be apprehensive about pursuing individual claims; (5) and there are no difficulties likely to be encountered in the management of a class action; and (6) "If plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover." *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir.2001) (class certification under FRCP 23(b)(3) appropriate for class of former employees of hotel casino in claim for back wages).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order certifying under NRCP 23(b)(3) the class as defined herein in, and designating Plaintiffs as class representatives and the undersigned counsel as class counsel.

DATED this 26th day of April, 2016.

MORRIS//ANDERSON

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **MORRIS//ANDERSON**, and on the __ day of April, 2016, I served the foregoing ***PLAINTIFFS' MOTION FOR CLASS CERTIFICATION*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

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/s/ Erickson Finch
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EXHIBIT 1

ORDR

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZURI-KINSHASA MARIA TERRY, individually, MARLENE NUNO, individually MICHELE COSPER, individually SELENA DENISE PELAEZ, individually, JESSICA ANNE MORGAN, individually and all on behalf of Class of similarly situated individuals, Plaintiffs, v. SAPPHIRE/SAPPHIRE GENTLEMAN'S CLUB, a business organization form unknown; SHAC, LLC, an active Nevada Domestic Limited-Liability Company dba SAPPHIRE and SAPPHIRE GENTLEMEN'S CLUB; and DOES 1 through 100, inclusive, Defendants.	CASE NO.: A602800 DEP'T.: I **Order Granting Motion To Re-certify Class**

The motion of plaintiffs, class representatives, Zuri-Kinshasa Maria Terry, Marlene Nuno, Michelle Cosper, Selena Denise Pelaez, and Jessica Morgan for an order re-certifying them as class representatives, and this case as a class action, came regularly before this court on December 13, 2010. The Court, considering the moving and reply

papers of the plaintiffs, and the opposing papers of the defendants, and good cause appearing therefore,

The COURT ORDERS that Plaintiffs' Motion to Re-certify this case as a class action pursuant to NRCP 23(b)(3) is hereby GRANTED.

IT IS SO ORDERED.

Dated: January 24, 2011

Judge Kenneth C. Cory

Submitted By:

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DISTRICT COURT
CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA, STEWART, DANIELLE LAMAR, and DIRUBIN TAMAYO, individually, and on behalf of a class of similarly situated individuals, Plaintiffs, vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited Liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X, Defendants. AND RELATED COUNTERCLAIMS	Case No.: A-14-709372-C Dept. No.: 31 **Date: May 31, 2016** **Time: 09:00 a.m.**

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DEFENDANT, RUSSELL ROAD FOOD AND BEVERAGE, LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

COMES NOW, Defendant, RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability, dba CRAZY HORSE III GENTLEMEN'S CLUB (the "Defendant"), by and through its attorneys of record, GREGORY J. KAMER, ESQ., and KAITLIN H. ZIEGLER, ESQ., of KAMER ZUCKER ABBOTT, and JEFFERY A. BENDAVID, ESQ., of MORAN BRANDON BENDAVID MORAN, hereby submits its Opposition to Plaintiffs' Motion for Class Certification.

DATED this 16th day of May 2016.

MORAN BRANDON BENDAVID MORAN

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Without even making an effort to fake that Plaintiffs' counsel is filing the same case and pleadings over and over again, Plaintiffs' counsel has filed a Motion to Certify a Class on behalf of Plaintiffs in this matter. Hoping to earn an award of attorneys' fees without actually bothering to identify, let alone conform Plaintiffs' Motion to the actual facts and circumstances of this case, Plaintiffs seek to certify a class of individuals who allegedly "worked" at Defendant's Crazy Horse III Gentlemen's Club since November 2, 2010 until an entry of judgment.

Although Plaintiffs' Motion contains a plethora of legal citations either not applicable to this case or non-binding on this Court, Plaintiffs' Motion fails to provide any actual evidence supporting Plaintiffs' attempted certification of their proposed class. In addition, Plaintiffs' legal citations fail to consider or concern themselves with Nevada's enactment of Senate Bill 224, which created a conclusive presumption that Plaintiffs, and those similarly situated to Plaintiffs, are independent contractors under Nevada law. In reality, Senate Bill 224 renders nearly all of Plaintiffs' legal citations irrelevant and inapplicable as support for Plaintiffs' Motion.

As a result, Plaintiffs' Motion fails to provide any actual evidence or applicable law demonstrating the prerequisites required by N.C.R.P. 23 to permit this Court to certify the class proposed by Plaintiffs' Motion. Accordingly, Plaintiffs' Motion for Certification must be denied as further explained below.

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II. FACTS

Plaintiffs, Jacqueline Franklin, Ashleigh Park, Lily Shepard, Stacie Allen, Michaela Divine, Veronica Van Woodsen, Samantha Jones, Karina Strelkova, Lashonda Stewart, Danielle Lamar, and Dirubin Tamayo (the "Plaintiffs"), filed their Third Amended Complaint on October 2, 2015, against Defendant alleging that Plaintiffs and those similarly situated to Plaintiffs were "employed" as exotic dancers at Defendant's Crazy Horse III Gentlemen's Club. *See* Plaintiffs' Complaint at 4. Plaintiffs allege that Defendant failed to pay Plaintiffs wages equal to Nevada's minimum wage as required by Art. XV, Sec. 6 of Nevada's Constitution ("Nevada's Minimum Wage Amendment"). *See* Id. at 4-6. Further, Plaintiffs allege that Defendant improperly extracted or withheld moneys from Plaintiffs for fines, fees, etc., that Plaintiffs were entitled to as employees. *See* Id. Accordingly, Plaintiffs asserted a claim for relief against Defendant for an alleged violation of Nevada's Minimum Wage Amendment. *See* Id.

Plaintiffs' Third Amended Complaint was filed on the heels of this Court's June 25, 2015 Order Granting in Part and Denying in Part Defendant's Motion to Dismiss and Granting Defendant's Motion to Strike Prayer for Exemplary and Punitive Damages. Pursuant to the Court's Order, Plaintiffs' attempt to use "Doe Dancer" pseudonyms for Plaintiffs was denied, Plaintiffs' minimum wage claim asserted then as part of its First Cause of Action was dismissed to the extent Plaintiffs' sought relief outside a two (2) year statute of limitation. *See* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss and Granting Defendant's Motion to Strike Prayer for Exemplary and Punitive Damages dated June 25, 2015. The Court further struck Plaintiffs' prayer for exemplary and punitive damages since Plaintiffs' claims fail to sound in tort. *See* Id.

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On October 19, 2015, Defendant filed its Answer to Plaintiffs' Third Amended Complaint and asserted Counterclaims against Plaintiffs alleging that Plaintiffs were independent contractors of Defendant who entered into a separate agreement with Defendant to perform as an exotic dancer at Defendant's Crazy Horse III Gentlemen's Club pursuant to the terms and conditions of that agreement. *See* Answer and Counterclaims at 19-21. As a result, Defendant asserted counterclaims against Plaintiffs' for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Conversion, Unjust Enrichment, Declaratory Judgment. *See* Id at 22-30.

Prior to Plaintiffs' filing of its Third Amended Complaint, the Nevada Legislature enacted Senate Bill 224, which created as a matter of Nevada law a conclusive presumption that persons such as Plaintiffs were independent contractors and not employees entitled to receive Nevada's minimum wage. *See* infra. Despite the enactment of SB 224, Plaintiffs' Third Amended Complaint failed to allege any facts demonstrating that Plaintiffs were not subject to the conclusive presumption provided by SB 224. *See generally*, Plaintiffs' Complaint.

Further, Plaintiffs now seek to certify a class of individuals based on Plaintiffs' Complaint. *See* generally, Plaintiffs' Motion. As provided below, Plaintiffs' Motion must be denied since Plaintiffs' have failed to meet their burden to certify a class required by N.R.C.P. 23 and applicable Nevada law.

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III. ARGUMENT

A. Plaintiffs' Motion For Class Certification Must Be Denied Because Plaintiffs Have Not Met Their Evidentiary Burden Establishing the Requirements of N.R.C.P. 23.

N.R.C.P. 23 specifies the circumstances under which a case proceeds as a class action. *See Shuette v. Beazer Homes Holdings Corporation,* 121 Nev. 837, 846, 124 P.3d 530, 537 (2005). Under N.R.C.P. 23, Plaintiffs bear the burden to prove that their case is appropriate for resolution as a class action. *See* Id. (citing *Cummings v. Charter Hospital*, 111 Nev. 639, 643, 896 P.2d 1137, 1140 (1995)). Plaintiffs only can meet this burden by demonstrating the four prerequisites; (1) numerosity; (2) commonality; (3) typicality: and adequacy. *See* Id. at 846.

Here, Plaintiffs' Motion must be denied because Plaintiffs have not put forth any, let alone sufficient evidence demonstrating these prerequisites. *See generally,* Plaintiffs' Motion. Rather than set forth evidence that this Court could consider in determining whether to certify Plaintiffs' proposed class, Plaintiffs instead rely on the 1994 case of *Meyer v. District Court* to justify Plaintiffs' complete lack of evidence supporting their Motion. *See* Id. at 4, fn. 1 (quoting *Meyer*, 110 Nev. 1357, 1364, 885 P.2d 622, 626 (1994)).

For several reasons, Plaintiffs' reliance on *Meyer* is misplaced. To begin with, the Nevada Supreme Court in *Meyer* never considered what level of evidence is required for a plaintiff to demonstrate the prerequisites of N.R.C.P. 23. *See*, 110 Nev. at 1360. Instead, *Meyer* only considered whether a district court abused its discretion in determining whether the prerequisite of commonality was present. *See* Id.

Further, *Meyer* does not provide Plaintiffs an excuse to not put forth any evidence demonstrating the required prerequisites. *See* Id. The Nevada Supreme Court in *Meyer*

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instead declared that an "extensive evidentiary showing is not required" in certifying a class. Id. at 1364. At no point did the Nevada Supreme Court declare in *Meyer* that Plaintiffs could certify a class without any evidentiary showing. *See* Id. The term, "extensive" is not synonymous with "none."

Since *Meyer*, the Nevada Supreme Court, in fact, has obligated Plaintiffs to demonstrate the four prerequisites with actual evidence and has chastised district courts for not conducting a thorough review of the evidence in analyzing whether a proposed class should be certified under N.R.C.P. 23. *See e.g., Shuette,* 121 Nev. at 856-57. In *Shuette*, which is one of Nevada's leading cases on class action certification, the Nevada Supreme Court expressly required that any party seeking class certification must establish the four prerequisites of N.R.C.P. 23 and that a district court must conduct an extensive analysis before certifying a proposed class. *See* Id.

In *Shuette*, decided more than a decade after *Meyer in 2005*, the Nevada Supreme Court never held that a party seeking class certification could do so without providing evidence or simply based on the allegations of a complaint as Plaintiffs have asserted in their Motion. *See* Id. In fact, the Nevada Supreme Court in *Shuette* never cited *Meyer* in the same manner as Plaintiff or as grounds for not establishing the four prerequisites of N.R.C.P. 23 without evidence. *See* Id. In reality, Plaintiffs' reliance on *Meyer* to avoid providing any evidence to establish the requirements of N.R.C.P. 23 is not appropriate in light of *Shuette* and its requirement that a district court conduct an extensive analysis of N.R.C.P. 23 analysis to determine whether class certification is appropriate.

In addition, the federal courts have had a significant sea change regarding the evidentiary burden required for certifying a class. *See e.g., Walmart Stores, Inc. v. Dukes*,

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131 S. Ct. 2541, 2550 (2011). Before certifying a class, a court must conduct a "rigorous analysis" to determine whether a party has met the four prerequisites of Fed. R. Civ. P. 23[1]. *Mazza v. Am. Honda Motor Co, Inc.,* 666 F.3d 581, 588 (9th Cir. 2012). The United States Supreme Court, in *Walmart Stores, Inc. v. Dukes,* has determined that a party seeking class certification must "affirmatively demonstrate" with actual evidence compliance with the requirements of Rule 23. *See,* 131 S. Ct. at 2551 (a party "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."). As demonstrated by these very recent cases, Rule 23 does set forth a simple pleading standard as the one argued in Plaintiffs' Motion. *See Comcast Corp, v. Behrend,* 133 S. Ct. 1426, 1432 (2013) (a party must satisfy through evidentiary proof the requirements of Rule 23). *See also, e.g., Thomas v. Presidential Limousine,* 2015 U.S. Dist. LEXIS 109588 *6 (citations omitted) (a plaintiff is required to provide substantial allegations, supported by declarations or discovery to support even conditional certification of a class). These cases and countless more decided decades after *Meyer*, require Plaintiffs to establish with actual evidence the requirements of N.R.C.P. 23 so that this Court can conduct the extensive analysis required for certifying a class. *See* supra.

After even a cursory review of Plaintiffs' Motion, it is evident that Plaintiffs have failed to establish any of the requirements of N.R.C.P. 23 with even a scintilla of admissible evidence. *See generally,* Plaintiffs' Motion. In truth, the lone evidentiary citation in Plaintiffs' Motion is to the Crazy Horse 3 website to somehow demonstrate numerosity. *See* Id. at 7.

[1] Plaintiffs' Motion relies almost entirely on federal case law to support their arguments. *See generally,* Plaintiffs' Motion. As a result, Defendant also must rely on federal authority to refute Plaintiffs' contentions.

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This total lack of evidence in Plaintiffs' Motion prevents Plaintiff from demonstrating the requirements of N.R.C.P. 23 in the manner required by the Nevada and United States Supreme Courts. *See* supra. Further, this Court cannot conduct its required N.R.C.P. 23 analysis absent any evidence from Plaintiff establishing the requirements of N.R.C.P. 23, including the four prerequisites.

As such, Plaintiffs have failed to establish with actual evidence the requirements of N.R.C.P. 23. Therefore, Plaintiffs' Motion for Class Certification must be denied.

B. Plaintiffs' Motion For Class Certification Must Be Denied Since Plaintiffs' Failed to Identify an Appropriate Proposed Class.

Plaintiffs have proposed the following class:

> All persons who work or have worked at the Club as dancers at any time on or after November 2, 2010 and going forward until the entry of judgment in this action.

Plaintiffs' proposed class is improper since this proposed class does not define properly a definite class of individuals who could actually obtain a judgment against Defendant. *See e.g., Daniel F. v. Blue Shield of Cal.,* 304 F.R.D. 115, 121 (N.D. Ca. 2014). Plaintiffs seeks to include all persons who worked at Defendant's Crazy Horse III Gentlemen's Club since November 2, 2010. This is improper since Plaintiffs' claim for the payment of Nevada's Minimum Wage is subject to a two (2) year statute of limitations[2]. *See* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss and Granting Defendant's Motion to Strike Prayer for Exemplary and Punitive Damages dated June 25, 2015. Previously, this Court ordered that Plaintiffs' claim for the alleged violation of Nevada's Minimum Wage Amendment was subject to a two (2) year statute of limitation. *See* Id. Accordingly, any

[2]Plaintiffs' conceded that their Second Claim for Relief for Unjust Enrichment was pled in the alternative, in order to avoid dismissal by this Court and cannot be relied upon to establish an appropriate statute of limitations. *See* Order dated June 25, 2015.

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proposed class asserted by Plaintiffs must be limited to November 2, 2012, or two years from the November 2, 2014 filing date of Plaintiffs' Complaint. *See* Id. Plaintiffs' Motion must be denied since Plaintiffs have proposed a class commencing from November 2, 2010, which is in excess of the prescribed two (2) year statute of limitation.

C. Plaintiffs' Motion For Class Certification Must Be Denied Since Plaintiffs' No Longer Can Obtain a Judgment Based on Plaintiffs' Complaint After Nevada's Enactment of Senate Bill 224.

As provided by the Nevada Supreme Court in *Shuette*, class action suits allow representatives of a class of similarly situated people to sue on behalf of that class in order to obtain a judgment binding all. *See*, 121 Nev. at 846 (citing *Johnson v. Travelers Insurance Co.*, 89 Nev. 467, 471, 515 P.2d 68, 71 (1973)). Although not included as part of any actual argument supporting Plaintiffs' Motion, Plaintiffs assert a limited number of "facts" essentially contending that Plaintiffs were employees of Defendant and as such were entitled Nevada's minimum wage for work each performed at Defendant's Crazy Horse 3 Gentlemen's Club. *See* Id. at 5. Although not actually a fact, Plaintiffs further conclude as part of their alleged facts that Nevada law is "clear" that exotic dancers are employees of the club at which they perform. *See* Id. (citing *Terry v. Sapphire Gentlemen's Club,* 130 Nev. Adv. Op. 87, 336 P.3d 951, 954 (2014)).

Plaintiffs' conclusion is false. To begin with the Nevada Supreme Court never held in *Terry* that all exotic dancers are employees as a matter of Nevada law. *See Terry,* 130 Nev. Adv. Op. at *18-20. Instead, the Nevada Supreme Court adopted the federal Fair Labor Standards Act's "economic realities" test for employment because the Nevada Legislature had "not signaled its intent that Nevada's minimum wage scheme should not deviate from the federally set course." Id. at *16-17.

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The Nevada Supreme Court in *Terry* then proceed to apply this newly adopted "economic realities" test to the facts in *Terry*. *See* Id. at *18-24. Only after an exhaustive application of the facts in *Terry* did the Nevada Supreme Court hold that Sapphire's Gentlemen's Club was an employer of the exotic dancers who performed there pursuant to NRS 608.011. *See* Id. at *24. At no point in *Terry* did the Nevada Supreme Court hold that all exotic dancers were employees as concluded by Plaintiffs. *See* Id.

Plaintiffs' conclusion is all the more false because of the enactment of Nevada Senate Bill 224. As a direct result of the Nevada Supreme Court's decision in *Terry*, and other related decisions, the Nevada Legislature considered the ramifications of these legal decisions upon the business community in Nevada. *See* Minutes of March 9, 2015 Hearing of the Nevada Senate Committee on Commerce, Labor, and Energy at 5-8, a copy of which is attached hereto and incorporated herein as Exhibit "A." After consideration and in response to *Terry* and other related decisions, Senate Bill 224[3] was proposed in the Nevada Legislature and was enacted and became effective upon the Governor's signature on Jun 2, 2015. *See* Text of Senate Bill 224, a copy of which is attached hereto and incorporated herein as Exhibit "B."

Senate Bill 224 was enacted after the Nevada Supreme Court's decision in *Terry* and after Plaintiffs filed their Complaint establishing "a conclusive presumption that a person is an independent contractor if certain conditions are met," and "excluding the relationship between a principal and an independent contractor from certain provisions governing the payment of minimum wage to an employee." Id. Thus, Senate Bill 224 constitutes the Nevada Legislature's "signal" to the Nevada Supreme Court of its intent to have Nevada's

[3] The codification of the contents of Senate Bill 224 as part of the Nevada Revised Statutes is imminent, but not yet complete. As such, all citations in this Opposition will be to Senate Bill 224 as enacted.

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minimum wage scheme deviate from the federal scheme that the Nevada Supreme Court was searching for in *Terry*. *See* supra.

Senate Bill 224 expressly amended NRS 608.255 to exclude a principal/independent contractor relationship from constituting an employment relationship. *See* Exhibit "B," Sec. 5. Senate Bill also amended NRS Chapter 608 by adding the following new section:

As enacted, SB 224, in part, provides:

> Section 1. Chapter 608 of NRS is hereby amended by adding thereto a new section to read as follows:
>
> 1. For the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:
>
> a.) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;
>
> b.) The person is required by the contract with the principal to hold any necessary state or local business license and to maintain any necessary occupational license, insurance or bonding; and
>
> c.) The person satisfies three or more of the following criteria:
>
> 1. Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.
>
> 2. Except for an agreement with principal relating to the completion schedule, range of work hours or, if the work contracted for in entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.
>
> 3. The person is not required to work exclusively for one principal unless:
>
> I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or
>
> II) The person has entered into a written contracts to provide services to only one principal for a limited period.
>
> 4. The person is free to hired employees to assist with the work.

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5. The person contributed a substantial investment of capital in the business of the person, including, without limitation, the:

I) Purchase or lease of ordinary tools, material and equipment regardless of source;

II) Obtaining of a license or other permission from the principal to access any work space of the principal perform the work for which the person was engaged; and

III) Lease of any work space from the principal required to perform the work for which the person was engaged. The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession which the person engages.

2. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subjection 1 does not automatically create a presumption that the person is an employee.
3. As used in this section, "foreign national" has the meaning ascribed to it in NRS 294A.325. Exhibit "B."

As provided above, SB 224 provides a conclusive presumption that a person is an Independent Contractor if facts exist demonstrating the factors provided in SB 224. *See* Id. Defendant, as part of its Answer and Counterclaims has asserted as a defense to Plaintiffs' Complaint and as part of its allegations supporting its Counterclaims that Plaintiffs each were Independent Contractors who entered into a separate agreement to perform as exotic dancers at Defendant's Crazy Horse III Gentlemen's Club. *See* generally, Answer to Third Amended Complaint and Counterclaims. As a result of SB 224, each Plaintiffs' status as an Independent Contractor is presumed conclusively. *See* supra.

As a result, Defendant's defense is established and Plaintiffs' claims are, on their face, without merit since Plaintiffs' Third Amended Complaint is based solely upon the conclusion that Plaintiffs are Defendant's employees. *See generally,* Plaintiffs' Complaint. If a person is an independent contractor under SB 224 of another party, a person cannot be

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an employee of that same party under the same facts and circumstances subject to the receipt of Nevada's Minimum Wage. *See* Exhibit "B." Accordingly, Plaintiffs cannot be employees of Defendant since there are presumed conclusively to be Independent Contractors under Nevada law. *See* Id.

More importantly, Plaintiffs' Third Amended Complaint fails to demonstrate a prima facie case for the payment of Nevada's minimum wage under Nevada's Minimum Wage Amendment in light of the enactment of SB 224. *See generally,* Plaintiffs' Complaint. Although Plaintiffs' filed their Third Amended Complaint on October 2, 2015, Plaintiffs failed to assert any factual allegations that Plaintiffs were not independent contractors as defined by SB 224. *See* Id.

Absent such allegations, Nevada law, pursuant to the enactment of SB 224 on June 2, 2015, presumes conclusively that Plaintiffs are in fact, independent contractors of Defendant. *See* supra. More importantly, Plaintiffs cannot therefore, be employees of Defendant as a matter of Nevada law subject to the receipt of Nevada's minimum wage.

As such, Plaintiffs' Complaint fails to assert a prima facie case upon which Plaintiffs' could recover in light of the enactment of SB 224. Therefore, Plaintiffs' Motion for Class Certification must be denied since any proposed class cannot recovery any damages from Defendant.

D. Plaintiffs' Motion For Class Certification Must Be Denied Since Plaintiffs Have Not Established the Prerequisite of Numerosity.

The first prerequisite before a class can be certified requires Plaintiffs to establish that the proposed class has so many members that "joinder of all members is impracticable." *Shuette*, 121 Nev. at 847. No minimum threshold exists for establishing the numerosity prerequisite. *See* Id. However, the numerosity prerequisite cannot be speculatively based

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on just the number of class members. *See* Id. (citing *Golden v. City of Columbus,* 404 F.3d 950, 965-66 (6th Cir. 2005). Instead, a party seeking class certification must positively demonstrate (*i.e.,* present evidence), that the joinder of all proposed class members is impracticable. *See* Id. (citation omitted). Pursuant to *Shuette*, district courts examining the circumstances under which an assertion of impracticality is asserted may consider "judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." Id. (quotation omitted).

Based on the actual requirements for establishing the numerosity prerequisite, Plaintiffs' Motion must denied because Plaintiffs have not demonstrated positively that joinder of all proposed class members is impracticable. *See* infra. First, Plaintiffs' Motion contends that class size alone justifies class certification. *See* Plaintiffs' Motion at 7. This declaration is false in light of *Shuette*, which expressly states that joinder impracticability cannot be based just on a speculated number of potential class members. *See Shuette,* 121 Nev. at 847. Instead, Plaintiffs must "positively demonstrate" with specific facts and the Court must conduct an "examination of the specific facts" against certain factors to determine whether joinder is impracticable. Id.

Plaintiffs' Motion fails to set forth any facts or reference any evidence for the Court to examine. *See* Plaintiffs' Motion at 7. Plaintiffs' Motion only provides a self-serving "estimate" that "scores if not hundreds of dancers" work at Defendant's Crazy Horse III club during a week. *See* Id. Plaintiffs' "estimate" is not evidence and in reality, constitutes the very speculation of number that the Nevada Supreme Court stated cannot be relied upon

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to establish impracticability. *See Shuette*, 121 Nev. at 847. As the Nevada Supreme Court stated in *Shuette*, the joinder of hundreds of plaintiffs, as Plaintiff have alleged here, may not prove impracticable after the Court's examination and application of the factors that may be considered. *See* Id. Plaintiffs' Motion prevents such an examination since Plaintiffs have failed to set forth any evidence establishing this prerequisite. *See* Plaintiffs' Motion at 7.

Further, Plaintiffs' Motion merely identifies some of the factors that the Court may consider. *See* Id. However, Plaintiffs' Motion does not identify any specific facts from its case that could establish those factors upon examination. *See* Id. In addition, Plaintiffs' Motion fails to provide any analysis as to how such facts could establish the factors that the Court may consider in determining whether joinder is impracticable. *See* Id. *Cf. Shuette*, 121 Nev. 837. The entirety of Plaintiffs' argument for numerosity consists of nothing more than their own unfounded "estimate" of the number of dancers who perform at Defendant's Crazy Horse III club during a week. *See* Id.

As such, Plaintiffs have failed to "positively demonstrate" that that joinder of all of the potential members of the proposed class is impracticable as required by *Shuette*. As a result, the Court cannot conduct its required examination of the circumstances under which Plaintiffs have asserted impracticability. Therefore, Plaintiffs have failed to establish the prerequisite of numerosity required by N.R.C.P. 23(a) and Plaintiffs' Motion must be denied.

E. Plaintiffs' Motion For Class Certification Must Be Denied Since Plaintiffs Have Not Established the Prerequisites of Commonality and Typicality.

The second prerequisite required before a class can be certified requires Plaintiffs to establish that the proposed class has common questions of law and fact. *Shuette*, 121 Nev.

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at 848. Questions of law and fact are common to a proposed class when their answers as to one class member hold true for all. *See* Id.

Plaintiffs' Motion contends that commonality is met in this case because Plaintiffs allege that their claims are based on a common question of law – whether a strip club is the employer of its dancers. *See* Plaintiffs' Motion at 9. Plaintiffs' further contend that this legal question will be determined with reference to the common questions of fact established by the total of the circumstances of the working relationship's reality. *See* Id. (citing *Terry*, 130 Nev. Adv. Op. 87, 336 P.3d at 960).

Inherent in the requirements of N.R.C.P. 23(a)(2), is the requirement that a valid question of law or fact must be identified. In light of the enactment of SB 224 by the Nevada Legislature, Plaintiffs' declaration of a common question of law and fact are no longer questions of law or fact answerable at trial. As provided above, SB 224 was enacted specifically as a result of the Nevada Supreme Court's decision in *Terry* and the "totality of circumstances" analysis adopted therein. *See* Exhibit "A." SB 224 was further enacted to clarify the definition of an Independent Contractor in light of the Nevada Supreme Court's decision in *Terry* and other related cases. *See* Id.

SB 224 operates to define an independent contractor under Nevada law and the manner in which any Nevada court conducts an analysis of whether Plaintiffs are or are not independent contractors (*i.e.,* a conclusive presumption of independent contractor status in Nevada and an analysis of specific factors prescribed by statute). *See* Exhibits "A" and "B." As such, Plaintiffs' asserted common question of law of whether Plaintiffs were employees of Defendant is no longer at issue in light of SB 224. Instead, the question of law that must be answered is whether Plaintiffs were independent contractors as now conclusively

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presumed under Nevada law. If that answer is affirmative, then Plaintiffs are not employees of Defendant as a matter of Nevada law and no longer have any claims against Defendant.

Based on the circumstances of this case, a determination of whether Plaintiffs were independent contractors who performed at Defendant's Crazy Horse III club must be answered first and on an individual basis with each Plaintiff. *See* Exhibit "B." Consequently, Plaintiffs' asserted common question of whether Plaintiffs are employees of Defendant is moot once the question of whether Plaintiffs are an independent contractors is answered, which pursuant to SB 224 is conclusively presumed[4].

Therefore, the common question of law identified by Plaintiffs is not a valid question of law that can be or will be answered at trial. Since Plaintiffs have not identified an actual common question of law to be adjudicated at trial, Plaintiffs have not established the prerequisite of commonality.

For similar reasons, Plaintiffs asserted common question of fact no longer is a relevant question under the circumstances of this matter and cannot be utilized to establish the prerequisite of commonality. Plaintiffs' contend that their common legal question of employment will be determined with reference to the common questions of fact established by the totality of the circumstances of the working relationship's reality. *See* Id. (citing *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d at 960).

Plaintiffs' assertion is incorrect. Any determination of Plaintiffs' independent contractor status no longer will be established by the "totality of the circumstances" analysis conducted in *Terry* and asserted by Plaintiffs. *See* Exhibits "A" and "B." Instead, SB 224 provides a

[4] Plaintiffs' Motion also relies on extensive string citations of cases alleging to certify classes of employer/employee disputes. *See* Plaintiffs' Motion at 6 and 8. All of these cases are irrelevant as none have certified a class based on Nevada's enactment of SB 224 or in light of a conclusive presumption of independent contractor status.

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statutory scheme for determining whether Plaintiffs are or are not independent contractors, which includes a conclusive presumption that Plaintiffs are independent contractors under Nevada law. *See* Id. Any legal analysis of Plaintiffs' status as independent contractor must be conducted in the manner prescribed by SB 224 (*i.e.,* a determination of whether certain factors exist conclusively presuming independent contractor status).

As a result, Plaintiffs' assertion that *Terry* and the "totality of circumstances" analysis conducted therein no longer can be relied upon. *Cf.* SB 224. As a result, Plaintiffs have not identified an actual common question of fact that can be adjudicated at trial. Therefore, Plaintiffs have not established the prerequisite of commonality and Plaintiffs' Motion must be denied.

The third prerequisite required before a class can be certified requires Plaintiffs to establish that the claims or defenses of the representative parties are typical of the class. *See* Id. In order to satisfy this prerequisite, Plaintiffs must show that "each class member's claim arises from the same course of events and each class member makes similar legal arguments" to prove Defendant's liability[5]. *See* Id. (citation omitted).

Plaintiffs' Motion again fails to meet this prerequisite. In truth, Plaintiffs' Motion fails to even address the prerequisite of typicality, let alone establish this prerequisite. *See* Plaintiffs' Motion at 9. Plaintiffs' Motion offers no evidence, references no allegations, and provides no legal analysis as to how the representative Plaintiffs' claims are typical of the class. *See* Id. Plaintiffs' Motion offers no argument establishing what course of events are the same amongst the class and the representative Plaintiffs. *See* Id.

[5] Plaintiffs' Motion combines their arguments for commonality and typicality. *See* Plaintiffs' Motion at 8-9. Accordingly, Defendant's Opposition addresses Plaintiffs' arguments in the same manner.

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Instead, Plaintiffs' Motion regarding typicality merely concludes that it has met this prerequisite because the representative Plaintiffs' claims "hinge upon" the same common question of law – whether they were employees of Defendant. As already provided above, Plaintiffs' asserted common question of law is no longer valid in light of the enactment of SB 224. *See* supra. As such, Plaintiffs' conclusion that the representative Plaintiffs' claims are typical of the class only because of this asserted common question of law fails to establish the prerequisite of typicality. Therefore, Plaintiffs' Motion must be denied.

F. Plaintiffs' Motion For Class Certification Must Be Denied Since Plaintiffs Have Not Established the Prerequisite of Adequacy.

The fourth prerequisite before a class can be certified requires Plaintiffs to establish that the representative Plaintiffs have the ability to "fairly and adequately protect the interests of the class." *Shuette*, 121 Nev. at 849. Plaintiffs' Motion concludes that the named Plaintiffs are capable of fairly and adequately representing a class of both former and current employees of Defendant because both former and current employees are interested equally in obtaining compensation for the unlawful practices alleged in their Complaint. *See* Plaintiffs' Motion at 10. Plaintiffs' Motion further concludes that each named Plaintiff "understands what is at stake in this lawsuit and is willing to perform their duties as class representatives." *See* Id.

Entirely absent from Plaintiffs' Motion is any affidavit or declaration of each named Plaintiff acknowledging such an understanding. *See* Id. As such, Plaintiffs have not established in the manner required by Nevada law that their representation of the proposed class is adequate in the manner required by N.R.C.P. 23 (a)(4). *See e.g., Thomas v. Presidential Limousine,* 2015 U.S. Dist. LEXIS 109588 *6 (citations omitted) (unsupported

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assertions of widespread violation are not sufficient. "A plaintiff is required to provide substantial allegations, supported by declarations or discovery.").

Despite Plaintiffs' unsupported conclusion that no conflicts exist between the named Plaintiffs and the proposed class, an actual conflict arises from Plaintiffs' pursuit of restitution of "all fees, fines, and other monies" allegedly extracted or withheld by Defendant. *See* Plaintiffs' Third Amended Complaint at 6. In certifying a class, demands for reimbursement or restitution can create an unresolvable conflict preventing the certification of a class. *See e.g., Harris v. Vector Mktg. Corp,* 753 F.Supp 2d 996, 1022 (N.D. Ca. 2010) (reimbursements can prevent certification because there may be substantial variance as to what kind of expenses were incurred); and *Guifu Li. v. A Perfect Day Franchise, Inc.,* 2011 U.S. Dist. LEXIS 114821 (N.D. Ca. October 5, 2011) (denying certification where plaintiffs failed to narrow claim to any specific expense or category of expense on a class wide basis).

Plaintiffs' Third Amended Complaint alleges that individual dancers at Defendant's Crazy Horse III Gentlemen's Club were subject to various monetary fines, fees, and payments. *See* Plaintiffs' Third Amended Complaint at 4. Consequently, Plaintiffs pray for the restitution of all fees, fines, and other monies extracted or withheld by Defendant. *See* Id. at 6. Such a prayer, on its face, creates an unresolvable conflict amongst the class members as the amounts of fines, fees, etc., incurred by Plaintiffs vary substantially amongst and in fact, are unique to the individual who incurred these fines, fees, etc. As such, it is impossible to determine or calculate such amounts on a class wide basis. *See* supra. Accordingly, the representative Plaintiffs do not and cannot adequately protect the interests

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of the proposed class regarding the restitution of the fines, fees, and other payments incurred by each Plaintiff.

As demonstrated above, Plaintiffs Motion must be denied since Plaintiffs have failed to establish the prerequisite of Adequacy.

G. Plaintiffs' Motion For Class Certification Must Be Denied Since Plaintiffs Have Not Established Whether Proposed Classes Are Sufficiently Cohesive to Warrant Adjudication by Representation as Required by N.R.C.P. 23(b).

In addition to establishing the four (4) prerequisites required by N.R.C.P. 23(a), Plaintiffs also must meet one of three conditions provided by N.R.C.P. 23(b). *See Shuette,* 121 Nev. at 849-50. Plaintiffs' Motion attempts to meet this obligation through N.R.C.P. 23(b)(3) by asserting that common questions of law or fact predominate over individual questions, and a class action is superior to other methods. *See* Plaintiffs' Motion at 11-13.

1. Individual Questions Predominate So That Class Action Is an Inappropriate Method of Adjudication.

The predominance prong of N.R.C.P. 23(b)(3) requires that the proposed class members have common questions of law and fact that are significant to the substantive legal analysis of the class members' claims. *See Shuette,* 121 Nev. at 850 (citations omitted). Common questions of law or fact predominate individual questions if they "significantly and directly impact each class member's effort to establish liability and entitlement to relief." Id. (quotations omitted).

As with all aspects of Plaintiffs' Motion, Plaintiffs again failed to establish the required predominance. Instead, Plaintiffs' Motion only offers a litany of cases that purportedly establish that employer/employee liability cases somehow create a *de facto* predominance. *See* Plaintiffs' Motion at 11 (citing *Ruffin v. Entm't of the E. Panhandle*, 2012 WL 5472165 at *10 (N.D. W.Va. 2012); *Iglesias-Mendoza v. La Belle Farm, Inc.,* 239 F.R.D. 363, 373

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(S.D. N.Y. 2007); *Williams-Green v. J. Alexander's Restaurants, Inc.,* 277 F.R.D. 374, 383 (N.D. Ill 2011); and *Ansoumana v. Gristede's Operating Corp.,* 201 F.R.D. 81, 89 (S.D. N.Y. 2001). Besides not being cases remotely on point, precedential in this jurisdiction, or even occurring in jurisdictions West of the Mississippi River, none of the cases are relevant in this matter. These cases are not relevant because none of them considered the issue of predominance in light of the Nevada Legislature's enactment of SB 224. *See* supra.

As provided in *Shuette,* when the facts and the law necessary to resolve claims vary from person to person, taking into account the defenses presented, or when resolution of common questions would result in a superficial adjudication depriving a party of a fair trial, individual questions predominate and a class action is improper. *See,* 121 Nev. at 851. The application of SB 224 and its subsequent statutory provisions creates a circumstance where individual questions predominate as a matter of Nevada law.

As enacted, SB 224, in part, provides:

> Section 1. Chapter 608 of NRS is hereby amended by adding thereto a new section to read as follows:
>
> 4. For the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:
>
> d.) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;
>
> e.) The person is required by the contract with the principal to hold any necessary state or local business license and to maintain any necessary occupational license, insurance or bonding; and
>
> f.) The person satisfies three or more of the following criteria:
>
> 6. Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.

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7. Except for an agreement with principal relating to the completion schedule, range of work hours or, if the work contracted for in entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.

8. The person is not required to work exclusively for one principal unless:

III) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or

IV) The person has entered into a written contracts to provide services to only one principal for a limited period.

9. The person is free to hired employees to assist with the work.

10. The person contributed a substantial investment of capital in the business of the person, including, without limitation, the:

IV) Purchase or lease of ordinary tools, material and equipment regardless of source;

V) Obtaining of a license or other permission from the principal to access any work space of the principal perform the work for which the person was engaged; and

VI) Lease of any work space from the principal required to perform the work for which the person was engaged. The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession which the person engages.

5. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subjection 1 does not automatically create a presumption that the person is an employee.

6. As used in this section, "foreign national" has the meaning ascribed to it in NRS 294A.325.

As explained above, Defendant's defense to Plaintiffs' Complaint is that Plaintiffs were never employees of Defendant, but independent contractors. *See* supra. As provided previously, SB 224 amends Chapter 608 to exclude Independent Contractors from any obligation to be paid Nevada's minimum wage and to establish the conclusive presumption that a person is an independent contractor under Nevada if certain elements are found. *See* Id. On their face, these criteria for establishing whether a person is conclusively presumed

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an Independent Contractor requires an independent and individual analysis of each Plaintiff and whether the required facts demonstrating the required elements exist as to each. *See* Id.

Consequently, it is impossible for any common questions of fact or law to exist because the determination of whether each Plaintiff or potential Plaintiff is or is not an independent contractor requires a unique factual determination that could be comprised of facts wholly different from any other Plaintiff, but yet still conclusively presume that such an individual was an Independent Contractor. *See* Id. SB 224 plainly creates a situation where individual facts demonstrating or not demonstrating whether a person is an Independent Contractor vary enormously from person to person. *See* Id.

For example, on person could be a foreign national and another have filed for a Social Security Number. *See* Id. Another person, who is a foreign national may have met the first three of the five criteria provided in Section 1(c). *See* Id. Another person, who filed for a Social Security Number may meet the last three of the five criteria provided in Section 1(c). *See* Id. All of which would still be conclusively presumed an Independent Contractor under SB 224. *See* Id.

In truth, the possible combinations of facts that could render a Plaintiff an Independent Contractor under SB 224 are nearly endless and certainly too voluminous for a common question of fact or law to predominate over these now required, individual determinations of whether each Plaintiff is or is not an Independent Contractor under SB 224. *See* Id. As such, the facts and law necessary to resolve each Plaintiffs' claims in light of Defendant's defense that each is an Independent Contractor under Nevada law are too various and predominate over any common question of law or fact. Accordingly, a class action is not appropriate.

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2. A Class Action Is Not the Superior Method of Adjudicating Plaintiffs' Claims.

The superiority prong of N.R.C.P. 23(b)(3) requires Plaintiffs to establish that the superior method for adjudicating Plaintiffs' claims. *See Shuette,* 121 Nev. at 851-52 (citations omitted). Plaintiffs' Motion contends that class is the superior method of adjudication because (1) the pursuit of individual claims would burden the judiciary; (2) concentrates the litigation in this forum where Defendant resides and a large number of Plaintiffs reside; (3) no other litigation is ongoing; (4) many potential plaintiffs are currently employed by Defendant and may be apprehensive about filing an individual claim; (5) and no difficulties will arise in managing the class; and 6) absent a class many plaintiffs will be financially unable to pursue an individual claim. *See* Plaintiffs' Motion at 12-13. Essentially, Plaintiff provided a conclusory statement for each of the factors that may be considered in determining whether a class action is the superior method of adjudication. *See Shuette,* 121 Nev. at 852.

In addition, to once again failing to provide any evidence supporting these conclusions, Plaintiffs forgot that any analysis of superior must also include a determination of whether other adjudication methods would allow for efficient resolution without compromising any parties' claims or defenses. *See* Id. Here, it is the proposed class action that compromises Defendant's counterclaims and defenses. *See* supra.

In order to maintain a class action, Plaintiffs must have common questions of fact or law. *See* N.R.C.P. 23. As explained above, the enactment of SB 224 prevents the existence of any common questions of law or facts because Defendant, in defense of Plaintiffs' claims, has asserted that Plaintiffs are Independent Contractors. *See* supra. SB 224 requires that each person alleged to be an Independent Contractor is conclusively presumed to be an

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Independent Contractor if facts exist demonstrating the criteria set forth in SB 224. *See* Id. Accordingly, no common set of facts or law can exist amongst Plaintiffs because the facts surrounding each Plaintiff must be applied to SB 224 to determine whether each Plaintiff is conclusively presumed to be an Independent Contractor under Nevada law. *See* Id. The facts of each Plaintiff are unique to that Plaintiff as described by SB 224 and cannot be common to any other Plaintiff. *See* Id.

As a result, a class action is not a superior method of adjudication because Defendant's defense that each Plaintiff was an Independent Contractor would not allow for an efficient resolution of each Plaintiff's claims without compromising Defendant's Independent Contractor defense. *See Shuette,* 121 Nev. at 852. Further, the facts establishing whether each Plaintiff is or is not an Independent Contractor vary greatly and could never be managed efficiently as part of any class action. *See* Id. The possible subclasses would swallow the proposed class.

As such, Plaintiff's proposed class action is not superior to individual resolution of Plaintiffs' claims and therefore, Plaintiffs' Motion must be denied.

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IV. CONCLUSION

Based on the arguments provided above, Defendant respectfully requests that this Court deny Plaintiffs' Motion for Class Certification.

DATED this 16th day of May 2016.

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Exhibit “A”

MINUTES OF THE
SENATE COMMITTEE ON COMMERCE, LABOR AND ENERGY

Seventy-Eighth Session
March 9, 2015

The Senate Committee on Commerce, Labor and Energy was called to order by Chair James A. Settelmeyer at 9:05 a.m. on Monday, March 9, 2015, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator James A. Settelmeyer, Chair
Senator Patricia Farley, Vice Chair
Senator Joe P. Hardy
Senator Becky Harris
Senator Mark A. Manendo
Senator Kelvin Atkinson
Senator Pat Spearman

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Policy Analyst
Renee Fletcher, Committee Secretary

OTHERS PRESENT:

Bryan Gresh, Nevada Business Owners Education Association
Nick Phillips, Nevada Business Owners Education Association
Zev Kaplan, Nevada Business Owners Education Association
Marty Weaver, Euphoria Salons and Day Spas
Teresa McKee, Nevada Association of Realtors
Paul Enos, Nevada Trucking Association
Ray Bacon, Nevada Manufacturers Association
James P. Kemp, Nevada Justice Association
Leon Greenberg, Nevada Justice Association
Andrew Rempfer, Nevada Justice Association
Mark Thierman, National Employment Lawyers Association

Nathan Ring, Laborers' International Union, Local 872; Bricklayers Local 13 Labor Management Cooperation Committee
Richard Daly, Laborers' International Union of North America
Jack Mallory, Southern Nevada Building and Construction Trades Council
Modesto Gaxiola, United Union of Roofers, Waterproofers and Allied Workers, Local 162
Chris Ferrari, Associated General Contractors, Las Vegas; Nevada Contractors Association
Leon Mead, Senior Construction Counsel; Board of Directors, Associated General Contractors, Las Vegas
Bryce Clutts, President, DC Building Group
Sean Stewart, Executive Vice President, Nevada Contractors Association; Associated General Contractors, Las Vegas
Zach Parry, Associated General Contractors
Boyd Martin, Owner, Boyd Martin Construction
Dennis Davis
Janice Flanagan
Pat Sanderson, Laborers' International Union, Local 872

Chair Settelmeyer:
We have a request for Committee introduction of numerous bill draft requests (BDRs).

BILL DRAFT REQUEST 53-986: Revises provisions relating to workers' compensation. (Later introduced as Senate Bill 231.)

SENATOR HARDY MOVED TO INTRODUCE BDR 53-986.

SENATOR FARLEY SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

* * * * *

BILL DRAFT REQUEST 53-990: Revises provisions relating occupational safety. (Later introduced as Senate Bill 233.)

SENATOR HARDY MOVED TO INTRODUCE BDR 53-990.

SENATOR HARRIS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

*****

BILL DRAFT REQUEST 53-987: Makes various changes relating to workers' compensation. (Later introduced as Senate Bill 232.)

SENATOR HARDY MOVED TO INTRODUCE BDR 53-987.

SENATOR HARRIS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

*****

Chair Settelmeyer:
I will now open the hearing on Senate Bill (S.B.) 224.

SENATE BILL 224: Revises provisions relating to employment. (BDR 53-985)

Bryan Gresh (Nevada Business Owners Education Association):
The Nevada Business Owners Education Association (NBOEA) supports S.B. 224.

Nick Phillips (Nevada Business Owners Education Association):
Senate Bill 224 is very personal to me, as I have been an independent contractor for many years. Independent contractors are a vital part of our business environment and economy. The NBOEA was formed in 2014. The Association's goal is to help monitor and inform smaller businesses of legislative matters.

Senate Bill 224 was established due to a couple of Nevada Supreme Court decisions. These court cases found some laws were unclear; therefore, the courts chose to apply testing to determine who is considered an independent contractor or an employee. The chosen test parameters are expansive and

ultimately shows the vast majority of all workers in Nevada would test as an employee. This particular testing scheme does not put any workers in the independent contractor category.

As independent contractors, we fill a vital role in Nevada's economy. Independent contractors appreciate the ability to work with a multitude of different companies not likely to be able to afford skilled employees. Independent contractors also enjoy the freedom to control work hours.

Zev Kaplan (Nevada Business Owners Education Association):
The purpose of S.B. 224 is to define independent contractors consistently as found throughout *Nevada Revised Statutes* (NRS). Independent contractor is not defined in NRS 608. However, definitions can be located in NRS 286.045, 333.700, 463.0164, 616A.255, 616B.639 and 617.120.

As mentioned by Mr. Phillips, the Nevada Supreme Court decisions noted that the Nevada Legislature had not adopted its own test or standard as to how courts or administrative agencies would determine who meets the criteria of an independent contractor. In section 2 of S.B. 224, the intent is to add the definition of independent contractor consistent with other NRS chapters.

There are eight factors listed in section 2 that must be considered by courts or administrative agencies in determining if an individual is an independent contractor. The intent is such that an independent contractor does not need to meet all eight factors, rather a weighting of some portion of the factors listed. It is NBOEA's suggestion that only a couple factors are necessary to satisfy the requirements to be considered an independent contractor.

The balance of S.B. 224 addresses specific issues which legislative counsel identified to clarify language to add consistency with other NRS chapters. Section 7 provides safeguards for individuals currently contesting the language through court or an administrative agency. Section 7 would serve as guidance to courts and agencies as to the appropriate standard for determining who is an independent contractor.

Senator Hardy:
Does the federal government have a list of factors to define an independent contractor? How many of those factors must an individual meet to satisfy the requirement?

Mr. Kaplan:
The federal standard would not apply if the action were based upon state law. The federal standard only applies to cases brought under the federal Fair Labor Standards Act (FLSA). Since Nevada does not have a standard test specified in NRS, courts can decide to follow the federal law. With passage of S.B. 224, Nevada courts and administrative agencies would be free to use State law instead of trying to interpret federal law that may not apply.

Senator Hardy:
Would the State law override federal law regarding the definition of an independent contractor?

Mr. Kaplan:
Yes, the State law would override federal law unless the case is brought under the federal FLSA.

Senator Harris:
What is the difference between the proposed definition of an independent contractor in S.B. 224 and the federal standard?

Mr. Kaplan:
The federal standard is weighted in a manner of how much control is exerted over an individual and whether there is a profit motive. Based on court cases, it is almost impossible to be classified as anything other than an employee under the federal standard. The language of S.B. 224 would preserve the definition of an independent contractor that has existed for many years.

When deciding the language in S.B. 224, the standards of common law were used. Many standards are used under federal law, and the IRS uses other standards. The multiple standards cause confusion for small business owners. Court decisions can be applied retroactively for past wages, penalties and fines. Many small business owners or independent contractors do not employ legal counsel that can help decipher the different rules, regulations, standards and laws.

Senator Manendo:
How many lawsuits are pending? Are they class action lawsuits?

Mr. Kaplan:
Decided last year, *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951 (2014) was originally litigated in district court where the individuals were determined to be independent contractors. The Nevada Supreme Court followed the federal standard test, thus determining the individuals were considered employees. Court decisions can be retroactive, affecting any individual facing a determination by a State agency having jurisdiction under NRS 608, or a class action lawsuit, or enforcement action suit. These individuals can be liable for 2 years of back wages.

Senator Manendo:
How many cases are pending? Would this legislation impact current cases, and would it be fair to the litigants?

Mr. Kaplan:
I believe there are three or four cases pending. Yes, S.B. 224 would impact current cases, which would be beneficial to independent contractors.

Mr. Phillips:
Regarding retroactive court decisions, every organization in the State that uses independent contractors is at risk for up to 2 years of back wages, penalties and business taxes, which could total in the millions of dollars of retroactive liability. For many years, there have been exemptions for minimum wage workers such as taxi drivers, limo drivers, babysitters and commissioned salespersons.

The economic realities test applied by the Nevada Supreme Court is the most expansive version of any employment test according to the U.S. Department of Labor. The majority of workers taking the economic realities test end up being classified as an employee instead of an independent contractor.

Chair Settelmeyer:
When was the Nevada Supreme Court ruling? Did this ruling invalidate current law?

Mr. Kaplan:
There were two Nevada Supreme Court rulings in 2014. One case, *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), involved an interpretation of the Nevada Constitution whether cab drivers were

classified as employees or independent contractors. When an amendment was passed on section 16 of Article 15 of the Nevada Constitution to increase minimum wage, the Supreme Court also defined the terms, "employee" and "employer." The definitions and terminology are very broad and vague. The court ruling on *Thomas* took out specific exemptions for independent contractors created in NRS 608 by the Legislature and removed necessary protection for independent contractors.

The other Supreme Court decision mentioned earlier, the *Terry* case, clearly stated there was no standard State test within NRS 608; therefore, the Supreme Court can use any test it desires.

Chair Settelmeyer:
What months and years were the Supreme Court decisions finalized?

Mr. Phillips:
The *Thomas* case was decided in June 2014, and the *Terry* case was decided in October 2014.

Senator Atkinson:
Is section 3 of S.B. 224 about independent contractors, or does it affect all minimum wage claims?

Mr. Phillips:
The argument is not if an individual is an employee, rather if an individual is an independent contractor and signs an agreement. This would affect minimum wage claims if there were a dispute of whether an individual is or is not an employee.

Senator Atkinson:
Are all minimum wage employees affected?

Mr. Phillips:
No, not all minimum wage employees would be affected. If a person works at McDonald's or other minimum wage establishments, there is no dispute about an individual being an employee. It is clear that someone is an employee if that person is on the payroll and taxes are withheld. It is not clear if an individual signs an agreement to provide services to a company, then the dispute is whether that person is or is not an employee.

Senator Atkinson:
Should every individual sign a consent form? If there is an action to recover lost wages, would this eliminate class action lawsuits?

Mr. Phillips:
The forms are signed only when would be a dispute over whether the individual is or is not an employee. There is no dispute about most minimum wage workers; it is clear that they are classified as employees. Disputes arise with independent contractors trying to prove they are not classified as employees.

Senator Farley:
Can you give an actual example of who is affected by the current law and who is impacted by the change?

Mr. Phillips:
Senate Bill 224 would protect workers such as real estate salespersons, cosmetologists, hair stylists, financial services salespersons, dancers and many others. There are large numbers of people who are clearly independent contractors who meet standards testing.

Mr. Kaplan:
There are employees hired by a company and independent contractors who sign an agreement to perform some specific service for an agreed upon amount of money. Section 3 is intended for the individual who signs an agreement to perform a service. The intent is to have the independent contractor sign a consent form as part of the filing record with the court or agency that has jurisdiction indicating the independent contractor is aware he or she is filing a claim.

Senator Atkinson:
What happens if someone does not understand the contents of the contract?

Mr. Kaplan:
If someone who signed the contract later states he or she did not understand what was being signed, then legally there is no contract; it becomes null and void. Frequently, there is no signed contract. The independent contractor may perform a service and provide an invoice after completion.

Senator Spearman:
Does S.B. 224 target all minimum wage employees? What is the time limit to recover damages?

Mr. Kaplan:
The intent of S.B. 224 is not to target minimum wage earners, rather to clarify who can be classified as an independent contractor.

Senator Spearman:
What about a large business that hires an individual who wears the company's uniform and collects a paycheck from that business, yet does not receive any health care benefits?

Mr. Kaplan:
If an individual wearing a company's uniform receives a paycheck, he or she is an employee of that company whether or not there are benefits received; therefore, S.B. 224 would not apply to him or her.

Senator Atkinson:
Would you be agreeable to an amendment that is much more specific to defining an independent contractor and does not apply to employees?

Mr. Kaplan:
Yes, we would be agreeable to such an amendment.

Senator Harris:
How would S.B. 224 affect a daily or temporary staffing agency? Is the agreement between the employer and the worker, the staffing agency and the employer, or the staffing agency and the individual? Is the individual working through the staffing agency an employee or an independent contractor?

Mr. Kaplan:
A staffing agency is the employer of the individual and the independent contractor to the company using the temporary staff.

Senator Harris:
Some staffing agencies view themselves as intermediaries between individuals and companies; how will S.B. 224 impact that relationship?

Mr. Kaplan:
There is a fact-based factor test that will determine if an individual, agency or company is considered an employee or an independent contractor.

Marty Weaver (Euphoria Salons and Day Spas):
Euphoria Salons and Day Spas are one of the largest salon chains in Nevada with more than 200 independent hair stylists and nail technicians who rent stations. Each individual sets his or her own work schedule and prices, makes appointments and pays rent for his or her station. The amount of rent paid for any particular station is dependent on the type and space of the station as well as the location of the salon.

A requirement of each individual is to post a valid cosmetology license at his or her station while working in the salon. I have owned and managed many salons. Over 90 percent of licensed cosmetologists are independent contractors, and I know they all like their independent status. If the cosmetologists working in my salons were forced to change their classification from independent contractor to employee, every worker would leave.

Teresa McKee (Nevada Association of Realtors):
The Nevada Association of Realtors supports S.B. 224. Realtors have been granted different status, under the federal test by the IRS and the Affordable Care Act. The status of independent contractor is a very critical issue for Realtors and real estate licensees across the Nation.

Our Association spoke with the National Association of Realtors' attorneys who have verified our unique status requirement. I agree with Mr. Kaplan's testimony regarding the criteria an individual must meet to be classified as an independent contractor. Although Realtors have a unique status, we would only meet subsections 5 and 6, consistently, of the eight factors listed in section 2 of S.B. 224. The test factor listed in subsection 1 regarding the freedom to set the days and hours would be met; however, the second part states being substantially free from control and direction of the person's principal. Realtors would fail because State law requires Realtors be supervised by their brokers. Subsection 3 refers to being free to offer the same services to competitors, yet by law, agents can only perform services for one broker at a time.

The point is, if Realtors would only meet two of the eight test factors, and still be considered independent contractors, then it should be allowed for other

independent contractors. The Nevada Association of Realtors is offering a friendly amendment (Exhibit C), not to change the proposed test factors, but to add an inclusion to address licensees under NRS 645.

Paul Enos (Nevada Trucking Association):
The Nevada Trucking Association supports S.B. 224, which provides clarity to the classification of independent contractors. Out of 6,100 trucking companies, approximately 60 percent of the drivers are one-truck owner-operators, independent contractors, that lease themselves to one or more trucking companies. We agree that an individual should not have to meet all eight factors listed in section 2, but that it should be a weighted test. Owner-operators are definitely independent contractors; however, they would not meet all factors such as subsection 2, because their work is not established independently of the principal.

Ray Bacon (Nevada Manufacturers Association):
In manufacturing, it is the smaller companies needing technical expertise but do not have a high demand or assistance needed on a daily basis. These smaller companies would hire independent contractors such as computer technicians, and services for machine repair, machine programming, product engineering, process improvement, software implementation, training operations and industry quality standards.

James P. Kemp (Nevada Justice Association):
The Nevada Justice Association is opposed to S.B. 224, particularly section 3. The current language would affect all employees. Section 3 does not clearly indicate intent to impact only independent contractors. The only protection is given to the worst employers preying on the weak and poor via wage theft. Employers not obeying rules try not to pay minimum wage, putting law-abiding employers at a competitive disadvantage. Senate Bill 224 makes it easier for employers to engage in wage theft.

There is some necessity for independent contractors; however, it is poor public policy to encourage that relationship due to taxes, unemployment contributions and workers' compensation insurance, which is bad for our economy.

Leon Greenberg (Nevada Justice Association):
I was counsel for the cabdrivers on the *Thomas* court case. To clarify an earlier statement, cabdrivers are considered employees, not independent contractors.

Everyone in the taxi industry is on a company payroll and classified as employees. Section 3 of S.B. 224 is not limited to disputes regarding the status of an employee versus an independent contractor. As drafted, S.B. 224 would affect any employee who brings a claim or benefits from someone else bringing a claim for unpaid wages. Courts would be prevented from ordering an employer to pay all employees any money owed based on minimum wage earnings. Section 3 gives a free pass to employers not respecting the minimum wage standards. Employees will be reluctant to identify themselves as making a claim for unpaid wages if the court will only back the employer, who may now retaliate against the employee. It is best for Nevada's economy when businesses play by the same rules and fairness of competition.

Andrew Rempfer (Nevada Justice Association):
I am 100 percent opposed to S.B. 224. In 1964, a wage earner named Leon Wynkoop fought a claim, *National Labor Relations Board v. Drives, Inc.*, 440 F.2d 354 (1971) for 7 years, all the way to the U.S. Court of Appeals for the Seventh Circuit, for a 10-cent wage increase because it was the right thing to do. He eventually won. The dignity and hard work of an employee should be rewarded with an appropriate wage. Senate Bill 224 is a subtle degradation of an employee's personal rights such as earning overtime wages. Independent contractors do not have rights to overtime or to join in class actions. This bill will take away the right of employees to earn pay for work performed.

Senator Atkinson:
Does section 3 apply to independent contractors or minimum wage earners?

Mr. Kemp:
Section 3 does not apply to independent contractors. It applies to minimum wage employees as listed in section 16 of Article 15 of the Nevada Constitution, which only applies to all employees in Nevada earning minimum wage.

Senator Hardy:
Are you opposed to amending section 3 if language was clarified to protect minimum wage employees? Are you opposed to or in favor of the language defining an independent contractor in section 2?

Mr. Kemp:
Our Association would be interested to see any proposed amendment. Many parts of S.B. 224 could easily be manipulated.

Mark Thierman (National Employment Lawyers Association):
Senate Bill 224 will only help the underground economy avoid paying taxes. In the case of *Terry*, the Sapphire Club is a strip joint, which should have been paying its taxes lawfully by classifying the workers as inside salespeople being paid commissions, instead of independent contractors.

This bill will impact a problem that could have been taken care of by the employers had they classified their workers correctly. Regardless of state legislation, there are the FLSA and other federal government rules. Some Nevada companies believe they are conforming to proper regulations set by the Nevada Labor Commissioner or Nevada tax authority, and then the federal government penalizes the companies. Section 2 of S.B. 224 does not add any clarity to classifications of employee and independent contractor.

As of the ruling on *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.,* 559 U.S. 393 (2010), most larger employers will be in federal court, where section 3 of S.B. 224 does not apply, Rule 23 of Federal Rules of Civil Procedure applies in federal court as a matter of right. Rule 23 is a class action mechanism for large employers. Senate Bill 224 is only helping employers avoid paying taxes by not classifying employees properly.

The proponents of this bill are exempt under federal rules. State and federal factor tests should be the same. Otherwise, someone could be one classification under State law, then be audited by the IRS and penalized with fees for being classified differently based on a federal test. There is not enough clarity in S.B. 224. Different employers or court judges would have different interpretations. This bill will fool small businesses into believing they have safe harbor, and the bill will generate too much liability. There are too many unintended consequences with S.B. 224.

Nathan Ring (Laborers' International Union, Local 872; Bricklayers Local 13 Labor Management Cooperation Committee):
I represent employees, labor unions and the middle-class workers. I have had several cases dealing with the distinction between an employee and an independent contractor and how misclassifications can occur. There is a federal

standards test containing 10 or 11 factors to determine classifications of employee or independent contractor. The benefit of the federal test is it has had 10 years of precedence to define test factors. With a new State standard, there is still the federal standard creating confusion for independent contractors, employees and businesses. It is difficult knowing which standard to follow.

An individual classified as an independent contractor is responsible for his or her own workers' compensation, disability insurance and unemployment insurance. If an employee is misclassified because he or she did not understand what was being signed, then gets hurt on the job, that individual will have no health insurance, disability or workers' compensation payments.

Richard Daly (Laborers' International Union of North America):
Regarding section 2, here is a personal story. Many years ago, there was a construction employer working on the Legislative Building who claimed his personnel were independent contractors. It was later determined that the workers were classified as employees, thus the employer was forced to pay into workers' compensation and disability insurance, as well as back wages. Since then, most people shy away from trying to fight the classification issue. Section 2 of S.B. 224 does not clarify how many of the eight factors must be met or how they should be weighted for a worker to be classified as an independent contractor. Senate Bill 224 confuses a system that is pretty well under control.

Senator Atkinson:
Does S.B. 224 incentivize employers to misclassify employees to avoid liability?

Mr. Ring:
Section 3 does give employers more incentive to misclassify employees.

Mr. Thierman:
Section 2 is not clear. Businesses want and need to know the correct rules. Most businesses do not employ attorneys to decipher test factors; they want clear and concise statements about each rule. Unclear statements and rules encourage misinformation.

Jack Mallory (Southern Nevada Building and Construction Trade Council):
I will address Senator Harris' earlier question regarding differences between the IRS standard and what is being proposed in S.B. 224. Common law rules the

IRS uses to determine classifications fit into three categories: behavioral control, financial control and the relationship existing between parties. Under behavioral control, there are explicit instructions such as when and where to perform services, what tools or equipment to use, if extra workers are needed, where to purchase supplies, service specifications and sequences to follow.

Financial control consists of unreimbursed expenses, extent of investment, extent to which workers' services are available to any relevant market, how the business pays for services rendered and extent of contractors' profit or loss. Contracts regarding the relationship between the parties, if the business intends to provide any employee-type benefits such as insurance, pension, vacation or sick pay, the permanency of the relationship and the extent to which the services performed are key aspects of regular company business.

The IRS does not require an individual or company to satisfy all requirements of the test. Each section is weighted individually and independently to see if there is sufficient evidence to determine whether a company is exerting behavioral control, financial control or if the relationship determines a service provider as an independent contractor or an employee. Nothing prohibits the State from inserting its own statute, and I would like to see that happen. There need to be clear guidelines to define an independent contractor, as well as clear penalties for improper classification.

There are a few problems in sections 2 and 3 of S.B. 224; however, included within S.B. 224 are several ingredients from the three categories of common law rule from the federal standard. There are provisions from the behavioral and financial control and type of relationship, yet it is very light on behavioral control. Senate Bill 224 needs a greater expansion and/or interpretation of specific behavioral controls.

Any individual can obtain a business license by paying a fee and supplying necessary information as required by the Secretary of State's Office. This process is ripe for abuse; therefore, section 5 should be expanded to include all occupational licensing required under State or federal law to perform specified tasks. This language would cover issues brought forth by Realtors, construction workers, hairdressers or any other independent contractors.

Modesto Gaxiola (United Union of Roofers, Waterproofers and Allied Workers, Local 162):
This Union, Local 162 opposes S.B. 224. Senate Bill 224 is an employer bill that seeks to eliminate employees and reclassify them as independent contractors. We have seen the term "independent contractor" abused in the field of roofing. There is no one investigating the abuse, enforcing rules and penalties, or providing safeguards to protect employees.

An example I witnessed occured when a foreman, "the independent contractor," was awarded a labor contract by a roofing company, "the employer." Are the workers on-site employees of the independent contractor or the employer? There is too much potential for abuse with S.B. 224, with no protection or enforcement for workers.

Chair Settelmeyer:
The proponents and opponents need to meet for discussions regarding language and any changes for better clarification. I would like to note that I have also received letters of support from Forrest Barbee (Exhibit D), Melinda Borsuk (Exhibit E) and Stan Olsen (Exhibit F). I will close the hearing on S.B. 224 and open the hearing on S.B. 223.

SENATE BILL 223: Revises provisions relating to contractors. (BDR 53-984)

Chris Ferrari (Associated General Contractors, Las Vegas; Nevada Contractors Association):
The goal of S.B. 223 is to clarify a broken process that leaves workers, contractors and their employers in limbo. This bill defines an elemental communication process to ensure responsible contractors pay their bills and fringe benefits deserved by employees. If payments have been made with receipts received, fees and penalties should not be imposed nor double payment required. Contractors need to know what is owed, be held liable for those payments, and workers deserve to know their wages or other funds are not going to be held back for 3 or 4 years.

Leon Mead (Senior Construction Counsel; Board of Directors, Associated General Contractors, Las Vegas):
Senate Bill 223 is not an attempt to eliminate any ability for workers to receive wages or benefits. I will give you a scenario, as referenced in my handout (Exhibit G). Imagine if you change your home carpet for tile. You supply the tile,

but need someone to install it. You hire a contractor who quoted you $900, plus incidental material. The contractor completes the work, and you pay him $900. Ten months later, you receive a letter from an attorney stating the contractor was a signatory to a union, which did not pay the fringe benefits for the laborers who worked on the house replacing tile. The attorney's letter demands additional payment incurred for unpaid benefits, legal fees, interest and penalties. If you do not pay the fees immediately, the law firm will sue you. It is possible that the total amount due is not yet known. You can be informed that additional fees were found to be needed due to an audit, and once the audit is complete, you will be informed how much you owe. You can have a mechanic's lien on your property in no amount, which will be added later, and if you do not pay once fees are established, your property can be sold to satisfy the fees.

Imagine the law firm letter appears 3 years after you had the tile placed in your home. This scenario is happening under NRS 608.150. Project owners should know what is being performed, who is performing the services and any financial responsibility that will be incurred. Money to cover benefits could be paid directly to the union; however, that is not an option due to statute of limitations requirements in section 2, subsection 2 of S.B. 223.

Section 1 of S.B. 223 is key, as it changes the language from "original contractor" to "prime contractor." Litigation arises to determine if an owner is acting as an original contractor as stated in NRS 608.150. Changing the language to prime contractor will clarify the definition per NRS 108.22164. An owner can be liable, under this definition, but the owner would have a general contractor's license and is managing a project. Senate Bill 223 is not trying to avoid liability for construction businesses; however, the prime contractor should not be liable for attorney fees, interest, liquidated damage and other penalties. The prime contractor is only liable for all wages and any unpaid benefits the signatory did not pay. A prime contractor should not be held responsible for penalties and interest of a subcontractor who does not follow the law.

Section 2 of S.B. 223 shortens the audit time of an in-state claim to 90 days and an out-of-state claim to 180 days. The shorter audit time will allow workers to receive all wages and benefits due to them. Workers should not have to wait 3 to 4 years to receive wages. Section 4 provides a notice of right to lien, pulling the benefit trust funds out of the labor union definition. Section 4 makes clear that they have to send the same notice as all other subcontractors or

anyone on a construction project wanting to be paid. This notification is used to preserve mechanic's lien rights. General contractors use this notice to know who is working on their project, and who to pay.

Our associations believe S.B. 223 is a fair bill, and protects workers against wage infringement and the prime contractor against double payments, fees and penalties.

Bryce Clutts (President, DC Building Group):
I am a third-generation Nevadan. My company was founded in 2001, and I have approximately 25 employees. We provide services for small to medium public and private commercial projects. Although my company is considered an open shop contractor, over 50 percent of our work is union; therefore, we do subcontract with union contractors.

I understand the importance of benefits and the necessity to pay for those benefits. My father and grandfather, as retirees, receive benefits. Owning a successful business means you pay your bills, understand the risk and manage both appropriately. Current law does not allow myself, or other prime contractors, to manage the risk of unpaid benefits to employees we do not employ. Over the years, and after threats of litigation, my company has paid unions thousands of dollars for benefits that were not paid by subcontractors, although my company had already paid the subcontractors.

The first example is a letter my company received from Glaziers Joint Trust Fund (Exhibit H) stating work performed by a subcontractor was current in funds through a certain period. The challenge is that the letter also states the issuance of the letter does not prevent the trust fund from conducting a compliance review later, and any shortages may be sought from the subcontractor or general contractor. Included in Exhibit H is a separate letter from Glaziers Joint Trust Fund advising my company that the subcontractor paid the amount due and stated the project would be paid in full; however, this was subject to audit. Almost 2 months later, we received yet another letter that a lawsuit was filed for unpaid benefits, as well as interest, liquidated damages, audit costs and attorney fees, included in Exhibit H.

The second example is a handout (Exhibit I) and outlines an almost 4-year audit period on another project, determining all benefits may not have been paid for workers, although my company paid the subcontractors in full several years

prior, and received a notice from the trust fund that the project was paid in full. This letter states the trust fund is placing a lien on the project for an unknown dollar amount to be determined at the conclusion of their audit.

It is not the intent of S.B. 223 to keep from paying the trust funds or to shirk our responsibilities as general contractors to deserving workers. The intent of S.B. 223 is to have unions conduct timely audits and provide proper documentation so the general contractors can pay subcontractors one time. Companies like mine face issues trying to manage the risk of additional payments of tens of thousands of dollars without S.B. 223.

Senator Atkinson:
What exactly will S.B. 223 fix? Why are we changing the audit times from years to 90 days?

Mr. Mead:
We are trying to fix a situation where general contractors are required to pay double and extra fees years after completion of a project. We are also attempting to clarify that if an owner of a project hires a trade contractor, that owner is not classified as the original contractor, therefore should not be liable.

Senator Atkinson:
Do you have statistics on how often these audits produce additional fees?

Mr. Mead:
I do not have actual statistics; however, I have already received six cases this year, and have handled hundreds of these matters. My colleagues state that this is a routine issue.

Senator Atkinson:
Why do you want to make such a drastic change in audit time from 2 years to 90 days?

Mr. Mead:
We want to have a contractor withhold money owed to the union from the subcontractor while the project is ongoing so there are sufficient funds to manage the project to completion. That is the time the unions are paid. Once a project is completed, with no further money flow, a fee cannot be held from the

appropriate subcontractor for payment to the union, the money then needs to come from the contractor's own pocket.

Senator Atkinson:
Are you referring to withholding payments?

Mr. Mead:
Yes, I am referring to withholding payments, as well as other activities that can be required of subcontractors, such as posting bonds and other claims. Without the information from persons claiming not to have been paid, it is impossible to protect the owner by withholding payments.

Senator Harris:
Is every project targeted for audit? What determines if an audit is to be performed? How long does an audit take to complete?

Mr. Mead:
I do not perform the audits; however, my understanding is the audit process is written within a contract between a subcontractor and the representing union. The audit process will look at all projects completed by a subcontractor over a 2- to 3-year period. If the audit determines there were any unpaid benefits, an action is started to collect this money from the original contractor, who has already paid the subcontractor all monies owed at the completion of the project.

Senator Spearman:
Is the subcontractor bound by law to make these payments?

Mr. Mead:
Subcontractors are bound by law to make payments to all workers. Subcontractors are also bound by contract to a union collective bargaining agreement.

Senator Spearman:
Are the necessary agreements between contractor and subcontractor written into a contract prior to a project?

Mr. Mead:
A general contractor has a contract with a subcontractor who, in turn, has obligations with his workers and union. The subcontractor may have violated

the obligation to the workers and union by not making benefit payments. Then the union makes a claim against the general contractor to pay the subcontractor's obligation, even if the general contractor has already paid the subcontractor everything owed.

If a project is ongoing, the general contractor is able to withhold some amount of payment to the subcontractor to be paid to a union trust in the event the subcontractor neglects to pay. A general contractor is not aware if a subcontractor does not make the fringe benefit payment unless the information is provided by a third party, such as the unpaid worker. A couple of years after a project is completed, the general contractor has already paid the subcontractor everything owed, then to be informed by an audit that he has to pay what the subcontractor did not, is the issue.

Sean Stewart (Executive Vice President, Nevada Contractors Association; Associated General Contractors, Las Vegas):
I represent approximately 600 general contractors. This is not a union versus nonunion issue. All contractors are affected by this bill and are concerned. During the 77th Legislative Session, the Nevada Contractors Association ran a similar bill relating to NRS 608.150 that was broader and more restrictive. We met with union representatives to try limiting the scope of changes to address speeding the collection process, limiting long-term, unknown liability to general contractors and to get workers paid in a timely manner.

We are addressing the demand on a general contractor to pay a second time to a subcontractor that has already been paid in full because the subcontractor has failed to pay its employee benefit program. There are other statutes that address a straightforward collection process of employers not paying debts owed. Senate Bill 223 requires notice and time limit restructuring so the subcontractor that owes the debt can be contacted, workers can still obtain their benefits and a general contractor can limit its liability. I heard earlier in this hearing that a slight modification might be needed to section 4, which we are willing to help with to resolve this matter.

Zach Parry (Associated General Contractors):
An alter-ego case is borne from federal common law. There are allegations that a nonunion subcontractor who is not a signatory to a collective bargaining agreement is related closely to a signatory contractor that the nonunion subcontractor should be held to the collective bargaining agreement. In an

alter-ego case, a union trust fund files a lawsuit against a subcontractor who is not a signatory. The union trust fund is trying to prove the nonunion subcontractor has close ties to a union subcontractor; therefore, the nonunion subcontractor should also be required to pay fringe benefits.

The unintended consequence of alter-ego cases and the application of NRS 608.150 is that general contractors are sued for fringe benefit payments on services provided by a nonunion subcontractor; however, that subcontractor has close ties to a union subcontractor and should have to make the benefits payment. The nonunion subcontractor is not bound by a collective bargaining agreement and does not make payments to a union; however, the union sues the general contractor for fringe benefit payments.

Boyd Martin (Owner, Boyd Martin Construction):
Although my construction company is based in Las Vegas, we perform services throughout Nevada. We are not a union contractor, but we employ both union and nonunion subcontractors. We have a positive relationship with union and nonunion subcontractors. We appreciate the relationship with union trades. As a general contractor, we are required to manage risk and need to ensure all involved in projects pay their bills for labor, materials and equipment, are insured and follow safety regulations. The tools we have to manage risk are lien releases, insurance certificates and safety guidelines and inspections.

The one risk that is impossible to manage is verification of union trust fund deposits from subcontractors due to lack of appropriate documentation during a project. Contractors are held liable for union benefit payments under NRS 608.150, for up to 3 years. The vast majority of subcontractors do make their payments to union trust funds in a timely fashion, yet some do not.

The best way to manage this risk is by requesting releases from various union trust funds. I am providing a few samples of such releases (Exhibit J). In every case, the trust includes a statement for actual verification of wages paid; therefore, the letter is not a release. A general contractor cannot truly manage this issue. Due to Nevada's prompt-pay law, the general contractor must pay subcontractors, not knowing if the subcontractors have fulfilled their obligations to union trust funds. The union trust funds then have 3 years to pursue payments from the general contractor that has paid its debt in full. The reduction of this time period will benefit workers, union trusts and the general contractors. I respectfully request your support on S.B. 223.

Dennis Davis:
My company is a subcontractor with more than 40 years of providing service. Passage of S.B. 223 would make it almost impossible for us to collect payment from a general contractor. We are a union subcontractor. By federal law, union trust funds have 3 years to audit a subcontractor. A general contractor has the ability to hire a financially qualified subcontractor to perform services, as well as a right to ask a subcontractor for financial statements to prove the subcontractor is stable enough to pay its debts and workers. Union workers receive benefits whether the subcontractor pays the union trust fund or not. Union workers receive work statements from their union to verify all work hours have been reported.

As a union subcontractor, we are not able to get out of any contract we have signed with a union; they are lifelong contracts. Our bills are due within 10-30 days; however, our union benefits are 8 weeks in arrears. At any given time, we are 60 days in arrears. We need to be paid by a general contractor within 30 days. General contractors have control of the paycheck, and federal law cannot be circumvented. Subcontractors are not able to have three times the amount of money needed to perform services. We are stuck in union contracts that are unbreakable. If we close down our businesses and reopen new, nonunion businesses, we are still considered union businesses due to the alter-ego issues.

Mr. Ring:
I have prosecuted many cases of unpaid benefits and am, therefore, quite knowledgeable about how trust funds and audit processes operate. Current law has been in statute for many years, enacted when the Hoover Dam was built to assure the process of getting workers paid wages and promised benefits. Our concerns with S.B. 223 are in sections 1 and 2.

Section 1, subsection 5 strikes the word "shall" and replaces it with "has exclusive jurisdiction to." This refers to the district attorney (DA) in the county where a prime contractor can be found. This change will eliminate the private right of action. Instead of lawsuits being filed by the union trust funds, they will now have to be filed by the DA, which will put an undue burden on the DA's office. I am not sure the DA's office is prepared to handle this or has expertise in these types of cases.

Another issue is with the statute of limitations in section 2. Changing time limits from 3 and 4 years to 90 and 180 days is drastic. Under common law and the Employee Retirement Income Security Act (ERISA), audits must be done in a 3-year process. If this process is not followed, the trustees violate their fiduciary duties set by federal law. If audits are limited to 90 days, it is unknown what benefits are due if reports are not being submitted, or are falsified.

Janice Flanagan:
I am a supporter of unions and oppose S.B. 223. I was a small business owner that had a contractor, who in turn had subcontractors. The cutback on the statute of limitations is extreme. If ERISA requires an audit every 2 to 3 years, then it is not logical to drop the time limit to such a degree.

Senator Farley:
How would S.B. 223 create a necessity for three times the payroll? What types of mistakes are being caught in audits?

Mr. Davis:
Through the prompt pay act, our bills are due sooner than we get paid by the general contractor; therefore, we need to be able to pay our workers and suppliers for 2 to 3 months before we see any payment from contractors. Our work may be completed well before the benefits are reportable. We need three times the cash flow, not 3 months of payroll.

Mr. Mallory:
Section 5, subsection 1 of S.B. 223 regarding the notification to the prime contractor is not a workable solution under current practice with Taft-Hartley Act funds. There is typically a 1-month lag between receipt and processing of trust fund contributions. The delinquency may go unknown until 60 days after the hours are worked. Contractors may not be aware of any such delinquency if a subcontractor is arguing the audit findings or refusing to pay or may have an inability to pay to the trust fund.

Audits are based on employer records for payroll, accounts processed and employee records. Regarding associated costs, some employers fight every step of the audit process, which drives up audit costs. Some employers do not report their trust fund contributions per project and they are free to report any information they deem necessary, which can be problematic.

Prime contractors have ultimate control over a project. In an effort to protect themselves, they can exert that control over the entire project. With access control, they can require subcontractors provide timesheets and report their jobs to union trust funds and match payrolls. This may be the ultimate way to avoid potential problems in the future.

Mr. Kemp:
I agree that the statute of limitations is being reduced by an extreme amount, as well as it places an undue burden on the county DA's office if lawsuits must be filed by the DA instead of the union trust funds.

Mr. Greenberg:
I represent workers on wage claims and have had many workers approach me after completion of a job for which they did not receive proper compensation. These workers were not union members or under union contracts. These workers are not in a position to seek legal counsel within 90 to 180 days of every paycheck. Shortening the statute of limitations would deny them any effective remedy. To place exclusive jurisdiction with the DA to enforce provisions of the statute will not foster proper enforcement.

Senator Spearman:
Are there any current remedies in place based upon contractual agreements? Can we enforce a certified payroll?

Pat Sanderson (Laborers' International Union, Local 872):
I have been a working man my entire life. A person must work a specified amount of hours to be eligible for health and welfare benefits and, ultimately, a pension. I have saved many years of paystubs and paperwork for my own protection. If records were submitted incorrectly, I had proof of my work hours. I understand the contractors' dilemma, but who really is impacted the most? It is the working men and women of Nevada. If my union trust fund does not receive reports for 6 months, and I do not receive my statement for another 30 to 90 days after that, I run out of insurance to provide for my family and myself. Supporters and those in opposition need to determine what is best for workers with a common sense agreement.

Chair Settelmeyer:
I will now close the hearing on S.B. 223. With no further comments or business before the Committee, the meeting is adjourned at 11:21 a.m.

RESPECTFULLY SUBMITTED:

Renee Fletcher,
Committee Secretary

APPROVED BY:

Senator James A. Settelmeyer, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	1		Agenda
	B	6		Attendance Roster
S.B. 224	C	1	Teresa McKee	Proposed Amendment
S.B. 224	D	1	Senator James A. Settelmeyer	Letter of support
S.B. 224	E	1	Senator James A. Settelmeyer	Letter of support
S.B. 224	F	1	Senator James A. Settelmeyer	Letter of support
S.B. 223	G	15	Leon Mead	Handout
S.B. 223	H	7	Bryce Clutts	Letter
S.B. 223	I	6	Bryce Clutts	Handout
S.B. 223	J	4	Boyd Martin	Sample releases

Exhibit "B"

Senate Bill No. 224–Committee on
Commerce, Labor and Energy

CHAPTER.....

AN ACT relating to employment; establishing a conclusive presumption that a person is an independent contractor if certain conditions are met; excluding the relationship between a principal and an independent contractor from certain provisions governing the payment of minimum wage to an employee; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Section 16 of Article 15 of the Nevada Constitution defines the term "employee" and requires each employer to pay a certain minimum wage to each employee. Existing law imposes certain additional requirements relating to compensation, wages and hours of employees. (Chapter 608 of NRS) **Section 1** of this bill establishes a conclusive presumption that a person is an independent contractor, rather than an employee, if certain conditions are met. **Section 5** of this bill excludes the relationship between a principal and an independent contractor from those relationships that constitute employment relationships for the purpose of requiring the payment of a minimum wage. **Section 7** of this bill applies the provisions of this bill to any action or proceeding to recover unpaid wages pursuant to a requirement to pay a minimum wage in which a final decision has not been rendered as of the effective date of this bill.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 608 of NRS is hereby amended by adding thereto a new section to read as follows:

1. For the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:

(a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;

(b) The person is required by the contract with the principal to hold any necessary state or local business license and to maintain any necessary occupational license, insurance or bonding; and

(c) The person satisfies three or more of the following criteria:

(1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.

(2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.

(3) The person is not required to work exclusively for one principal unless:

(I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or

(II) The person has entered into a written contract to provide services to only one principal for a limited period.

(4) The person is free to hire employees to assist with the work.

(5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:

(I) Purchase or lease of ordinary tools, material and equipment regardless of source;

(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and

(III) Lease of any work space from the principal required to perform the work for which the person was engaged.

➥ The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.

2. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee.

3. As used in this section, "foreign national" has the meaning ascribed to it in NRS 294A.325.

Secs. 2-4. (Deleted by amendment.)

Sec. 5. NRS 608.255 is hereby amended to read as follows:

608.255 For the purposes of this chapter and any other statutory or constitutional provision governing the minimum wage paid to an employee, the following relationships do not constitute employment relationships and are therefore not subject to those provisions:

1. The relationship between a rehabilitation facility or workshop established by the Department of Employment, Training and Rehabilitation pursuant to chapter 615 of NRS and an individual with a disability who is participating in a training or rehabilitative program of such a facility or workshop.

2. The relationship between a provider of jobs and day training services which is recognized as exempt pursuant to the provisions of 26 U.S.C. § 501(c)(3) and which has been issued a certificate by the Division of Public and Behavioral Health of the Department of Health and Human Services pursuant to NRS 435.130 to 435.310, inclusive, and a person with an intellectual disability or a person with a related condition participating in a jobs and day training services program.

3. The relationship between a principal and an independent contractor.

Sec. 6. (Deleted by amendment.)

Sec. 7. The amendatory provisions of this act apply to an action or proceeding to recover unpaid wages pursuant to Section 16 of Article 15 of the Nevada Constitution or NRS 608.250 to 608.290, inclusive, in which a final decision has not been rendered before, on or after the effective date of this act.

Sec. 8. This act becomes effective upon passage and approval.

RPLY
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DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CLARK COUNTY

JACQUELINE FRANKLIN *et al.*, Plaintiffs, vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC., *et al.*, Defendants.	CASE NO. A-14-709372-C DEPT. XXI **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

Plaintiffs, individually and on behalf of all persons similarly situated, hereby submit their Reply in Support of their Motion for Class Certification.

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This Reply is based upon the following Memorandum of Points and Authorities and any oral argument this Court may wish to entertain at the hearing of this Motion.

DATED this 5th day of December, 2016.

MORRIS//ANDERSON

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I. INTRODUCTION

Defendant Russell Road Food and Beverage, LLC (the Club) opposes class certification on two grounds: (1) it asserts there is not enough "actual evidence" to support certification (Oppo. at p.3); and (2) it claims a recent amendment to NRS Chapter 608 (codified in relevant part at NRS 608.0155), if applied in this case, would somehow render it "impossible for any common questions of fact or law to exist because the determination of whether each Plaintiff or potential Plaintiff is or is not an independent contractor requires a unique factual determination that could be comprised of facts wholly different from any other Plaintiff" (Oppo. at p. 25).[1]

The first argument fails to appreciate that a complaint typically furnishes all the evidence required to evaluate class certification and, in any event, has been entirely deflated by subsequent disclosures and admissions (for example, the Club has since confirmed the putative class contains over 4500 dancers going back two years, likely double that number for the four year unjust enrichment claim). The second argument is a nonstarter because even if the new test for independent contractor status in NRS 608.0155 applied to this case (it doesn't), this test, like the economic realities test, easily can be assessed on a class-wide basis where, as here, the Club admits it treated all dancers the same.

Regardless of the test to be applied to determine their legal status, the Club's dancers either are all its employees or none of them are, and this issue most certainly can and should be decided on a class basis. Indeed, as many other courts have held, this particular common liability issue presents "about the most perfect question[] for class treatment." *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.NY.2007). That is why no court ever has refused to certify a class under NRCP 23(b)(3) or its federal analog in employment misclassification cases by dancers against the strip club in which they work. *See Espinoza*, 2016 WL 127586 at *3 (noting in granting dancers' class certification motion that "Defendants have not cited to any decision with different results - denying the Rule 23 class certification motion. And the Court has not been able to uncover

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[1] The Club also challenges the proposed class definition. *See* Oppo. at pp. 9-10. That is not grounds for denying class certification; at most it would require the class definition to be refined or for the Court to certify one or more subclasses.

one either.").

II. REPLY

A. There is no requirement under NRCP 23 to "attach evidence" to a class certification motion

NRCP 23 specifically instructs that a court is to address the issue of class certification "as soon as practicable after the commencement of an action brought as a class action." NRCP 23(c)(1). The Club's repeated insistence that this issue cannot be decided without more "actual evidence" fails to recognize that class certification in this case is warranted under NRCP 23 based on the uncontroverted factual allegations in the complaint. *See Meyer*, 110 Nev. at 1364, 885 P.2d at 626 (citations omitted) ("[i]n analyzing whether it should certify a class, the court should generally accept the allegations of the complaint as true. An extensive evidentiary showing is not required."). *See also* Newberg on Class Actions § 24:74 (4th ed.) ("the complaint itself should usually afford the court a sufficient basis on which to make a [class certification] determination, thereby rendering an evidentiary hearing unnecessary.").

The Club entirely overstates the purported "sea change regarding the evidentiary burden required for certifying a class." Oppo. at p. 7 (*citing Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The U.S. Supreme Court in *Dukes* noted that "**sometimes** it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis added). In *Dukes*, for example, the court was not convinced, based on the pleadings (or, it turns out, on copious amounts of additional evidence), that a nationwide class of 1.5 million employees who wanted to sue "about literally millions of [allegedly discriminatory] employment decisions at once" could demonstrate that there was "some glue holding the alleged *reasons* for all those decisions together." *Id.* at 352. Similarly, the Nevada Supreme Court in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005) determined it was necessary to "probe behind the pleadings" in construction defect class actions. The defendant in *Beazer Homes* constructed and sold about 200 single-family residences in Las Vegas in the 1990s. *Beazer Homes,* 121 Nev. at 843, 124 P.3d at 535. Three owners of these

homes, individually and as proposed class representatives, filed a complaint against the contractor alleging various constructional defects to their homes. *Id.* The Supreme Court held that the trial court erred in granting class certification because (unlike the misclassification claim at issue here), liability in single-family residence constructional defect cases depends on "variables particular to 'unique' parcels of land" and "these uniqueness factors weigh heavily in favor of requiring independent litigation of the liability to each parcel and its owner." *Id.* at 855, 124 P.3d at 543.

This is not a nationwide sex-discrimination case. It is not a construction defect case involving hundreds of uniquely-constructed houses. It is an employee misclassification case at a single club which, as the complaint alleges and the Club admits, has applied a uniform set of policies and procedures to all dancers at all relevant times. *See* Compl. at ¶¶29-33; Depo. Trans. of Club Manager at 19:7-11 (attached as **Ex. 1**) ("Q. Is it fair to say during the relevant time period that the club treat all the dancers equally and applies the policies that it has equally to all the dancers? A. Yes."); *id.* at 16:24-17:7 (stating the Club at all relevant times has required dancers to pay a house fee each time they worked). This "actual evidence" is all that is needed to distinguish *Dukes* and *Beazer Homes* and to establish that this case belongs with all the other employment misclassification cases that courts without exception have certified under NRCP 23 or its federal analog.[2] This case, like all the other dancer class actions cited in Plaintiffs' motion and awkwardly ignored by the Club, is not a "more evidence" case.

B. NRS 608.0155 does not and cannot apply to constitutional claims. Even if it did or could, it would not alter the class certification analysis

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[2] It is also useful though not necessary to have "actual evidence" of the putative class size. *See Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (noting numerosity can be established either by "some evidence **or reasonable estimate** of the number of purported class members.") (emphasis added) (construing parallel federal rule). Plaintiffs, based on their personal experience dancing in the club, reasonably estimated that "hundreds if not thousands of dancers worked there during the class period" (Mot. at p. 7). It turns out the dancers' estimate was pretty spot on. The Club subsequently confirmed that it employed (or leased space to) over 4,500 individuals between November 2012 and August 2016. *See* first and last page of Entertainer List (attached as **Ex. 2**).

1. NRS 608.0155 by its plain terms applies only to claims under NRS Chapter 608, not to Minimum Wage Amendment claims

The Nevada Supreme Court in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951 (2014), *reh'g denied* (Jan. 22, 2015) considered an employment misclassification class action by dancers alleging violations of NRS Chapter 608. The dancers in that case made no claim under the Minimum Wage Amendment, which creates an independent constitutional cause of action for Nevada employees entirely separate from any statutory cause of action under Chapter 608. *See* Nev. Const. Art. 15, sec. 16(B) ("An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section.").

The Supreme Court in *Terry* held that NRS 608.010 (the wage statute's definition of "employee") was co-extensive with the term as used in the Fair Labor Standards Act (FLSA), the parallel federal wage law. *Id.* at 953. NRS 608.0155 leaves intact the Supreme Court's adoption of the economic realities test but adds a "conclusive presumption" of independent contractor status for claims arising under Chapter 608 if certain criteria are met. *See* NRS 608.0155(1). But the first six words of NRS 608.0155 (entirely ignored by the Club) unambiguously states that this new test for independent contractor status applies only "[f]or the purposes of this chapter [*i.e.*, Chapter 608]." NRS 608.0155(1) (emphasis added). In other words, NRS 608.0155 clearly indicates that its independent contractor test does not apply "for the purposes of Minimum Wage Amendment claims." *See State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) (We must attribute the plain meaning to a statute that is not ambiguous."). If the Nevada legislature wanted the test to apply to constitutional claims it easily could have said so, but did not.

2. Even if NRS 608.0155 could be construed to apply to Minimum Wage Amendment claims, the Nevada Supreme Court already has determined that such a statute would be preempted

The Minimum Wage Amendment was proposed by initiative petition and overwhelmingly approved and ratified by Nevada voters in 2004 and again in 2006. *See* Nev. Const. art. 15, § 16. It guarantees a mandatory minimum wage to all employees, broadly defined in the Amendment as

"any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Nev. Const. art. 15, § 16(C).

The only Nevada Supreme Court case that has directly considered the breadth of the Minimum Wage Amendment's definition of employee is *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), *reh'g denied* (Sept. 24, 2014). The question presented in *Thomas* was whether Minimum Wage Amendment's definition of employee preempted an exception for taxicab drivers provided in Nevada's minimum wage statute, NRS 608.250(2)(e). *Id.* at 520. In answering that question in the affirmative, the Supreme Court held that: (a) the definition of employee in the Amendment must be determined with reference to intent of the voting public, not the legislature, (b) "[t]he Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups", (c) the voters intended that "all employees not exempted by the Amendment . . . must be paid the minimum wage set out in the Amendment", and (d) any statute that purports to interfere with the Amendment's broad definition of employee is "irreconcilably repugnant" to the Amendment and therefore preempted. *Id.* at 521. *See also Terry*, 336 P.3d at 955 (noting the Amendment reflects "this state's voters' wish that more, not fewer, persons would receive minimum wage protections [than were protected by NRS Chapter 608 prior to SB224].").[3]

The Supreme Court in *Thomas* affirmed in striking down a conflicting statute that Nevada's judicial branch is up to the job of effectively interpreting and enforcing constitutional rights, and specifically foreclosed any attempt by the legislature to interfere with the Amendment's broad scope. *See Thomas*, 327 P.3d at 522 ("[T]he principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution."). The Nevada legislature did not claim in enacting SB224 that it was interpreting the

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[3] This Court also noted in its June 25, 2015 order granting in part and denying in part the Club's motion to dismiss that the Minimum Wage Amendment "expanded the minimum wage protections to more Nevadans." Order at p.20.

voters' intent in enacting the Minimum Wage Amendment. The Club has cited no legislative history considering or even mentioning the Minimum Wage Amendment and its independent definition of employee. To the contrary, as the Club notes, the legislature enacted SB224 in response to the Supreme Court's decision in *Terry,* which was a Chapter 608 case not a Minimum Wage Amendment case. *See* Oppo. at p. 11. The statutory language thus appropriately indicates that the new statutory test for independent contractor status set forth in NRS 608.0155 applies only "for the purposes of" Chapter 608. As the Nevada Supreme Court has held, specific statutory exemptions from the Minimum Wage Amendment's broad definition of employee are preempted. A statutory test that, if applied, would accomplish the same result also would be preempted. Even if NRS 608.0155 could potentially be construed to limit the scope of the Minimum Wage Amendment (it cannot) and even if any legislative history suggested that was the legislature's intent (it does not), such an interpretation would be foreclosed by "the canon of constitutional avoidance, which states that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Evans v. State*, 2014 WL 1270606, at *2 (Nev. Mar. 26, 2014) (quotation omitted).

3. Even if NRS 608.0155 applied in this case, its test easily can be assessed on a class-wide basis

To be presumptively labeled an independent contractor for purposes of NRS Chapter 608, a person must satisfy three or more of five criteria enumerated in NRS 608.0155(1)(c). The Club's suggestion that this inquiry cannot be performed on a class-wide basis is unconvincing.

Most obviously, of course, courts have no problem applying the economic realities test on a class-wide basis. That test, which requires a "review of the totality of the circumstances of the working relationship's economic reality" *Terry*, 336 P.3d at 960, is much broader and nuanced than NRS 608.0155.

A closer look at NRS 608.0155(1)(c) reveals nothing so unusual to support the Club's insistence that it creates a per se bar to class treatment of employee misclassification claims against a single putative employer that has admitted it treats all putative employees the same.

The first criterion considers whether "[1] the person has control and discretion over the

means and manner of the performance of any work and [2] the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract." NRS 608.0155(1)(c)(1). The first part of this criterion (control and discretion) is very similar to the control factor in the economic realities test, which was considered by the Nevada Supreme Court on a class-wide basis with no problems. *See Terry*, 336 P.3d at 958 (considering degree of club's control of manner of dancers' performances on class-wide basis). The second part (primary element bargained for) frankly seems impossible to apply. How can a court attempt to discern the "primary intent" of a contracting party? Presumably, however, the Club (and anyone else trying to avoid employer status) will swear the "result of the work" was paramount in its mind when it contracted with all putative employees. This element too thus will or will not be met on a class-wide basis.

The second criterion considers whether "the person has control over the time the work is performed." *Id.* at (1)(c)(2). This criterion does not apply where, as here, "the work contracted for is entertainment." *Id.*

The third criterion considers whether the dancers are "required to work exclusively for one principal." The dancers concede this is not the case, but again this is because the Club had a common policy on this matter that can be assessed on a class-wide basis.

The fourth criterion considers whether "[t]he person is free to hire employees to assist with the work." Either they could or they couldn't. Again, another class-wide issue capable of class-wide resolution.

The fifth and final criterion considers whether the "person contributes a substantial investment of capital in the business of the person." This subsection specifically instructs the court to make a class-wide assessment. *See* NRS 608.0155(1)(c)(5) (degree of capital investment to be determined on basis of "equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages."). This capital investment inquiry also is applied on a class-wide basis in the economic realities test. *See Terry*, 336 P.3d at 959 (considering

dancers' investment in equipment or materials and concluding, on class-wide basis, that performers' capital investment is *de minimis*).

C. Though the proposed class definition is proper, the court could create subclasses under NRCP 23(c)(4)

There are two claims in this lawsuit: a legal claim for unpaid wages under the Minimum Wage Amendment (count one) and an equitable claim for unjust enrichment (count two). The wage claim seeks payment of the minimum wage for all hours worked. Compl. ¶43. The unjust enrichment claim seeks restitution of fees and fines the Club extracted from the dancers as a condition of employment. *Id.* at ¶46. The statute of limitations is two years from the filing of the original complaint for count one (*i.e.*, going back to November 2, 2012) and four years for count two (*i.e.*, going back to November 2, 2010). *See* NRS 608.260 and 11.190(2)(c). The temporal scope of the proposed class properly extends back to November 2, 2010 to account for the unjust enrichment claim.

Unlike most wage claims, this case is unusual in that not only did dancers not receive any wages for performing at Defendant's strip club - they also were required to pay a "house fee" to the Club every time they showed up to work. *See* Ex. 1 at 16:24-17:7. The Club thus has benefitted for years (and continues unjustly to benefit) from labor that not only is free, but that pays to work. Mere payment of wages for each hour worked will not make the dancers whole. Plaintiffs aver with respect to Count One that damages for unpaid wages must account for the negative balance created by the extraction of fees and fines. If, for example, the Club required a dancer to pay $100 to work a six-hour shift and paid no wages for that work, then the dancer's wage damages for that six hour period should be $100 + (prevailing minimum hourly wage x 6). Alternatively, however, if the wage damages are limited to just the prevailing minimum hourly wage then the Minimum Wage Amendment would not provide a full and adequate legal remedy and the dancers would look to the unjust enrichment claim to recover the fees and fines they paid to the Club. *See* 6/25/15 Order (noting "unjust enrichment is appropriately pled as an alternative equitable basis for relief in addition to the claims for legal relief set forth in the other Counts."). *See also Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. Adv. Op. 35, 283 P.3d 250, 257 (2012) ("Unjust enrichment

exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.") (quotations and citations omitted).

The Nevada Supreme Court noted in *Terry* that courts across the country "almost without exception [have] found an employment relationship and required nightclubs to pay their dancers a minimum wage." *Terry*, 336 P.3d at 960 (citation and quotation omitted). Despite this known legal backdrop, the Club will not be held to account for payment of back wages beyond November 2, 2012 because of the two year statute of limitations. But the dancers' unjust enrichment claim maintains independent validity as an equitable claim extending back an additional two years.

The class certification motion proposes the following class: "All persons who work or have worked at the Club as dancers at any time on or after November 2, 2010 and going forward until the entry of judgment in this action." Mot. at p. 4. All class members have a wage claim against the Club extending back to November 2, 2012 (count one). All class members also have an unjust enrichment claim against the Club extending back to November 2, 2010 (count two). If all fees and fines are accounted for in calculating back wages under count one, then the unjust enrichment claim will be limited to November 2, 2010 to November 1, 2012.

With this understanding, the Court may determine under NRCP 23(c)(4) to certify the two following subclasses:

Count One: "All persons who work or have worked at the Club as dancers at any time on or after November 2, 2012 and going forward until the entry of judgment in this action."

Count Two: "All persons who work or have worked at the Club as dancers at any time on or after November 2, 2010 and going forward until the entry of judgment in this action."

III. CONCLUSION

This case is not without precedent. Whether by design or happenstance, many strip clubs in Nevada and across the country have refused to treat their dancers as employees and many courts have adjudicated dancers' misclassification claims. *See Terry*, 336 P.3d at 954 (holding club's

dancers are employees and noting that "[i]n so holding, this court is in accord with the great weight of authority, which has almost without exception found an employment relationship and required nightclubs to pay their dancers a minimum wage."). It is to those cases this Court should look in determining whether this action is appropriate for class treatment. Plaintiffs' class certification motion should be granted because, as every other court that has considered the precise issue now before this Court has held, the common liability issue presented here, *i.e.*, whether the Club's dancers were supposed to be paid the minimum wage as a matter of law and were not is "about the most perfect question[] for class treatment." *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007).

DATED this 5th day of December, 2016.

MORRIS//ANDERSON

By: */s/ Lauren Calvert*
Ryan M. Anderson (NV Bar No. 11040)
Lauren Clavert (NV Bar No. 10534)
716 S. Jones Blvd.
Las Vegas, NV 89107

RUSING LOPEZ & LIZARDI, PLLC
P. Andrew Sterling (NV Bar No. 13769)
Michael J. Rusing (AZ Bar No. 6617)
6363 N. Swan Road, Ste. 151
Tucson, AZ 85718

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **MORRIS//ANDERSON**, and on the 5th day of December, 2016, I served the foregoing ***PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service.

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Attorneys for Defendants

/s/ Erickson Finch
An employee/agent of **MORRIS//ANDERSON**

DISTRICT COURT

CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES KARINA STRELKOVA, LASHONDA STEWART, DANIELLE LAMAR and DIRUBIN TAMAYO individually, and on behalf of Class of similarly situated individuals, Plaintiffs, vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB) SN INVESTMENT PROPERTIES, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, DOE EMPLOYER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X, Defendants.	CASE NO. A-14-709372-C DEPT. NO. XXXI

VIDEOTAPED DEPOSITION OF KEITH RAGANO

WEDNESDAY, OCTOBER 5, 2016

1:00 P.M.

AT 6130 ELTON AVENUE

LAS VEGAS, NEVADA

REPORTED BY: MICHELLE R. FERREYRA, CCR No. 876

goes back another two years to November of 2010. And that's a legal issue. But just to let you know, we've -- we've agreed off the record -- and I will just state it for the record -- that today we're going to look at is how the club works today, going back to November of 2012. Is that okay?

A. Yes.

Q. And, again, the -- the key -- the most important thing from your point of view is to help me understand if -- if things have changed during that time or if they stayed the same with respect to whatever we're looking at. Okay?

A. (Witness nods.)

Q. Okay. So in an effort to streamline this and -- and kind of make good use of our time, I think we can -- we can safely say that during that time period, Russell Road has never treated its dancers as employees; is that correct?

A. Yes.

Q. And so, therefore, they would have never have been issued -- no W-2s would have ever been issued to a dancer for her services; right?

A. Correct.

Q. Also during that time period, November 2012 through the -- the present, is it true that dancers had

paid a house fee each time they wished to work at the club?

MR. DAVIS: Objection. Form and foundation as to each individual named plaintiff.

You can answer if you know.

THE WITNESS: Yes. They pay a house fee or a lease fee to use the building that night.

BY MR. STERLING:

Q. Do you call it a house fee or a lease fee or either?

A. House fee.

Q. House fee? Okay.

And that's -- that house fee policy has been in place since at least the 2012 period that we are talking about?

A. Yes.

Q. When was the club -- was it founded in 2009; is that right -- or set up?

A. The actual Crazy Horse?

Q. Yeah. The -- the -- the club as it exists today, do you know when it was set up or when it --

A. I don't know the exact date.

Q. Okay.

Well, so you -- you were hired on November 5th of 2008. Was that --

Q. During the relevant time period, is there -- was there any other way for dancers to make money at the club?

A. No.

Q. Now, we'll talk in a minute about the policies in more detail that the club has with respect to the dancers. But is it fair to say during the relevant time period that the club treats all the dancers equally and applies the policies that it has equally to all the dancers; is that a fair statement?

A. Yes.

Q. Let's -- let's talk a little bit about the -- the company itself and the business side of it before we get into the -- the -- the actual -- you know, the day-to-day operations. So I think we said already the -- the corporate entity is Russell Road Food and Beverage, LLC; right?

A. Yes.

Q. And the club's name is -- is Crazy Horse III?

A. Yes.

Q. And that's out at 3525 West Russell Road?

A. Yes.

Q. And is the -- is there another corporate office separate from that location for Russell Road, the entity, that you know of?

ELECTRONICALLY SERVED
08/09/2016 11:53:36 AM

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DISTRICT COURT
CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA, STEWART, DANIELLE LAMAR, and DIRUBIN TAMAYO, individually, and on behalf of a class of similarly situated individuals, Plaintiffs/ Counter Defendants, vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited Liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X, Defendants/Counter Claimant.	Case No.: A-14-709372-C Dept. No.: 31

DEFENDANT/ COUNTER CLAIMANT, RUSSELL ROAD FOOD AND BEVERAGE, LLC'S THIRD SUPPLEMENT TO ITS LIST OF DOCUMENTS AND WITNESSES PURSUANT TO NRCP. 16.1

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19. Entertainer Michaela Moore's Profile, Charge Summary and Dance Dollar Report, attached hereto and bate stamped RR0601 through RR0605;

20. Defendant/ Counter Claimant is not in possession of any documents pertaining to Dirubin Tamayo aka Diurbin Tamayo Perez. Defendant/ Counter Claimant has performed an extensive search of available records and has not found any records demonstrating that Plaintiff, Dirubin Tamayo aka Diurbin Tamayo Perez performed at Defendant's Crazy Horse III club at any time after November 4, 2012.

21. List of Entertainers who performed at Crazy Horse III Gentlemen's Club from November 4, 2012 to present (disclosed in electronic format on disk provided and Bate Stamped as RR0606);

22. Any and all documents provided by Plaintiff/ Counter Defendants' in their Initial Disclosures to their List of Documents and Witnesses pursuant to NRCP 16.1 and all supplements thereto;

23. Defendant/ Counter Claimant objects as to authentication and foundation of all documents listed or presented by Plaintiff/ Counter Defendant;

24. Defendant/Counter Claimant reserves the right to supplement this list at a later date.

DEFENDANT/COUNTER CLAIMANT LIST OF WITNESSES

1. Plaintiff/Counter Defendant, JACQUELINE FRANKLIN, c/o RYAN ANDERSON, ESQ. of MORRIS ANDERSON, 716 S. Jones, Las Vegas, Nevada 89107. Plaintiff /Counter Defendant is expected to testify as to the facts and circumstances surrounding the incident alleged in Plaintiffs' Third Amended Complaint on file herein;

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testify as to the facts and circumstances surrounding the incident alleged in Plaintiffs' Third Amended Complaint on file herein;

13. Plaintiff/Counter Defendant, MICHAELA MOORE, c/o RYAN ANDERSON, ESQ. of MORRIS ANDERSON, 716 S. Jones, Las Vegas, Nevada 89107. Plaintiff/Counter Defendant is expected to testify as to the facts and circumstances surrounding the incident alleged in Plaintiffs' Third Amended Complaint on file herein;

14. All witnesses listed in Plaintiff/Counter Defendants' Initial Disclosures to their List of Documents and Witnesses pursuant to 16.1;

15. Defendant/Counter Claimant also reserve the right to call any rebuttal witnesses as a result of any exhibits or witnesses listed or presented by Plaintiff/ Counter Defendant; and

16. Defendant/Counter Claimant reserves the right to supplement this List of Witnesses at a later date.

DATED this 9th day of August 2016.

KAMER ZUCKER ABBOTT

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CH3LV

Entertainers November 4, 2012 - August 4, 2016

	First	Last	Stage Name	Status	Ent. ID	Exp. Position	Last Performed
1	REDACTED		Merlot	Inactive	5061163	10/17/2019 Female	6/5/15 3:24 AM
2			Aspen	Inactive	6052030	01/22/2016 Female	12/10/15 8:45 PM
3			Mariana	Inactive	3066710	06/19/2017 Female	11/21/12 2:26 PM
4			Nia	Active	2854775	10/07/2020 Female	8/3/16 2:18 PM
5			Miyokou	Inactive	3070678	03/16/2020 Female	5/14/16 7:57 PM
6			needs name	Inactive	6010977	09/25/2013 Female	6/26/13 10:08 PM
7			Josey	Inactive	6047059	07/15/2020 Female	5/7/16 7:54 PM
8			Logan	Inactive	5993124	09/11/2019 Female	10/8/15 4:40 AM
9			Gucci	Inactive	3020685	07/27/2015 Female	12/3/14 12:05 AM
10			?	Inactive	2663467	03/23/2020 Female	10/9/15 9:03 PM
11			Stoli	Inactive	2529441	05/18/2017 Female	3/22/13 3:18 AM
12			Jayleen	Inactive	6012090	07/19/2018 Female	
13			Athena	Inactive	6061588	04/18/2021 Female	4/20/16 12:07 AM
14			Fallon	Active	6052984	11/16/2020 Female	8/4/16 1:17 AM
15			Yohana	Active	6065771	05/30/2021 Female	7/23/16 12:39 AM
16			Vixen	Inactive	2820847	05/28/2018 Female	11/16/13 7:54 PM
17			Miss Jaija	Inactive	3073366	11/16/2017 Female	
18			Chelsea	Inactive	6040162	03/05/2020 Female	3/6/16 4:25 PM
19			Zen	Inactive	3065445	09/21/2017 Female	9/12/14 7:56 PM
20			Aleida	Inactive	5729945	04/17/2019 Female	11/4/14 6:07 PM
21			Syra	Inactive	6059417	06/10/2016 Female	
22			Alessandra	Inactive	6025018	06/02/2019 Female	6/3/14 10:24 PM
23			Rilley	Inactive	6039732	02/24/2020 Female	2/25/15 7:20 PM
24			Alejandra	Inactive	6025847	05/02/2019 Female	6/27/15 12:42 AM
25			Lex	Inactive	6036341	12/15/2019 Female	12/4/15 11:32 PM
26			Malty	Inactive	6035564	11/25/2019 Female	12/5/14 8:27 PM
27			Giselle	Active	6035595	12/31/2020 Female	
28			Loki	Inactive	2613124	10/20/2016 Female	3/3/16 10:19 PM
29			Desire	Inactive	1879227	08/20/2015 Female	6/4/15 1:23 AM
30			Xena	Inactive	6053193	11/19/2020 Female	3/18/16 10:22 PM
31			?	Inactive	3081467	04/09/2018 Female	
32			Finesse	Inactive	6009786	08/07/2019 Female	12/6/15 4:40 AM
33			Lora	Active	2579072	03/22/2021 Female	8/3/16 11:20 PM
34			Karma	Active	1746206	10/12/2016 Female	7/30/16 12:04 AM
35			Soraya	Inactive	3060067	09/16/2018 Female	1/30/16 4:02 AM
36			NEEDS TO CH	Inactive	3065177	05/16/2017 Female	10/1/13 5:24 AM
37			Staffanie E	Inactive	6019125	12/27/2018 Female	
38			Mona	Inactive	6044459	05/21/2020 Female	4/2/16 1:30 AM
39			Sally	Inactive	6011433	09/10/2018 Female	8/19/15 9:16 PM
40			Kana	Active	3040083	01/13/2020 Female	7/31/16 11:12 PM
41			Mercy	Inactive	6013520	08/21/2018 Female	5/14/16 12:11 AM
42			Natasha	Inactive	6045732	06/17/2020 Female	6/18/15 10:02 AM
43			Talia	Active	6050212	06/16/2020 Female	7/23/16 11:25 PM
44			Princess	Inactive	6055660	01/07/2021 Female	2/4/16 1:54 PM
45			GiGi	Inactive	6019343	01/02/2020 Female	5/10/15 3:26 AM
46			Emma	Inactive	1807852	06/25/2015 Female	1/17/14 1:44 PM
47			Nicole	Inactive	6019390	04/03/2014 Female	1/19/14 12:04 AM
48			Desie	Inactive	6019392	04/03/2014 Female	1/4/14 3:57 PM
49			Mercy	Inactive	6012920	08/08/2018 Female	8/11/13 12:45 AM
50			Gemini	Inactive	2756253	12/06/2018 Female	10/23/15 4:58 AM
51			Samera	Inactive	6027514	06/05/2019 Female	6/6/14 9:16 PM
52			Telia	Inactive	6034688	11/06/2019 Female	5/17/15 1:16 PM

	First	Last	Stage Name	Status	Ent. ID	Exp.	Position	Last Performed
4537	REDACTED		Jenny	Inactive	6045938	09/22/2015	Female	
4538			Mai	Active	6053569	11/25/2020	Female	8/3/16 11:33 PM
4539			Glitter	Inactive	3032871	06/12/2014	Female	4/18/14 7:31 PM
4540			??	Inactive	8261826	02/11/2021	Female	
4541			Aspen	Active	6061579	04/18/2021	Female	8/1/16 9:54 PM
4542			Cherry-Ann	Inactive	6012392	07/26/2018	Female	7/29/13 2:35 AM
4543			Ella	Inactive	2890519	06/05/2018	Female	10/11/13 1:53 PM
4544			Layla-Rose	Inactive	3080347	03/22/2018	Female	9/23/13 3:33 AM
4545			Santana	Active	3060462	03/28/2021	Female	
4546			Tori Taylor	Inactive	6035937	12/05/2019	Female	1/26/15 11:56 PM
4547			Royalty	Inactive	2764120	11/12/2019	Female	2/11/15 11:30 PM
4548			Biz	Inactive	3041440	12/11/2018	Female	10/25/15 6:34 PM
4549			?	Inactive	1765340	09/12/2018	Female	
4550			Eureka	Inactive	6042704	04/20/2020	Female	7/10/15 9:04 PM
4551			Yuki	Inactive	6033783	10/17/2019	Female	10/17/14 11:29 PM
4552			Kimbella	Inactive	5997837	07/02/2014	Female	4/4/14 12:27 AM
4553			Naoki	Inactive	3062338	03/12/2017	Female	7/1/14 2:57 PM
4554			Maricela	Inactive	6030840	08/18/2019	Female	9/12/14 10:34 PM
4555			Cleveland	Inactive	3062793	06/09/2019	Female	2/28/16 2:37 AM
4556			Be-Be	Inactive	2854376	06/24/2019	Female	12/1/14 11:54 PM
4557			Lia	Active	6065683	09/29/2016	Female	6/29/16 11:59 PM
4558			Rain	Inactive	2676268	04/28/2016	Female	
4559			Nixie	Inactive	6037959	01/22/2020	Female	1/24/15 9:56 PM
4560			Adriana	Inactive	6034123	10/23/2019	Female	10/24/14 4:00 AM
4561			Nikki	Inactive	6038371	04/29/2015	Female	2/6/15 12:59 PM
4562			Aiyana	Inactive	6038814	02/06/2020	Female	7/16/15 7:56 PM
4563			Talia	Inactive	3079133	03/05/2018	Female	
4564			Zara	Inactive	3022408	09/05/2018	Female	9/6/13 11:51 PM
4565			Meela	Inactive	6049224	08/27/2020	Female	3/20/16 2:10 PM
4566			Elveria	Active	8100911	10/12/2020	Female	6/18/16 9:14 PM
4567			Aspen	Inactive	6015456	10/03/2018	Female	10/6/13 1:22 AM
4568			Bree	Inactive	6059432	03/10/2021	Female	3/20/16 11:22 AM
4569			Imogene	Inactive	3064927	05/10/2017	Female	2/9/13 8:40 PM
4570			Lilly	Inactive	3010653	01/08/2018	Female	6/15/13 8:52 PM
4571			Georgia	Inactive	6033182	10/06/2019	Female	10/12/14 9:26 PM
4572			Monique	Inactive	6017894	11/22/2018	Female	4/23/16 1:34 PM
4573			Meg	Active	6052192	10/27/2020	Female	6/7/16 11:31 PM
4574			Champagne	Inactive	1285957	07/23/2014	Female	6/13/14 12:13 AM
4575			Madden	Active	3076365	01/22/2018	Female	7/23/16 11:58 PM
4576			Meleena	Inactive	6048206	08/06/2020	Female	4/26/16 11:40 PM
4577			India	Inactive	3062948	05/08/2018	Female	8/19/13 4:33 PM

MTS
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DISTRICT COURT
CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA, STEWART, DANIELLE LAMAR, and DIRUBIN TAMAYO, individually, and on behalf of a class of similarly situated individuals vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability company LLC, (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB, DOE CLUB OWNER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER Defendants AND RELATED COUNTERCLAIMS	Case No.: A-14-709372-C Dept. No.: 31 **DEFENDANT RUSSELL ROAD FOOD AND BEVERAGE, LLC'S MOTION TO STRIKE NEW EVIDENCE RAISED IN PLAINTIFFS' REPLY FOR THEIR MOTION FOR CLASS CERTIFICATION ON ORDER SHORTENING TIME**

DEPARTMENT XXXI
NOTICE OF HEARING
DATE 12/20/16 TIME 9:00am
APPROVED BY

12-09-16 A10:31 IN

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COMES NOW Defendant, RUSSELL ROAD FOOD AND BEVERAGE, LLC d/b/a CRAZY HORSE III GENTLEMEN'S CLUB ("Defendant"), by and through its attorneys of record JEFFERY A. BENDAVID, ESQ. and STEPHANIE J. SMITH, ESQ. of MORAN BRANDON BENDAVID MORAN, and hereby moves this Court for an Order Shortening Time for hearing on Defendant's Motion to Strike New Evidence Raised in Plaintiffs' Reply for Their Motion for class Certification.

This Motion is based upon the Points and Authorities submitted herewith, together with the papers and pleadings on file herein, exhibits attached hereto, and oral arguments at the time of Hearing.

DATED this 7th day of December, 2016.

MORAN BRANDON BENDAVID MORAN

/s/ Jeffery A. Bendavid, Esq.
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ORDER SHORTENING TIME

This matter having come before this Court upon the Affidavit of Jeffery Bendavid, Esq. in Support of Order Shortening Time and the Court having reviewed all of the papers and pleadings on file herein, and for good cause shown, therefore:

IT IS HEREBY ORDERED that, Defendant Russell Road Food and Beverage, LLC d/b/a Crazy Horse III Gentlemen's Club Motion to Strike New Evidence Raised in Plaintiffs' Reply for Their Motion for Class Certification shall be heard on shortened time, and shall be heard before this Court on the 20th day of December at the hour of 9:00 AM a.m./p.m. in the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 9 day of December, 2016.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Motion must be filed/served by: 12/12/16 noon;
Opposition must be filed/served by: 12/16/16 noon;
Reply must be filed/served by: 12/19/16 noon.

Please provide courtesy copies to Chambers upon filing.

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AFFIDAVIT OF JEFFERY A. BENDAVID, ESQ. IN COMPLIANCE WITH EDCR 2.26

STATE OF NEVADA)
) ss.:
COUNTY OF CLARK)

JEFFERY A. BENDAVID, ESQ., being first duly sworn, under oath, deposes and says that:

1. Affiant is an attorney licensed, in good standing, to practice law in the State of Nevada and a Partner with the law firm of **MORAN BRANDON BENDAVID MORAN**, counsel for Defendant in this matter;

2. Plaintiffs originally filed a Motion for Class Certification on April 27, 2016.

3. On or about May 16, 2016, Defendant opposed the Motion for Class Certification.

4. Defendant's Opposition pointed out the numerous deficiencies in Plaintiffs' Motion for Class Certification, and the parties stipulated to moving the hearing and subsequently vacating the hearing entirely.

5. Without filing a new Motion, Plaintiffs finally re-noticed their previous Motion that was filed on April 27, 2016.

6. On or about December 5, 2016, Plaintiffs filed their Reply Brief for their Motion for Class Certification.

7. The Reply Brief improperly introduced new evidence, arguments and/or law that were not raised in their original motion and thus should be stricken from the Reply Brief and not considered by the Court.

///

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8. The Motion for Class Certification is set to be heard on December 20, 2016 at 9:00 a.m., as such, good cause exists for this Motion to Strike to be heard on or before that date, as its outcome will materially affect the Motion for Class Certification.

FURTHER, AFFIANT SAYETH NAUGHT.

I swear on penalty of perjury that matters set forth herein are true to the best of my knowledge.

Dated 8, December 2016.

JEFFERY A. BENDAVID, ESQ.

SUBSCRIBED AND SWORN to before me this 8th day of December, 2016.

NOTARY PUBLIC

LEILANI GAMBOA
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STATE OF NEVADA
Appt. No. 06-109640-1
My Appt. Expires May 10, 2019

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MEMORANDUM OF POINTS AND AUTHORITIES

I.
PROCEDURAL HISTORY

Plaintiffs filed a Class Action Complaint on or about November 4, 2014. Plaintiffs subsequently amended their original complaint several times, and filed their Third Amended Class Action Complaint on October 2, 2015 alleging claims brought pursuant to the Nevada Constitution Article XV, Section 16 more commonly known as the Nevada Minimum Wage Amendment ("MWA") and for unjust enrichment.

The Plaintiffs are allegedly a group of eleven individuals that may have performed as dancers/entertainers on Defendant's premises as early as November 2012. Plaintiffs, on April 27, 2016, filed a Motion for Class Certification ("Motion"). See Plaintiffs' *Motion for Class Certification*, filed April 27, 2016. Although Plaintiffs' Motion had citations to standards for certifying a class, it was devoid of actual evidence and/or allegations to support the attempted certification. On May 16, 2016, Defendant raised these issues in its filed Opposition to Motion. See Defendant's *Opposition to Motion for Class Certification*, filed May 16, 2016. Plaintiffs subsequently vacated the hearing on their Motion, upon stipulation from Defendant. On October 19, 2016, without filing a new Motion, simply re-noticed their Motion (and subsequently changed the date again in a correspondence). *See Case Docket*. However, Plaintiffs did not file a new motion or otherwise amend their original Motion which was lacking in any evidence. *See generally*, Case Docket. On December 5, 2016, Plaintiffs, after having six (6) months with Defendant's Opposition, filed their Reply Brief, improperly raising new issues. See Plaintiffs' *Reply in Support of Motion for Class Certification*. At issue here is the fact that Plaintiffs' Reply Brief raises for the first time, new evidence, arguments and/or law.

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II.
ARGUMENT

A. Plaintiffs' Reply Should be Stricken to the Extent it Presents New Evidence.

In this case, Plaintiff's reply brief improperly introduces new arguments and law. The Nevada Supreme Court has held that insofar as new arguments are raised solely in the party's reply brief, it "need not consider it." *Weaver v. State*, 121 Nev. 494, 502 (2005). In *Tovar v. United States Postal Serv.*, the 9th Circuit Court of Appeals also specifically noted that to the "extent that the (reply) brief presents new information, it is improper" with respect to a party's reply brief on appeal that newly presented "statistics." 3 F.3d 1271, n. 3 (9th Cir. 1993). Here, this Court cannot consider new evidence provided in a reply when the other party has no opportunity to respond to it. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). Accordingly, Plaintiffs' newly provided information, evidence, and arguments should be stricken in their entirety.

Plaintiffs' original Motion for Class Certification had no evidence to substantiate its base allegations (or those of the operative Complaint). Now, Plaintiffs' Reply Brief inserts new and previously un-attached deposition testimony as evidence, and to refute Defendant's arguments regarding Plaintiffs' failure to comply with the requisites of Nev. R. Civ. P. 23. However, attaching this evidence for the first time in their Reply Brief is improper. As such, the following should be stricken, along with Exhibits 1 and 2 in their entirety:

> "...the Club admits...", Depo. Trans. Of Club Manager at 19:7-11 (attached as **Ex. 1**) ("Q. Is it fair to say during the relevant time period that the club treat (*sic*) all the dancers equally and applies the policies that it has equally to all the dancers? A. Yes."); *id.* at 16:24-17:7 (stating the Club at all relevant times has required dancers to pay a house fee each time they worked)." *Reply Brief*, 5:8
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> "The Club subsequently confirmed that it employed (or leased space to) over 4,500 individuals between November 2012 and August 2016. *See* first and last page of Entertainer List (attached as **Ex. 2**)." *Reply Brief*, 5:fn. 2.

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"...they were also required to pay a 'house fee' to the Club every time they showed up to work. *See* Ex. 1 at 16:24-17:7." *Reply Brief*, 10:13-14.

As the foregoing is **new** information/ evidence to their argument that the eleven individuals adequately represent a class of persons for purposes of class certification pursuant to NRCP 23, it is "improper" and should be stricken. Accordingly, this Court should preclude Plaintiffs from presenting arguments and evidence in their reply that were not properly brought before this Court in their original Motion for Class Certification.

III.

CONCLUSION

Based upon the foregoing law, Defendant respectfully requests that this Honorable Court **GRANT** its Motion to Strike New Evidence Raised in Plaintiffs' Reply for their Motion for Class Certification.

DATED this 8 day of December, 2016.

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DISTRICT COURT

CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA STEWART, DANIELLE LAMAR and DIRUBIN TAMAYO individually, and on behalf of Class of similarly situated individuals, Plaintiffs, v. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB) SN INVESTMENT PROPERTIES, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, DOE EMPLOYER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X, Defendants.	CASE NO.: A-14-709372-C DEPT. NO.: XXXI

PLAINTIFFS' OPPOSITION TO DEFENDANT RUSSELL ROAD FOOD AND BEVERAGE, LLC'S MOTION TO STRIKE NEW EVIDENCE RAISED IN PLAINTIFFS' REPLY FOR THEIR MOTION FOR CLASS CERTIFICATION ON ORDER SHORTENING TIME

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PLAINTIFFS' OPPOSITION TO DEFENDANT RUSSELL ROAD FOOD AND BEVERAGE, LLC'S MOTION TO STRIKE NEW EVIDENCE RAISED IN PLAINTIFFS' REPLY FOR THEIR MOTION FOR CLASS CERTIFICATION ON ORDER SHORTENING TIME

Plaintiffs, individually and on behalf of all persons similarly situated, hereby file their Opposition to Defendant Russell Road Food and Beverage, LLC's Motion to Strike New Evidence Raised in Plaintiffs' Reply for Their Motion for Class Certification on Order Shortening Time.

This Opposition is more fully supported by the accompanying Memorandum of Points and Authorities.

DATED this 16th day of December, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant (the club) does not want the Court to consider or rely on two pieces of evidence submitted with Plaintiffs' (the dancers) reply in support of their pending motion for class certification: (1) The club's discovery response confirming that there are at least 4,500 putative class members; and (2) portions of the deposition transcript of the club's general manager admitting that the club treated all dancers the same and applied all policies equally to all dancers.[1] The club claims the court "cannot consider new evidence provided in a reply when the other party has no opportunity to respond to it." Mot. to Strike at p. 7, *citing Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).

The club's motion to strike is baseless. First, neither the discovery response nor the club manager's testimony is "new evidence." Rather, it appropriately replies to one of the club's main arguments in its opposition brief that some unspecified quantum of "actual evidence" is required for class certification.[2] The purpose of a reply brief is to reply to arguments raised in the opposition brief, and this may include submitting evidence. Second, even if the evidence in question was "new evidence," the Court should still consider it because the club was not surprised by it, has failed to seek a timely remedy for any alleged injustice (*i.e.*, by asking the court for an opportunity to respond), and makes no claim it has any contrary evidence to introduce even if it were given an opportunity to proffer it.

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[1] The club also erroneously claims the reply "introduces new arguments and law." Mot. to Strike at p. 7.

[2] Defendant's argument misses the mark. Though more evidence might be required in certain cases to convince court that class certification is appropriate (*e.g., Dukes*, *Beazer Homes*), this is not one of those cases. To the contrary, the issue to be litigated here - whether the class members were supposed to be paid the minimum wage as a matter of law and were not, is "about the most perfect questions for class treatment." *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007).

II. RESPONSE

1. The evidence submitted in Plaintiffs' Reply raises no new issues; it properly responds to an argument Defendant raised in its Opposition

The dancers in their pending class certification motion argued this case is ripe for certification under NRCP 23 based on the uncontroverted allegations in the complaint. *See Meyer v. Eighth Judicial Dist. Court*, 110 Nev. 1357, 1364, 885 P.2d 622, 626 (1994) (citations omitted) ("[i]n analyzing whether it should certify a class, the court should generally accept the allegations of the complaint as true. An extensive evidentiary showing is not required."). *See also* Newberg on Class Actions § 24:74 (4th ed.) ("the complaint itself should usually afford the court a sufficient basis on which to make a [class certification] determination, thereby rendering an evidentiary hearing unnecessary."). To be sure, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), but this is not one of those times. *See Espinoza v. Galardi S. Enterprises, Inc.,* 2016 WL 127586, *3 (S.D. Fla. Jan. 11, 2016) (noting in granting class certification in dancer misclassification case that "Defendants have not cited to any decision with different results — denying the Rule 23 class certification motion. And the Court has not been able to uncover one either.").

The club in its opposition argued, in relevant part, that Plaintiffs had not submitted "actual evidence" regarding numerosity and commonality. *See* Oppo. at p. 15 (claiming "Plaintiffs' Motion only provides a self-serving 'estimate' that 'scores if not hundreds of dancers' work at Defendant's Crazy Horse III club during a week."); *id.at* p. 25 (arguing "it is impossible for any common questions of fact or law to exist because the determination of whether each Plaintiff or potential Plaintiff is or is not an independent contractor requires a unique factual determination that could be comprised of facts wholly different from any other Plaintiff.").

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The clear purpose of the "actual evidence" submitted with the reply was to reply, appropriately enough, to an argument the club chose to raise in its opposition brief. *See, e.g., Carr v. Int'l Game Tech.*, 2013 WL 638834, at *4 (D. Nev. Feb. 20, 2013) ("The Court finds that the allegedly new evidence submitted with the reply was not new and was properly attached in response to arguments made in Defendants' opposition."); *Panliant Fin. Corp. v. ISEE3D, Inc.*, 2014 WL 3592718, at *8 (D. Nev. July 21, 2014) (same); *Bell v. Santa Ana City Jail*, 2010 WL 582543, *1 n. 3 (C.D. Cal. Feb. 16, 2010) ("The Court concurs with defendant that the evidence adduced in her Reply raises no new issues and consists solely of a response to the arguments that plaintiff first raised in his Opposition"). Indeed the club in its own motion to strike concedes as much. *See* Mot. to Strike at p. 7 (recognizing the evidence at issue was submitted "to refute Defendant's arguments" made in the opposition about the alleged need for "actual evidence").

2. Even if the evidence in question were "new evidence," it should still be considered because Defendant was not surprised by it, has failed to seek a timely remedy for any alleged injustice, and makes no claim it has any contrary evidence to introduce even if it were given an opportunity to proffer it.

The evidence submitted in connection with Plaintiffs' reply properly responds to arguments raised by Defendant in its opposition. But even if it were "new evidence," the decision whether to consider such evidence in a reply falls within the sound discretion of the trial court. See, e.g., *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 227 (2d Cir. 2000) (holding district court acted within its discretion in accepting and relying upon certain affidavits submitted with a reply brief). The court in *Bayway Ref. Co* identified three relevant factors: (1) whether the other party was surprised by the evidence in question; (2) whether the other party sought a timely remedy for any injustice by seeking leave to file a sur-reply to respond to the evidence; and (3) whether the other party claimed it had any contrary evidence to introduce if it were given an opportunity to proffer it. *Id.* at 227. Here all three factors weigh decisively in favor of considering the evidence in question.

There is no surprise here for two reasons. First, the club in its opposition repeatedly insisted Plaintiffs must produce "actual evidence" on the class certification question. *See, e.g.*, Oppo. at pp. 3, 6, 7, 8, 9. How can the club be surprised or complain now it got what it asked for? Second, the evidence in question comes from the club's own admissions in the form of discovery responses and deposition testimony. How can the club be surprised by evidence that it produced and that has been in its exclusive possession from day one? Indeed, the only surprise here is how ardently the club insisted in its brief opposing class certification that numerosity, commonality, and virtually every other element of class certification was lacking when in fact the club has known all along that Plaintiffs' estimate regarding class size was spot on and that it has treated all dancers the same at all times, thus confirming the existence of common questions of law and fact.

The club cites *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996), for the proposition that "when new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the non-movant an opportunity to respond." Mot. to Strike at p. 7. The problem, of course, is that, unlike the aggrieved party in *Provenz*, the club hasn't asked for an opportunity to respond by moving for leave to file a sur-reply. *See Provenz*, 102 F.3d at 1483 (holding district court erred in not considering plaintiff's supplemental declaration that rebutted "new" evidence contained in defendant's reply). Nor has the club suggested it might have any contrary evidence to introduce if it were given an opportunity to proffer it, which is not surprising since the allegedly "new" evidence in question comes from its own discovery responses identifying the precise size of the class and from the testimony of its own general manager admitting that the club has treated all dancers the same throughout the relevant time period.

III. CONCLUSION

Plaintiffs properly attached "actual evidence" to their reply brief to reply to the "you need actual evidence" argument raised by the club in its opposition brief. Even if this evidence were "new" evidence unrelated to the opposition, the club concedes that, at most, it should be allowed an

opportunity to respond but has chosen not to ask the Court for leave to do so. The motion to strike is without merit and should be denied.

DATED this 16th day of December, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **MORRIS//ANDERSON**, and on the 16th day of December, 2016, I served the foregoing ***PLAINTIFFS' OPPOSITION TO DEFENDANT RUSSELL ROAD FOOD AND BEVERAGE, LLC'S MOTION TO STRIKE NEW EVIDENCE RAISED IN PLAINTIFFS' REPLY FOR THEIR MOTION FOR CLASS CERTIFICATION ON ORDER SHORTENING TIME*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF CLASS CERTIFICATION MOTION

Plaintiffs, pursuant to this Court's order dated January 17, 2017, hereby submit this supplemental memorandum regarding the impact, if any, of a recent amendment to Nevada's wage statute (codified at NRS 608.0155) on their pending motion for class certification.

DATED this 31st day of January, 2017.

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INTRODUCTION

This is a proposed class action by exotic dancers against the owners of Crazy Horse III Gentlemen's Club (the "Club"), a Las Vegas strip club. Count One of the extant Third Amended Complaint ("3AC") is a claim under the Minimum Wage Amendment to Nevada's Constitution (Art. XV. sec. 16) to recover the prevailing minimum wage for each hour worked. 3AC at ¶43. Count Two (unjust enrichment) seeks to recover various fees and fines that were improperly imposed on Plaintiffs by the Club as a condition of employment. *Id.* at ¶48. The complaint does not allege any claim under Nevada's wage statute, NRS Chapter 608. Plaintiffs have moved to certify a class of putative employees for both counts under NRCP 23(a) and 23(b)(3). The Court requested this supplemental briefing to address whether NRS 608.0155 (a recent amendment to Nevada's wage statute) has any impact on the class certification analysis.

SHORT ANSWER

NRS 608.0155, which adds a "conclusive presumption" of independent contractor status for claims arising under Chapter 608 if certain criteria are met, does not alter the fact that both counts in Plaintiffs' complaint should be certified under NRCP 23(a) and 23(b)(3).

With respect to Plaintiffs' Minimum Wage Amendment claim, the Club's suggestion that NRS 608.0155's new test for independent contractor status acts as a de facto "class action killer" and prevents class treatment of Plaintiffs' constitutional wage claim is unconvincing. *See* Cert. Oppo. at 24 (arguing NRS 608.0155 test "requires an independent and individual analysis of each Plaintiff"). In fact, NRS 608.0155 only applies to statutory wage claims, not to constitutional wage claims. Even if NRS 608.0155 could be construed to apply to constitutional wage claims it would be preempted. Even if it did apply to constitutional wage claims and was not preempted, NRS 608.0155 does not purport to apply where, as here, the putative principal denies that the putative contractors perform any work for it and admits it has paid the putative contractors no money. Finally, even if the test were to be applied, the test criteria easily can be assessed on a class-wide basis where, as here, all putative

class members had the same job and were subject to the same policies and working conditions. The law in this regard comports with common sense. Regardless of the legal test or tests to be applied, at the end of the day the Club's dancers are either all its employees or none of them are. That question can and should be decided on a class-wide basis. *See Iglesias–Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y.2007) (noting the common liability issue of whether class members "were supposed to be paid the minimum wage as a matter of law and were not" is "about the most perfect question[] for class treatment."); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) ("When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.").

No provision of NRS Chapter 608 could have any conceivable impact on Plaintiffs' unjust enrichment claim. "Where state common law includes an unjust enrichment action like Nevada's, courts have usually granted class certification." *Sobel v. Hertz Corp.*, 291 F.R.D. 525, 543 (D. Nev. 2013) (collecting cases). *See also Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330, 341 (N.D. Cal. 2010) (certifying Rule 23(b)(3) class for unjust enrichment claim because whether defendant was unjustly enriched is "[c]ommon to all class members and provable on a class-wide basis").

ANALYSIS

I. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

A. The Minimum Wage Amendment

The Minimum Wage Amendment was proposed by initiative petition and overwhelmingly approved and ratified by Nevada voters in 2004 and 2006. *See* Nev. Const. art. 15, § 16. It guarantees a mandatory minimum wage to all employees, who are defined in the Amendment as "any person who is employed by an employer as defined herein but does not include [1] an employee who is under eighteen (18) years of age, [2] employed by a nonprofit organization for after school or summer

employment or [3] as a trainee for a period not longer than ninety (90) days." *Id.* at sec. 16(C). The Amendment incorporates the definition of employee used by the federal Fair Labor Standards Act ("FLSA") (29 USC §§ 201-219). *See* 29 U.S.C. § 203(e)(1) ("the term 'employee' means any individual employed by an employer."). The Amendment expressly creates a private cause of action separate and distinct from any pre-existing statutory cause of action. *See id.* at sec. 16(B) ("An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section…"); s*ee also Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 955 (2014) (noting Minimum Wage Amendment claim is separate and distinct from a claim under NRS Chapter 608).

B. NRS Chapter 608

An employee's right to a minimum wage in Nevada is guaranteed by the federal FLSA and by the Nevada Constitution. The Nevada legislature in NRS Chapter 608 also has enacted some laws regarding the minimum wage and provided a private cause of action in NRS 608.260 and 608.140. This statutory scheme is effectively obsolete, however, because it is less generous to employees than the guarantees provided by the FLSA and the Nevada Constitution. *See Perry v. Terrible Herbst, Inc.*, 132 Nev. Adv. Op. 75, 383 P.3d 257, 260 (2016) (noting the Minimum Wage Amendment "affords a broader array of remedies than the back-pay claim NRS 608.260 allows."); s*ee also Terry*, 336 P.3d at 956 (noting "a broader or more comprehensive coverage of employees [than that provided in the FLSA's definitions] would be difficult to frame."), *quoting United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

The Nevada Supreme Court addressed the substantive scope of the Chapter 608's minimum wage provisions in *Terry v. Sapphire Gentlemen's Club*, which was an employment misclassification class action by dancers alleging violations of NRS Chapter 608. *Terry*, 336 P.3d at 953. The dancers in that case made no claim under the Minimum Wage Amendment. *Id.* at 955. The Supreme Court

held that NRS 608.010 (the wage law's definition of "employee") incorporated the FLSA's broad definition of employee. *See Terry*, 336 P.3d at 953 (holding that, because "the statutes in question do not signal any intent to deviate from that course, and that for practical reasons the two schemes should be harmonious in terms of which workers are entitled to protection, we herein adopt the Fair Labor Standards Act's 'economic realities' test for employment in the minimum wage context.").

NRS 608.0155, which was enacted after the decision in *Terry*, leaves intact the Supreme Court's adoption of the economic realities test to define "employee" under NRS 608.010 but adds a "conclusive presumption" of independent contractor status for the purposes of Chapter 608 if certain criteria are met. *See* NRS 608.0155(1). However, the fact that "a person is not conclusively presumed to be an independent contractor" under this new test "does not automatically create a presumption that the person is an employee." NRS 608.0155(2). In other words, if a person is not an independent contractor under NRS 608.0155, then employment status for the purposes of Chapter 608 would be determined under NRS 608.010's economic realities test.

II. IMPACT OF NRS 608.0155 ON RULE 23(a) ANALYSIS

NRS 608.0155 has no impact on NRCP 23(a)'s threshold analysis. A new legislative test for independent contractor status clearly has no impact on whether the class size is sufficiently numerous (it is) or whether the representative parties will fairly and adequately protect the interests of the class (they will). Nor could this independent contractor test have any impact on the commonality and typicality prerequisites. Commonality and typicality are satisfied because the Club's uniform corporate policy is the focus of this litigation and because each count presents a single common question of law - Count One asks whether dancers are the club's employees under Nevada law; Count Two asks whether the Club has been unjustly enriched by retaining fees and fines extracted from the dancers as a condition of employment. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 848-49, 124 P.3d 530, 538-39 (2005) (holding commonality and typicality met where "each class member's claim arises from the same course of events and each class member makes similar legal

arguments to prove the defendant's liability."); *Meyer v. Eighth Judicial Dist. Court*, 110 Nev. 1357, 1364, 885 P.2d 622, 626 (1994) (commonality and typicality met where general corporate policy is focus of litigation); *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 606 (N.D.Cal. 2014) (commonality and typicality met where complaint alleges putative employer implemented systematic misclassification policy).

III. IMPACT OF NRS 608.0155 ON RULE 23(b)(3) ANALYSIS

A. Count One (Minimum Wage Amendment Claim)

1. Predominance of common questions of law and fact

The predominance prong "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Beazer Homes*, 121 Nev. at 850, 124 P.3d at 540. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022). Conversely, predominance is not met where "individual stakes are high and disparities among class members great." *Shuette*, 121 Nev. at 851, 124 P.3d at 540. "A 'single, central issue' as to the defendant's conduct vis a vis class members can satisfy the predominance requirement even when other elements of the claim require individualized proof." *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 27 (D. Mass. 2003) (*quoting In re Prudential Ins. Co. of Am. Sales Practices*, 148 F.3d 283, 314 (3d Cir.1998)).

NRS 608.0155 does not impact the predominance analysis under NRCP 23(b)(3) with respect to Plaintiffs' Minimum Wage Amendment claim for the following reasons:

a. ***Regardless of whether NRS 608.0155 applies, common questions predominate over individual ones because the central liability issue is common to the class***

Liability in this case (*i.e.*, the lawfulness of Defendants' policy of not treating its dancers as employees) is the central legal issue common to the class. As other courts previously have found, where the "liability issue is common to the class, common questions are held to predominate over individual ones." *Ruffin v. Entm't of the E. Panhandle*, 2012 WL 5472165, at *10 (N.D.W. Va.

Nov. 9, 2012) (certifying class under FRCP 23(b)(3) where common liability question whether defendant strip club legally misclassified its dancers as independent contractors). Indeed, one court even declared that the common liability issue of whether class members "were supposed to be paid the minimum wage as a matter of law and were not" is "about the most perfect question[] for class treatment." *Iglesias–Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y.2007); *see also Williams-Green v. J. Alexander's Restaurants, Inc.*, 277 F.R.D. 374, 383 (N.D. Ill. 2011) (certifying FRCP 23(b)(3) class of waiters in class action against employer for tip pool violations where "controlling substantive issue" was propriety of employer's policy); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 89 (S.D.N.Y. 2001) (finding predominance where central issues were whether plaintiffs were employees as matter of law and consequences of resolution of that issue in relation to minimum wage). Even if NRS 608.0155 applied to Plaintiffs' constitutional wage claim (it does not) this would merely add another layer of legal analysis. It would not change the fundamental nature of the claim or the fact that the common liability issue predominates over any individual issues.

b. NRS 608.0155 by its plain language applies only to claims brought under NRS Chapter 608; it does not purport to apply to Minimum Wage Amendment claims

The first six words of NRS 608.0155 clearly indicate that its test for independent contractor status applies only "**[f]or the purposes of this chapter** [i.e., Chapter 608]." NRS 608.0155(1) (emphasis added). In other words, NRS 608.0155 unambiguously indicates that its independent contractor test does not apply for the purposes of Minimum Wage Amendment claims. If the Nevada legislature wanted to ignore the principle of constitutional supremacy and attempt to apply the test to limit the scope of the Minimum Wage Amendment it easily could have said so, but did not.

The Club in its brief opposing class certification attached as an exhibit the minutes of a Senate Committee on Commerce, Labor, and Energy hearing on the bill (SB 224) that contained what would become NRS 608.0155. *See* Class Cert. Oppo. at Ex. A. These minutes are irrelevant. Courts "must attribute the plain meaning to a statute that is not ambiguous." "*State v. Catanio*, 120 Nev. 1030,

1033, 102 P.3d 588, 590 (2004). *See also State v. Lucero*, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011) ("The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.") (quotation omitted). As an historical footnote, however, it bears noting that one industry lobbyist clearly stated to the Committee at the outset of the hearing that "[t]he purpose of S.B. 224 is to define independent contractors consistently **as found throughout Nevada Revised Statutes**." Class Cert. Oppo. Ex. A at p.4 (emphasis added). The lobbyist did not suggest that the purpose of the bill was to legislatively restrict the constitutional right to a minimum wage. Indeed, the minutes contain no mention of the concept of constitutional supremacy and no discussion regarding whether a legislature can restrict key constitutional provisions enacted by voter initiative or abrogate Supreme Court interpretations of those provisions. *Cf. Thomas*, 327 P.3d at 522 ("The principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution.").

c. Even if NRS 608.0155 could be construed to apply to Minimum Wage Amendment claims, the Nevada Supreme Court already has determined that such a statute would be preempted

The Nevada Supreme Court addressed the substantive scope of the Minimum Wage Amendment in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), *reh'g* denied (Sept. 24, 2014). The question presented in *Thomas* was whether the Amendment's broad definition of employee preempted a pre-existing legislative exception for taxicab drivers. *Id.* at 520. In answering that question in the affirmative, the Supreme Court held that: (a) "[t]he Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups," (b) it expressly provides that "all employees not exempted by the Amendment . . . must be paid the minimum wage set out in the Amendment", and (c) any statute that purports to interfere with the Amendment's broad definition of employee is "irreconcilably repugnant" to the Amendment and therefore preempted. *Id.* at 521 (noting "[t]he Amendment's broad definition of employee and very

specific exemptions necessarily and directly conflict with the legislative exception for taxicab drivers.").

The Nevada Supreme Court has not expressly held that voters intended the Minimum Wage Amendment's definition of employee to be co-extensive with the identical FLSA definition but strongly has indicated as much in both *Thomas* and *Terry*. The Court in *Terry* noted that the Amendment reflects "this state's voters' wish that more, not fewer, persons would receive minimum wage protections."). *Terry*, 336 P.3d at 955. The Court here was comparing the Amendment to the statutory definition of employee in Chapter 608 which the Court held was co-extensive with the FLSA definition except for six exemptions enumerated in NRS 608.250(2). As the Court indicated in *Thomas*, these six legislative exemptions are preempted by the Minimum Wage Amendment. The clear inference is that the scope of the Amendment is co-extensive with the FLSA except for the three exceptions enumerated in the Amendment. *Thomas* 327 P.3d at 520 ("the text of the Minimum Wage Amendment, by clearly setting out some exceptions to the minimum wage law and not others, supplants the exceptions listed in NRS 608.250(2)").

The Supreme Court in *Thomas* emphatically declared that Nevada's voters intended the Minimum Wage Amendment to broadly protect all workers and appropriately indicated that its scope is co-extensive with the FLSA subject to the three exceptions enumerated in the Amendment. *Thomas* expressly forecloses any past or future attempt by the legislature to constrict the broad definition of employee enshrined by Nevada's voters in the Minimum Wage Amendment. **Specific statutory exceptions from the Amendment's broad scope are preempted; so too are statutory tests that, if applied, would accomplish the same result**.

d. NRS 608.0155 does not purport to apply in situations where the putative principal denies that the putative contractors perform any work for it and admits it has paid the putative contractors no money

Even if this were a case under Chapter 608 and not the Minimum Wage Amendment, the independent contractor test in NRS 608.0155 still would not apply. The text of NRS 608.0155 makes

clear it only applies where there is a contract between the putative employer/principal and the putative employee/contractor for the latter to perform work for the former. Indeed, four of the five test criteria enumerated in NRS 608.0155(1)(c) make absolutely no sense unless there is an underlying contract to perform work. *See* NRS 608.0155(1)(c)(1) (asking whether "the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract"); *id*. at (c)(2) (asking whether the putative contractor has "control over the time the work is performed"); *id*. at (c)(3) (asking whether putative contractor "is required to work exclusively for one principal"); *id*. at (c)(4) (asking whether putative contractor "is free to hire employees to assist with the work"). The test presumably was meant to apply, for example, if a package delivery company hired, classified and paid its delivery drivers as independent contractors and the drivers claimed they were in fact employees. *See e.g., Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 985 (9th Cir. 2014) (considering whether FedEx drivers, who were "compensated [by FedEx] according to a somewhat complex formula that includes per day and per-stop components" were employees or independent contractors). This is the understanding the business lobbyists for the Amendment presented to Senate Committee. *See* Class Cert Oppo. Ex. A at 7-8 (lobbyist explaining that the independent contractor test in NRS 608.0155 would apply to determine the status of an individual where the individual "signs an agreement to provide services to a company" but there is a "dispute [as to] whether that person is or is not an employee."). The independent contractor test in NRS 608.0155 cannot coherently be applied where, as here, the putative employer/principal denies that the putative employees/contractors performed any work for it and admits it paid them no money.

e. The test criteria in NRS 608.0155 can be assessed on a class-wide basis

To be presumptively labeled an independent contractor for purposes of NRS Chapter 608, a person must satisfy three or more of five criteria enumerated in NRS 608.0155(1)(c). Assuming, for the sake of argument, that NRS 608.0155 applied to constitutional wage claims and was not

preempted, and further assuming that the Club had contracted with (and paid) its dancers to perform work at the club as independent contractors, the criteria in NRS 608.0155 easily could be assessed on a class-wide basis.

Most obviously, of course, courts have no problem applying the economic realities test on a class-wide basis. That test, which requires a "review of the totality of the circumstances of the working relationship's economic reality," *Terry*, 336 P.3d at 960, is much broader and nuanced than the criteria enumerated in NRS 608.0155. No element of the test in NRS 608.0155 is so unusual as to support the Club's insistence that it creates a per se bar to class treatment of employee misclassification claims against a single putative employer that has admitted it treats all putative employees the same.[1]

The first criterion considers whether "[1] the person has control and discretion over the means and manner of the performance of any work and [2] the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract." NRS 608.0155(1)(c)(1). The first part of this criterion (control and discretion) is very similar to the control factor in the economic realities test, which was considered by the Nevada Supreme Court on a class-wide basis with no problems. *See Terry*, 336 P.3d at 958 (considering degree of club's control of manner of dancers' performances on class-wide basis). The second part (primary element bargained for) frankly seems impossible to apply. How can a court meaningfully attempt to discern the "primary intent" of a contracting party? Presumably, however, the Club (and anyone else trying to avoid employer status) will swear the "result of the work" was paramount in its mind when it contracted with all putative employees. This element too thus will or will not be met on a class-wide basis.

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[1] The Club has admitted "during the relevant time period that the club treats all dancers equally and applies the policies that it has equally to all the dancers." *See* Class Cert. Reply, Ex. A at p. 19.

The second criterion considers whether "the person has control over the time the work is performed." *Id.* at (1)(c)(2). Since the Club treated all putative employees the same, this criterion also can be addressed on a class-wide basis (although this criterion does not apply where, as here, "the work contracted for is entertainment"). *Id.*

The third criterion considers whether the dancers are "required to work exclusively for one principal." The dancers concede this is not the case, but again this is because the Club had a common policy on this matter that can be assessed on a class-wide basis.

The fourth criterion considers whether "[t]he person is free to hire employees to assist with the work." Either they could or they couldn't. Again, another class-wide issue capable of class-wide resolution.

The fifth and final criterion considers whether the "person contributes a substantial investment of capital in the business of the person." This subsection specifically instructs the court to make a general class-wide assessment regarding whether dancers make a "substantial investment of capital" in their purported "dancing business." *See* NRS 608.0155(1)(c)(5)(degree of capital investment to be determined on basis of "equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages."). This capital investment inquiry also is applied on a class-wide basis in the economic realities test. *See Terry*, 336 P.3d at 959 (considering dancers' investment in equipment or materials and concluding, on class-wide basis, that performers' capital investment is *de minimis*).

2. Superiority of Minimum Wage Amendment Class Action

NRS 608.0155 would have no effect on the superiority analysis with respect to Count One. Regardless of any statutory test for independent contractor status (which, in any event, could easily be assessed on a class-wide basis), a class action wage claim is superior to piecemeal individual litigation because it concentrates the litigation in this forum where the Club is located and where a large number of putative class members presumably reside, there is no other litigation concerning the

controversy already commenced by members of the class, and the alternative would involve class members "filing hundreds of individual lawsuits that could involve duplicating discovery and costs that exceed the extent of the proposed class members' individual injuries." *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1176 (9th Cir.2010). Class actions routinely are found superior to piecemeal individual litigation in employee misclassification cases. *See, e.g., Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625 (S.D. Cal. 2010).

B. Count Two (Unjust Enrichment)

NRS 608.0155 only applies to minimum wage claims under Chapter 608. It has no impact on the predominance or superiority analysis under NRCP 23(b)(3) for Plaintiffs' common law claim for unjust enrichment. Certification of a Rule 23(b)(3) class for the unjust enrichment claim is appropriate because whether Defendant was unjustly enriched is "[c]ommon to all class members and provable on a class-wide basis." *Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330, 341 (N.D. Cal. 2010) (applying parallel rule).

CONCLUSION

NRS 608.0155 has no impact on any aspect of this case, including the class certification analysis. The Court should certify a class of dancers under NRCP 23(b)(3), certify subclasses for each count under NRCP 23(c)(4), and designate Plaintiffs as class representatives and the undersigned counsel as class counsel.

DATED this 31st day of January, 2017.

MORRIS//ANDERSON

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **MORRIS//ANDERSON**, and on the 31st day of January, 2017, I served the foregoing ***PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF CLASS CERTIFICATION MOTION*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service.

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DISTRICT COURT
CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, SAMANTHA JONES, KARINA STRELKOVA, and DANIELLE LAMAR, individually, and on behalf of a class of similarly situated individuals,

Plaintiffs,

vs.

RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada Limited Liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), SN INVESTMENT PROPERTIES, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X,

Defendants.

AND RELATED COUNTERCLAIMS

Case No.: A-14-709372-C
Dept. No.: 31

DEFENDANT, RUSSELL ROAD FOOD AND BEVERAGE, LLC'S SUPPLEMENTAL BRIEF IN SUPPORT OF DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION MOTION

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DEFENDANT, RUSSELL ROAD FOOD AND BEVERAGE, LLC'S SUPPLEMENTAL BRIEF IN SUPPORT OF DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION MOTION

COMES NOW, Defendant, RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability, dba CRAZY HORSE III GENTLEMEN'S CLUB, (the "Defendant"), by and through its attorney of record, GREGORY J. KAMER, ESQ., and KAITLIN H. ZIEGLER, ESQ., of KAMER ZUCKER ABBOTT, and JEFFERY A. BENDAVID, ESQ., and STEPHANIE J. SMITH, ESQ., of MORAN BRANDON BENDAVID MORAN, and hereby submits its Response to Plaintiffs, JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, SAMANTHA JONES, KARINA STRELKOVA, DANIELLE LAMAR's, AND (collectively, the "Plaintiffs") Supplemental Brief in Support of Denying Plaintiffs' Motion for Class Certification.

DATED this 24th day of February, 2017.

KAMER ZUCKER ABBOTT

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After a hearing on Plaintiffs' Class Certification Motion held on January 10, 2017, this honorable Court ordered Plaintiffs and Defendant to submit supplemental briefs regarding the sole issue of whether the Court should require the application of Senate Bill 224, now codified as NRS 608.0155 and NRS 608.255(3) prior to the certification of Plaintiffs' proposed class. On January 31, 2017, Plaintiffs filed their Supplemental Brief in Support of Class Certification Motion. Despite the Court's mandate regarding the sole issue to be addressed in Plaintiffs' Supplemental Brief, Plaintiffs elected to instead set forth arguments that NRS 608.0155 does not apply to Plaintiffs' case and only in the miraculous event that it does apply, then NRS 608.0155 should be applied on a class wide basis to Plaintiffs' proposed class.

Notwithstanding Plaintiffs' contentions that NRS 608.0155 does not apply to Plaintiffs' case, this Court should order that NRS 608.0155 be applied and addressed prior to any certification of Plaintiffs' proposed class. As explained below, this Court should issue such an order since:

1. NRS 608.0155 prevents common issues of fact and law from predominating over individual issues;

2. NRS 608.0155 prevents Plaintiffs' proposed class action from being the superior method of adjudication;

3. NRS 608.0155; has not been preempted by any Nevada Supreme Court decision;

4. NRS 608.0155 applies to the creation of an Independent Contractor relationship that bars the existence of an employment relationship under NRS 608.255(3);

5. The application of NRS 608.0155 is not limited to contracts where the independent contractor is paid money directly; and

6. NRS 608.0155 cannot be applied on a class wide basis because the individuals conclusively presumed to be an independent contractor are prohibited from engaging in an employment relationship.

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II. ARGUMENT

A. A Determination As To Whether Plaintiffs Are Conclusively Presumed to Be Independent Contractors Pursuant to NRS 608.0155 Should Be Made Prior to Any Certification of Plaintiffs' Proposed Class.

NRS 608.0155 and NRS 608.255(3) were enacted by the Nevada Legislature on June 2, 2015 and in conjunction, operate to exclude individuals conclusively presumed under NRS 608.0155 to be Independent Contractors from any obligation to be paid Nevada's minimum wage under NRS Chapter 608 and Article 15, § 16, of Nevada's Constitution (the "Minimum Wage Amendment"). *See* NRS 608.255(3). NRS 608.0155 states:

> 1. For the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:
>
> (a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;
>
> (b) The person is required by the contract with the principal to hold any necessary state business registration or local business license and to maintain any necessary occupational license, insurance or bonding; and
>
> (c) The person satisfies three or more of the following criteria:
>
> (1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.
>
> (2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.
>
> (3) The person is not required to work exclusively for one principal unless:
>
> (I) A law, regulation or ordinance prohibits the person from

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providing services to more than one principal; or

(II) The person has entered into a written contract to provide services to only one principal for a limited period.

(4) The person is free to hire employees to assist with the work.

(5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:

(I) Purchase or lease of ordinary tools, material and equipment regardless of source;

(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and

(III) Lease of any work space from the principal required to perform the work for which the person was engaged.

➥ The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.

2. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee.

3. As used in this section, "foreign national" has the meaning ascribed to it in NRS 294A.325. *(Emphasis Added).*

As provided above, NRS 608.0155 provides the criteria and circumstances under which an individual can be conclusively presumed to be an Independent Contractor. *See* supra. At the same time, NRS 608.0155(2) explicitly declares that if a person is not conclusively presumed to be an Independent Contractor under NRS 608.0155, that same individual is not automatically presumed to be an employee. *See* Id. In other words, an analysis of whether an individual is conclusively presumed to be an Independent Contractor under NRS 608.0155 is separate from any analysis as to whether that individual is deemed

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an employee under Nevada law. *See* Id. Cf. *See Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Rep. 87 *15-16, 336 P.3d 951, 958 (2014). (adopting FLSA standards to determine the existence of an employment relationship).

Since NRS 608.0155 provides separate criteria for determining whether an individual is conclusively presumed to be an Independent Contractor, such a determination must be conducted on each individual Plaintiff in this matter prior to any certification of Plaintiff's proposed class. Such a determination is required prior to any certification of Plaintiffs' proposed class because if an individual is conclusively presumed to be an Independent Contractor under NRS 608.0155, then that individual is not, pursuant to NRS 608.255(3), in an employment relationship upon which the individual can assert claims for unpaid wages under NRS Chapter 608 or Nevada's Minimum Wage Amendment. Put simply, such an individual conclusively presumed to be an Independent Contractor cannot be part of Plaintiffs' proposed class because that proposed class only includes individuals allegedly employed as dancers by Defendant who were not paid Nevada's minimum wage. *See* Plaintiffs' Motion for Class Certification at 4.

Additionally, a determination under this standard is required prior to any certification of Plaintiffs' proposed class because any individual who is not conclusively presumed to be an Independent Contractor under NRS 608.0155 is not automatically presumed to be an employee. *See* NRS 608.0155(2). As such, each individual Plaintiff and each proposed member of Plaintiffs' proposed class still must establish that they are employees under Nevada law pursuant to an entirely separate legal and factual analysis. *See Terry*, 336 P.3d at 958. Thus, NRS 608.0155 does not identify or establish, in any way, these individual Plaintiffs or proposed class members are employees of Defendant. Instead, NRS 608.0155

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only identifies those individual Plaintiffs or proposed class members who are conclusively presumed to be Independent Contractors and therefore cannot assert any claims under Nevada's Minimum Wage Amendment and more importantly, cannot participate in Plaintiffs' proposed class of alleged employees of Defendant.

As a result, a determination of whether the individual Plaintiffs are conclusively presumed to be an Independent Contractor must occur prior to any certification of Plaintiffs' proposed class because any individual Plaintiff who is conclusively presumed to be an Independent Contractor cannot be a member of the proposed class and cannot adequately represent the proposed class as a matter of Nevada law.

B. NRS 608.0155 Prevents Common Questions of Fact and Law From Predominating Over Individual Questions of Fact and Law As the Variance of Individualized Facts Prevents Any Resolution Through Generalized Proof.

Under N.R.C.P. 23, Plaintiffs bear the burden to prove that their case is appropriate for resolution as a class action. *See Shuette v. Beazer Homes Holdings Corporation,* 121 Nev. 837, 846, 124 P.3d 530, 537 (2005) (citing *Cummings v. Charter Hospital*, 111 Nev. 639, 643, 896 P.2d 1137, 1140 (1995)). Plaintiffs can meet this burden only by demonstrating the four prerequisites; (1) numerosity; (2) commonality; (3) typicality: and adequacy. *See* Id. at 846. In addition to establishing these four (4) prerequisites for certifying a class action required by N.R.C.P. 23(a), Plaintiffs also must meet one of three conditions provided by N.R.C.P. 23(b), one of which is whether there exists common questions of law and fact that are significant to the substantive legal analysis of the class members' claims. *See Shuette,* 121 Nev. at 849-50. Questions of law or fact that may be at issue are those that qualify a potential class member's case as a genuine controversy. *See* Id. at 851 (quotation omitted).

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Common questions of law or fact predominate individual questions if they "significantly and directly impact each class member's effort to establish liability and entitlement to relief" and can be resolved through generalized proof. Id. (quotations omitted). When the facts and the law necessary to resolve claims vary from person to person, taking into account the defenses presented, or when resolution of common questions would result in a superficial adjudication depriving a party of a fair trial, individual questions predominate and a class action is improper. *See* Id. at 851.

Plaintiffs contend in their Supplemental Brief that regardless of whether NRS 608.0155 applies, common questions predominate over individual ones because the central liability issue remains common to Plaintiffs' proposed class. *See* Supp. Brief at 7-8. Specifically, Plaintiffs contend that the liability related to Defendant not treating its dancers as employees is the central issue regardless of the enactment of NRS 608.0155. *See* Id.

Despite Plaintiffs' contention, Plaintiffs' Supplemental Brief offers no actual analysis or argument as to how NRS 608.0155 does not affect whether common questions of law and fact predominate over individual questions. *See* Id. at 8. As was the case in Plaintiffs original Motion to Certify, Plaintiffs' Supplemental Brief only provides reference to a host of cases supposedly supporting Plaintiffs' contention. *See* Id. at 7-8 (citing *Ruffin v. Entm't of the E. Panhandle*, 2012 WL 5472165 at *10 (N.D. W.Va. 2012); *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D. N.Y. 2007); *Williams-Green v. J. Alexander's Restaurants, Inc.*, 277 F.R.D. 374, 383 (N.D. Ill 2011); and *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 89 (S.D. N.Y. 2001)). However, these cases only discuss predominance regarding alleged employees. *See* supra. None of these cases consider or had the opportunity to consider whether predominance exists where each

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individual plaintiff's status as an employee can only arise after it is determined whether each is conclusively presumed to be an Independent Contractor under NRS 608.0155. *See* Id.

In light of NRS 608.0155, Plaintiffs' contention fails because Defendant's liability can only arise if the members of Plaintiffs' proposed class are employees of Defendant. In order to make such a determination, Plaintiffs' status and therefore Defendant's liability can only be established after diverse and individual factual determinations are made regarding whether each individual Plaintiff may be conclusively presumed an Independent Contractor under NRS 608.0155.

As a result, a predominance of common questions of fact cannot exist because the determination of whether each Plaintiff or potential Plaintiff is or is not an independent contractor requires a unique factual determination under NRS 608.0155 that could be comprised of facts wholly different from any other Plaintiff, but yet still conclusively presume that such an individual was an Independent Contractor. *See* Id. The criteria set forth in NRS 608.0155 creates a situation where individual facts demonstrating or not demonstrating whether a person is conclusively presumed to be an Independent Contractor vary enormously from person to person. *See* Id.

For example, one person could be a foreign national and another could have filed for a Social Security Number. *See* Id. Another person, who is a foreign national may have met the first three of the five criteria provided in Section 1(c). *See* Id. Another person, who filed for a Social Security Number may meet the last three of the five criteria provided in Section 1(c). *See* Id. All of whom would still be conclusively presumed to be an Independent Contractor under NRS 608.0155. *See* Id.

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In truth, the preliminary evidence provided by the deposition of the individual Plaintiffs establishes this reality. NRS 608.0155(1)(a) provides that a person may be conclusively presumed an Independent Contractor if:

> Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year.

During the deposition of Plaintiff, Karina Strelkova, she testified to filing an income tax return for earnings from self-employment and taking certain related exemptions. Specifically, Ms. Strelkova testified:

> Q. Okay. Would you take business write-offs?
>
> A. Yes.
>
> Q. What type of things would you use as a business write-off?
>
> A. Clothing, accessories, hair, color, cuts or hairpieces, makeup, shoes, little pouches to keep my money in, food and alcohol.
>
> Q. What about house fees?
>
> A. House fees.
>
> Q. Anything else? Vehicle?
>
> A. Yes. I owned a car, correct.
>
> Q. So I have clothing, accessories, hairstyling or pieces, makeup, shoes?
>
> A. Nails.
>
> Q. Okay. Food and beverage, house fees, and then vehicle mileage?
>
> A. Correct.

Deposition Transcript of Karina Strelkova at 35:9-18, copy of the relevant page are attached hereto and incorporated herein as Exhibit "A."

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On the contrary, Plaintiff, Jacqueline Franklin testified differently. Ms. Frankly testified to the following:

> Q: Okay. Since you've lived in Nevada, no income tax filing?
>
> A: Correct. Transcript of Deposition of Jacqueline Franklin at 24:6-8, a copy of which is attached hereto and incorporated herein as Exhibit "B."
>
> . . .
>
> Q: Okay. What about expense receipts?
>
> A: No. I don't keep those.
>
> Q: So you wouldn't keep receipts for clothes or shoes or anything like that?
>
> A: No, because I never filed taxes. I didn't see a purpose for saving receipts. Id. at 114:11-14.

As provided above, Plaintiff, Karina Strelkova testified to "writing off" her self-employed business taxes her expenses related to performing as a dancer, which evidences that she meets the requirements of NRS 608.0155(1). *See* supra. On the other hand, Plaintiff, Jacqueline Franklin testified that she never bothered to file any tax returns. *See* Id. Although Ms. Franklin failed to file any tax returns does not mean that she fails to meet the requirements of NRS 608.0155 as she may have obtained a social security number or employer identification number. *See* NRS 6080155(1). Either of which meets the requirements of NRS 608.0155(1).

This single piece of factual evidence provided in these deposition testimonies demonstrates that the possible combinations of facts that could conclusively presume each Plaintiff to be an Independent Contractor under NRS 608.0155 are nearly endless. Thereby, such individual factual determinations are too voluminous for a common question of fact or law to predominate over these now required, individual determinations of whether each Plaintiff is or is not conclusively presumed to be an Independent Contractor under NRS

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608.0155. *See* Id. As such, the question of whether each Plaintiff is conclusively presumed to be an Independent Contractor cannot be determined through "generalized proof." Therefore, common questions of fact cannot predominate over these required individual questions. *See Shuette,* 121 Nev. at 851.

More importantly, these diverse individual factual assessments necessary under NRS 608.0155 for each Plaintiff requires that such a determination be made prior to any certification of a proposed class. Including such individual factual determinations as part of the proposed class would render the class entirely unmanageable as the individual facts determining under NRS 608.0155 whether each Plaintiff is or is not conclusively presumed to be an Independent Contractor is overwhelming and would result in numerous disparate outcome.

C. NRS 608.0155 Prevents Plaintiff's Proposed Class Action From Being the Superior Method of Adjudicating Plaintiffs' Claims.

Plaintiffs' Supplemental Brief contends that NRS 608.0155 would have no effect on the superiority prong. *See* Supp. Brief at 13. Plaintiffs conclude that regardless of NRS 608.0155, a class action is superior to individual litigation because class actions have been found to be superior to individual litigation in the past. *See* Id. (citing *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625 (S.D. Ca. 2010)). This self-serving conclusion lacks merit because none of the cases relied upon by Plaintiffs have considered the effect of NRS 608.0155 on the certification of class action wage cases. *See* Id. NRS 608.0155 only was enacted on June 2, 2015. No other jurisdictions have a similar statute and certainly have not addressed its effect on ongoing class action litigation.

The superiority prong of N.R.C.P. 23(b)(3) requires Plaintiffs to establish that the superior method for adjudicating Plaintiffs' claims. *See Shuette,* 121 Nev. at 851-52

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(citations omitted). Unlike all of the other cases relied upon by Plaintiffs, NRS 608.0155 applies in this matter and if such individual Plaintiffs are conclusively presumed to be an Independent Contractor under NRS 608.0155, each are prevented from asserting any claims for unpaid wages as an employee under Nevada's Minimum Wage Amendment or under NRS Chapter 608. The facts of each Plaintiff that conclusively presumes that individual to be an Independent Contractor are unique to that Plaintiff and cannot be common to or typical of any other Plaintiff. *See* NRS 608.0155.

Additionally, Plaintiffs' references to cases beyond this jurisdiction consider statutes and regulation opposite to the conclusive presumption of NRS 608.0155. For example, Plaintiffs rely on the case of *Dilts v. Penske Logistics, LLC*, which is a matter based entirely on California's Labor Code. *See*, 267 F.R.D. at 632-33. In such cases such as *Dilts*, certain rebuttal presumptions such as that all individuals are presumed employees from the onset of a wage case make a class action superior to other forms of adjudication. *See e.g.,* California Business and Professions Code Section 7000, et seq., and California Labor Code Section 2750.5.

Here, NRS 608.0155 creates an opposite conclusive presumption that individuals are in fact Independent Contractors who cannot engage in an employment relationship. *See supra*. As such, a class action is not a superior method of adjudication because the facts resolve whether each Plaintiff is or is not conclusively presumed to be an Independent Contractor under NRS 608.0155, and could never be managed efficiently as part of any class action involving alleged employees. *See* Id. The status of each individual as an Independent Contractor or an employee would conflict with and overwhelm Plaintiffs' proposed class,

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which consists only of alleged employees of Defendants. As such, Plaintiff's proposed class action is not superior to individual resolution of Plaintiffs' claims.

D. NRS 608.0155 Applies to the Establishment of Independent Contractor Relationship Which Does Not Constitute an Employment Relationship Under NRS 608.255(3).

Plaintiffs contend that the provisions of NRS 608.0155 do not apply to Plaintiffs' claims asserted under Nevada's Minimum Wage Amendment. *See* Supp. Brief at 8. Plaintiffs' contend that since the first six words of NRS 608.0155(1) states "for the purposes of this Chapter," NRS 608.0155 therefore cannot apply to Plaintiffs' claims because Plaintiff never asserted any claims under NRS Chapter 608. *See* Id. Plaintiffs further argue that if the Nevada Legislature wanted to apply NRS 608.0155 to limit the scope of the Minimum Wage Amendment it could have done so, but did not. *See* Id.

Plaintiffs' conclusion fails for two (2) reasons. First, the Nevada Legislature actually did apply NRS 608.0155 (as well as NRS 608.255), which expressly provides than an independent contractor relationship does not constitute an employment relationship under Nevada law. On June 2, 2015, the Nevada Legislature approved SB No. 224, which amended NRS Chapter 608 to add the provisions of NRS 608.0155 and amend the already existing NRS 608.255 to include an exclusion for independent contractor relationships. Section 7 of SB 224 specifically states:

> The amendatory provisions of this act [SB 224] apply to an action to recover unpaid wages pursuant to Section 16 of Article 15 of the Nevada Constitution or NRS 608.250 to 608.290, inclusive, in which a final decision has not been rendered before, on or after the effective date of this act. SB 224 as enacted on June 2, 2015, a copy of which is attached hereto and incorporated herein as Exhibit "C."

This above statement from the Nevada Legislature plainly establishes that NRS 608.0155 as well as NRS 608.255(3) applies to wage claims like Plaintiffs asserted under

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Nevada's Minimum Wage Amendment. *See* supra. As provided above, it is the clear, and absolute intent of Nevada's Legislature to apply the provisions of NRS 608.0155 and NRS 608.255(3) to any action to recover unpaid wages still pending, which unequivocally includes Plaintiffs and their claims for unpaid wages.

Second, the plain meaning of "for the purposes of this Chapter" actually establishes that NRS 608.0155 does apply to Plaintiffs claims when properly analyzed. Plaintiffs attempt to avoid the plain statement of intent by the Nevada Legislature by contending that this Court can only consider the plain meaning of the NRS 608.0155, and more specifically only the clause, "for the purposes of this Chapter." *See* Supp. Brief. At 8-9 (citing *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004); and *State v. Lucero*, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011)). Based on this single clause, Plaintiffs incorrectly conclude that this phrase only applies to claims asserted under NRS Chapter 608, and not Nevada's Minimum Wage Amendment because it states "for the purposes of this Chapter only." *See* Id. at 8.

Plaintiffs' argument fails quickly because Plaintiffs attempt to limit their analysis to just the first clause of NRS 608.0155 is improper and contrary to the actual method of analysis of any Nevada statute. *See* supra. The Nevada Supreme Court is clear that when a court interprets a statute, it must:

> give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Further, it is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent. *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171 (2005) (internal quotations and citations omitted).

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Based on the above, Plaintiffs' argument and conclusion results in the very outcome that a correct statutory analysis should avoid (*i.e.*, an absurd or unreasonable outcome). *See* supra. When analyzed correctly, it is clear that NRS 608.0155 and NRS 608.255(3) apply to any claims asserted under Nevada's Minimum Wage Amendment.

To begin with, the purpose of NRS Chapter 608 is not exclusive to claims for unpaid wages. *See* NRS Chapter 608. Instead, the purpose of NRS Chapter 608, entitled "Compensation, Wages, Hours," is to safeguard the hours of service, working conditions, and related compensation of workers in Nevada. *See* NRS 608.005. As part of meeting this purpose, NRS Chapter 608 defines what is or what is not an employment relationship under Nevada law subject to the requirements of Nevada's Minimum Wage Amendment. *See* NRS 608.255. NRS 608.255(3) states:

> For the purposes of this chapter and any other statutory or constitutional provision governing the minimum wage paid to an employee, the following relationships do not constitute employment relationships and are therefore not subject to those provisions:
>
> 3. The relationship between a principal and an independent contractor.

NRS 608.0155 is a supporting "General Provision" of NRS Chapter 608, which provides the circumstances under which a person is presumed conclusively to be an independent contractor and consequently, involved in an independent contractor/principal relationship. If so conclusively presumed under NRS 608.0155, an individual cannot be deemed to have an employment relationship with his or her principal under NRS 608.255(3). *See* supra. NRS 608.255(3), along with the Nevada Legislature's accompanying statement of intent, expressly includes and applies to any claims asserted under Nevada's Minimum Wage Amendment.

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Thus, when NRS 608.0155 is considered in its entirety and harmoniously in conjunction with NRS 608.255(3), it is clear that NRS 608.0155 absolutely applies for the purposes of Minimum Wage Amendment claims. NRS 608.0155 provides the statutory circumstances under which an independent contractor relationship is presumed. *See* Id. Without NRS 608.0155, NRS 608.255(3) has no effect.

As such, accepting Plaintiffs' argument conclusion results in the absurd and unreasonable result that statutory analysis must avoid. Specifically, Plaintiffs' argument demands that the provision of NRS 608.255(3) be ignored along with the majority of NRS 608.0155 when claims are asserted under Nevada's Minimum Wage Amendment. *See* Supp. Brief at 8-9. The result of this argument is that NRS 608.255(3) applies to Minimum Wage Amendment claims, but the accompanying statutory test for conclusively presuming that an individual is engaged in an independent contract relationship cannot be applied. *See* Id.

Such an outcome would render NRS 608.255(3) superfluous as to Minimum Wage Amendment claims despite expressly including such claims because NRS 608.0155 could not be used to determine whether an independent contractor relationship exists. Such a result also is absurd and unreasonable, since this outcome would make it impossible for a party to conclude whether an independent contractor relationship exists where claims for unpaid wages are asserted under Nevada's Minimum Wage Amendment because the circumstances set forth in NRS 608.0155 could not be utilized. In other words, NRS 608.255(3) would be rule without a test. This outcome is all the more absurd and unreasonable in light of the fact that SB 224 was enacted by the Nevada Legislature with the clearly stated purpose of applying both NRS 608.0155 and NRS 608.255(3) to claims asserted under Nevada's Minimum Wage Amendment. *See* supra.

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As such, it is clear from the proper analysis of NRS 608.0155 that NRS applies to Plaintiffs' claims asserted under Nevada's Minimum Wage Amendment and the Nevada Legislature plainly intended for NRS 608.0155 and NRS 608.255(3) to apply to such claims.

E. The Nevada Supreme Court Has Never Determined That NRS 608.0155 or Any Other Statute Was Preempted by Nevada's Minimum Wage Amendment.

Plaintiffs contend that the Nevada Supreme Court in *Thomas v. Nevada Yellow Cab Corp.*, determined that NRS 608.0155 is preempted by Nevada's Minimum Wage Amendment. *See* Supp. Brief at 9 (citing 130 Nev. Adv. Op. 52, 527 P.3d 518 (2014)). Plaintiffs' contention misses the mark from the beginning as the Nevada Supreme Court in *Thomas* never considered or addressed the doctrine of preemption, which is a determination of whether a federal law takes the place of a conflicting state law. *See*, 527 P.3d at 520. Cf. *FDIC v. Rhodes*, 130 Nev. Adv. Rep. 88 *9-10, 336, P.3d 961, 965 (2014). Accordingly, the Nevada Supreme Court in *Thomas* never "determined" that NRS 608.0155 or any other statute was "preempted" by Nevada's Minimum Wage Amendment.

To the contrary, the Nevada Supreme Court in *Thomas* only considered a single, purely legal issue: "Does the Minimum Wage Amendment to the Nevada Constitution, Article 15, Section 16, override the exception for taxicab drivers provided in Nevada's minimum wage statute, NRS 608.250(2)(e)?" 527 P.3d at 520. In answering this question, the Nevada Supreme Court in *Thomas* only held that Nevada's Minimum Wage Amendment "superseded and supplanted" the taxicab driver exception set forth in NRS 608.250(2). *See* Id. at 522.

The Nevada Supreme Court's reasoning in *Thomas* was explicitly limited to the fact that Nevada's Constitution is the supreme Nevada law and since the Minimum Wage Amendment to Nevada's Constitution provided its own set of exceptions to Nevada's

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minimum wage requirements, the existing statutory exceptions were "superseded and supplanted" by these constitution exceptions. *See* Id. at 521-22.

Contrary to Plaintiffs' assertions, the Nevada Supreme Court in *Thomas* never made any determination that NRS Chapter 608 or any future provision of NRS Chapter 608 was unconstitutional, preempted, or otherwise invalid as a result of Nevada's Minimum Wage Amendment. *See* Id. Additionally, the Nevada Supreme Court in *Thomas* never determined that NRS 608.0155 or any other employment statute is or would be preempted by Nevada's Minimum Wage Amendment. *See* Id.

After *Thomas*, the Nevada Supreme Court in *Perry v. Terrible Herbst, Inc.*, recognized the effectiveness of NRS 608.260. *See*, 132 Nev. Adv. Op. 75 *7, 383 P.3d 257, 260 (October 27, 2016). In fact, the Nevada Supreme Court in *Perry* went so far as to adopt NRS 608.260 to establish a two year statute of limitation applicable to any wage claim asserted under Nevada's Minimum Wage Amendment or NRS 608.260. *See* Id. As such, the Nevada Supreme Court has not determined in these decisions or any in other decision that NRS 608.0155 is preempted by Nevada's Minimum Wage Amendment.

Plaintiffs' unsupported conclusion relies upon the misconception that having the legal status of an Independent Contractor as now established by NRS 608.0155 is somehow an exception to Nevada's Minimum Wage Amendment and therefore invalid. *See* Supp. Brief at 10 ("Specific statutory exceptions from the Amendment's broad scope are preempted"). To the contrary, an Independent Contractor is not an employee and an employee is not an Independent Contractor under Nevada law. *See* NRS 608.255(3).

This conclusion is based on Plaintiffs' incorrect assumption that Plaintiffs are already "employees" as defined by Nevada law and that applying the provision of NRS 608.0155

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would somehow operate to "except" Plaintiffs from this already assumed status. *See* Supp. Brief at 10. Nevada law and in particular, Nevada's Minimum Wage Amendment does not make such an assumption. *See generally,* Nev. Const. art. 15, § 16 and NRS Chapter 608.

Instead, Nevada's Minimum Wage Amendment establishes the right to a base minimum wage for employees working in Nevada. *See* Nev. Const. art. 15, § 16. *See also, Perry*, 383 P.3d at 259-60. Nevada's Minimum Wage Amendment also grants employees the right to sue their employer if the employer does not pay them the required minimum wage. *See* Id. However, Nevada's Minimum Wage Amendment only grants this right to actual employees working in Nevada, which Nevada's Minimum Wage Amendment defines as "any employee who is employed by an employer," not including an employee is who is under 18, employed by a nonprofit organization for after school or summer employment, or as a trainee for no longer than 90 days. *See* Nev. Const. art. 15, § 16, paragraph C. Thus, if any individual cannot establish that he or she is an "employee" under this definition, then that individual has no rights under Nevada's Minimum Wage Amendment. *See* Id.

Nowhere in the plain language of Nevada's Minimum Wage Amendment is any declaration that all citizens in Nevada or all individuals who perform as dancers in Nevada are deemed "employees" from the onset. Plaintiffs, instead, bear the burden of establishing that they in fact are employees under Nevada law. *See Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Rep. 87 *15-16, 336 P.3d 951, 958 (2014). One of the steps required in establishing employment status is a prior determination of whether an individual can be conclusively presumed to be an Independent Contractor. *See* NRS 608.0155.

NRS 608.0155 operates not to establish an exception to the definition of "employee" provided by Nevada's Minimum Wage Amendment, but to provide the elements necessary for

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establishing a conclusive presumption that an individual is an independent contractor prior to any determination of whether an individual is an employee engaged in an employment relationship under Nevada law. *See* NRS 608.255(3). If that conclusive presumption applies to an individual, then that individual cannot be an "employee" as defined by Nevada's Minimum Wage Amendment and therefore, is not entitled to the rights granted employees provided therein. *See* Id. If this conclusive presumption does not apply, an individual still must establish that he or she is an employee as defined by Nevada's Minimum Wage Amendment. NRS 608.0155(2). This analysis must occur prior to any analysis of whether an individual is an employee as defined by Nevada's Minimum Wage Amendment. Thus, an individual who is presumed conclusively to be an Independent Contractor is not an employee excepted from the requirements of Nevada's Minimum Wage Amendment, but is not an employee in the first place who by Nevada law is not engaged in an employment relationship. Therefore, he or she cannot be granted the rights set forth in Nevada's Minimum Wage Amendment.

F. NRS 608.0155 Never Requires The Payment of Money To An Individual Before In Order For the Individual Can Be Conclusively Presumed To Be An Independent Contractor.

In a last ditch effort to prevent the application of NRS 608.0155, Plaintiffs contend in their Supplemental Brief that NRS 608.0155 cannot apply in this case because NRS 608.0155 only "applies where there is a contract between the putative employer/principal and the employee/contractor for the latter to perform work for the former." *See* Supp. Brief at 10-11. Of course Plaintiffs fail to identify what portion of NRS 608.0155 declares that this statute is limited in its application as alleged by Plaintiffs. *See* Id. at 11. Plaintiffs provide no such reference because none exists. *See* NRS 608.0155.

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NRS 608.0155 states:

1. For the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:

(a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;

(b) The person is required by the contract with the principal to hold any necessary state business registration or local business license and to maintain any necessary occupational license, insurance or bonding; and

(c) The person satisfies three or more of the following criteria:

(1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.

(2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.

(3) The person is not required to work exclusively for one principal unless:

(I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or
(II) The person has entered into a written contract to provide services to only one principal for a limited period.

(4) The person is free to hire employees to assist with the work.

(5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:

(I) Purchase or lease of ordinary tools, material and equipment regardless of source;

(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for

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which the person was engaged; and

(III) Lease of any work space from the principal required to perform the work for which the person was engaged.

➥ The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.

2. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee.

3. As used in this section, "foreign national" has the meaning ascribed to it in NRS 294A.325.

As stated above, NRS 608.0155 is not limited in any manner in its application. *See* supra. No evidence of any obligation to perform work in exchange for money is required for NRS 608.0155 to be applied. *See* Id. *See also,* Supp. Brief at 11. In fact, the only obligation required to be in a "contract" under NRS 608.0155 is that the "contract" obligates an individual to have and maintain the necessary business licenses. *See* NRS 608.0155(1)(b). As such, Plaintiffs desperate argument fails because no such limitation exists in NRS 608.0155 and in fact applies to any contract where an independent contractor/principal relationship exists.

In reality, Plaintiffs are intentionally trying to confuse the issues regarding the application of NRS 608.0155 by contending that NRS 608.0155 only applies to contracts where the individual receives a direct money payment from the principal for work performed. *See* Supp. Brief at 11. Of course, Plaintiffs offer no legal reference that NRS 608.0155 was limited in such a manner or that such a contract is the only type of contract that could give rise to an independent contractor relationship. *See* Id.

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Plaintiffs are attempting this act of confusion because the alleged contract between Defendant and Plaintiffs does not involve Defendant's obligation to pay Plaintiffs money directly for performing as dancers at Defendant's Gentlemen's Club. *See* Defendant's Answer to Plaintiffs' Third Amended Complaint and Counterclaims at 19-22. Plaintiffs are not paid directly by Defendant under such a contract but have certainly entered into a valid contract where each Plaintiff has agreed to perform as a dancer in exchange for retaining the sums paid by each customer. *See* Id. As such, the contract alleged by Defendant is as valid as any other contract under Nevada law and qualifies as a contract under which Plaintiffs may be conclusively presumed to be an Independent Contractor once the facts concerning each individual Plaintiff are applied under NRS 608.0155.

G. NRS 608.0155 Cannot Be Applied On a Class Wide Basis Because The Application of NRS 608.0155 Prevents Each Individual Plaintiff Conclusively Presumed To Be An Independent Contractor From Engaging In An Employment Relationship As a Matter of Law.

Plaintiffs contend that NRS 608.0155 easily can be applied on a class wide basis because courts routinely apply the "economic realities" test on a class wide basis. *See* Supp. Brief at 12. Plaintiff's argument fails for an obvious reason. Courts apply the "economic realities" test on a routine basis for proposed classes of alleged employees. *See e.g., Terry,* 336 P.3d at 958-60. As such, courts are able to apply this test to such proposed classes because the "economic realities" test establishes whether there exists an employment relationship between the proposed class of employees and an alleged employer. *See* Id.

NRS 608.0155 cannot be applied in the same manner, especially in this matter, because the application of NRS 608.0155 does not operate to demonstrate the existence of an employment relationship, but instead operates to eliminate the possibility of an employment relationship as a matter of Nevada law regardless of the results of the "economic realities"

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test. *See* NRS 608.255(3). If NRS 608.0155 is applied to an individual, then that individual is conclusively presumed to be an Independent Contractor and cannot as a matter of Nevada law have engaged in an employment relationship. *See* Id. As such, that individual cannot, as a matter of Nevada law, assert any claims for unpaid wages under Nevada's Minimum Wage Amendment or NRS Chapter 608. *See* Id. Therefore, NRS 608.0155 cannot be applied on a class wide basis to a proposed class of alleged employees asserting claims for unpaid wages under Nevada's Minimum Wage Amendment, which is the class proposed by Plaintiffs. *See* supra.

This proposed class of individuals consists only of those individuals expressly prohibited from existing in the first place by the successful application of NRS 608.0155 and NRS 608.255(3). Applying NRS 608.0155 to an existing proposed class of employees eliminates this effect created by NRS 608.0155 and NRS 608.255(3). These statutes do not require the allegation or determination of an employment relationship before application, which is the result of applying NRS 608.0155 within the proposed class of alleged employees. Instead, these statutes eliminate the possibility of a conclusively presumed Independent Contractor from ever participating in a proposed class of alleged employees and from alleging any claims for unpaid wages under NRS Chapter 608 and Nevada's Minimum Wage Amendment because no employment relationship exists as a matter of Nevada law.

Accepting Plaintiffs' argument places the cart before horse, which is that an employment relationship allegedly existed before the application of NRS 608.0155. To the contrary, the application of NRS 608.0155 and NRS 608.255(3) prohibits any individual from asserting or relying upon the existence of an employment relationship to assert claims for unpaid wages as well as proposing a class of similarly situated individuals. Therefore, NRS

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608.0155 cannot be applied to Plaintiffs' proposed class of employees alleging an employment relationship since Plaintiffs' proposed class of employees cannot exist as a matter of Nevada law upon the application of NRS 608.0155 and NRS 608.255(3).

For the same reasons, the application of NRS 608.0155 must occur prior to any certification of Plaintiffs' proposed class because Plaintiffs and those similarly situated could not have and cannot assert any claims against Defendant for the payment of unpaid wages owed if they are conclusively presumed to be an Independent Contractor.

III. CONCLUSION

Based on the arguments provided above, Defendant respectfully requests that this Court deny Plaintiffs' Motion for Certification and subject Plaintiffs to the prior application of NRS 608.0155 to determine if Plaintiffs are conclusively presumed to be Independent Contractors.

DATED this 24h day of February, 2017.

KAMER ZUCKER ABBOTT

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Exhibit "A"

In The Matter Of:

FRANKLIN V.

RUSSELL FOOD & BEVERAGE

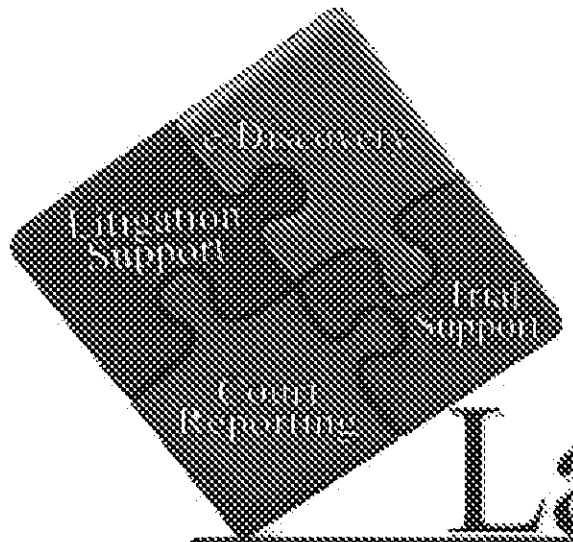
KARINA STRELKOVA

January 9, 2017

Lawyer Solutions Group

321 S. Casino Center Blvd, Suite 180

Las Vegas, Nevada 89101



Lawyer Solutions Group

A. No.
Q. Okay. I'm not sure you said. Did you report all of your income from Crazy Horse in 2012 to the IRS?
A. I did my taxes in 2012.
Q. What about in 2013?
A. I did my taxes every year.
Q. Okay. Would you take business write-offs?
A. Yes.
Q. What type of things would you use as a business write-off?
A. Clothing, accessories, hair, color, cuts or hairpieces, makeup, shoes, little pouches to keep my money in, food and alcohol.
Q. What about house fees?
A. House fees.
Q. Anything else? Vehicle?
A. Yes. I owned a car, correct.
Q. So I have clothing, accessories, hairstyling or pieces, makeup, shoes?
A. Nails.
Q. Okay. Food and beverage, house fees, and then vehicle mileage?
A. Correct.

Exhibit “B”

Las Vegas Reporting

PROFESSIONAL COURT REPORTING SERVICES

Transcript of the Testimony of

Jacqueline Franklin

Date Taken: January 10, 2017

Case: JACQUELINE FRANKLIN v. RUSSELL ROAD FOOD AND BEVERAGE, LLC, et al.

Case No.: A-14-709372-C

Las Vegas Reporting
Phone: 702.509.5001 Fax: 702.974.2242
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A. I did.
Q. Do you still have a Nevada business license?
A. Not a current one, no.
Q. What about your sheriff's card, is that current?
A. It is.
Q. Okay. So during the time that you were performing at Crazy Horse, you think you had a Nevada business license?
A. I did, yes.
Q. Did you understand that to be a requirement to perform at Crazy Horse?
A. Yes. It was required.
Q. Okay. All right. Did you need to have those items to perform at other clubs?
A. Yes.
Q. Okay. I guess I wasn't very clear about items. I meant the business license and the sheriff's card.
Did you file income tax with the Internal Revenue Service?
A. No. I never have.
Q. Not for any of the time you performed at Crazy Horse?

MS. CALVERT: And just stop there.

THE WITNESS: I answered them, I signed it, and I have not heard anything since then.

BY MS. SMITH:

Q. So like filled out a questionnaire, not filled out a response like the responses I'm having you review right now?

A. Right. He asked me questions, he wrote down my answers, and then I signed the bottom of it.

Q. Okay. All right. And I know I asked you this earlier, but no receipts or documents in your possession?

A. No.

Q. Maybe hidden away in that safe?

A. No.

Q. Okay. What about expense receipts?

A. No. I don't keep those.

Q. So you wouldn't keep receipts for clothes or shoes or anything like that?

A. No, because I never filed taxes. I didn't see a purpose for saving receipts.

Q. Okay. So I'm going to direct your attention to page 11 of 14, your response to Interrogatory No. 16.

Exhibit "C"

Senate Bill No. 224–Committee on
Commerce, Labor and Energy

CHAPTER.....

AN ACT relating to employment; establishing a conclusive presumption that a person is an independent contractor if certain conditions are met; excluding the relationship between a principal and an independent contractor from certain provisions governing the payment of minimum wage to an employee; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Section 16 of Article 15 of the Nevada Constitution defines the term "employee" and requires each employer to pay a certain minimum wage to each employee. Existing law imposes certain additional requirements relating to compensation, wages and hours of employees. (Chapter 608 of NRS) **Section 1** of this bill establishes a conclusive presumption that a person is an independent contractor, rather than an employee, if certain conditions are met. **Section 5** of this bill excludes the relationship between a principal and an independent contractor from those relationships that constitute employment relationships for the purpose of requiring the payment of a minimum wage. **Section 7** of this bill applies the provisions of this bill to any action or proceeding to recover unpaid wages pursuant to a requirement to pay a minimum wage in which a final decision has not been rendered as of the effective date of this bill.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 608 of NRS is hereby amended by adding thereto a new section to read as follows:

1. For the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:

(a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;

(b) The person is required by the contract with the principal to hold any necessary state or local business license and to maintain any necessary occupational license, insurance or bonding; and

(c) The person satisfies three or more of the following criteria:

(1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.

(2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.

(3) The person is not required to work exclusively for one principal unless:

(I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or

(II) The person has entered into a written contract to provide services to only one principal for a limited period.

(4) The person is free to hire employees to assist with the work.

(5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:

(I) Purchase or lease of ordinary tools, material and equipment regardless of source;

(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and

(III) Lease of any work space from the principal required to perform the work for which the person was engaged.

The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.

2. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee.

3. As used in this section, "foreign national" has the meaning ascribed to it in NRS 294A.325.

Secs. 2-4. (Deleted by amendment.)

Sec. 5. NRS 608.255 is hereby amended to read as follows:

608.255 For the purposes of this chapter and any other statutory or constitutional provision governing the minimum wage paid to an employee, the following relationships do not constitute employment relationships and are therefore not subject to those provisions:

1. The relationship between a rehabilitation facility or workshop established by the Department of Employment, Training and Rehabilitation pursuant to chapter 615 of NRS and an individual with a disability who is participating in a training or rehabilitative program of such a facility or workshop.

2. The relationship between a provider of jobs and day training services which is recognized as exempt pursuant to the provisions of 26 U.S.C. § 501(c)(3) and which has been issued a certificate by the Division of Public and Behavioral Health of the Department of Health and Human Services pursuant to NRS 435.130 to 435.310, inclusive, and a person with an intellectual disability or a person with a related condition participating in a jobs and day training services program.

3. The relationship between a principal and an independent contractor.

Sec. 6. (Deleted by amendment.)

Sec. 7. The amendatory provisions of this act apply to an action or proceeding to recover unpaid wages pursuant to Section 16 of Article 15 of the Nevada Constitution or NRS 608.250 to 608.290, inclusive, in which a final decision has not been rendered before, on or after the effective date of this act.

Sec. 8. This act becomes effective upon passage and approval.

SB
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, VERONICA VAN WOODSEN, SAMANTHA JONES, KARINA STRELKOVA, LASHONDA STEWART, DANIELLE LAMAR and DIRUBIN TAMAYO individually, and on behalf of Class of similarly situated individuals, Plaintiffs, v. RUSSELL ROAD FOOD AND BEVERAGE, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB) SN INVESTMENT PROPERTIES, LLC, a Nevada limited liability company (d/b/a CRAZY HORSE III GENTLEMEN'S CLUB), DOE CLUB OWNER, I-X, DOE EMPLOYER, I-X, ROE CLUB OWNER, I-X, and ROE EMPLOYER, I-X, Defendants.	CASE NO.: A-14-709372-C DEPT. NO.: XXXI **PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION MOTION**

/ / /

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION MOTION

Plaintiffs hereby submit this Supplemental Reply Brief on their pending Motion for Class Certification.

DATED this 7th day of March, 2017.

MORRIS//ANDERSON

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REPLY

At the initial class certification hearing the Court indicated that certification of Plaintiffs' wage claim almost certainly would be appropriate based on existing precedent, but requested supplemental briefing on whether SB 224 in any way impacted the class certification analysis.[1] Defendant in its supplemental brief argues that SB224, if applied, would transform a case ideally suited for class treatment into a case completely unsuited for class treatment. But SB224 does no such thing. Even assuming, for argument's sake, that SB224 applies to this case, class certification clearly is appropriate here because the putative employer has admitted it treated all putative class members the same in every respect. Class certification of Plaintiffs' wage claim is appropriate because, regardless of the test(s) to be applied, Defendants' dancers either all are its employees or none of them are.

Defendant in its supplemental brief first argues that no class can be certified because some or all of its dancers might be independent contractors under NRS 608.0155 and therefore can't properly be members of a proposed class. *See* Def. Supp. Brief at Secs. A and G. But Defendant's insistence that any or all of its dancers are independent contractors is merely an affirmative defense. Defendant cites no case law or other authority for the proposition that a class cannot be certified without first addressing the merits of an affirmative defense. In fact, courts "traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members … Instead, where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues

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[1] Defendant also appears to concede the propriety of certification, at least prior to the enactment of SB 224. *See* Def. Supp. at 24:17 (recognizing "courts routinely apply the 'economic realities test' on a class wide basis" in employee misclassification cases such as this one).

were present in one or more affirmative defenses." *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 39 (1st Cir. 2003).[2]

Defendant next argues that NRS 608.0155 destroys the commonality and predominance elements of Rule 23 because, Defendant suggests, the dancers' status as independent contractors under NRS 608.0155 "can only be established after diverse and individual factual determinations are made." Def. Supp. Brief at 8:7-9. Defendant's attempt to provide examples of these purported "diverse and individual factual determinations" illustrates the facial absurdity of the position. For example, Defendant notes that some dancers could be foreign nationals and others could have social security numbers. *Id* at 9:20-21. Presumably Defendant is alluding to NRS 608.0155(a), which provides:

> Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year.

Defendant evidently fails to appreciate that, if NRS 608.0155 applies, every human being who has danced at the Club will satisfy section (a) because the provision expressly does not apply to foreign nationals and presumably everyone else who worked as an exotic dancer at the club will possess a social security number. Of course the Court also could address this imaginary concern simply by excluding from the putative class U.S. citizens who do not possess or have not applied for an employer identification number or a social security number or have not filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year. Defendant's concerns about the five criteria enumerated in NRS 608.0155(1)(c) is another red herring because Defendant has admitted it treated all dancers the same throughout the relevant time period. *See* Class Cert Reply at 5:6-16.

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[2] Here, of course, the affirmative defense will either succeed or fail against all putative class members because Defendant treated all dancers the same. The affirmative defense thus raises no individualized issues.

Defendant next suggests that a class action is not a superior means of addressing a misclassification claim by putative employees against a single putative employer if NRS 608.0155 is involved. *See* Def. Supp. Brief at Sec. C. Defendant here relies on the same misguided notion that independent contractor status under NRS Chapter 608 cannot be determined on a class-wide basis.

The parties also have briefed whether SB224, if interpreted to apply to Plaintiffs' constitutional claim, would be unconstitutional and therefore invalid to the extent in purports to preclude recovery under the Minimum Wage Amendment where, but for the operation of the statute, recovery would be available. Defendant's attempt to distinguish the holding in *Thomas v. Yellow Cab Corp* is unpersuasive. The Nevada Supreme Court in that case clearly articulated and affirmed the bedrock notion that protections enshrined by Nevada's voters in the state constitution are not capable of abridgment or elimination by a mere legislative act. *See Thomas v. Yellow Cab Corp.*, 327 P.3d 518, 522 (2014) (noting "the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution."). The Supreme Court in *Thomas* did not suggest its holding was a mere technicality – that the legislature could reach the same end result (excluding taxi drivers from the scope of the Minimuim Wage Amendment) simply by recasting a statutory "exception" as a "prior determination" of independent contractor status. However, this issue is more properly addressed in a motion for summary judgment because SB224, even if it did apply, would have no impact on the class certification issue currently before the Court.

Finally, Defendant does not suggest SB224 would have any impact on certification of Plaintiffs' unjust enrichment claim. The Court therefore should find that Count Two should be certified under NRCP 23(b)(3) because whether Defendants were unjustly enriched is a question common to all class members and provable on a class-wide basis. *See Sobel v. Hertz Corp.*, 291 F.R.D. 525, 543 CD. Nev. 2013) ("Where state common law includes an unjust enrichment action

like Nevada's, courts have usually granted class certification."). *See also Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330, 341 (N.D. Cal. 2010) (certifying Rule 23(b)(3) class for unjust enrichment claim because whether defendant was unjustly enriched is "[c]ommon to all class members and provable on a class-wide basis").

CONCLUSION

As noted in *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F .R.D. 363, 373 (S.D.N.Y.2007), whether class members were supposed to be paid the minimum wage as a matter of law is about the most perfect issue for class treatment. Courts in misclassification cases routinely address the multi-factored economic realities test for employment on a class-wide basis. *See, e.g., Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951,954 (2014) (broadly evaluating "the totality of the circumstances of the working relationship's economic reality" and concluding class of exotic dancers are club's employees as a matter of law). Even if the much more limited test for independent contractor status set forth in NRS 608.0155 applied to Plaintiffs' constitutional wage claim, it also could be addressed on a class-wide basis.

DATED this 7th day of March, 2017.

MORRIS//ANDERSON

By: */s/ Lauren Calvert*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **MORRIS//ANDERSON**, and on the 7th day of March, 2017, I served the foregoing ***PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION MOTION*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service.

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ASHLEIGH PARK, et al, Plaintiffs, vs. CRAZY HORSE III GENTLEMAN'S CLUB AT THE PLAYGROUND, et al, Defendants.	)	CASE NO. A709372 DEPT NO. XXXI **Transcript of Proceedings**

BEFORE THE HONORABLE JOANNA KISHNER, DISTRICT COURT JUDGE

MOTION FOR CLASS CERTIFICATION

THURSDAY, MARCH 16, 2017

APPEARANCES:

FOR THE PLAINTIFFS: LAUREN D. CALVERT, ESQ.
MICHAEL J. RUSING, ESQ.

FOR THE DEFENDANTS: JEFFERY A. BENDAVID, ESQ.

RECORDED BY: RACHELLE HAMILTON, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

LAS VEGAS, NEVADA, THURSDAY, MARCH 16, 2017, 9:59 A.M.

(Court was called to order)

THE COURT: So we are calling Park versus Crazy Horse Gentleman's Club Playground, pages 1 through 4, 709372. Counsel, can I get your appearances.

MS. CALVERT: Lauren Calvert, Bar No. 10534 for plaintiffs.

MR. RUSING: And Mick Rusing pro hac vice.

MR. BENDAVID: Good morning, Your Honor. Jeff Bendavid appearing on behalf of defendants.

THE COURT: Okay. And I do have all counsel representatives for all parties; right? We're not waiting for anyone?

MR. BENDAVID: Yes.

THE COURT: Okay. I want to just make sure. Okay. So let's get to what we have. We have a motion to certify the class, and I have an opposition thereto. And then I have supplements and reply supplements and all sorts of goodies.

So, counsel, you're up first. It's your motion.

MR. RUSING: Yes, may it please the Court, Your Honor. My name is Mick Rusing. I'm from Tucson appearing here pro hac vice. We appeared in front of this Court a couple months ago, I guess, and -- on our motion to certify and the Court requested some additional briefing on Senate Bill 224 and its potential implication in the certification issue.

THE COURT: Right.

MR. RUSING: And that has been done.

THE COURT: Appreciate it.

MR. RUSING: These types of employee misclassification cases have been routinely certified, including dancer cases here and throughout the country. Reported cases suggest that those courts could not find any that were denied anywhere.

In fact, one court has called these the most perfect question for class treatment because the reason is that the status is determined by the objective facts that definitionally will apply to all the workers across the board to everybody in that class. And that's what's been admitted here. The defendants have admitted that during the relevant time period the club treated all dancers equally and applied the same policies equally to all of the dancers. So either they're all employees or their not, and that's the issue and that makes it perfect for class certification.

The Court seemed to make it clear at the last hearing that certification was almost a certainty, certainly be appropriate based on existing precedence, but requested a briefing on the 220 -- Senate Bill 224 to see if that somehow impacted your analysis. Now, as we pointed out, we don't believe Senate Bill 224 applies because we're seeking relief under the constitution and not the wage an hour act, and also to the extent they would try and make it apply, it would be barred

by constitutional supremacy.

But even if we were to apply it, certification would still be appropriate because all 224 does is have some list of factors to consider in determining whether or not the answers are employees or something else. The defense arguments really, which I really don't get, is that the plaintiffs must prove liability before they can get class certification. In other words, we have to prove that the dancers are employees before the case can be properly certified when, in fact, that is the issue to be determined upon certification.

And at this juncture the allegations control in any event, and in no instance does someone moving for class certification have to negate affirmative defenses to obtain certification. We believe we're entitled to win the case as a matter of law and we'll probably be filing our own summary judgments. But if the defense felt that they were entitled as a matter of law to win, they've had a year and a half to file their motion for summary judgment and they don't.

So what the Court should do is grant class certification. And then if they feel they have a slam dunk on liability, file their certification. Indeed, that's what they should want to do because then it would be binding on the entire class and not just the class reps.

But the absurdity of what they're arguing, I think, is illustrated by the last line of their supplemental briefing

where it says based on the arguments provided above, defendant respectfully requests that this Court deny plaintiff's motion for certification and subject plaintiffs to the prior application of NRS 608.0155 to determine if plaintiffs are conclusively presumed to be independent contractors.

So the Court is just supposed to sua sponte undertake its own motion for summary judgment or something like that, some sort of springing thing? That's not how it works. If they think that we're independent contractors, they'd move for summary judgment. They haven't. The Court should certify the class because common law facts and laws predominate.

There's a bunch of factors under 224, but those are not individually applied class-wide, and they're the same type of factors just like under the FLSA economic realities test. And even defendants didn't argue that here are some people that won't be employees and here's some that will be. They take the position all dancers are not employees. We take the position that they are employees based on the same facts, the terms and conditions of employment. And those are uniform, undisputed, and will probably be the subject of cross-motions.

The bottom line is, though, they either are or they are not employees and that needs to be decided, but it needs to be decided after certification. They didn't address unjust enrichment at all, and so that should be certified, too. Thank you, Your Honor.

THE COURT: Appreciate it. Okay. So looks like you reserved two and a half minutes for your response. Is that what you've reserved?

MR. RUSING: I believe so, yes.

THE COURT: Okay. Just a moment. Okay. Counsel.

MR. BENDAVID: Good morning, Your Honor. Let me address a couple of the comments. First of all, I think plaintiff's argument, if I was to sum it up, is to say, look, we do this all the time, this is what happens, we file these complaints and then we ask courts to certify them. And then we ask you just to look at the complaint itself, don't look at anything else. Don't look at the case, don't look at any law that may have come up. These cases are always certified, so just certify them and then we'll move on. Because, hey, we want them all to be employees.

So since we want them all to be employees, then that's all we need to do is file a motion and say, hey, Judge, we want them to all be employees so can you please certify this and we can move on. That's really the summary of their argument. That's all they're saying. Because if you take a look at their original motion for class certification and their supplemental motion --

THE COURT: Uh-huh.

MR. BENDAVID: -- what is the one common theme that is all throughout the brief? It's that they didn't provide any

factual determinations whatsoever for you to review. None. They didn't even ask you to review any.

So there's deposition testimony of all the named plaintiffs. They provided none of that deposition testimony of their own clients. They didn't provide a single affidavit from one. Not from -- there's 11 of them, Your Honor. Not one affidavit from one single dancer, one single plaintiff that says I can adequately represent this class and that these factors apply to me or these factors don't apply to me or here's how it applies. Why didn't they provide that?

Now, Your Honor, in our original -- in our original opposition we argued the case of Schutt (phonetic). And in Schutt says the Court must do an extensive analysis of the facts to determine certification. How can they ask you to do an extensive analysis of the facts of those cases without providing you a single fact for you to look at? The only fact they're stating is what you just heard today from counsel, and what counsel put on its brief. That's it.

They're asking you because they do this all the time that you can ignore this case and just based on the fact that, oh, we're all asking them to be employees, so that's how class certification works. Books and volumes of statutes and cases over the years ignore all those. Because we want them all to be employees, therefore, you should certify. That's they're only argument.

And, Your Honor, when we argued last time and we talked about 608.0155 and its implications of that. They've now jumped to say it's preempted by the Nevada constitution. Well, first of all, it's not, Your Honor. All right. They cite -- they cite Thomas, and we'll talk about Perry in a second.

In the Thomas decision, Your Honor, the court made a specific, very specific finding in Thomas that said they were looking at whether the exemptions listed in NRS 608.250(2)(e) were wiped out by the Nevada Constitution. That's what Thomas reviewed and held that they were supplanted -- that they were repealed and supplanted by the Nevada Constitution. That's a specific finding on those exemptions. And the basis for that exemption -- I'm sorry, the basis for that decision was is that the Nevada constitutional amendment provided its own exemptions to minimum wage and that they conflicted and then were repealed -- were repealed and supplanted.

In the following case, which is Perry versus Terrible Herbst, the court makes an analysis and says, first of all, 608 was not wiped out by the Nevada Constitution and, in fact, adopts 608.250 in statute of limitation of two years and applies it to the Nevada minimum wage constitutional amendment. So we have the Nevada Supreme Court saying it's not wiped out, the Nevada Supreme Court saying it specifically has to conflict, which NRS 608.0155 doesn't conflict in a bit because it has nothing to do with wages for employees. It is a test for an

independent contract. That's what they seem to ignore.

They have filed their motion for classification and ignored the standing Nevada law on independent contractors. Their actual complaint says they are treated as independent contractors, but they should be employees and we're moving to convert that and have this Court make them employees instead of independent contractors. That's the summary of what this case is.

How could you then ignore the Nevada statute that specifically provides a presumption that NRS 608.0155 says they are independent contractors and here is the test for it and lists out three sections and factors that says -- or, I'm sorry, criteria is what they call them, that says you must -- if you have three of these then you're an independent contractor. But it's not necessarily you need all three or you don't need all five. And it's very specific. In fact, one argument says it doesn't even apply to this.

Well, take a look at Section 7 of SB224, Your Honor. Legislature specifically said the amendment provision of this act applied to an action to recover unpaid wages pursuant to Section 16 of Article 15 of the Nevada Constitution. They literally cite it in Section 7 of SB224 that it applies to the Nevada Constitution and/or NRS 608.250 inclusive. The legislature specifically put it right in the -- in -- in SB224 that it applies to the constitutional amendment and NRS 608. So

how can they possibly argue it doesn't apply?

So what -- our argument, Your Honor, is this. If you take a look at -- now, we cited -- we provided you a very brief testimony of two of the named plaintiffs. Just two; right? In Karina's deposition testimony, she testified to filing her tax returns. Her answer -- and the question she was asked, did you take business write-offs? She answered yes. What type of business write-off? Clothing, accessories, hair color, cuts, hair pieces, makeup, shoes, little pouches to keep my money in, food, alcohol. What about house fees? Yes, house fees. Anything else, the vehicle? Yes, I own a car, correct. So I have clothing, accessories, hair styling or pieces, makeup, shoes, nails. Okay. What about food, beverages, house fees, and vehicle mileage? Correct.

So she testifies that she took all those as business expenses, which is what an independent contractor would do. They're running their own business. They took out -- this is -- now, keep in mind, this is one of the plaintiffs that they want to represent a class of potential employees. Okay. How could she adequately represent employees when she herself does not qualify as an employee.

But if you take that aside for just one second, Your Honor, and take a look at Jaqueline Franklin's testimony. Franklin testified that she didn't even file a tax return. She says what about -- the question was, so you lived in Nevada but

no income or tax filing? She says correct. Okay. So what about expense receipts? No, I don't keep those. No, because I never filed taxes. I didn't see a purpose for saving receipts.

Now, look at the difference between two of the eleven named plaintiffs. Just two. They're saying there's hundreds of dancers that could apply to this class certification process, but two of their own named plaintiffs can't adequately represent each other. How could they possibly adequately represent a class? Your Honor, the law requires that there are -- the factors require that there are common issues of law and fact from -- starting with the named representatives to the class.

THE COURT: Okay. Time. That was the end of your argument? That's what I thought. Okay.

MR. BENDAVID: It is. Yes. Thank you, Your Honor.

THE COURT: You can see I've got a courtroom. And you came first because you each said you'd keep to it.

MR. BENDAVID: You've got it, Your Honor.

THE COURT: Okay.

MR. RUSING: So after all of that, the only distinction he could find was how one dancer treats taxes versus another. What he didn't argue and what there's no law on is whether a person pays taxes, how they pay them, whether they pay them. Interesting, but not a factor under any of the tests for employee-independent contractor, so totally irrelevant.

What you just heard was Crazy Horse's opening argument

on their yet to be filed motion for summary judgment. It went to liability, not to class certification, and they've cited no cases suggesting why cert should be denied under these circumstances. And they never really argued the class reps being inadequate. And what they critically have not done is cited any cases or any reason why this should be the first court to deny class certification in these type of cases. Thank you, Your Honor.

THE COURT: Okay. Thank you so very much. Okay. Quick question. And I appreciate the answer may be no. Did either of you have a chance to read the case that came out this morning, Western Cab Company versus Eighth Judicial District, 133 Adv. Op. 10? It was a petition on the minimum wage statute?

MR. BENDAVID: It came out this morning?

THE COURT: Yeah, it came out this morning.

MR. BENDAVID: No, I did not.

MR. RUSING: I was in a sportsbook.

MR. BENDAVID: I wish I had. No, Your Honor.

MS. CALVERT: Would you give us the citation again, Your Honor?

THE COURT: Sure. 133 Nev. Adv. Op. 10 with today's date. The reason why is the Court first has to take into account, and the only reason I'm citing this case is although it was not specifically argued by either of you, and I can appreciate why, is because the issue there was an issue -- and

I'll cite straight from the discussion.

The issue we are asked -- and this is the Nevada Supreme Court -- the issue we are asked to address are as follows, one, whether the NLRA preempts the MWA minimum wage amendment, whether ERISA preempts the MWA, whether the MWA is void for vagueness, and, four, whether assuming the MWA is valid, fuel costs should be factored. The last one doesn't matter for your purposes, the fuel costs aspects because it was a cab case.

So the reason why the Court has to look at that first is the Court has to look to make sure that the -- one of the provisions in which it is being asserted in this case, whether or not it's viewed as constitutional or unconstitutional, so since the Nevada Supreme Court has said that -- well, I should read the next sentence. After concluding that our intermediate review is warranted, we exercise our discretion to address the validity of each of these statutes to be declined other than the fuel one.

And so basically it concludes that all three standards haven't met the -- and none of the -- none -- it's not preempted. Minimum wage amendment, alive and well, is not preempted on any of the bases raised in the petition. So the Court a) has to find out what the statute -- excuse me, I said statute, I mean to say constitutional amendment is constitutional, right.

So that's just not for purposes of either of your argument, but if there had been a difference in the Court's ruling then, of course, the Court would have had to, unfortunately, ask you to do additional briefing on the impact of this -- of that ruling in this case. But the Court did not find -- the Court finds that it's consistent with the status of the law as the pleadings are before the Court, and so the Court can now move forward to the merits of the case.

The Court is appreciative of all of the arguments raised by each of the parties. The Court is appreciative of the supplemental briefing provided by this -- these parties. And I will tell you, part of the briefing really, in looking at the deposition testimony of some of the actual specific lead, currently named lead plaintiffs and potential class, the Court is going to have to deny without prejudice the motion for class certification because based on the -- I have to look at SB224. The Court does find that SB224 does apply to this case.

Alternatively, even if SB224 does not apply to this case, the Court's analysis, what I'm about to say, would be the same. But I think SB224 gives me further support, so these are two alternatives. If we're looking at SB224 in the totality of the pleadings, then the Court would find that based on the own -- potential class representatives' own statements, they in and of themselves would not meet the standard for class representatives at this juncture, so the Court would deny it

without prejudice.

And then even in the absence of look at SB224, the Court's analysis would be the same. While the Court is cognizant of the low threshold with regards to class certification, there has to be something that the representatives are already in the category in which they're seeking to represent individuals. And here, at least what I have from excerpts, and I don't have any response that says that these excerpts are incorrect or should be interpreted differently.

Now, I'm appreciative that part of the oral argument was the fact that the Court shouldn't consider how someone treats their taxes for purposes of the analysis. The Court is not looking at how they treat their taxes. The Court is looking at whether or not these individuals are considering for their own purposes that they would be similarly situated to the very class that they're seeking to represent, and that information provided in their undisputed deposition testimony shows that they would not.

So, therefore, the Court will deny without prejudice at this juncture the motion for class certification, and I'm going to ask counsel for defense to please prepare the order, circulate it to all counsels, and provide it back to the Court.

MR. BENDAVID: I will, Your Honor. Thank you.

THE COURT: Okay. EDCR 7.21, to let you know, 10

days. Thank you so very much.

MR. BENDAVID: Thank you, Your Honor.

MS. CALVERT: Thank you, Your Honor.

MR. RUSING: Thank you.

(Proceedings concluded at 10:18 a.m.)

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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