IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, KARINA STRELKOVA, and DANIELLE LAMAR, INDIVIDUALLY, AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS, Appellants, vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC, Respondent.	Case No.: 74332 District Court Case No.: A-14-709372-C Appeal from the Eighth Judicial District Court, Clark County, Nevada

RESPONDENT'S ANSWERING BRIEF

/s/ Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702) 384-8424
Attorneys for Respondent

GREGORY J. KAMER, ESQ.
Nevada Bar No. 0270
KAITLIN H. ZIEGLER, ESQ.
Nevada Bar No. 013625
KAMER ZUCKER ABBOTT
3000 W. Charleston Blvd., #3
Las Vegas, Nevada 89102
(702) 259-8640
Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILY SHEPARD, STACIE ALLEN, MICHAELA DIVINE, KARINA STRELKOVA, and DANIELLE LAMAR, INDIVIDUALLY, AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS, Appellants, vs. RUSSELL ROAD FOOD AND BEVERAGE, LLC, Respondent.	Case No.: 74332 District Court Case No.: A-14-709372-C Appeal from the Eighth Judicial District Court, Clark County, Nevada

RESPONDENT'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Russell Road Food And Beverage, LLC:

1. No Parent corporation.

2. Publicly held company owning 10% of Respondent's stock- No such corporation.

3. Respondent's present counsel: Jeffery A. Bendavid, Esq., and Stephanie, J. Smith, Esq. of Moran Brandon Bendavid Moran; and, Gregory J.

Kamer, Esq., and Kaitlin H. Ziegler, Esq., of Kamer Zucker Abbot, but not expected to appear before this Court,.

4. Respondent is authorized to do business under fictitious firm name: Crazy Horse III Gentlemen's Club.

/s/ Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702) 384-8424

GREGORY J. KAMER, ESQ.
Nevada Bar No. 0270
KAITLIN H. ZIEGLER, ESQ.
Nevada Bar No. 013625
KAMER ZUCKER ABBOTT
3000 W. Charleston Blvd., #3
Las Vegas, Nevada 89102
(702) 259-8640
Attorney of Record for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Cases:

II. Nevada Constitution:

III. Nevada Revised Statutes:

IV. Nevada Legislature:

V. Federal Statutes:

VI. Nevada Rules of Appellate Procedure:

None.

VII. Nevada Rules of Civil Procedure:

VIII. Federal Rules of Civil Procedure:

I. STATEMENT OF FACTS

Respondent, Russell Road Food & Beverage, LLC ("Russell Road") owns and operates a Gentlemen's Club in Clark County, Nevada. *See Joint Appendix ("JA") at I, 1-7.* On October 2, 2015, Appellants (the "Dancers") subsequently filed their Third Amended Complaint asserting two causes of action alleging violations of the Nevada's Minimum Wage Amendment (the "MWA") and Unjust Enrichment due to their alleged misclassification as independent contractors rather than employees. *See* Id. Discovery closed on May 19, 2017, and the Dancers failed to produce any evidence that would support their allegations that they were in fact, employees, or that their agreement to provide entertainment in the form of exotic dancing was otherwise improper or invalid in light of the fact that they were independent contractors. *See* JA at II, 272-75, and at XII, 2504-06. The evidence demonstrated that the Dancers conducted themselves and under NRS 608.0155 as independent contractors engaged in the business of providing exotic dancing to individual patrons of gentlemen's clubs and the evidence further demonstrated that under NRS 608.0155, each Dancer could be conclusively presumed to be an independent contractor. *See* JA at XII, 2509-22.

Each Dancer possessed a social security number. *See* JA at IV, 672 and 699-704. Additionally, each Dancer was required to have, and had, a valid Nevada State business license and "Sheriff's Card" during the time she performed. *See* JA at IV,

811 and 820. These licenses are necessary for the Dancers to engage in their business as exotic dancers. *See* Id.

Each Dancer was treated, pursuant to their agreement with Russell Road, as independent contractors and therefore, was subjected to the legal requirements placed on sole proprietors including exotic dancers. *See* Id. at 676. Indeed, each Dancer accepted being an independent contractor *ipso facto* by accepting and retaining the benefits conferred upon independent contractors. *See* Id.

The Dancers came to audition and, if both parties agreed, would be presented with information related to Russell Road's general rules and guidelines, including an Entertainers' Agreement, which delineated the Dancers' role as an independent contractor. *See* Id. at 677. The Dancers were never required to, nor did they, perform exclusively at Russell Road's club and any of them could, and did, perform at other venues. *See* Id. at 677-79. Aside from a range of hours that a Dancer could present entertainment, the Dancers could choose to perform as little or as much as they desired, or on any given day, week, or year. *See* Id. The Dancers could also choose which days they wished to perform and how many days in a row (or not) they came in. *See* Id. The Dancers could perform one hour a day, a month, or a year. *See* Id.

Each Dancer could choose her performance outfits, as long as it also comported with legal requirements for exotic dancers. *See* Id. at 677. While performing over the course of an evening, Russell Road did not require the Dancers

to give a certain number of lap dances, or dance for any specific patron or number of patrons. *See* Id. In fact, the Dancers did not have to perform any lap dances at all should they choose not to do so. *See* Id. The Dancers had sole discretion in approaching any number of patrons they chose while performing. *See* Id. The Dancers could make any amount they chose to make. *See* Id.

Further, The Dancers could take breaks whenever they chose without reporting to anyone, even while performing. *See* Id. The Dancers could take a break for an hour or five and anywhere they wanted. *See* Id. They could choose to stop performing all together. *See* Id. It was entirely their choice. *See* Id.

The Dancers never reported the amount of money they earned to anyone and had no quota of money they had to earn. *See* Id. at 678. The Dancers freely negotiated with customers for payment for lap dances and/or time spent in the VIP areas. *See* Id. The Dancers freely collected negotiated amounts from the customers who wished to be entertained by that particular dancer. *See* Id.

The Dancers were free to hire employees to assist them in their business of exotic dancing. *See* Id. Furthermore, each Dancer supplied her own outfits, cosmetics, and accessories, and could have and did have signature items that were unique to them. *See* Id. The Dancers also promoted themselves as exotic dancers, if they chose, and were free, in their sole discretion, to stop utilizing Russell Road's club for their business purposes at any minute of any hour. *See* Id. at 677-78. The

Dancers had autonomy and could choose any other venue to perform at any time. *See* Id. The Dancers were treated materially different than other persons who were actually employed by Russell Road. Furthermore, the individual Dancers themselves (although all sole proprietorships) operated differently and with varying degrees of success and perception of their business relationship their customers and with Russell Road. *See* Id. at 678.

As the evidence demonstrated, nearly all of the Dancers failed to demonstrate that based on their claims, they individually incurred damages in excess of the jurisdictional amount of $10,000. *See* JA at XII, 2505. In fact, only the Dancer, Jacqueline Franklin ("Franklin"), could possibly demonstrate alleged damages exceeding the $10,000 jurisdictional amount based required to maintain their action in the District Court. *See* Id. As a consequence, all of the Dancers, except for Franklin, were dismissed as a matter of Nevada law for lack of subject matter jurisdiction since they could not demonstrate any actual damages in excess of $10,000. *See* Id.

II. SUMMARY OF ARGUMENT

The District Court correctly decided that Russell Road was entitled to summary judgment, by rightfully assessing the pleadings and evidence in the light most favorable to the Dancers, since no genuine issue of material fact remained as to whether the Dancers met the criteria set forth in NRS 608.0155 and as a result,

were conclusively presumed to be independent contractors and not employees under Nevada law. The Dancers, in lieu of actual evidence demonstrating employment, insisted, based upon wholly unsupportable arguments, that "all exotic dancers are employees" under Nevada law. *See* JA at XII, 2509-22. The Dancers also argued that NRS 608.0155, which specifically provides statutory criteria to be utilized to evaluate whether an individual is conclusively presumed to be an independent contractor, somehow did not apply to their wage claims. *See* Id. The Dancers proffered these arguments directly in the face of the Legislature's clear intention to apply NRS 608.0155 to the exact type of wage case they asserted. *See* infra.

The District Court also was correct to grant Russell Road's Motion to Dismiss the Dancers for Lack of Subject Matter Jurisdiction. As the evidence demonstrated, nearly all of the Dancers failed to allege or otherwise prove to a legal certainty that they had alleged damages in excess of the statutory amount of $10,000 based on the claims they asserted against Russell Road. *See* JA at XII, 2505. Further, Nevada law specifically required each Dancer to individually demonstrate damages in an amount in excess of the jurisdictional amount of $10,000. *See* Id.

Finally, the District Court correctly denied the Dancers' Motions since Nevada law does not provide for a *per se* certification of a class of exotic dancers asserting claims against an owner of a club at which they performed. *See* N.R.C.P. 23. *Cf.* JA at II, 272-75 and at XII, 2504-06. Also, the Dancers failed to provide

any evidence demonstrating any of the prerequisites required for certification and the actual testimony provided supposedly representing the class members demonstrated that each could not be part of the class proposed. *See* Id.

III. ARGUMENT

A. NRS 608.0155 Applies To MWA Claims Since The Legislature Intended Such Application.

The Dancers attempt to argue that the District Court committed an error in applying NRS 608.0155 because their claims were only brought under the MWA. *See* Brief at 12. The Dancers base this argument on the part of NRS 608.0155, which states "[for] the purposes of this Chapter [608]." Id. Based on this statement, the Dancers contend that NRS 608.0155 only applies to claims asserted under NRS Chapter 608. *See* Id. The Dancers reason that had the Legislature intended for NRS 608.0155 to apply to claims brought under the MWA, it would have said so. *See* Id. at 12-13.

Absent from the Dancers argument is the recognition that the Legislature did state that NRS 608.0155 was to apply to claims asserted under the MWA. *See* infra. Section 7 of Senate Bill 224, which was enacted and later codified as NRS 608.0155, expressly declares:

> 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 [the MWA]** 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. 2015 Statutes of Nevada, Chapter 325, Pages 1743-44. (Emphasis Added).

Based on the above declaration from the Legislature, it is clear that NRS 608.0155 applies to the Dancers' MWA claims as intended by the Legislature.

B. Applying NRS 608.0155 Does Not Run Afoul of the MWA's Protections.

The Dancers incorrectly argue that NRS 608.0155, improperly removes persons from the MWA. *See* Brief at 14. The Dancers reason that by applying NRS 608.0155 to MWA claims, Nevada's Constitution would be rendered inferior since no statute can remove the protections provided by the MWA. *See* Id. The Dancers' argument relies largely on their unfounded assumption that they would be, or somehow are, "automatically employees" pursuant to the definition of one under the MWA. Id. However, no such employee presumption exists in Nevada. *See* infra.

NRS 608.0155 only provides a test by which to conclude presumptively whether a person is or is not an independent contractor, not an employee. No definition of an independent contractor exists in the MWA, or within NRS Chapter 608, prior to the institution of NRS 608.0155. *See* Nev. Const. Art. XV, § 16. However, it is undisputed that individuals can and were identified as "independent contractors" under Nevada law prior to and after the enactment of the MWA. *See* Brief at 39-40.

Additionally, this Court has found that when there is no direct conflict between the MWA and the provisions of NRS Chapter 608, they can be " '…capable

of coexistence' so long as the statute is understood, as it may reasonably be, to supplement gaps in the MWA's terms." *Perry v. Terrible Herbst,* 132 Nev. Adv. Op. 75 at *7, 383 P.3d 257, 259-61 (2016) (relying NRS Chapter 608 to enforce rights under MWA). Further "[W]hen possible, the interpretation of a… constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results." *We the People Nevada ex rel. Angle v. Miller,* 192 P.3d 1166, 124 Nev. 874, 881 (2008).

Here, there is clearly no direct conflict. The statutory test to determine whether someone is an independent contractor does not abrogate the definition of employee in the MWA. *See NRS Chapter 608. See also,* Nev. Const. Art. XV, § 16. The Dancers cite to *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 521, 130 Nev. Adv. Op. 52, *4 (Nev. 2014) supposedly to support their proposition that somehow NRS 608.0155 changes the Nevada Constitution and therefore should be ignored. *See* Brief at 15. The Dancers' reliance on *Thomas* is in inappropriate as this Court did not make such a declaration and already has found that the MWA definition of "employee" was "vague" and that "independent contractor," was a recognized business relationship not within the definition of an "employee." *Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 954,* 130 Nev. Adv. Rep. 87, *4 *(2014).* In fact, this Court in *Terry* established that the courts were obligated to look within Nevada

statutes to determine definitions for both an employee and an independent contractor. *See* Id. at 955.

Accordingly, NRS 608.0155 can be applied complementary and in harmony with the MWA because it provides a clear definition of when a person can be conclusively be presumed to be an independent contractor and not an employee. Notably, NRS 608.0155 does not state that a person who does not meet those criteria is automatically an employee. Therefore, it follows that the MWA's definition of an "employee" remains unaltered by NRS 608.0155, and therefore, none of the protections of the MWA are removed.

C. NRS 608.0155 Is Not Preempted By the FLSA.

The Dancers contend that NRS 608.0155 is preempted by the Fair Labor Standards Act of 1938 ("FLSA") because it is in direct conflict. *See* Brief at 16-17. The Dancers' contention cannot be considered by this Court because the Dancers did not assert this argument in the District Court[1]. *See Old Aztec Mine v. Brown*, 97 Nev., 49, 52, 623 P.2d 981, 984 (1981). *See also,* JA at III, 558-83, VII, 1325-46, and XII, 2481-2501. Therefore, the Dancers waived this argument. *See Old Aztec Mine*, 97 Nev. at 52.

[1] The Dancers did argue that this Court in *Thomas v. Nevada Yellow Cab Corp.,* declared that NRS 608.0155 was preempted by the MWA. *See* JA at I, 166-67. This Court made no such holding and the Dancers have abandoned that argument for this entirely new argument regarding a conflict with the FLSA. *See* Id. *See also,* 327 P.3d 518 (2014).

Additionally, the Dancers' argument fails since this Court already has determined that the FLSA does not preempt NRS Chapter 608 and does not conflict with the FLSA. *See Dancer v. Golden Coin, Ltd.,* 124 Nev. 28, 32, 176 P.3d 271, 274 (2008). Conveniently, the Dancers' argument does not the decision in *Dancer* nor do they offer any evidence, other than the Dancers' unsupported conclusions, as to how the FLSA is impeded by the application of NRS 608.0155. *See* Brief at 16-17. Further, NRS 608.0155 does not "define" who is or who is not an employee under Nevada law nor does it affect in any manner the implementation of the FLSA under any circumstance. *See* Id. As such, NRS 608.0155 like the rest of NRS Chapter 608 is not preempted by the FLSA for the same reasons this Court identified in *Dancer*. *See,* 124 Nev. at 32.

D. There is No Genuine Issue of Material Fact As To Whether Franklin Is Conclusively Presumed An Independent Contractor Under NRS 608.0155.

The Dancers specifically have appealed the District Court's order granting Russell Road's Motion for Summary Judgment, which in part, determined that no genuine issue of material fact remained as to whether Franklin satisfied all of the criteria required by NRS 608.0155 to be conclusively presumed an independent contractor as a matter of law. Pursuant to N.R.C.P. 56, summary judgment is appropriate when the evidence and pleadings on file, viewed in light most favorable to the non-moving party, demonstrates that no genuine issue of material fact remains

and the moving party is entitled to a judgment as a matter of law. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

To be conclusively presumed an independent contractor under NRS 608.0155, a person must satisfy the criteria set forth in NRS 608.0155(1)(a)-(c). As provided below and in the District Court's findings of fact and conclusions of law, no genuine issue of material fact remained as to whether Franklin satisfied all of the criteria required by NRS 608.0155(1)(a)-(c).

1. No Genuine Issue of Material Fact Remains As To Whether Franklin Entered Into a Contract with Russell Road.

Before attempting to address the insufficiency of the evidence in meeting the actual criteria set forth in NRS 608.0155, the Dancers argue that NRS 608.0155 does not apply because no contract existed between Franklin and Russell Road. *See* Brief at 38-39. However, the Dancers do not provide any argument as to how a contract actually could not exist. *See* Id. at 39. Instead, the Dancers contend that since Russell Road "characterized" Franklin "merely as a licensee," who, in exchange for a fee paid to Russell Road, are permitted to perform as an exotic dancer for patrons. *See* Id. The Dancers, therefore, conclude that NRS 608.0155 cannot apply. *See* Id.

Such an argument cannot withstand even the most basic scrutiny. To begin with, the actual evidence in this matter demonstrated a contract between Franklin and Russell Road. *See* JA at XII, 2515-22. The Dancers do not cite to any case, because none exists, that holds that because a party is "characterized" in a certain

manner that no contract can exist preventing the application of NRS 608.0155. *See* Brief at 39. Further, the Dancers' argument fails because NRS 608.0155(1)(c)(5)(II) and (III) specifically contemplates that part of an exotic dancer's capital investment is the purchase of a license to utilize space to perform or pay rent to lease space to perform. *See* JA at XII, 2520-22. Both of which would be valid, enforceable contracts under Nevada law.

2. Franklin Was Required By Her Agreement To Hold Any Necessary Licenses.

NRS 608.0155(1)(b)[2] provides that:

> The person is required by the contract with the principal to hold any necessary state business license or local business license and to maintain any necessary occupational license, insurance or bonding[.]

The Dancers contend that this above criteria is not met here because the contract between Franklin and Russell Road did not require her to obtain workers' compensation insurance. *See* Brief at 41.

To begin with, the Dancers never argued to the District Court that NRS 601.0155(1)(b) was not met because Franklin did not have workers' compensation insurance. Cf. JA at Vol VII, 1335-36 (arguing only that the agreement had to require the Dancers to have a State business license and be licensed as an exotic dance establishment). *See also*, *Old Aztec Mine*, 97 Nev. at 52.

[2] The Dancers do not argue that NRS 608.0155(1)(a) was not met. *See* Brief at 41.

Regardless, no portion of NRS 608.0155(1)(b) requires Franklin to hold such specific licenses or for any contract with Franklin to specify such licenses. All that is required by NRS 608.0155(1)(b) is that any contract with Franklin obligate her to hold and maintain the necessary state and local occupation and business licenses. Here, it is indisputable that the Entertainer Agreement with Franklin required her to comply with the applicable, laws, rules, and regulation of … the State of Nevada and County of Clark." JA at IV, 676 and 813. As admitted by Franklin, compliance with those rules and regulations required Franklin only to have a Nevada State Business License and a "Sheriff's Card" in order to perform as an exotic dancer in Clark County, Nevada. *See* JA at IV, 781. Nowhere in Dancers' Brief or in the Dancers' Opposition to Russell Road's Motion for Summary Judgment did the Dancers identify any State or Local rule or regulation that obligates a person performing as an exotic dancer to have and maintain workers' compensation insurance[3]. *See* Brief at 41. *See also*, JA at VII, 1325-45. Accordingly, no genuine issue of material fact remains as to whether the requirements of NRS 608.0155(1)(b) were met.

[3] "Independent Contractor" is not a separate occupation as inferred by the Dancers and no provision of Nevada law requires a person to be licensed solely or generically as such.

3. Franklin Met All Of The Additional Criteria of NRS 608.0155(1)(c).

In addition to meeting the requirements of NRS 608.0155(1)(a) and (b), NRS 608.0155(1)(c) requires that:

> 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.

Contrary to the arguments in the Dancers' Brief that only one (NRS 608.0155(1)(c)(3)) of the five criteria listed above was met by Franklin, the District Court determined that no genuine issue of material fact remained as to whether Franklin met all five of the criteria set forth in NRS 608.0155(1)(c). *See* Brief at 41-42. Cf. JA at XII, 2511-15. The following plainly demonstrates that the District Court was correct:

a. Franklin Had Complete Control Over The Means And Manner Of the Performance And Result of Her Work.

As to the first criteria provided in NRS 608.0155(1)(c)(1), the District Court determined that there was a number of indisputable facts demonstrating that Franklin had complete control over the means and manner of the performance of her work and the result of her work. *See* Id. (discussing Franklin's ability to choose the customer, the number of customers and dances, her outfits and accessories, stage name, etc.).

The Dancers contend that NRS 608.0155(1)(c) actually consists of two components with the first being the "exercise of control" component and the second,

the "result of the work being the primary element bargained for by the principal in the contract." Brief at 42. The Dancers, of course, do not provide any legal citation or statutory reference that establishes the existence of "two components." *See* Id. The Dancers simply declare this to be the case. *See* Id.

Nonetheless, the Dancers contend that Franklin did not meet the self-defined second component as a matter of law since the contract signed by Franklin determined that she was a "mere" licensee who did not perform any work for Russell Road. *See* Brief at 43. The Dancers contend that the "primary element bargained for" cannot be a license fee paid by Franklin for work that she may not have performed. *See* Id.

This argument cannot survive basic scrutiny because there are not "two components" to consider. *See* supra. Instead, this criteria plainly provides that the issue of control is concerned with whether Franklin entered into an agreement where she had control over the means of performing and the result of those performances. *See* Id. *See* also, NRS 608.0155(1)(c).

As the District Court recognized, indisputable facts existed demonstrating that Franklin had such control. *See* Id. Specifically, Franklin had total control, among many instances of control, over the minimum or maximum number days she performed, the customers she performed for, and when she chose to break from performing or stop performing all together. *See* Id. As such, Franklin had and

entered into an agreement with Russell Road where she had the necessary control required by NRS 608.0155(1)(c)(1).

b. NRS 608.0155(1)(c)(2) Applies to Franklin.

The Dancers contend that since Franklin's contract with Russell Road is for entertainment work, NRS 608.0155(1)(c)(2) does not apply to Franklin. *See* Brief at 43. NRS 608.0155(1)(c)(2) does not exclude entertainment agreements. Instead, the plain language of NRS 608.0155(1)(c)(2) provides that only if the contract is for entertainment where the time for such entertainment "is to be presented," then such a contract is excepted. *See* supra. The Dancers do not provide any evidence that Franklin's contract is such an entertainment contract actually excepted from NRS 608.0155(1)(c)(2). *See* Brief at 43.

To the contrary, the District Court found that Franklin's contract was not excepted from NRS 608.0155(1)(c)(2), and Franklin could choose whether or not she performed on any given day, week, or year, and in fact, had complete control to modify her schedule as she chose. *See* JA at XII, 2513. As Franklin stated in her deposition, "I was told I could come in any time." *See* JA at IV, 686-86 and at V, at 921. As such, Franklin met the requirements of NRS 608.0155(1)(c)(2).

c. NRS 608.0155(1)(c)(4) Is Met Since Franklin Is Free to Hire Employees.

The Dancers do not argue that NRS 608.0155(1)(c)(4) was not met because the evidence shows that Franklin could not hire her own employees. *See* Brief at

43-44. The Dancers instead argue that NRS 608.0155(1)(c)(4) "should" only be met upon a showing that the contract expressly allowed Franklin to hire employees to assist her with work being done for Russell Road. *See* Id. at 44. The Dancers offer no legal reference or argument as to why this showing is required or how this showing exists as part of NRS 608.0155(1)(c)(4) and the plain text does not require otherwise. *See* Id.

Regardless, the Dancers concede that the evidence demonstrates that Franklin was free to hire employees to assist her in being an exotic dancers. *See* Id. at 43. As Franklin stated in her deposition:

> Q. Okay. Did you ever hire anyone to help your hair and makeup?
> A. No.
> Q. Could you have?
> . . .
> A. . . . [I] guess I would have been free to hire whoever I wanted to help me. JA at V, 934-35.

This above testimony plainly establishes that NRS 608.0155(1)(c)(4) was met.

d. Franklin Made A Substantial Investment Of Capital.

Evidence, including Franklin's deposition, was provided to the District Court demonstrating that Franklin invested substantial capital in being an exotic dancer. *See* JA at IV, 691-92 and at V, 931-32. Such investments, included various licenses and permits to perform, payments of house fees to perform, breast augmentation, facial injections, veneers, costumes, clothing, and accessories. *See* Id. Franklin expressly testified that she had received breast implants, facial injections, and

cosmetic veneers at great cost because she was an exotic dancer. *See* JA at V, 931-32. Based on Franklin's testimony, the District Court correctly concluded that Franklin's capital investments were sufficient investments common to being an exotic dancer and met the requirements of NRS 608.0155(1)(c)(5). *See* Id.

The Dancers contend that Franklin did not meet NRS 608.0155(1)(c)(5) because the sums spent by Franklin on cosmetic surgeries or on other miscellaneous items was not sufficient considering the amount of capital required to operate an exotic dancer club. *See* Brief at 45-46. This argument lacks merit. Franklin is not in the business of "operating an exotic dance club" where substantial capital is required to operate such a facility, including, marketing, supplies, personnel, and licensing. *See* Brief at 46. Rather, Franklin plainly is only in the business of being an exotic dancer, which requires substantial investment of capital in other areas, such as in her performance and her appearance, but not to operate an entire facility for all exotic dancers. The District Court, therefore, correctly concluded that Franklin met the requirements of NRS 608.0155(1)(c)(5) since no genuine issue of material fact remains as to whether Franklin made an substantial capital investment in her actual profession, which is being an exotic dancer.

E. NRS 608.0155 Can Be Applied Retroactively.

The Dancers contend that NRS 608.0155 cannot be applied retroactively because it would impair vested rights. *See* Brief at 18-19. Again, the Dancers'

contention cannot be considered by this Court because the Dancers did not raise this argument in the District Court. *See Old Aztec Mine v. Brown,* 97 Nev. at 52. Therefore, the Dancers have waived this argument. *See* Id.

Additionally, the Dancers' argument fails because the Dancers have not provided any evidence that Nevada has deemed the right to a minimum hourly wage a fundamental right warranting due process protections. *See* Brief at 19. The Dancers have not referenced any Nevada law of any kind that makes such "rights" vested. *See* Id. The Dancers only reference the Nevada case of *Sandpointe Apts. v. Eighth Jud. Dist. Ct.,* to support their conclusion. *See* Id. at 19 (citing 129 Nev. 813, 823-24, 313 P.3d 849, 856 (2013)). However, this case has no application to the Dancers' argument since *Sandpointe Apts.,* only concerns itself with final deficiency judgments, which is not at issue in this matter. *See,* 129 Nev. at 823-24.

The Dancers also argue that the putative class members also have a vested property right in the existing class action. *See* Brief at 20. This contention also is incorrect. This case does not have an "existing class action" since Nevada does not recognize a cause of action for "class action" and the Dancers' Motions for Certification were denied. *See e.g., Salazar v. Avis Budget Grp., Inc.,* 2008 U.S. Dist. LEXIS 94610 at *5 (S.D. Cal. 2008) (denial of class certification means there is not and never was a class action).

Regardless, the Legislature plainly intended for NRS 608.0155 to be applied retroactively, in a manner that included the Dancers' Complaint. *See Valdez v. Empl'rs Ins. Co., of Nev.*, 123 Nev. 170, 179, 162 P.3d 148, 154 (2007) (retroactivity of newly enacted statutes applies if Legislature clearly indicates such application). Section 7 of Senate Bill 224, which was enacted and later codified as NRS 608.0155, expressly declares:

> 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 [the MWA] 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**. 2015 Statutes of Nevada, Chapter 325, Pages 1743-44. (Emphasis Added).

Based on the above declaration from the Legislature, it is clear that NRS 608.0155 applies retroactively and includes the Dancers' MWA claims as intended by the Legislature since Senate Bill 224 was enacted on June 2, 2015 and the Dancers final judgment was not rendered until 2017. *See* Brief at 4-5.

F. The MWA's definition of "Employee" Does Not Incorporate the FLSA's Economic Realities Test.

In an attempt to have this Court deem all exotic dancers as *per se* employees under Nevada law, the Dancers contend that the definition of "employee" in the MWA somehow incorporates the FLSA's economic realities test. *See* Brief at 21. It does not.

The MWA requires that each employer in Nevada pay a wage to each employee at a prescribed rate. *See* Nev. Const. art. XV § 16(A). The plain language of the MWA defines an employee as "any person who is employed by an employer," but expressly excludes those under the age of 18, those employed by a non-profit for after school or summer work, or a trainee for a period of no longer than 90 days. *See* Id. Nowhere in the plain text does the MWA reference let alone incorporate, any aspect of the FLSA, including any federal definition of "employee." *See* Id.

In *Terry,* this Court addressed whether performers at Sapphire's Gentlemen's Club were employees within the meaning of NRS 608.010, not the MWA. *See, 130 Nev. Adv. Op. 87 at *1, 336 P.3d 951, 953 (Nev. 2014).* In addressing this issue in *Terry*, this Court recognized the MWA's definition of "employee," but found it vague and unhelpful. *See*, 336 P.3d at 954. Consequently, this Court, since the NRS did not have a statutory definition, then adopted the FLSA's "economic realities" test at that time. *See* Id. at 958. However, this Court's adoption of the "economic realities" test does not make it an incorporated part of the definition of "employee" in the MWA, especially considering this Court expressly stated otherwise in *Terry*, nor does it create any presumption that that the FLSA applies in lieu of actual Nevada law. *See* Id. at 953. *See also, e.g., Campbell v. Dean Martin Dr-Las Vegas, LLC,* 2015 U.S. Dist. LEXIS 170855 *6, fn. 1 (D. Nev. 2015)

(utilizing a federal standard in interpreting Nevada law does not transform Nevada law into federal law).

Since *Terry,* the Nevada Legislature enacted NRS 608.0155, which operates to conclusively presume who is an independent contractor and not an employee under Nevada law, including the MWA. Thus, NRS 608.0155 provides courts with statutory guidance to distinguish between those persons who are conclusively presumed to be independent contractors and who those may be deemed employees under a later, separate analysis. The enactment of NRS 608.0155, indicates that the Nevada Legislature is willing to "part ways with the FLSA" where the language so requires and not incorporate as a matter of law the FLSA into the MWA.

G. The Dancers Are Not Deemed Employees Under the MWA.

The Dancers argue that since several courts from other jurisdictions who have applied the "economic realities" test to exotic dancers found those dancers to be employees, they should be deemed employees in this matter as a matter of law. *See* Brief at 26 (citations omitted). Regardless of the Dancers' conclusion, no court, including this Court and the Nevada Legislature, and all of the courts string cited by the Dancers, have held as a matter of law that there can never be any relationship other than employee/employer between exotic dancers and the exotic dance establishment. *See* Id. *See* NRS 608.0155. *See also, e.g., Terry*, 336 P.3d at 957.

The mere fact that some courts have found an employment relationship does not require the same conclusion in this case or any other Nevada case.

H. The Undisputed Material Facts Demonstrate that the Dancers Were Not Employees.

Completely ignoring the required prior application of NRS 608.0155, which the facts in this matter conclusively presumed that Franklin[4] was an independent contractor, the Dancers' Brief conclude that the application of the "economic realities" test determined that Franklin was an employee. *See* Brief at 25. However, a review of the undisputed facts demonstrate that Franklin was not an employee of Russell Road after applying the "economic realities" test.

1. Russell Road Did Not Exert Control Over a Meaningful Part of Franklin's Business.

The Dancers contend that the "record" without question established that Russell Road wielded significant control over Franklin's exotic dance business. *See* Brief at 27. Despite this contention, the Dancers do not actually provide any of Franklin's "record" to establish Russell Road's control. Instead, which is a common practice of the Dancers, they simply reference a string of legal citations to somehow demonstrate the necessary factor. *See* Id. at 27-29 (citations omitted).

[4] At the time of the competing Motions for Summary Judgment, all of the Dancers, except Franklin, had been dismissed. *See* JA at XII, 2504-06.

The Dancers contend that Russell Road's "control" over Franklin exists because she was required to sign in and sign out and was subject to certain guidelines. *See* Id. at 28. As expected, the Dancers list a string of citations supposedly demonstrating that the implementation of guidelines by Russell Road somehow demonstrates control. *See* Id. (citations omitted). However, the Dancers fail to reference any authority that completely relieves Franklin from agreeing to certain rules and regulations while performing. *See* Id. Certainly, anyone providing services to the public would be expected to adhere to certain regulations and have such licenses. *Cf.* Id.

Nonetheless, the actual record does not establish the control necessary for Franklin to be deemed an employee. Russell Road was required to implement a check-in/check-out policy in order to be compliant with local and/or State requirements since Russell Road operated an exotic dance venue serving alcohol. *See* JA at IV, 685-87. Applicable law required Russell Road to provide a record of the Sheriff's Card of each dancer on site at any time, which required Russell Road to have the dancers check-in/check-out. *See* Id. However, this policy did not obligate the Dancers from checking-out at any time or staying significantly longer. *See* Id. Franklin testified that there were instances where she was only needed her to perform for a few hours and not her normal chosen amount of time. *See* JA at V,

927-28. Franklin could and did regularly check-in and check-out at any time. *See* Id.

The Dancers contend that Franklin was required to follow certain Entertainer Guidelines and Rules and if violated, she would be fined, terminated, or placed on an inactive list. *See* Brief at 30. However, the Dancers do not identify any evidence that Franklin was fined, terminated, or deemed inactive. *See* Id. Thus, the actual facts of this case show that Russell Road did not exert any significant control over Franklin as contemplated by the FLSA.

2. Franklin Was Required to Have Special Skills As an Entertainer.

The Dancers contend that Russell Road did not require Franklin to have any formal dance training, certification, or other special skills. *See* Id. at 35. This declaration is incorrect. Russell Road did not require Franklin to have any formal dance training. *See* JA at IV, 826. However, Franklin was required and expected to have previous skill and experience as an entertainer. *See* Id. Russell Road desired qualified entertainers and relied upon the representations of Franklin of her qualifications. *See* Id.

3. Franklin Was Not Prohibited From Performing at Other Clubs.

A factor in considering employment under the FLSA is whether Franklin was able to perform at other clubs while performing at Russell Road. *See* Brief at 35.

The Dancers concede Franklin[5] was not prohibited in any manner from performing at other exotic dance clubs while performing for Russell Road. *See* Id. In Franklin's deposition she stated:

> Q. Okay. Do you know if you could have performed at another club[?]
>
> A. I believed that would have been acceptable. I chose not to.
>
> Q. Okay. But no one said that you couldn't?
>
> A. Not that I recall. JA at V, 920.

4. The LVMC Code Does Not Confirm That the Dancers Are Not Independent Businesswomen Since It Does Not Apply to Russell Road Or the Dancers.

Apparently "cut-and-pasted" from some other legal brief prepared by the Dancers' counsel, their Brief contends that the application of the City of Las Vegas' regulations forecloses Russell Road's "practice" of treating the dancers as licensees operating their own business. *See* Brief at 37. The Dancers continue on with explaining how the Las Vegas Municipal Code operates such foreclosure since it does not issue business licenses to dancers. *See* Id.

The Dancers' argument is inapplicable here because neither Russell Road nor the Dancers, while performing at Russell Road's club, were subject to the City of Las Vegas' Code. This is because Russell Road's club is not located within the

[5] At the time of the competing Motions for Summary Judgment, Franklin was the sole remaining Plaintiff. *See* JA at XII, 2504-06.

jurisdiction of the City of Las Vegas, Nevada. It is located at 3525 West Russell Road, which is in an unincorporated portion (Paradise Township) of Clark County, Nevada[6]. As a result, the Dancers also are not subject to LVMC since their performances at Russell Road's club also did not occur within the City of Las Vegas, Nevada. *See* Id.

I. The District Court Did Not Abuse Its Discretion In Denying Class Certification.

The Dancers contend that the District Court abused its discretion because it applied the wrong legal standard in holding class certification was not warranted. *See* Brief at 50. However, the Dancers' Brief does not identify exactly which legal standard was wrongly applied. *See* Id. at 50-51. Instead, the Dancers conjure a legal standard out of thin air so that they could contend that the District Court misapplied it. *See* Id. at 51.

In denying the Dancers' Motion for Class Certification[7], District Court determined that NRS 608.0155 applied in this case. *See* JA at II, 275. Accordingly, the District Court determined that applying NRS 608.0155 "in the totality of the pleadings," the District Court found that based on the deposition testimony of the

[6] Russell Road requests that this Court take judicial notice as a matter of public record the location of Russell Road's club is in Clark County, Nevada.

[7] The Dancers only address the District Court's denial of their initial Motion for Certification. *See* Brief at 49-51. The Dancers' Brief does not address nor provide any argument regarding the District Court's denial of their renewed motion for class certification, which also was denied. *See* Id.

potential class representatives, "in and of themselves" did not meet the standard for class representatives. *See* Id. at 272-75.

Alternatively, the District Court also determined that even without applying NRS 608.0155, its analysis would be the same – the deposition testimony of the potential class representatives, "in and of themselves" did not meet the standard for class representatives. *See* Id. Consequently, the District Court denied the Motion for Certification without prejudice. *See* Id. *See also,* JA at I, 231.

In denying the Motion for Certification, the District Court specifically noted the arguments that the District Court should not consider how someone treats their taxes for the purpose of determining class certification. *See* Id. Accordingly, the District Court stated:

> The Court is not looking at how they [the potential class representatives] 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. Id.

Despite this clear declaration from the District Court, the Dancers contend that the District Court somehow still wrongly engaged in a subjective analysis of the potential class representatives. *See* Brief at 51. This contention clearly fails in light of the District Court's clear declaration to the contrary. *See* supra. As such, the District Court did not abuse its discretion.

The Dancers also self-servingly declare that the District Court's reasoning in denying certification really was an allusion to the typicality prerequisite. *See* Brief at 51. Of course, the Dancers do not cite to any actual instance where the District Court referenced this prerequisite in making this decision or any case that provides that the District Court's statements constitute an allusion to the typicality prerequisite. *See* Id. They simply conclude that this was the case. *See* Id.

Since, as the Dancers self-determine, that the District Court really was analyzing the typicality prerequisite in making its decision to deny certification, the District Court wrongly applied the typicality standard. *See* Id. Somehow, the District Court did so by concentrating on the actions of the potential class representatives rather than Russell Road's actions, which the Dancers contend is the correct analysis required for determining typicality. *See* Id. Thus, the Dancers conclude that the District Court abused its discretion in denying certification since it misapplied this legal standard. *See* Id. at 52.

As provided above, the District Court correctly considered whether the potential class representatives would be similarly situated to the class they were seeking to represent. *See* supra. Regardless of applying NRS 608.0155, the District Court determined that based on the deposition testimony of the potential class representatives, "in and of themselves," these potential representatives did not meet the standard. *See* Id. In making this determination, the District Court did not identify

any specific prerequisite of N.R.C.P. 23 that prevented certification. *See* Id. The District Court also never referenced, inferred, alluded to, or had a premonition of the typicality prerequisite in determining that the Dancers' Motion for Certification must be denied. *See* Id. There is absolutely no evidence or record that establishes such an act by the District Court and the Dancers' Brief does not reference any. *See* Id. *See* also, Brief at 51-52.

Thus, the District Court did not apply the wrong legal standard as argued by the Dancers in denying their Motion for Certification. Therefore, the District Court did not abuse its discretion in denying the Dancers' Motion for Certification without prejudice.

J. The Dancers Failed to Demonstrate the Required Prerequisites.

Under N.R.C.P. 23, the Dancers 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). The Dancers can meet this burden only by demonstrating the four prerequisites; (1) numerosity; (2) commonality; (3) typicality: and adequacy. *See Shuette,* 121 Nev. at 846.

Although the Dancers' Brief does not argue that the District Court abused its discretion pertaining to the establishment of each required prerequisite for certifying a class action, the Dancers nonetheless provide a conclusory statement that each

required element somehow was met by the Dancers. *See* Brief at 48-51. These conclusory statements are wrong.

The Dancers never put forth any, let alone sufficient, evidence demonstrating any of the required prerequisites nor do they reference any instance where they provided the required facts in their Motion to Certify. *See* Brief at 47-50. However, the Dancers were not prevented from providing any evidence. At the time of both of the Motions for Class Certification, Discovery was complete. All of the witnesses had been deposed on both sides. *See* JA at I, 223-24. Written discovery had been exchanged. *See* Id. The Dancers never put forth any evidence because the evidence provided through Discovery ended their case and certainly ended their attempt at certifying a class. *See* Id.

Instead, the Dancers' Brief, as was the case in moving the District Court for certification, rely solely on a litany of federal case citations to conclude that since all of these prior cases had certified a class, the District Court should do the same[8]. *See* Brief at 48-49. *See also,* JA at I, 46-55. The Dancers' reliance on a collection of federal cases from various jurisdictions unrelated to Nevada to justify certification

[8] Russell Road objects to the Dancers' nearly exclusive reliance on federal law based on the incorrect premise that N.R.C.P. 23 and the Federal Rule 23 are identical. N.R.C.P. 23 was amended in 2005, which was not an amendment identical to the Federal Rule 23 and the Federal Rule 23 has been amended on several occasions after 2005 without a matching amendment(s).

ordinarily is insufficient, especially considering that the evidentiary record was complete. *See* supra.

Such reality is emphasized greatly here because **none** of the cases relied upon by the Dancers considered class certification where NRS 68.0155 must be applied to determine whether any representative Dancer or putative class member is conclusively presumed to be an independent contractor. *See* JA at I, 46-55. As such, none of these cases are relevant to the issues at hand. The Dancers relied solely on its string of cases because the evidence overwhelmingly prevented certification. *See* supra.

Further, Nevada law does not permit a District Court to certify a class simply because "one was certified previously in another jurisdiction." *See* N.R.C.P. 23. Instead, this Court has obligated the Dancers to demonstrate the four prerequisites with actual evidence and that a District Court must conduct an extensive analysis before certifying a proposed class. *See Shuette,* 121 Nev. at 856-57. As demonstrated below, the Dancers failed to demonstrate the required prerequisites.

1. The Dancers Failed to Demonstrate Numerosity.

The first prerequisite required the Dancers to establish that the proposed class has so many members that "joinder of all members is impracticable." Id. at 847. This numerosity prerequisite cannot be speculatively based on just the number of class members. *See* Id. (citation omitted). 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).

The Dancers only set forth a speculative number of dancers and never provided any specific facts to positively demonstrate the impracticability of joinder of all members as required by *Shuette*. *See* JA at I, 48-49. Consequently, the Dancers did not meet their burden in demonstrating numerosity.

2. The Dancers Never Established Commonality and Typicality.

The second required prerequisite is that the proposed class has common questions of law and fact. *See Shuette*, 121 Nev. 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.

The Dancers' Brief contends that commonality is met because "a general corporate policy is the focus of litigation." Brief at 48-49. Of course, the Dancers' Brief does not identify exactly what general corporate policy is at issue, but the Dancers' motion for certification declared that the common question of law at issue was whether a strip club is the employer of its dancers. *See* JA at I, 50-51.

Inherent in this prerequisite is that a valid question of law or fact must be identified to establish this prerequisite. In light of the enactment of NRS 608.0155, the Dancers declared common question of law and fact are no longer valid common questions of law or fact. NRS 608.0155 and NRS 608.255(3) operate in conjunction

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 the MWA. *See* NRS 608.255(3). As such, the question of law that first must be answered is whether the Dancers were independent contractors under Nevada law. *See* NRS 608.0155. If that answer is affirmative, then the Dancers are not employees of Russell Road and have no claims against it because they are conclusively presumed to be independent contractors. As a result, the Dancers failed to establish this prerequisite.

The third prerequisite requires the establishment that the claims or defenses of the representative parties are typical of the class. *See Shuette*, 121 Nev. at 848-49. In order to satisfy this prerequisite, it must be shown that "each class member's claim arises from the same course of events and each class member makes similar legal arguments" to prove Russell Road's liability. *See* Id. (citation omitted).

The Dancers' Brief contends that typicality is somehow met because "each class member's claims arise from the same course of events" and each class member "makes similar legal arguments." Brief at 48-49. The Dancers' Brief offers no evidence, references no allegations, and provides no legal analysis as to how the representatives' claims arise from the same course of events or what legal arguments are similar. *See* Id. As a result, the Dancers failed to establish this prerequisite.

3. The Dancers Failed to Demonstrate Adequacy.

The fourth prerequisite requires that the representative Dancers have the ability to "fairly and adequately protect the interests of the class." *Shuette*, 121 Nev. at 849. The Dancers contend that they have met this prerequisite because nothing in the record indicates a conflict of interest. *See* Brief at 49. Entirely absent is any reference to any affidavit, declaration, or evidence in support. *See* Id. *See* also, JA at I, 51-52. *Cf., e.g., Thomas v. Presidential Limousine,* 2015 U.S. Dist. LEXIS 109588 at *6 (D. Nev.) ("A plaintiff is required to provide substantial allegations, supported by declarations or discovery.").

Despite the unsupported conclusion that no conflicts exist, an actual conflict arises from the Dancers' pursuit of restitution of "all fees, fines, and other monies" allegedly extracted or withheld by Russell Road. *See* JA at I, 79-81. 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); and *Guifu Li. v. A Perfect Day Franchise, Inc.,* 2011 U.S. Dist. LEXIS 114821 (N.D. Ca. 2011).

The Dancers' Complaint alleges that individual dancers were subject to various monetary fines, fees, and payments. *See* JA at I, 5. Consequently, the Dancers pray for the restitution of all fees, fines, and other monies extracted or withheld. *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., allegedly incurred 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 Dancers do not and cannot adequately protect the interests of the proposed class regarding the restitution of the fines, fees, and other payments incurred.

4. NRS 608.0155 Prevents Common Questions of Fact and Law From Predominating Over Individual Questions of Fact and Law.

In addition to establishing the four (4) prerequisites under N.R.C.P. 23(a), the Dancers also must meet one of three conditions provided by N.R.C.P. 23(b), one of which is whether common questions of law or fact predominate over individual questions and a class action is superior to other methods. *See Shuette,* 121 Nev. at 849-50. 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.

As was the case in the original Motions, the Dancers' Brief only provides reference to a host of cases supposedly supporting predominance in this matter. *See* Brief at 49 (citations omitted). However, these cases only discuss predominance regarding alleged employees. *See* Id. None of these cases consider or had the

opportunity to consider whether predominance exists where each 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, Russell Road's liability can only arise if the members of the putative class are its employees and not conclusively presumed to be independent contractors. *See* supra. In order to make such a determination, the class members' status and therefore Russell Road's liability can only be established after diverse and individual factual determinations are made regarding whether each individual may be conclusively presumed an Independent Contractor under NRS 608.0155. 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. As such, the question of whether each is conclusively presumed to be an Independent Contractor cannot be determined through "generalized proof." *See Shuette,* 121 Nev. at 851.

For example, the Dancer, Karina Strelkova ("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.

….

A. House fees. JA at I, 182.

On the contrary, Franklin testified differently:

Q: Okay. Since you've lived in Nevada, no income tax filing?

A: Correct.

. . .

Q: Okay. What about expense receipts?

A: No. I don't keep those.

. . .

A: No, because I never filed taxes. I didn't see a purpose for saving receipts. Id. at 183.

As stated above, Strelkova testified to "writing off" her expenses, which evidences that she meets the requirements of NRS 608.0155(1). *See* supra. In opposite, Franklin testified that she never bothered to file any tax returns. *See* Id. Although Franklin failed to file any tax returns, she obtained a social security number, which also meeting NRS 608.0155(1). *See* JA at IV, 672 and 699-704.

These facts demonstrate that the possible combinations of facts that could conclusively presume each dancer to be an Independent Contractor under NRS 608.0155 are nearly endless and far too voluminous for a common question of fact or law to predominate. *See* Id. As such, the question of whether each Plaintiff is

conclusively presumed to be an Independent Contractor cannot be determined through "generalized proof" and 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 requires that such a determination be made prior to any certification of a proposed class. *See* supra. 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 potential class member is or is not conclusively presumed to be an Independent Contractor would result in numerous disparate outcomes.

5. NRS 608.0155 Prevents A Class Action From Being the Superior Method of Adjudication.

The superiority prong of N.R.C.P. 23(b)(3) requires the Dancers to establish that the superior method for adjudicating their claims. *See Shuette,* 121 Nev. at 851-52 (citations omitted). Here, NRS 608.0155 applies and if such individual Dancers are conclusively presumed to be an Independent Contractor, each are prevented from asserting any claims for unpaid wages as an employee. The facts of each Dancer that conclusively presumes that individual to be an Independent Contractor are unique and cannot be common to or typical of any other Dancer. *See* NRS 608.0155.

As such, a class action is not a superior method of adjudication because the facts resolve whether each Dancer 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 Dancer as an Independent Contractor or an employee would conflict with and overwhelm the proposed class, which consists only of alleged employees of Russell Road. *See* JA at I, 81.

K. The District Court Did Not Err In Dismissing Those Who Failed To Meet the Amount-in-Controversy Requirement.

The Dancers' contend that the District Court erred in not allowing Strelkova Strelkova to combine her damages incurred in her self-admitted, wholly separate and independent claims to meet the jurisdictional limit required for maintaining an action in District Court[9]. *See* Brief at 52. The Dancers, for the first time, rely entirely on this Court's decision in *Castillo v. United Fed. Credit Union*, 134 Nev. Adv. Rep. 3,*4-7, 409 P.3d 54, 58 (February 1, 2018), to support their incorrect conclusion. *See* Id. The Dancers argue that since this Court in *Castillo* held that all damage claims must be combined to determine whether the jurisdictional amount has been met, the District Court erred in refusing to consider Strelkova's damage claim of $7,515.75, and her demand for restitution under a claim for unjust enrichment in the amount of $5,032. *See* Id.

[9] Russell Road objects to this argument as the Dancers did not identify any issue on appeal regarding whether the District Court erred in determining whether any plaintiff exceeded the required jurisdictional amount. *See* Brief at 2.

Besides being decided more than 6 months after the District Court dismissed Strelkova for lack of subject matter jurisdiction, the reliance on *Castillo* is misplaced. First, this Court did not hold in *Castillo* that all damage claims must be combined to determine whether the jurisdictional amount has been met. See, 409 P.3d. at 58. In *Castillo*, this Court only considered:

> whether a claim for statutory damages can be combined with a claim for the elimination of the deficiency amount asserted to determine jurisdiction. *Castillo*, 409 P.3d. at 56.

In *Castillo*, the appellant alleged in her amended complaint that the amount in controversy exceeded $10,000[10] because appellant was entitled to the elimination of a deficiency balance and statutory damages pursuant to NRS 104.9625(3)(b). *See* Id. at 56. The District Court dismissed appellant for lack of subject matter jurisdiction because NRS 104.9652(4) precluded appellant from combining statutory damages alleged with the deficiency claimed because this statute prohibited a recover under NRS 104.9625(2). *See* Id. at 58.

This Court held that the District Court erred because the appellant never sought to recover under NRS 104.9625(2), which precluded the right to recover where a deficiency is eliminated or reduced. *See* Id. at 58. Therefore, this Court determined that the appellant in *Castillo* could combine a claim for statutory

[10] The Legislature raised the jurisdictional amount to $15,000, effective on June 8, 2017.

damages with a claim for deficiency to determine jurisdictional amount since she was not statutorily prohibited from such a combination. *See* Id. The Court's decision in *Castillo* did not go any farther to create a general rule that all damage claims could be combined to determine jurisdictional amount. *See* Id.

Castillo easily is distinguishable since Strelkova did not seek to combine statutory damages with a deficiency claim. *See* Brief at 52. Unlike the appellant in *Castillo*, Strelkova also never alleged in her amended Complaint that her damages were in excess of $10,000, which on its face, required the dismissal of Strelkova for lack of subject matter jurisdiction. *See* JA at I, 1-7. *See* N.R.C.P. 8(a)(2). *See also, Morrison v. Beach City LLC,* 116 Nev. 34, 36, 991 P.2d 982, 983 (2000) (The Dancers bear the burden of proving subject matter jurisdiction).

Also unlike the appellant in *Castillo*, Strelkova seeks to combine her alleged damages incurred from her wage claim and her claim for restitution derived from her equitable claim of unjust enrichment. *See* Brief at 52. Such a combination cannot occur because the two (2) claims asserted by Strelkova cannot stand together as a matter of law. Nevada maintains the long-standing general rule that a plaintiff may not recover equitable remedies where a plaintiff has a full and adequate remedy at law. *See State v. Second Judicial Dist. Court in & for Washoe County,* 49 Nev. 145, 159, 241 P. 317, 322 (1925).

Strelkova's Complaint alleges violations of Nevada's Minimum Wage Amendment and Nevada's minimum wage statutes, NRS 608.040-050 and 608.250, which provide Strelkova with an adequate and full remedy at law to sue and recover any actual unpaid wages owed. *See* Nev. Const., Article XV, § 16(B); and NRS 608.260. Further, Nevada's regulatory scheme permits Nevada's Labor Commission to assess an administrative penalty against any violator of Nevada's minimum wage laws. *See* NRS 608.290(2). As such, Nevada law provides an adequate and full remedy upon which Strelkova can recover. Therefore, it is impossible under Nevada law for Strelkova to recover in any manner in equity under a claim for Unjust Enrichment. As such, Strelkova cannot combine for purposes of determining jurisdiction alleged damages from a claim at law and alleged restitution owed for a claim in equity that cannot exist at the same time as her claim at law.

From the onset of this case, Russell Road has objected to and sought the dismissal of Strelkova's claim for Unjust Enrichment since she cannot recover in equity where she could recover as a matter of law. *See* JA at II, 334-36. Originally, Strelkova avoided the dismissal of this equity claim on the ground that she had asserted it in the "alternative." *See* Id. Since that time, however, Strelkova repeatedly has attempted to redefine and newly characterize her equity claim as an "independent" claim asserted entirely separate from her legal claim. *See* Id.

Strelkova's insistence that her equity claim is wholly "independent" operates to further prevent any combination of the two claims to meet the jurisdictional requirement. Nevada, as in other jurisdictions, has determined that claims may only be aggregated if sufficiently united. *See Hartford Mining Co. v. Home Lumber Coal Co.,* 61 Nev. 19, 21, 107 P.2d 1093, 1094 (1940) (only where causes of action are properly united may a plaintiff aggregate the amounts sued for to exceed jurisdictional amount). *See also, e.g., Budget Rent-A-Car Systems, Inc. v. Stauber,* 849 F. Supp. 743, 746 (D. Hawaii 1994) (standard for aggregation in a "legal certainty" matter is whether claims are "common and undivided" or "separate and distinct").

In the cases where aggregation to determine jurisdictional amount was at issue, this Court has found sufficient unity between claims to allow for aggregation. *See Hartford Mining Co.* 61 Nev. at 21 (two causes of action at issue were both for the sale of goods with the value of each less than the jurisdictional amount); and *El Ranco Inc., v. New York Meat & Provision Co.,* 88 Nev. 111, 116, 493 P.2d 1318, 1322 (1972) (aggregated claims because the same claim for the sale of meat products was asserted 26 separate times).

However, the holding in *El Ranco* does not support The Dancers' contention. The Nevada Supreme Court held that the respondent could aggregate his individual, separate claims. *See*, 88 Nev. at 116. However, the claims in *El Ranco* were the

same claim asserted 26 times because the respondent had sold meat and meat products 26 separate times. *See* Id. at 112. Because several of these meat sales were individually less than the jurisdictional amount, the Nevada Supreme Court reasoned that these individual sales could be aggregated so that jurisdiction is obtained. *See* Id. at 116.

Unlike the claims asserted in these case, Strelkova does not seek to aggregate the same claim with different amounts. *See e.g.,* JA at III, 548-556. Instead, Strelkova seek to aggregate two entirely separate and as she insists, "independent" claims: one asserted under Nevada law and one asserted in equity, which in reality cannot stand together as a matter of law. *See* Id. Under such circumstances, these claims do not demonstrate the necessary unity required to aggregate the amounts alleged under each claim. *Cf. Hartford Mining Co.*, 61 Nev. at 21. Consequently, the District Court was correct to only consider the damages established in Strelkova's legal claim to determine whether she met the required jurisdictional amount. Since those alleged damages did not exceed $10,000, the District Court, therefore, was correct to dismiss Strelkova for lack of subject matter jurisdiction.

L. The District Court Did Not Err In Dismissing Five Other Plaintiffs Since None Met the Jurisdictional Requirement.

The Dancers' contend that the District Court erred in dismissing five other plaintiffs despite each failing to meet their burden of establishing subject matter jurisdiction. *See* Brief at 53. However, the Dancers' Brief fails to identify any

manner in which the District Court committed such an error. *See* Id. Instead, the Dancers contend that an open issue exists with this Court over what happens where some alleged class representatives who fail to individually meet the jurisdictional requirement to assert claims in District Court exist with some individuals who have met the jurisdictional requirement. *See* Id. Conveniently, the Dancers provide a solution to this supposed open issue. Specifically, the Dancers call for the adoption of a supposed federal rule that requires a federal court to exercise supplemental jurisdiction over claims of class members who do not meet the jurisdictional requirement. *See* Id. at 54 (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 546 (2005)).

Identifying a supposed open issue for this Court is not an actual assertion of error by the District Court. Countless unresolved issues of law exist and asserting the existence of one does not deem a District Court in error simply because it did not resolve such a supposed open issue to the Dancers' satisfaction.

Regardless, the open issue supposedly identified by the Dancers is quite closed in Nevada. The Dancers contend that this Court has not addressed what happens where some alleged class representatives who fail to individually meet the jurisdictional requirement to assert claims in District Court exist with some individuals who have met the jurisdictional requirement in a class action case. *See* Brief at 53. The Legislature and this Court have resolved this issue completely–each

individual plaintiff who at any time does not meet the jurisdictional requirement must be dismissed. *See N.R.C.P. 12(h)(3)* ("whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") (Emphasis Added).

The Nevada Constitution provides that District Courts do not have original jurisdiction over actions that fall within the original jurisdiction of the justices' courts. *See Nev. Const. art. 6, § 6*. NRS 4.370(1) confers original jurisdiction upon justices' courts over civil actions for damages or fines, if such damages or fines, without interest, do not exceed $10,000. Thus, Nevada District Courts only have original jurisdiction over civil actions for damages and fines that exceed $10,000. *See* NRS 4.370(1). Consequently, the District Court was correct to dismiss the five plaintiffs because each failed to meet their burden of demonstrating that the District Court had subject matter jurisdiction over their claims. *See* JA at XII, 2504-06.

The Dancers contend that since these plaintiffs are part of the putative class asserted, they and their respective claims against Russell Road should remain in the District Court. *See* Brief at 53-54. However, the Dancers do not cite any actual Nevada law that creates such an exception. *See* Id. Instead, the Dancers urge this Court to adopt their massaged version of the federal rule, which supposedly permits a federal court to exercise supplemental jurisdiction over such parties. *See* Id. at 54 (citing *Exxon Mobil Corp.,* 545 U.S. at 546).

The Dancers' adoption plea to this Court is without merit. The rule set forth in *Exxon* was superseded in several ways by the Class Action Fairness Act of 2005 ("CAFA") (28 U.S.C § 1332(d)(2)). *See e.g., Frisby v. Keith D. Weiner & Assocs. Co., LPA*, 669 F. Supp. 2d 863, 871, fn. 3 (N.D. Ohio 2009). Further, *Exxon* did not establish any rule that permits a federal court to allow a class action to proceed where at least one plaintiff meets the jurisdictional threshold. *See*, 545 U.S. at 549. Instead, *Exxon* considered only a single question:

> [W]hether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirements, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. Id.

In response to this single question, the Supreme Court held:

> [W]here the other elements of jurisdiction are present and at least one named plaintiffs in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting for the requirement for diversity jurisdiction. Id.

Unlike *Exxon*, this case is not in federal court, the Dancers are not attempting diversity jurisdiction, the District Court was not and is not subject to "§ 1367," the Dancers' claims are not Article III matters, and the Dancers have not met the other elements of jurisdiction since their Complaint does not allege damages in excess of $10,000. *See JA at III, 553*. In addition, the rule espoused in *Exxon* does not apply

to wage and hour cases. *See e.g., Urbino v. Orkin Servs. Of California, Inc.,* 726 F.3d 1118, 1122 (9th Cir. 2013).

The District Court, unlike federal court, also does not have the right to exercise supplemental jurisdiction. *See* NRS 4.370. Nevada District Courts are courts of original jurisdiction created by statute and consequently, cannot assert any jurisdiction other than as granted by statute. *See Kell v. State,* 96 Nev. 791, 792-793, 618 P. 2d 350, 351 (1980).

The Dancers cite to *Barelli v. Barelli*, to somehow contend that this Court has granted District Courts the authority to exercise supplemental jurisdiction. *See* Brief at 54 (citing, 113 Nev. 873, 878, 944 P.2d 246, 249 (1997)). *Barelli* has no such holding and does not apply here. The Court only held in *Barelli*:

> [B]oth the family and general divisions of the District Court have the power to resolve issues that fall outside their jurisdiction when necessary to for the resolution of those claims over which jurisdiction is properly exercised. 113 Nev. at 878.

As stated above, *Barelli* only permitted a family court or the District Court to address issues not normally in their purview in order to resolve issues that are. *See* Id. Hearing the claims of plaintiffs who do not meet the jurisdictional requirement is not an "issue" that requires the District Court's resolution of some other issue. *See* supra. Since the Dancers do not actually identify an error committed by the District Court and the solution advocated for in the Dancers' Brief to a problem that is not

at issue cannot be adopted under Nevada law, the District Court did not err in dismissing the five other plaintiffs.

IV. CONCLUSION

There are no genuine issues of material fact in dispute. The District Court rightfully determined that Russell Road was entitled to summary judgment as a matter of law since the Dancer, Jacqueline Franklin, met the criteria required by NRS 608.0155 and therefore, was conclusively presumed an independent contractor. As such, Russell Road respectfully requests that this Court affirm summary judgment in its favor.

Further, the District Court rightfully dismissed all of the Dancers, except for Jacqueline Franklin, for lack of subject matter jurisdiction since each failed to demonstrate that each had damages in excess of the jurisdictional minimum of $10,000. As such, the Russell Road respectfully requests that this Court affirm the District Court's Order Granting the Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Finally, the District Court did not abuse its discretion in denying the Dancers' Motion for Class Certification. As such, the Russell Road respectfully requests that this Court affirm the District Court's Order Denying the Motion Class Certification.

Dated this 5th day of November, 2018.

/s/ Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702)384-8424

GREGORY J. KAMER, ESQ.
Nevada Bar No. 0270
KAITLIN H. ZIEGLER, ESQ.
Nevada Bar No. 013625
KAMER ZUCKER ABBOTT
3000 W. Charleston Blvd., #3
Las Vegas, Nevada 89102
Attorney for Respondents

V. CERTIFICATE OF COMPLIANCE PURSUANT TO N.R.A.P. 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief, including footnotes, has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point;

2. I further certify that this brief complies with the page limit and/or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(A)(ii) and (C), is proportionately spaced, has a typeface of 14 points or more, and only contains 13,951 words, including footnotes, quotations, and signature block.

3. I further certify that I have read Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of November, 2018.

/s/ Jeffery A. Bendavid, Esq.

JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702) 384-8424

GREGORY J. KAMER, ESQ.
Nevada Bar No. 0270
KAITLIN H. ZIEGLER, ESQ.
Nevada Bar No. 013625
KAMER ZUCKER ABBOTT
3000 W. Charleston Blvd., #3
Las Vegas, Nevada 89102
(702) 259-8640
Attorneys for Respondent