

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANE DOE DANCER, I; JANE DOE
DANCER, II; JANE DOE DANCER, III;
and JANE DOE DANCER, V,
individually, and on behalf of Class of
similarly situated individuals,

Appellants,

vs.

LA FUENTE, INC., an active Nevada
Corporation,

Respondent.

CASE NO.: 78078

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District Court Case No. 10-2020-08508
Elizabeth A. Brown
Clerk of Supreme Court
Appeal from the Eighth Judicial District
Court, Clark County, Nevada

**APPELLANTS' APPENDIX
VOLUME VI**

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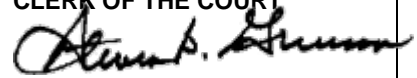
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TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JANE DOE I-V,)	
)	CASE NO. A-14-709851
Plaintiffs,)	
)	
vs.)	DEPT. NO. IV
)	
WESTERN PROPERTY HOLDINGS,)	
LLC, LA FUENTE, INC., CHEETAHS)	Transcript of Proceedings
GENTLEMEN'S CLUB,)	
)	
Defendants.)	

BEFORE THE HONORABLE KERRY EARLEY, DISTRICT COURT JUDGE
**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; PLAINTIFFS'
COUNTERMOTION FOR SUMMARY JUDGMENT; HEARING: ORDER FOR
DISCOVERY SANCTIONS**

THURSDAY, OCTOBER 4, 2018

APPEARANCES:

For the Plaintiffs: P. ANDREW STERLING, ESQ.
KIMBALL JONES, ESQ.

For the Defendants: DOREEN M. SPEARS HARTWELL, ESQ.

RECORDED BY: SHARON NICHOLS, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript
produced by transcription service.

1 THURSDAY, OCTOBER 4, 2018 AT 9:03 A.M.

2

3 THE COURT: Case A709851, *Jane Doe*, plaintiffs,
4 *versus Western Property Holdings, LLC*, defendants. These
5 are two motions, a Motion for Summary Judgment by the
6 defendant and a Countermotion for Summary Judgment by the
7 plaintiffs. This was originally heard on August 8th. There
8 was some new argument regarding the case *Thomas versus*
9 *Nevada Yellow Cab*, whether the NRS 601 criteria would apply
10 to the wage amendment claim. I did read that case. I
11 asked for supplemental briefing on it. I did read that
12 case and analyzed that. And I read the transcript from our
13 last hearing to make sure and we had not even gotten into
14 the 608 argument yet because it kind of --

15 MS. HARTWELL: Yeah.

16 THE COURT: We spent time on the new argument that
17 wasn't briefed. So, we're all up to date. Correct? All
18 right. Counsel, give your appearance for the record. I
19 just want to make sure I'm on the right page before we
20 start. Here we go.

21 MR. STERLING: Good morning, Your Honor --

22 THE COURT: Yes.

23 MR. STERLING: -- Andrew Sterling and Kimball
24 Jones for the plaintiff.

25 THE COURT: Okay.

1 MS. HARTWELL: Doreen --
2 MR. JONES: Good morning, Your Honor.
3 MS. HARTWELL: Doreen Hartwell on behalf of the --
4 THE COURT: Defendant.
5 MS. HARTWELL: -- defendants. And lead counsel is
6 actually on an airplane right now. He won't be able to
7 make it.
8 THE COURT: I was going to say, is he on the --
9 I'm looking, is Mr. --
10 MS. HARTWELL: No. He's on the --
11 THE COURT: -- on the phone?
12 MS. HARTWELL: He's on the -- on a flight on his
13 way here.
14 THE COURT: Oh.
15 MS. HARTWELL: Yes. His timing was a little bit
16 off.
17 THE COURT: Okay. Well, -- all right. Well,
18 coulda, woulda, shoulda. Huh?
19 MS. HARTWELL: Yeah.
20 THE COURT: Here we go. Okay. Well, I appreciate
21 his efforts to try to come since we can -- okay. All
22 right. So, let me do this.
23 I did read the *Thomas versus Nevada Yellow Cab* and
24 I understand the argument. I read the -- not only the
25 supplemental briefing, which was interesting. Very little

1 was focused on this case, it was all over the 608, which is
2 fine. I didn't mind supplemental briefing, to be honest,
3 on the NRS 608.0155 criteria. It always would help because
4 when it goes up on appeal, so I'm not critical of that at
5 all. So, for the record, I also read the supplemental
6 briefing on both issues. Okay? And it was argued
7 extensively, the *Thomas versus Nevada Yellow Cab*, so I did
8 review it.

9 What I'm going to do today is I did not feel
10 *Thomas versus Nevada Yellow Cab* is applicable in that it
11 only addresses the issue if an employee's rights under a
12 constitutional minimum wage claim is limited by a
13 legislative action. It does not address the issue of
14 determining whether that person is or is not a employee or
15 independent contractor for purposes of eligibility under
16 the Minimum Wage Act. So, as I read it, if they were
17 determined to be an employee, yes, I agree, you cannot -- a
18 legislative action, whatever statute they would enact
19 cannot limit a minimum wage employee. So, I'm disagreeing
20 on that. But I wanted to put that on the record, you have
21 extensive argument from the other one in your briefs. So,
22 if when you need -- when you go up on that, you have an
23 adequate record, which is mine.

24 Okay. So, where I want to start, since it's --
25 whether it's Defendants' Motion for Summary judgment or

1 Plaintiffs', you're both asking me to look at the criteria
2 under 608 -- or, ask the Court, under NRS 608.155, to
3 determine that the Jane Doe dancers, plaintiffs in this
4 case, either are independent contractors or are not an
5 employees. All right? So, do you want to get -- yours was
6 the --

7 MS. HARTWELL: Okay.

8 THE COURT: Whoever wants to go first, they're so
9 intertrixably [sic] -- intertwined. It's the same facts,
10 the same dancers, the same everything. So, however you
11 want to start, I'm good.

12 MS. HARTWELL: With that --

13 THE COURT: Do you want to go first?

14 MS. HARTWELL: Sure. I'll go first. And I'll --

15 THE COURT: Okay. That's fine. Okay. So, you're
16 the defendant so we're first going to hear argument on
17 Defendants' Motion for Summary Judgment. All right.

18 MS. HARTWELL: And I'll be pretty short with
19 regards to this. It's obviously based in our papers. We
20 believe that the dancers are independent contractors based
21 on NRS 608.0155. And, under -- in the key issues that I
22 believe that Your Honor had concerns with were sections
23 1(c) --

24 THE COURT: Correct.

25 MS. HARTWELL: -- (c)(1) --

1 THE COURT: For the record, when I read it, it
2 pretty much -- everybody seemed to agree 608 -- and, if I'm
3 wrong, let me know because I'm just trying to piece
4 together the argument. But my notes say -- and when I read
5 the transcripts, under NRS 608.0155, criteria 1(a) was
6 already agreed to, stipulated that that applies to these
7 dancers. Am I correct? Okay. Counsel, thank you. Yes?

8 MS. HARTWELL: I believe so. Yes.

9 THE COURT: Yes. Well, they just agreed. So, you
10 want to say yes.

11 MS. HARTWELL: Yes.

12 THE COURT: Okay. You don't unqualify. Just --
13 okay. You -- defendant says yes. My same understanding is
14 608.0155 subsection b, that that was also agreed to by the
15 facts. Is that correct, counsel for the plaintiffs?

16 MR. STERLING: Yes.

17 THE COURT: Yes.

18 MS. HARTWELL: Yes.

19 THE COURT: Counsel for the -- yes. Okay. So,
20 what our argument is limited to right now because, as we
21 know under this criteria you have to have three of them.
22 Correct?

23 MS. HARTWELL: Correct.

24 THE COURT: All right. So, what the argument --
25 and the papers were very focused on it, is the

1 determination under 608.0155 subsection 1, subsection c,
2 the person who -- to be a -- presumed to be an independent
3 contractor has -- must satisfy three or more of the
4 following criteria and those are 1 -- subsection 1 of that
5 2, 3, 4, and 5. And we focused on but you can start -- on,
6 obviously, subsection 1. And we talked about subsection 2
7 and subsection 3. Any of the other ones. But we focused -
8 - when we started, we started with (c)(1).

9 MS. HARTWELL: Yes.

10 THE COURT: Am I right?

11 MS. HARTWELL: Yes.

12 THE COURT: Okay. So, we're going for -- I just
13 like to make sure my record is clear so I know --

14 MS. HARTWELL: Yes.

15 THE COURT: -- we're not all over the place.

16 Thank you. All right. Tell me why the -- these dancers,
17 the plaintiffs, should presume to be independent
18 contractors because the criteria in subsection (c)(1) is
19 satisfied. There's no dispute on that.

20 MS. HARTWELL: Okay. So, --

21 THE COURT: All right.

22 MS. HARTWELL: -- with regards to subsection
23 (c)(1), the requirement is that the person or the dancer
24 has control over the means and manner of the performance of
25 any work and the result of the work. And, under the lease,

1 the contract itself states, paragraph 10, that: The club
2 shall have no right to direct and/or control the nature,
3 content, character, manner, or means of the performance.
4 And, as cited in our supplemental brief from Jane Doe's
5 deposition, she admits, basically, that the dancers can --
6 the dancers control and have the discretion to perform
7 however they choose. They can be on the stage, off the
8 stage, they can choose to -- are free to consume alcohol,
9 smoke cigarettes while they work. They are not required to
10 -- required or asked to disclose to Cheetahs what their
11 earnings from whatever performance they do. It says
12 they're free to perform on the stage, on the floor of the
13 club, or in the VIP area. And if they don't want to, they
14 don't have to do that either.

15 THE COURT: What --

16 MS. HARTWELL: They basically -- they determine
17 how much they charge Cheetahs customers for private dances.
18 They determine whether or not they want to perform private
19 dances or not. All of that is within the dancer's
20 discretion and Cheetah has no say in that. And, pretty
21 much, the Jane Doe Dancer Number 3, in her deposition, she
22 said: You can pretty much do whatever you want. That's
23 how she described her job or her performance at the club.
24 And she says: The only restriction imposed by Cheetahs was
25 no prostitution. And pretty much --

1 THE COURT: Well, that's imposed by the law, --

2 MS. HARTWELL: Right. Right.

3 THE COURT: -- also, in the state of Nevada. But,
4 okay.

5 MS. HARTWELL: This is true. And, but, in terms
6 of that section, when it says the means and control --
7 means, manner, control, and performance, it excludes
8 compliance with the law and regulations.

9 And, so, we think, based on the admissions and,
10 also, the dancers are free to take a break during their
11 shifts, they're free to choose their shifts, they're --
12 they decide whether or not they want to attend the club's
13 promotional events, they really -- they have wide
14 discretion and control over how they entertain customers at
15 Cheetahs. And we think this definitely satisfies the
16 criteria for this section.

17 THE COURT: Okay.

18 MS. HARTWELL: Subsection (1)(c)(1).

19 THE COURT: All right. All right. What I'd like
20 to do is, then, have them -- it's easier for me to follow
21 if we do it section at a time, if that's okay? I'm not
22 interrupting --

23 MS. HARTWELL: That's fine. No. That's totally
24 fine.

25 THE COURT: Okay. And that way you'll have --

1 whoever -- when we need a record on this, we'll have a good
2 record. Right, Mr. Sterling?

3 MR. STERLING: Yes, Your Honor.

4 THE COURT: Which is the goal for either side.
5 Right?

6 MR. STERLING: Yes, Your Honor.

7 THE COURT: And for the Court. Okay. Okay. Tell
8 me the facts why you think, for your summary judgment,
9 under that criteria, they should not get the presumption to
10 be independent contractors. In fact, I should find that
11 they're employees.

12 MR. STERLING: Right, Your Honor.

13 THE COURT: Okay.

14 MR. STERLING: The first global point is the order
15 of the Court imposing a rebuttable presumption on -- due to
16 the spoliation issue. As I understand, the rebuttable
17 presumption, that -- again, there's -- the jury
18 instructions have yet to be approved. But, essentially, it
19 shifts the burden of proof onto the defendant.

20 THE COURT: Once they get to trial.

21 MR. STERLING: Correct.

22 THE COURT: And, so, --

23 MR. STERLING: Correct. And, so, my understanding
24 -- my position would be that it would be a jury function to
25 determine whether that presumption had been burst unless

1 there's -- no reasonable juror could determine otherwise --

2 THE COURT: No. That -- okay. That presumption
3 would help them determine facts that are in front of them
4 as the trier of fact. That just meant instead of you, the
5 plaintiff, having the burden, which you do to prove your
6 case, of a fact to the trier of fact, which, in this case,
7 is the jury, that -- I would give the instruction that the
8 presumption is in your favor for that. They can still
9 rebut it but that's for specific facts. What I'm looking
10 at for our purposes right now is what facts are in dispute.
11 Because, if they're disputed facts, then the presumption to
12 the juror of fact -- if it gets to a jury --

13 MR. STERLING: Right.

14 THE COURT: -- would be in your favor. Am I doing
15 that right? I think.

16 MR. STERLING: Yes, Your Honor.

17 THE COURT: I try and I try. Okay.

18 MR. STERLING: On the issue of --

19 THE COURT: Okay. So, --

20 MR. STERLING: -- and, again, there are --

21 THE COURT: Okay.

22 MR. STERLING: -- there are, you know, about 27 of
23 these types of cases. I'm just --

24 THE COURT: So I've heard.

25 MR. STERLING: Right.

1 THE COURT: No. And I know I get upset. I -- ask
2 you know, what other people do -- no. What other judges
3 rule -- here's -- and I get it's fact specific. But I
4 certainly -- I have read some of the other cases just to --
5 you know, they're all over. I'm not going to -- you know,
6 and I understand Cheetahs may run it a little different
7 from Spearmint Rhino, from Crazy Horse II, III, or -- and
8 you may know all of them more than this Court knows. But I
9 am aware of these type of facilities and I'm aware of the
10 lap dancing laws and anything -- actually, in my other
11 life, I did have a case -- nothing to do with this.
12 There's no -- but where I had to learn a little bit about
13 how some of this functioning -- not from personal
14 experience.

15 So, I want that very clear on the record. Okay?
16 I don't want anybody to think I'm -- I visited these, even
17 for the food. Okay? That's not whatever -- I had to learn
18 some facts from a case totally unrelated to any of these
19 issues a long time ago.

20 MR. STERLING: Yes, Your Honor. And my --

21 THE COURT: So --

22 MR. STERLING: -- and my point went --

23 THE COURT: Right.

24 MR. STERLING: -- the only point I wanted to make
25 is --

1 THE COURT: Yes.

2 MR. STERLING: -- the control issue that comes up
3 in these cases --

4 THE COURT: All the time.

5 MR. STERLING: -- typically is mixed. Typically,
6 the defendant says this is a utopian paradise of freedom.

7 THE COURT: Sure.

8 MR. STERLING: We do nothing. And, typically, the
9 dancers say, actually, when you work there, there's a lot
10 going on.

11 THE COURT: Okay. So, tell me in this case what
12 you have in -- to support. Because you have to, then, have
13 the burden -- you know what you're doing. You have to tell
14 me what facts would say: Hey, Judge, this fact is not in
15 dispute but this is a fact that is -- would say, based on
16 that fact, you would not find them to be presumed to be
17 independent contractors on (c). Because I tried to go
18 through the list of what you said. The -- I found -- I can
19 tell you what I found is, as best I could, going through
20 it. I find you said that the club required them to follow
21 house rules and pay the house mom.

22 MR. STERLING: Yes --

23 THE COURT: Like a fee. Am I -- is that one of
24 your facts? I found that. If it's not, please let me
25 know.

1 MR. STERLING: It is a fact.

2 THE COURT: Yeah. Is that a fact you think that
3 would support that they are -- should not be presumed
4 because the -- following the rules means the house had
5 control over how they did their performance?

6 MR. STERLING: Correct.

7 THE COURT: Okay.

8 MR. STERLING: And it's not only the written rules
9 but it's the unwritten expectation of --

10 THE COURT: Okay.

11 MR. STERLING: -- compliance of basically
12 satisfying the managers on the floor. In other words, --

13 THE COURT: Okay. Do that again. I'm sorry. The
14 unwritten --

15 MR. STERLING: So, there are house rules.

16 THE COURT: No. I've actually read them, which
17 I'm aware there are house rules. You know -- of -- I'm
18 aware of that. What specific house rules tell them how
19 they -- I hate this word, but how they perform -- I don't
20 hate the word. How they -- the manner of their performance
21 as an entertainer. Is that right?

22 MR. STERLING: Yes. So, we --

23 THE COURT: Because that's -- I'm taking the
24 language as best I --

25 MR. STERLING: Right.

1 THE COURT: I am taking the language out of NRS
2 608.0155.

3 MR. STERLING: So, if we look at some of -- so,
4 some of the postings or the flyers that get posted --

5 THE COURT: Okay.

6 MR. STERLING: -- in the dancer changing rooms.

7 THE COURT: Okay. And that's an exhibit?

8 MR. STERLING: Correct.

9 THE COURT: Just --

10 MR. STERLING: That's actually in Defendants'
11 Exhibit --

12 THE COURT: Give me the number. I've got them all
13 here but there's quite a bit. Maybe you can help me in
14 case they -- if they give me -- point me to a spot.

15 MR. STERLING: And it's an exhibit to the
16 deposition of -- see, I've got the wrong packet here.

17 THE COURT: Okay. I have all the original
18 pleadings here in -- which is what I'm looking at, and all
19 the supplemental pleadings. That's what I have to refer
20 to.

21 MR. STERLING: Well, if the Court would permit if
22 I could flag the evidence? And, then, I'll scan through
23 and I can get the Bates Number that I'm referring to.

24 THE COURT: Okay. What I need to know is where it
25 is and what I'm -- I reviewed in the pleadings to be able

1 to use that fact. As you know, I -- you can't come -- I
2 mean, I guess you can add to the facts. I don't know. Was
3 it here somewhere?

4 MR. JONES: And, Your Honor, where --

5 THE COURT: Can you help me? Yeah. Because I --

6 MR. JONES: Yeah. So, we're largely on the same
7 page. We are -- there are a number of documents that we're
8 going through. But it does -- one of the things that was
9 being argued is that relating to the spoliation itself, it
10 directly impacts this hearing. Because we have boxes of
11 documents we believe would have supported our contention
12 demonstrating that the house rules that they put out there
13 were far more restrictive than what they --

14 THE COURT: Okay. Are you saying to me that part
15 -- the documents you know were house rules -- because those
16 house rules would have been there prior to the time frame
17 of the boxes and after? I've never seen the --

18 MR. JONES: That's --

19 THE COURT: Right?

20 MR. JONES: I have seen them change over time, for
21 sure.

22 THE COURT: In what way?

23 MR. JONES: In many ways. In terms of --

24 THE COURT: Well, I don't know because I don't
25 have --

1 MR. JONES: In terms of what dancers --

2 THE COURT: Okay.

3 MR. JONES: In terms of what dancers can wear.

4 THE COURT: Okay.

5 MR. JONES: In terms of what dancers can say. In
6 terms of whether or not a dancer is permitted to turn down
7 a drink when offered. So, the idea that a dancer, for
8 example, can smoke or drink while on shift, let's be real,
9 they actually don't have a choice. They must drink while
10 on shift because they get fired if they turn down a drink
11 while on shift. So, those --

12 THE COURT: But I don't -- okay.

13 MR. JONES: So, those things, those are things
14 where --

15 THE COURT: Okay. What do you have to give that
16 to me? I can't go by your general experience or even --

17 MR. JONES: No. Well --

18 THE COURT: -- what I might have learned in
19 another -- because that has nothing to do what I have here.
20 What you're saying to me now is because documents were not
21 produced but they were on a specific issue, you're now
22 going to say: We can say that could have been in there,
23 that could have been in there, that could have been in
24 there, and, so, that would all go against the presumption
25 of independent contractor.

1 MR. JONES: Your Honor, in fact, we would say
2 that. Literally --

3 THE COURT: And that's what I'm saying. That's
4 pretty broad. We were pretty specific in what you were
5 asking for. What you were asking -- and, help me with my
6 recollection because, you know, I -- this was you wanted to
7 know the dancers who -- dancers. That's -- the dancers who
8 were pre-arbitration. That whole point of that document
9 production is so you can go forward with your class act.
10 They need -- you need the information to be able to find
11 out who was a dancer at the club that could be a potential
12 -- who did not sign an arbitration agreement. That was the
13 focus of this -- of the documents. That was the whole
14 focus. Hey, that's why when they said -- and we went
15 through the whole thing. Remember, well, you know, you can
16 go to the police headquarters and see who has permits. And
17 I said: No, no, no. So, there was nothing about in those
18 documents there would possibly be rules and regulations of
19 what you can wear. Oh, now you have to drink with a
20 customer, or you'll have to drink watered down drinks, or
21 you have to smoke -- I don't know.

22 MR. JONES: And --

23 THE COURT: But, you know, any of those rules.
24 Like I said, I'm --

25 MR. JONES: Your Honor, I will say --

1 THE COURT: So --

2 MR. JONES: -- that definitively, for us, the most

3 critical element was the dancers. Because --

4 THE COURT: The names of the dancers.

5 MR. JONES: -- we must have the names to prove

6 both who they were and what damages are in the case.

7 THE COURT: Correct.

8 MR. JONES: Otherwise, there is no case.

9 Certainly, --

10 THE COURT: I absolutely was on board with you on

11 that, as you know.

12 MR. JONES: Right. Certainly, --

13 THE COURT: Absolutely.

14 MR. JONES: And I thought it was argued but,

15 certainly, we believe that it is far more expansive than

16 that in that they have destroyed all documents in the

17 relevant time frame. It's not just about --

18 THE COURT: Well, that is not what was in front of

19 me on spoliation. I will tell -- I mean, I --

20 MR. JONES: Okay.

21 THE COURT: In fact, we just went through it a

22 little bit to refresh my recollection because I tried to --

23 you know, that was not -- and the reason I gave it is

24 because they were wrong to not give you info -- and I don't

25 even know if it was in there. But you have a right to find

1 that and you did what you should -- your due diligence, to
2 get that information. And any of the sanctions for that, I
3 was trying to -- as you recall, we were working on how do
4 we even --

5 MR. JONES: Right.

6 THE COURT: -- address that sanction by -- and,
7 remember, I came up with: Well, I don't know how many
8 people did they average? And, you know --

9 MR. JONES: Yeah. Absolutely.

10 THE COURT: -- I was trying to come up with a way
11 to even carve a sanction so you can go forward on not what
12 they did but who they were is how I focused it. So, I want
13 to be clear on that because, as you know, I -- I understood
14 that. And, in fact, we were working on a sanction.

15 MR. JONES: And, to me, Your Honor --

16 THE COURT: Okay. So, to me, to come to this
17 Court and say, you know what Judge, now your spoliation and
18 your ruling, I -- we don't have information to rebut
19 608.0155 subsection c, subsection 1, --

20 MR. JONES: And let me --

21 THE COURT: -- I don't think is correct.

22 MR. JONES: Your Honor, I'll step back and let
23 Andrew make the argument --

24 THE COURT: That's fine.

25 MR. JONES: -- on what we do have. Because we do

1 have some things to rebut it.

2 THE COURT: Okay.

3 MR. JONES: But, in reality, we are limited
4 because of this destruction, a temporal destruction of
5 records over that time frame is what I'm saying. Do I know
6 what was entirely in those boxes? No. But we know that in
7 the data dump we got, we got some things that have, you
8 know, flyers and other things in addition.

9 THE COURT: Okay. Well, then, they did give you
10 some stuff that may be relevant. Remember the whole thing
11 was --

12 MR. JONES: But --

13 THE COURT: -- you said it wasn't even responsive
14 to their request.

15 MR. JONES: Well, and temporally, it's not.
16 Because the time is what matters. Right? I can't say that
17 in 2016 they're doing X, Y, Z, when the issue that we're
18 dealing with is from 2013.

19 THE COURT: Well, you can --

20 MR. JONES: We can --

21 THE COURT: -- certainly take depositions of
22 dancers who were there in 2016, even if they signed an
23 arbitration agreement. That's independent --

24 MS. HARTWELL: Yep.

25 THE COURT: -- of what were your rules, what did

1 you get to smoke, or whatever. You know? I'm trying to
2 learn these cases --

3 MR. JONES: Right.

4 THE COURT: -- learn the facts better.

5 MR. JONES: And you --

6 THE COURT: And I'm not being facetious.

7 MR. JONES: No. And these productions --

8 THE COURT: It's very important. I understand
9 that.

10 MR. JONES: And these productions were made after
11 discovery, largely. It wasn't like --

12 THE COURT: Okay.

13 MR. JONES: -- so --

14 THE COURT: But you -- okay. All right.

15 MR. JONES: In any case, but I'll let you --

16 THE COURT: You're doing your record and I don't
17 want to cut -- I understand. I just wanted to do my
18 response to make sure the record was clear on that. Okay.
19 All right. Now, what do --

20 MR. STERLING: If we turn to --

21 THE COURT: -- you have?

22 MR. STERLING: Yes, Your Honor.

23 THE COURT: Okay. Perfect.

24 MR. STERLING: And, thank you for -- if we turn to
25 page 5 of Plaintiffs' Countermotion/Opposition.

1 THE COURT: Okay. Hold on. We got so many -- we
2 have so many papers here. This is your time. I've -- I
3 didn't put anybody -- this isn't a regular day. So, --

4 MR. STERLING: Thank you, Your Honor.

5 MS. HARTWELL: And I didn't -- I didn't realize
6 how long we were going to be. I have another hearing in
7 front of Judge Sturman. If I can just, like, text someone
8 downstairs, let them know that --

9 THE COURT: Whoever you need to do.

10 MS. HARTWELL: Okay.

11 THE COURT: Because I'm not leaving. I've worked
12 too hard on this. Can I be honest? And this is your time.
13 I gave you a special setting --

14 MR. STERLING: Thank you. Yes.

15 THE COURT: -- since I did all my other calendar
16 Tuesday and Wednesday and I have something tomorrow. So,
17 take your time. I want this -- I want the record complete.
18 So, no matter which way I go, it's a record that -- because
19 I understand, they've already gone up on one of these
20 already? Or, two of these. I don't know.

21 MR. STERLING: We've gone up on a couple. Defense
22 has gone up on some, too, --

23 THE COURT: Okay.

24 MR. STERLING: -- depending on the case.

25 THE COURT: That was my impression. Okay. I'm

1 sorry.

2 [Colloquy at the bench]

3 THE COURT: Hold on. Let her --

4 MR. STERLING: Okay.

5 THE COURT: Whoever she needs to do for Sturman.

6 Just for the record, what page did you say it is?

7 MR. STERLING: Page 5, Plaintiffs' Controverting
8 Statement of Facts.

9 [Colloquy at the bench]

10 THE COURT: I don't know. There's so much stuff.

11 THE CLERK: Which motion was it in?

12 MR. STERLING: This is Plaintiffs' Countermotion.

13 So, it would be the -- and Opposition. Filed on --

14 THE COURT: Plaintiffs' Countermotion?

15 MR. STERLING: -- Counter Summary Judgment Motion,

16 --

17 THE COURT: Yes.

18 MR. STERLING: -- filed on May 15.

19 THE COURT: Hold on. What is this one in front of
20 me? Here it is. Errata to Plaintiffs' Cross-Motion --

21 MR. STERLING: Yeah. It was an -- I believe that
22 should be an amended. The --

23 THE COURT: Yeah.

24 MR. STERLING: So, --

25 THE COURT: I --

1 MR. STERLING: It's not an erratum.
2 THE COURT: so, is that it? Is that what we --
3 MR. STERLING: Yes, Your Honor.
4 THE COURT: Okay. This is what he wants us to
5 look at.
6 MR. STERLING: Correct, Your Honor.
7 THE COURT: Okay. Do it again. Page --
8 MR. STERLING: Page 5, Plaintiffs' Controverting
9 Statement of Facts.
10 THE COURT: Plaintiffs' Controverting -- I got it.
11 Okay. That's a start. Okay. Sorry. I -- let's -- I want
12 to get this done. Are we okay?
13 MS. HARTWELL: Yeah. I just text the client and
14 told them when they go in the courtroom to let the judge
15 know.
16 THE COURT: Okay.
17 MS. HARTWELL: That's fine.
18 THE COURT: I can only do what I can do.
19 MS. HARTWELL: It happens. It happens.
20 THE COURT: Okay. So, we're on page --
21 MR. STERLING: Five.
22 THE COURT: On -- yes. I -- the documents is the
23 Errata to Plaintiffs' Cross-Motion -- it's -- but whatever,
24 for Summary Judgment on Employee Status. Okay. Page 5 of
25 30, it starts with roman numeral 3. Correct, counsel?

1 Plaintiffs' Controverting and Separate Statement of Facts.

2 MR. STERLING: Yes, Your Honor.

3 THE COURT: Okay. I'm on that. Do you have that?

4 MS. HARTWELL: I'm trying to pull it up. So --

5 THE COURT: Okay.

6 MS. HARTWELL: But you can go through and I can
7 listen.

8 THE COURT: Okay. I've got it so I'll follow you.

9 MR. STERLING: The topic is the statutory language
10 control and discretion over the means and manner of the
11 performance.

12 THE COURT: Correct. That's where we're at.

13 MR. STERLING: The performance here is a dance
14 service provided to patrons of the club.

15 THE COURT: Right.

16 MR. STERLING: We believe, obviously, a key
17 component of that dance performance is point number one,
18 the club's layout, décor, and ambiance. If a club -- if a
19 dancer wishes to perform to a Barry Manilow song versus
20 performing to an Eminem song, that's a key part of the
21 performance of -- the music. The lightning, the
22 temperature in the room, the stage setup, the -- how
23 crowded one permits the facility to be. Those are issues
24 that bear on the means and manner --

25 THE COURT: That --

1 MR. STERLING: -- of performance.

2 THE COURT: Okay. I'm just trying -- so, the type
3 of dance the performer may be able to do is controlled by
4 the layout of the room, whether it's Barry Manilow or Kanye
5 West?

6 MR. STERLING: So -- and we're focused --

7 THE COURT: I'm just trying to --

8 MR. STERLING: So, the map --

9 THE COURT: Don't laugh at me. I know that. I
10 did pull out --

11 MR. STERLING: When we're focusing specifically on
12 the map --

13 THE COURT: Okay. So, let me just make --

14 MR. STERLING: Yes.

15 THE COURT: I'm older than you guys so give me a
16 break here. So, that -- the dance -- the genre of the
17 music is selected by the club. And since they can select -
18 - and I'm not -- between Barry Manilow and a Kanye West
19 song, that would bear on how the entertainer performs their
20 dance.

21 MR. STERLING: On the manner --

22 THE COURT: The manner.

23 MR. STERLING: -- of the performance. Correct,
24 Your Honor.

25 THE COURT: Well, how? And the manner is how. I

1 mean, right?

2 MR. STERLING: Correct.

3 THE COURT: What they do. Right?

4 MR. STERLING: Yes.

5 THE COURT: All right.

6 MR. STERLING: And, again, similarly, the physical
7 layout, where the patrons are allowed to be, the -- whether
8 there's a stage, these are -- and, again, it's a
9 performance piece. So, the --

10 THE COURT: Correct.

11 MR. STERLING: In performing the work, the --
12 everything in the club that is controlled by the club --
13 and, again, I would use examples --

14 THE COURT: Well, let me do -- yeah.

15 MR. STERLING: Yeah.

16 THE COURT: Let me give you an analogy. How I
17 perform my job as a judge, do you think that the way the
18 layout of this courtroom affects my ability to make -- do
19 my job, my performance of my job, as an analogy?

20 MR. STERLING: Yes.

21 THE COURT: Okay. Tell me how that would work.

22 MR. STERLING: So, just the simple -- the
23 elevation of the Court to symbolize --

24 THE COURT: Well, that just means you're scared of
25 me. Right?

1 MR. STERLING: -- to symbolize --

2 THE COURT: Sorry. But the --

3 MR. STERLING: -- power and authority. The space
4 -- you know, the spacing, the physical space that we have
5 between us, the -- you know, the sign, the -- you know, the
6 --

7 THE COURT: So, that -- but, then, you'd have to -
8 - so that would mean to -- I'm just -- I want to make sure
9 I'm following. That would mean, for me to perform my job
10 as a judge, I need to be a symbol of power. You -- the
11 people need to be a certain distance away from me and I'm
12 elevated.

13 MR. STERLING: Correct. And, so, if you -- if we
14 were to take it further to say that you were an independent
15 contractor and can judge how you wish, you could perhaps
16 have a meeting space outside -- you know, at Starbucks, and
17 say: Hey, guys, --

18 THE COURT: Well, you know what, honestly, I could
19 probably do that if I wanted. It's just not --

20 MR. STERLING: Or --

21 THE COURT: Okay. All right. Okay. I'm just --
22 I wanted to follow. Because I read that and I have some
23 question marks here. Okay. That helps.

24 MR. STERLING: Thank you, Your Honor.

25 THE COURT: As long as I understand an analogy.

1 Okay.

2 MR. STERLING: And, again, --

3 THE COURT: So, that's one -- that's a fact.

4 MR. STERLING: And, again, the touchstone --

5 THE COURT: What --

6 MR. STERLING: -- that is economic independence.

7 I mean, an independent contractor is by definition in
8 business terms --

9 THE COURT: But that's -- we're not looking at
10 that. We're looking at (1)(c)(1).

11 MS. HARTWELL: (1)(c)(1).

12 MR. STERLING: Correct.

13 THE COURT: Okay.

14 MR. STERLING: I still think -- and, again, this
15 is kind of a matter of first impression because it's a new
16 law. I still think it would --

17 THE COURT: No. I get it. We're all working with
18 it.

19 MR. STERLING: It's helpful to do a common sense
20 check. Right? To say, oh, and this makes sense because of
21 --

22 THE COURT: Well --

23 MR. STERLING: -- you know, it makes sense for you
24 to be an -- that you would be an employee or that -- sorry.
25 In here, you would be an independent contractor because

1 that means -- you know, --

2 THE COURT: But the way they did the statute to --
3 it --they did it pretty fact -- pretty criteria-specific --

4 MR. STERLING: Correct.

5 THE COURT: -- is what they did.

6 MR. STERLING: So, in determining --

7 THE COURT: Okay. So, you're saying -- I
8 understand the *Terry versus Sapphire* and I -- you know,
9 that economics reality test. But I'm trying to -- I need
10 to, under the law, look at the facts that you feel that the
11 person has control and discretion of the means and manner
12 of the performance of any work and the result of the work,
13 which, I guess, how you perform it would give you a result
14 of the work. Right?

15 MR. STERLING: Yes.

16 THE COURT: And how it is that these dancers or
17 entertainers don't do that? Your one thing is the fact I
18 understand that they don't get to control the room, they
19 don't get to control what music, they don't get to control
20 the layout. And, then, you started on the flyer thing. I
21 didn't mean to cut you off --

22 MR. STERLING: Yes.

23 THE COURT: Is there --

24 MR. STERLING: Yes.

25 THE COURT: Can I tell you, I did find -- or, my

1 Law Clerk found for me, under plaintiff -- the one we're
2 looking at, Plaintiff's Errata to Plaintiffs' Motion, there
3 is an exhibit -- what -- how is this marked? I had a rules
4 thing here. I found it. Is this an exhibit? I'm so
5 sorry. I'm trying to -- here. Exhibit -- your Exhibit 3.

6 MR. STERLING: Yes, Your Honor.

7 THE COURT: The third page in, fourth page in, I
8 marked something that's called Cheetahs Lounge Rules may
9 include Metro and City laws.

10 MR. STERLING: Yes, Your Honor.

11 THE COURT: Okay. So, I did look at that -- or, I
12 found that when I read that you were saying the rules.

13 MR. STERLING: Yes, Your Honor.

14 THE COURT: And the one I marked was no refusing
15 drink if customer wants to buy you one. Water is
16 acceptable.

17 MR. STERLING: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. STERLING: I would also point --

20 THE COURT: Which makes sense.

21 MR. STERLING: -- point one, costumes only, no
22 street clothes.

23 THE COURT: Okay. Right. Yeah. Which would make
24 sense because that's what the industry -- I -- okay.

25 MR. STERLING: But, again, it's the choice -- it's

1 the control of the -- it's not the dancer's choice. But if
2 a dancer wants to do a YMCA routine and come in with a
3 construction gear, it's not allowed. She has to obey that
4 lounge rules, which even says the title: May include Metro
5 and City laws. And it does. But it includes more than
6 that. More than that is -- this number one, costumes only.
7 And, as we'll find in the testimony, it means costumes that
8 fit the club's concept.

9 THE COURT: I think costumes -- yes. The whole
10 entertainment industry, whether it's Cheetahs --

11 MR. STERLING: The club. Yes.

12 THE COURT: Yes. Spearmint Rhino -- I'm sure you
13 guys know more names than I do. Crazy Horse II, one --
14 what I don't know. But that type. Correct?

15 MR. STERLING: Correct. And the club, not the --

16 THE COURT: They're gentlemen's clubs.

17 MR. STERLING: Yes, Your Honor.

18 THE COURT: There you go. Okay. That type.
19 Okay.

20 MR. STERLING: And the -- it's the club and not
21 the dancer who has control over costumes --

22 THE COURT: Correct.

23 MR. STERLING: -- meaning that -- and that's,
24 again, a manner --

25 THE COURT: Right.

1 MR. STERLING: -- of performance.

2 THE COURT: No. They have control over it. No
3 street clothes.

4 MR. STERLING: Correct.

5 THE COURT: They -- my understanding -- and see if
6 I'm right, they don't -- it's so hard. They don't say you
7 have to come in with feathers and boas and -- I don't know.
8 What else would they wear? I don't know. They must -- I
9 don't know.

10 MS. HARTWELL: Masks.

11 THE COURT: What?

12 MS. HARTWELL: Masks. A mask.

13 THE COURT: Whatever. I don't know. I mean, do
14 they do that? Because my understanding from looking at it,
15 as long as they're -- its fit within the entertainers
16 industry, which is what they mean by costumes only.
17 Obviously, they may not necessarily wear them -- what --
18 hence why they use street clothes. But I could be wrong.
19 That was my understanding when I read all this, like I
20 said. Okay. But I -- so, you're looking at that. I did
21 find -- okay. All dancers will get a -- okay. Is there
22 anything else in here?

23 MR. STERLING: Yes, Your Honor. A point --

24 THE COURT: I picked out the drinking one because
25 it was --

1 MR. STERLING: Point 3 high heels, two inches
2 high.

3 THE COURT: Okay.

4 MR. STERLING: This is an issue for women with
5 ankle issue who prefer -- would prefer -- actually cannot
6 medically perform in two-inch heels, would prefer not to
7 perform in two-inch heels, cannot perform in two -- in
8 flats or anything other than two-inch heels.

9 THE COURT: Okay. Oh my God.

10 [Colloquy at counsel table]

11 MR. STERLING: Okay. And, so, what we're saying -
12 - well, so --

13 MR. JONES: Yeah. So, there are a couple of
14 points just on a couple of the topics. For example, it
15 says water is acceptable. Even that is actually not really
16 true in the club environment. There will be testimony at
17 trial that although they are permitted to not have alcohol
18 when offered a drink, they have to basically fake it to the
19 customer that they are having alcohol --

20 THE COURT: Okay.

21 MR. JONES: -- by getting, you know, something
22 that looks like it.

23 THE COURT: Sure.

24 MR. JONES: The point being there is a degree of
25 control there, that it even goes beyond what they say here.

1 In --

2 THE COURT: No. But the dancer decides whether
3 she wants the full alcohol or the diluted --

4 MS. HARTWELL: Or water.

5 THE COURT: -- or just being a drink --

6 MR. JONES: The --

7 THE COURT: -- or water only.

8 MR. JONES: That is --

9 THE COURT: They're just saying you have to have
10 drinks because that's part of how it works.

11 MR. JONES: That is true. But --

12 THE COURT: But you can have water.

13 MR. JONES: But how about an alcoholic dancer that
14 doesn't want to drink? She has to fake it as though she's
15 drinking with this guy --

16 THE COURT: Probably.

17 MR. JONES: -- or else she gets fired over it.
18 That's the reality.

19 THE COURT: Well, but water would be okay.

20 MR. JONES: Well, technically under this rule it
21 says that --

22 THE COURT: Yeah.

23 MR. JONES: -- but it's not really okay. They
24 couldn't actually go in with a cup of water --

25 THE COURT: No.

1 MR. JONES: -- they have to make him believe
2 they're drinking alcohol or else they get fired.

3 In addition, for example, in terms of the costume
4 part of it, there are dancers that will testify that they
5 go into this club --

6 THE COURT: Do you have that here? Where is their
7 testimony? Not what testify at trial, I have to do what's
8 in front of me on a motion. They -- because I did read
9 through all your exhibits.

10 MR. JONES: Your Honor -- as you know, Your Honor,
11 the names, we still don't have them. We have a limited
12 number of names. And, so, we will --

13 THE COURT: I'm sorry. I know I'm putting you on
14 the spot. But I have to.

15 MR. JONES: No. That's the great unfairness of
16 the situation in this case with the destruction of
17 evidence, that we don't have the names of the people that
18 we could depose and talk to. And we know -- we know what
19 actually goes on and -- but, in terms of -- anyway. We
20 know that, for example, a dancer coming in, wouldn't
21 necessarily be street clothes but she comes in in, like, a
22 one piece or in something that she thinks is sexy and might
23 appeal to a certain group of gentlemen, she's not
24 permitted. Like, there's -- there -- they get very strict
25 on what they actually are going to allow you to wear when

1 you're there.

2 THE COURT: Okay. And where do I have that? Do I
3 have testimony by any of the managers there? Do I -- once
4 again, --

5 MR. JONES: Your Honor, I can --

6 THE COURT: -- even you knew people who were in
7 the group originally. I -- that signed the arbitration.
8 That's an independent thing. They can tell you what kind
9 of costume -- you could take their -- what kind of costume
10 can I wear? Can I come in in whatever, anything to give me
11 that information.

12 MR. JONES: Well, Your Honor, again, for summary
13 judgment --

14 THE COURT: Right.

15 MR. JONES: -- they haven't established that it is
16 a wide-open utopian paradise where they can dress the way
17 they want.

18 THE COURT: Well, that's my decision -

19 MR. JONES: Precisely.

20 THE COURT: -- on whether there's disputed facts
21 under that. I'm just -- I've gotten their facts, I'm just
22 looking for your facts.

23 MR. JONES: Right. And they don't have a fact
24 demonstrating that there is degree of freedom. That --

25 THE COURT: Well, that's an interpretation by me

1 under this statute.

2 MR. JONES: But --

3 THE COURT: What I'm looking for, as you know,
4 under *Wood versus Safeway*, you have to give facts that I
5 can look at. That's why I'm very carefully trying to go
6 through this to try to -- to find out if -- and, as you
7 know, there's a lot of pleadings. I -- and I, on my own,
8 went through all your exhibits here. I found -- you know,
9 I'll be honest, I found the thing and put rules, you know,
10 trying in fairness to make sure I'm balancing. I did find
11 -- and I did find the drink one. And --

12 MR. STERLING: And, Your Honor, we do -- and
13 that's exactly right on the *Wood versus Safeway* standard.

14 THE COURT: Right.

15 MR. STERLING: Could a reasonable juror look at
16 these lounge rules and find a question of fact as to
17 whether the club controls the manner of performance.

18 THE COURT: No. No. Whether they could find that
19 the person has control and discretion over the means and
20 manner of the performance --

21 MR. STERLING: Correct. Correct.

22 THE COURT: -- is where we're at.

23 MR. STERLING: And, so, again, on the lounge
24 rules, we flagged rule 1, rule 3 --

25 THE COURT: Okay. Rule -- I've got that.

1 MR. STERLING: And there's the inter -- the
2 contact rules. They're -- the county rule is very specific
3 to the groin and the breasts.

4 THE COURT: It is. It's called the lap dance. I
5 am familiar with that.

6 MR. STERLING: Thank you, Your Honor. Your Honor
7 --

8 THE COURT: There are lap dance -- but those are
9 county rules and they have to comply with those.

10 MR. STERLING: Your Honor, here's a deposition
11 testimony --

12 THE COURT: In here?

13 MR. STERLING: -- from Jessica Hendricks
14 [phonetic] in this case.

15 THE COURT: Okay. Tell me where.

16 MR. STERLING: On page 104 of her deposition.

17 THE COURT: Where is it here, though? I don't
18 have her whole deposition. Is it a part of yours? What
19 exhibit? Okay. Let me see if I can find a deposition. I
20 want to -- I'm -- deposition -- because, counsel, I looked
21 through all of your exhibits. Let's see. I know there's
22 deposition testimony, rules. Here's a deposition. Let me
23 see who it is. Let me see the beginning. Hold on a minute
24 and I'll help you. No. That's Diana Pontrelli. She's the
25 -- kind of the house mom lady.

1 MR. STERLING: No.

2 MS. HARTWELL: The manager.

3 THE COURT: The manager.

4 MR. JONES: My own impression was that defense
5 counsel just read from the deposition of Jessica Hendricks
6 in this case earlier during their argument. And I --

7 THE COURT: I have no idea because --

8 MR. JONES: Okay. Well, they --

9 THE COURT: -- you can't argue to me evidence that
10 -- under our rules for summary judgment, you have to give
11 me -- you can't, in argument, give me something that's not
12 facts. I mean, if you both agree, all I have is hers --
13 I'm just trying to find it in case I -- I'm not -- I don't
14 want to limit you. Okay. That's -- okay. I don't know.
15 Okay. But tell me what --

16 MR. STERLING: Just, Your Honor, so, again, coming
17 back to the lounge rules --

18 THE COURT: Yeah. I got the lounge rules.

19 MR. JONES: Okay.

20 MR. STERLING: So, I'm just making sure that we
21 flagged them all.

22 THE COURT: I've got them here.

23 MR. STERLING: The lap dance rule is over broad
24 when you match it to the rules of the legal obligation. If
25 we look at --

1 THE COURT: You're saying -- duty. Okay. I'll
2 listen.

3 MR. STERLING: If we look at 8, customers cannot
4 fondle you, you cannot fondle them, well, it's questioned
5 what is meant by fondle. Again, taking all inferences in
6 our favor as we do at the summary judgment stage, I would
7 argue that means contact. And, you know, let's say a
8 caress, if I caress on someone's shoulder, that is, as I
9 understand it, legal in a strip club context.

10 THE COURT: But fondling isn't.

11 MR. STERLING: Well, it depends on how you --

12 THE COURT: Because fondling is under the criminal
13 statutes. That's an offensive -- I mean, I --

14 MR. STERLING: Well, again, --

15 THE COURT: So, --

16 MR. STERLING: -- I would argue that it's
17 ambiguous as to -- if I'm reading this as an exotic dancer,
18 it just says here: Customers cannot fondle you.

19 THE COURT: Okay. Did anybody do any discovery
20 that they got handed the Clark County Lap Dance
21 Regulations?

22 MR. STERLING: There's no evidence of that, to my
23 knowledge.

24 THE COURT: I thought that was pretty standard in
25 every club. So, I don't know. Because they -- I don't

1 know.

2 MR. STERLING: And we do recognize --

3 THE COURT: Okay. But you're --

4 MR. STERLING: Yes.

5 THE COURT: I'm just trying to follow you. So,
6 you're saying by saying customers cannot fondle you --
7 okay. You cannot fondle them, that means the club is
8 controlling the way they perform their work?

9 MR. STERLING: It's a permissible inference. Yes,
10 Your Honor.

11 THE COURT: Okay. I -- okay.

12 MR. STERLING: Again, would I rank it -- if I'm
13 ranking them, it does -- you know, --

14 THE COURT: No. I'm --

15 MR. STERLING: Yeah.

16 THE COURT: I'm just --

17 MR. STERLING: But -- and, again, you -- the Court
18 has flagged the drink rule.

19 THE COURT: I did.

20 MR. STERLING: Again, very much an interference.
21 Outfits must be lean, personal hygiene is a must. Again,
22 this is in the opinion of the club, which retains
23 discretion to say: You smell bad, get out of here. The
24 dancer says: I just took a shower. Again, I'm basing this
25 just on the rules.

1 THE COURT: I'm just listening to your -- yeah.

2 MR. STERLING: So, again, we're impinged -- the
3 club is impinging on the means and manner in which dancers
4 can work. They must meet the subjective criteria of the
5 club to, quote/unquote: Clean. If they are not in the
6 opinion of the club, quote/unquote, clean, they are in
7 violation of the lounge rules and will not be able --

8 THE COURT: No. It's -- it means it's -- I look
9 at it, it doesn't mean how they dance, it means you don't
10 get to work today or you don't get to perform today, you
11 get to go home and take a shower. Not how they but whether
12 they can or cannot --

13 MR. STERLING: Well --

14 THE COURT: -- work, or perform, or whatever the -
15 - perform is the right expression. Correct? Yes. Perform
16 --

17 MS. HARTWELL: Perform.

18 THE COURT: -- at the club that day. Okay.

19 MR. STERLING: Yes.

20 THE COURT: But I --

21 MR. STERLING: And, then --

22 THE COURT: -- connect your argument.

23 MR. STERLING: And, again, if a dancer is saying,
24 I am -- you know, a grunge dancer, I like to, you know,
25 wear flannel and that's my thing, that's my manner of

1 performing --

2 THE COURT: Right.

3 MR. STERLING: -- big hit, apparently, wherever,
4 that's the discretion of the dancer that's being taken away
5 by the lounge rules and, again, creates a triable issue of
6 fact on this issue.

7 THE COURT: Okay.

8 MR. STERLING: No purses or cellular phones on the
9 floor. Again, why? If someone wishes to incorporate a
10 cell phone into their dance performance or their handbag,
11 why -- you know, again, it's a -- might seem a minor deal
12 but it's still a mechanism of control over the dancers when
13 they're performing. How -- you know, what they can have
14 with them, what they can't have with them. And I'm not
15 aware of any law.

16 Another interesting thing is cell phones can be
17 used to swipe now credit cards. Wouldn't it be great as a
18 dancer if you could bypass the club's dance dollar system,
19 which takes -- they can take a cut off the top? An
20 independent contractor really should be able to have a
21 phone, swipe with the customer, and cut the club out of the
22 equation. That's not allowed and the rules -- that's what
23 the rules say.

24 One foot on the floor. That's -- and shoes must
25 be worn at all time. There's no law or regulation

1 regarding that.

2 THE COURT: I think that's part of the lap dance
3 law if you would look at the Clark County lap dance that
4 you have to have one foot on the floor. I'm almost --

5 MR. STERLING: It has not been cited in this --

6 THE COURT: If anybody wants to look at it, it
7 might be something interesting.

8 MR. STERLING: Yeah. it's a --

9 THE COURT: No one's mentioned the --

10 MR. STERLING: It's not been cited by --

11 THE COURT: Well, but --

12 MR. STERLING: -- the defendant.

13 THE COURT: It's a county ordinance. So, it
14 applies. I'm just saying, you're --

15 MR. STERLING: Shoes --

16 THE COURT: Okay. Whatever.

17 MR. STERLING: Yeah. I mean, I get it.

18 THE COURT: I only have what's in front of me.

19 MR. STERLING: I'm not -- all I'm saying is the
20 record -- I'm not aware of any --

21 THE COURT: That you must have -- yeah.

22 MR. STERLING: -- law with respect to shoes and
23 the one-foot rule. If it is a -- you know, I would expect
24 the defendant to have raised that --

25 THE COURT: Okay.

1 MR. STERLING: -- and I haven't seen it in the
2 record.

3 THE COURT: Okay. I --

4 MR. STERLING: Continuing -- and, again, if we can
5 -- would the Court prefer to go back to the controverting
6 statement of facts?

7 THE COURT: Okay. Hold -- what page again?

8 MR. STERLING: Now it's page 6.11.

9 THE COURT: Okay. Hold on. Just give me a
10 chance. Six to 11? Five. Okay. I'm -- okay. What
11 number?

12 MR. STERLING: Two -- page 6 --

13 THE COURT: Yeah.

14 MR. STERLING: -- item 11 --

15 THE COURT: Okay.

16 MR. STERLING: -- promotionals. The club, two for
17 20 lap dance. So, in other words, the manner -- you know,
18 and as I understand it, basically, a dance in the industry
19 would last for a song. That's another point, of course.
20 The DJ controls the length of the song is another important
21 issue. Right? Dancers would love to have 20-second songs
22 because there's an expectation when the song ends, you get
23 paid. So, that's another critical point about the DJ. Not
24 only is it the Barry Manilow versus Kanye West, it's also
25 the length. And I -- it'd be an interesting question

1 whether DJs screen ahead of time to get a standard length
2 for the dancers. But, again, it's controlled by the club.
3 But the two for 20 lap dance promotions, they -- as it
4 suggests, says: Here's what you're going to do for this
5 promotion. You're going to do a lap dance for 10 dollars -
6 - two lap dances for 10 dollars apiece. That's what you --
7 so, dictating the performance of the work.

8 THE COURT: Okay. I'm thinking it through.

9 MR. JONES: There's an allegation that the club
10 did control what was paid, that it was -- dancers were free
11 to make that and they're not. They largely have a scale
12 they have to go by. And when they have specials, there is
13 absolutely no --

14 THE COURT: Okay. Where is that?

15 MS. HARTWELL: I know -- Your Honor, it's -- if
16 you can -- if can ask if I can -- they just have one person
17 that --

18 THE COURT: You know what? I'm okay. I agree.
19 But you can answer whoever says it. I'm okay if I'm
20 double-teamed.

21 MS. HARTWELL: With --

22 THE COURT: If we were at trial, I don't allow it.
23 But I'm okay.

24 MS. HARTWELL: With it.

25 THE COURT: As long as you write what the facts

1 are, I'm okay --

2 MS. HARTWELL: I --

3 THE COURT: This is important. It's --

4 MS. HARTWELL: I am.

5 THE COURT: That should -- I get it. In front of
6 a jury, I don't allow it. but, for these purposes, I'm
7 okay. I'm able to follow.

8 MR. JONES: And I was just saying --

9 THE COURT: So, I -- it would be nicer but I'm
10 good.

11 MR. JONES: The record that Mr. Sterling --

12 THE COURT: Hopefully, you can follow -- just
13 follow the facts, not who said it.

14 MS. HARTWELL: I am. But he's adding arguments
15 and it's just making it a lot longer.

16 THE COURT: I said that. I said: Where are the
17 facts? That's different from who the speaker is.

18 MR. JONES: And, Your Honor, the only facts cited
19 to are specifically that there was the allegation that they
20 were free in defendants' opening argument. And --

21 THE COURT: Well, there is -- they had testimony -
22 -

23 MR. JONES: That they were --

24 MS. HARTWELL: Right.

25 THE COURT: -- that they pulled that -- I got it.

1 I got you. Okay. Because I really read -- they actually
2 have testimony from one of the dancers that said that.
3 That -- not said that, testified that under oath.

4 MR. JONES: So -- where -- and I --

5 THE COURT: I don't --

6 MR. JONES: Okay.

7 THE COURT: I just --

8 MR. JONES: In any case --

9 THE COURT: Like I said, there's a lot of --

10 MR. JONES: There is.

11 THE COURT: And the record is the record. Okay?

12 MR. STERLING: Yes, Your Honor.

13 THE COURT: Anything else in here?

14 MR. STERLING: Yes, Your Honor.

15 THE COURT: Shift is a day shift.

16 MR. STERLING: If we look to, again, on the
17 controverting statement of facts, point 23 on page 7.

18 THE COURT: Okay. Hold on. Let me find it, Mr.
19 Sterling. Yes.

20 MR. STERLING: Being disciplined for displaying a
21 negative attitude. This comes from the club's sort of
22 ledger.

23 THE COURT: Okay.

24 MR. STERLING: There are several instances here
25 that basically support an inference that the club is

1 monitoring performance and stepping in when -- as they see
2 fit. So, the -- a reprimand in point 23 for a negative
3 attitude; a reprimand in 25 for a poor, rude, and nasty
4 attitude; 26 for being disrespectful; 28, again, being
5 disrespectful; 29, negative -- having her attitude. So,
6 again, what this suggests is the club records suggest that
7 the club is monitoring and evaluating the means and manner
8 of the performance and reserves the right to step in and
9 reprimand up and to including termination if they deem --
10 if they fit. So, again, and this came -- did come up in
11 *Sapphire*. They called it a false autonomy. They said it
12 is --

13 THE COURT: A what?

14 MR. STERLING: False --

15 THE COURT: False --

16 MR. STERLING: False autonomy.

17 THE COURT: False autonomy. Okay. What did that
18 mean?

19 MR. STERLING: Meaning that the club says: Hey,
20 we don't -- they do their thing but until the club says
21 they can't.

22 THE COURT: Okay. But I'm looking at this --

23 MR. STERLING: Yes.

24 THE COURT: -- and attitude is not necessarily how
25 they perform their dance. When I look at the attitude,

1 it's what they're doing while they're working with a
2 manager, while they're working with the house mom. So, --

3 MR. STERLING: Again, Your Honor, we --

4 THE COURT: -- how do you address -- okay. How
5 you do your dance and how you have somebody's attitude at
6 work -- or, attitude in the workplace, how do you put those
7 two together?

8 MR. STERLING: Yes, Your Honor. First of all, we
9 would request the benefit of all permissible inferences.

10 THE COURT: Absolutely.

11 MR. STERLING: So, when we're --

12 THE COURT: I'm doing my best.

13 MR. STERLING: When we're looking at 23, with the
14 negative attitude, I mean, obviously that's highly
15 subjective. But, of course --

16 THE COURT: Sure.

17 MR. STERLING: -- it could be being rude to a
18 guest or saying: I don't want to dance for you, you're
19 ugly, I don't like you. These are issues that can arise in
20 the dancer-patron context that could -- in other words,
21 basically, -- and, again, and even -- so, that's patron --
22 you know, so, this point 23 with a positive inference in
23 our favor absolutely could support the inference that a
24 dancer is being disciplined for not having the correct
25 attitude with a customer.

1 This comes up, too, in some of these flyers where
2 it says, you know, you've got to make the club run -- you
3 know, you got to help us out here. And this is in -- it's
4 actually --

5 THE COURT: Where's the flyer? I found the rule -
6 -

7 MR. STERLING: Two -- if you go back to the
8 Cheetahs lounge rules, it's one --

9 THE COURT: I got them.

10 MR. STERLING: -- two, three more pages.

11 THE COURT: Three more pages after my -- I found
12 the rules?

13 MR. STERLING: Yes.

14 THE COURT: Okay. Hold on. I'll find it. New
15 house fees.

16 MR. STERLING: It says: Welcome to Cheetahs.

17 THE COURT: Okay. Just give me a chance, Mr.
18 Sterling. One, two -- Welcome to Cheetahs. Okay.

19 MR. STERLING: The rules have been placed here for
20 a reason, to continue to make the club run smoothly. The
21 main object around here is for everyone to make money.
22 Now, that sounds really positive. But, again, I think the
23 pretty powerful inference here is you need to get with our
24 program. And if you don't, if your -- you know, so, to run
25 smooth in our opinion, you need to be clean, you need to

1 have heels, you need to have a good attitude. Those are
2 the -- and if you don't, you're gone. And, so, that's the
3 basic message that's -- and it's being sort of supporting
4 these --

5 THE COURT: But aren't those more the
6 prerequisites to be qualified to do this job, whether your
7 status is an employee or an independent contractor? Like,
8 say you hire a paralegal and you want them to -- you decide
9 they're an independent contractor. Would one of your rules
10 be that you come on time? You have to work these certain
11 hours. Or you -- or, you know, here's the work I'm going
12 to give you, I don't care -- I've been around the
13 paralegal, that's why I'm using the analogy because we had
14 that issue. Do -- you know where I'm going with this.
15 Here's -- you need to be ready for this trial. Okay? I
16 don't care. You have to -- okay. Here's an easy thing.
17 You have to summarize these depositions. I want page line
18 summary. I know computers do it now but, in the old days
19 the paralegals do it, and cross-reference so I as the trial
20 attorney be able to use that -- your work here. So, when
21 this witness gets on the stand, I can make sure I have
22 everything I need if they are saying something that can be
23 impeached from their deposition. There's a good example.
24 Because, as we know in our industry, some people say
25 paralegals are --

1 MR. STERLING: And, Your Honor --

2 THE COURT: -- independent contractors. Right?

3 MR. STERLING: This is -- that is a great analogy.

4 And we actually, within our firm, looked into that a few
5 years ago. We started growing and we wanted to make sure -
6 -

7 THE COURT: Sure.

8 MR. JONES: -- that all the employment rules were
9 being followed. And something that we found is that
10 paralegals flat out can't be independent contractors,
11 basically, based on the type of work they do. But if you
12 did have one that was acting as an independent contractor -
13 -

14 THE COURT: That was a ruling by the Nevada Labor
15 Commission.

16 MR. JONES: Right.

17 THE COURT: I'm very aware of it.

18 MR. JONES: And if you did, if you did have a
19 paralegal that was an independent contractor, you certainly
20 couldn't say you had to be there at 8 o'clock.

21 THE COURT: No. But you could say what I said --

22 MR. JONES: You could say: Do this work by this
23 time.

24 THE COURT: Correct.

25 MR. JONES: Perhaps. Right? So, by the 30th, I

1 need these things accomplished.

2 THE COURT: Correct.

3 MR. JONES: And you're going to be paid a certain
4 amount for that. You could do something perhaps in -- to
5 that degree. But, with paralegals in particular, they've
6 even said they can't even be viewed as salaried employees.
7 By the nature of their work, it is so predictably hourly.
8 So, --

9 THE COURT: Well, also, there's -- their
10 responsibility is not necessarily they're being controlled.
11 But I'm --

12 MR. JONES: Absolutely.

13 THE COURT: I'm familiar with it. I was involved
14 in it.

15 MR. JONES: But -- and that's the whole point.
16 Right?

17 THE COURT: Right. Okay --

18 MR. JONES: To the degree that you start saying,
19 hey, you have to be here --

20 THE COURT: -- but how does --

21 MR. JONES: -- at a certain time --

22 THE COURT: But how does that equate to how they
23 perform their paralegal job? You're intertwining here.
24 And I understand *Terry versus Sapphire*. I read it again.
25 I understand exactly the reasoning of the Nevada Supreme

1 Court. I -- using that economics reality test. I -- but
2 what I'm required to do is limit facts as to how -- the
3 person has control and discretion of the means and manner
4 of the performance, which is much more -- none of us made
5 these rules, as you know. This was just what we have to
6 deal with now until something happens up in the Supreme
7 Court. Okay?

8 MR. STERLING: Yes, Your Honor.

9 THE COURT: But I equate it to something like
10 that, like what I was doing on the hygiene and stuff when
11 people come to work. That's more whether you're -- I don't
12 want to say the word -- maybe it is qualified, or fit, or
13 have the capability to do the job, not how you do the job.
14 You could say the capability to do a job as an entertainer
15 -- and, no offense, if you have offensive body odor, that
16 probably wouldn't make you qualified in this type of
17 setting, which I think is what -- to do the type of
18 entertainer job, which is in close proximity to customers.
19 Dancing, lap dancing, whatever they -- lap dancing, there's
20 nothing wrong with that. That's under their -- I'm not
21 criticizing. Lap dancing --

22 MR. JONES: Table dancing.

23 THE COURT: They lap dance on customers. That's
24 legal, that's fine, that's what's acceptable here by law.
25 But it's more -- there are rules on how you lap dance,

1 meaning what physical parts can touch. And I understand.
2 But that's under the ordinance as to whether you are
3 violating an ordinance or as to being --

4 MR. JONES: But, Your Honor, how about just the
5 simple thing, going back to the drink. Right? What if, as
6 I am performing my dance, I feel that the right move to
7 make is when he says: Hey, do you want a drink? Is to
8 say: No, I don't. Right? And I think that that's going
9 to be the best thing for my relationship with him. I get
10 fired over that because the club requires me to be a
11 salesperson --

12 THE COURT: Okay --

13 MR. JONES: -- of their alcohol. And, so, they
14 control the manner of my performance by forcing me to drink
15 every time I'm offered a drink.

16 THE COURT: So, you're broadening performance to
17 be every single interaction with a customer there.

18 MR. JONES: Well, that's exactly what it is.

19 THE COURT: No. I know. I'm just --

20 MR. JONES: Yeah.

21 THE COURT: -- I'm trying to see where you're
22 scoping at.

23 MR. JONES: That is the point. They're even --

24 THE COURT: By not being able to say, no, --

25 MR. JONES: But, literally, --

1 THE COURT: -- I don't want an alcoholic drink --
2 MR. JONES: Under their rules, if the dancer is in
3 the middle of a dance and is offered a drink, she must say
4 yes.
5 THE COURT: Okay. Where's that? Where's that
6 rule?
7 MR. JONES: It says the -- it says
8 incontrovertibly that they can't say no to a drink offer.
9 MR. STERLING: That's the lounge rules, Your
10 Honor.
11 THE COURT: I'm looking at it. No refusing drink
12 if customer wants to buy you one.
13 MR. JONES: Right.
14 THE COURT: Okay.
15 MR. JONES: These men in these clubs --
16 THE COURT: So --
17 MR. JONES: -- they want to drink with the girl.
18 And, I guess, in their imagination, think there's something
19 more there than just a dance they're paying for. But, if
20 they make that offer, the club knows they make a lot of
21 money --
22 THE COURT: Okay.
23 MR. JONES: -- on those drink sales. And, so,
24 they had established a rule that that takes priority over
25 all other performance considerations.

1 THE COURT: Okay. All right. Gotcha. I'm
2 following that broadening your definition of performance.

3 MR. JONES: I --

4 THE COURT: Not your definition. But what you're
5 saying is --

6 MR. JONES: But it literally stops and starts
7 performance. It takes precedent over all performance.

8 THE COURT: Okay. All right. Anything else?

9 MR. STERLING: Just one final point on this issue,
10 this fit between 608, this test, and our situation.

11 THE COURT: Okay. And, now, we're --

12 MR. STERLING: So, we have one question is: What
13 is the work or what is the performance? Is it each dance?
14 Is it, you know, when you clock in to clock out? So,
15 moving around the space, interacting with customers, meet
16 and greet? You know? So, that's -- that absolutely is one
17 question. And, then, the other point that was raised in
18 our brief about this test is that it is trying to identify
19 who is an independent contractor with a principle. And,
20 so, that's the other question is: Who is the principal in
21 this scenario? It's not -- and I would submit the only way
22 -- thing that would make sense is it's each club patron. I
23 think what the club typically is -- because, again, the
24 document -- the contract at issue here is a lease. So, --

25 THE COURT: No. I've read it.

1 MR. STERLING: Yeah. So, --

2 THE COURT: That's what they call it.

3 MR. STERLING: So, we have a --

4 THE COURT: That's what they call it.

5 MR. STERLING: That's what they call it. But, of
6 course, --

7 THE COURT: That does not mean it's a legal lease,
8 as you know. It's a -- it doesn't matter what you call an
9 agreement. You look at the terms and conditions to decide
10 whether it's a contract. Contract is what -- right? Under
11 law. So, whether you call it a lease, or a buy back
12 agreement, or I don't -- whatever title you put on it
13 really doesn't have significance.

14 MR. STERLING: And, then, the second part of that
15 is when the tenant comes in to use this facility, the
16 business that is transacted is between the -- each customer
17 and the dancer. So, but, in that situation, the dance --
18 the dancer is being employed or working for the principal,
19 which is the customer. I mean, I think -- because, then,
20 the customer pays the dancer. This is the fiction -- the
21 legal fiction that we're operating under, --

22 THE COURT: No. I --

23 MR. STERLING: -- which would be dancer pays the
24 club to come and use the space. The club is just: Hey,
25 we're just letting you here, do your independent contractor

1 thing with the patrons.

2 THE COURT: Okay.

3 MR. STERLING: And, so, the principal in that
4 scenario that is paying for work to be done is the patron,
5 not --

6 THE COURT: So, are you saying -- okay. So, are
7 you saying the customer -- they are, then, the employee of
8 the customer?

9 MR. STERLING: Well, and -- or they are working
10 for the customer and they're trying to --

11 THE COURT: Okay. But how does that affect
12 whether they're an independent contractor or an employee?
13 Doesn't that go to the independent contractor?

14 MR. STERLING: Well, that's my point is that this
15 test could be applied to that relationship to determine
16 whether the dancer is -- whether the dancer is an
17 independent contractor and the --

18 THE COURT: In relation to each customer.

19 MR. STERLING: -- to the -- and the patron would
20 be the principal. And there's a relationship there. Here
21 -- and I guess the overarching point is independent
22 contractor is not synonymous with not employee. That's
23 what --

24 THE COURT: No.

25 MR. STERLING: So, we --

1 THE COURT: I'm using this, whether there's a
2 presumed -- person is presumed by the -- I didn't write
3 this criteria. Let me -- right? You didn't either. This
4 is just what was enacted by our legislatures and we're
5 doing the best we can to an interpret and imply it. And
6 I'm sure that why the Nevada Supreme Court's going to look
7 at it because it's not easy.

8 MR. STERLING: and I just want to define --

9 THE COURT: Yes.

10 MR. STERLING: -- my threshold point was it
11 applies to analyze a situation where a worker has been
12 hired to perform a job and the question is: Is that person
13 an independent contractor? So, FedEx, for example.

14 THE COURT: Sure. I'm --

15 MR. STERLING: If -- yeah. And, so, the question
16 there is: Is a FedEx driver an employee of FedEx or an
17 independent contractor of FedEx? And this test would make
18 sense there. I would argue that it doesn't make sense in
19 this specific situation.

20 THE COURT: And I bet you'll give that argument --

21 MR. STERLING: Okay.

22 THE COURT: -- up to the Nevada Supreme Court when
23 this statute goes up.

24 MR. STERLING: Thank you, Your Honor. I just
25 wanted to flag it.

1 THE COURT: I would -- I think you probably
2 already have your arguments ready.

3 MR. STERLING: Yes, Your Honor. I just --

4 THE COURT: To be honest, you did such a good job
5 in *Terry versus Sapphire*, look what you got.

6 MR. STERLING: Yes, Your Honor.

7 THE COURT: Because I'd be careful. I get -- I
8 understand that. But that's --

9 MR. STERLING: Yeah. No. Absolutely.
10 Absolutely. I just wanted to flag it.

11 THE COURT: That's not my focus, unfortunately.

12 MR. STERLING: Okay.

13 THE COURT: My focus has to be the law in front of
14 me and interpreting what it means to the facts of this
15 case, Mr. Sterling, as best I can.

16 MR. STERLING: Yes.

17 THE COURT: That's all our job and that's -- so,
18 have we gone through the facts that you feel would counter
19 their Motion for -- the Defendants' Motion for Summary
20 Judgment and support your Countermotion for Summary
21 Judgment that these entertainers should be found that you
22 have overcome this presumption in 608.0155. And, in fact,
23 there's no disputable -- genuine issue of disputed fact
24 that this Court should find them as employees as a matter
25 of law?

1 MR. STERLING: Right, Your Honor. And, so, --
2 THE COURT: Okay. I just want to make sure I've
3 done it all.
4 MR. STERLING: To be done with on (c).
5 THE COURT: (c), we're done? Okay.
6 MR. STERLING: No, no. I'm sorry.
7 THE COURT: No. I'm sorry.
8 MR. STERLING: On (c)(1), we're done with the
9 issue, the meet -- the control and discretion over means
10 and matter of performance.
11 THE COURT: Okay. So, --
12 MR. STERLING: Your Honor, this --
13 THE COURT: -- now we're going to go to --
14 MS. HARTWELL: (c)(2).
15 THE COURT: (c)(2).
16 MS. HARTWELL: Okay.
17 THE COURT: Okay. Then she gets to start.
18 MR. STERLING: Yes, Your Honor. There was --
19 THE COURT: Were you not finished with (c)(1)? I
20 am not cutting you off.
21 MR. STERLING: Right. There was one extra --
22 THE COURT: That's fine. I'm sorry. I know you
23 have something --
24 MR. STERLING: It's fine.
25 THE COURT: -- but I purposely move this as for

1 supplemental briefings and gave you a special setting so we
2 can have a fair record --

3 MR. STERLING: Thank you.

4 THE COURT: -- when I rule on this. So, I --

5 MR. STERLING: So, we --

6 THE COURT: So, I -- if you need to take a two-
7 minute break and go to -- I don't know what you need to do.

8 MS. HARTWELL: I don't -- well, I should.

9 THE COURT: Or send in a -- I --

10 MS. HARTWELL: I don't have any associates.

11 There's like --

12 THE COURT: Well, I duly noticed this and
13 continued this from August.

14 MS. HARTWELL: With -- yeah.

15 THE CLERK: I did e-mail the Clerk for --

16 THE COURT: Did you --

17 THE CLERK: -- Judge Sturman and let her know.

18 MS. HARTWELL: Perfect.

19 THE COURT: Okay. She did --

20 MS. HARTWELL: Thank you. That's good. Because -
21 -

22 THE COURT: Okay. So, I don't know if she has a
23 big calendar or maybe --

24 MS. HARTWELL: She normally does. So --

25 THE COURT: Okay. Or maybe it could be

1 rescheduled. I'm not rescheduling this one. This one --

2 MS. HARTWELL: And I want to get through it, too.

3 I --

4 THE COURT: Well, thank you. Because we are. The
5 Court done a lot of work on this. So, we're doing it. I
6 mean, these are --

7 MR. STERLING: We flagged the --

8 THE COURT: Okay. One more.

9 MR. STERLING: -- the facts, Your Honor, on the
10 issue of control. There's the second element in (c)(1).
11 is that the movant -- or that there is a burden. Again, we
12 haven't really addressed the burden of proof. But I would
13 submit:

14 The club bears the burden of proof of establishing
15 that the result of the work, rather than the means or
16 manner in by which the work is performed, is the
17 primary element bargained for by the principal in the
18 contract.

19 And, again, if we're assuming that the club is the
20 principal and the contract is the lease, I -- we submit
21 that there's no evidence on that point to discern the
22 club's -- what was the primary element. And we also submit
23 that in --

24 THE COURT: For the result of the work?

25 MR. STERLING: Correct. We submit that the

1 payment of the license fee is the primary element bargained
2 for in the license agreement.

3 THE COURT: Okay.

4 MR. STERLING: For the contract between the dancer
5 and the club.

6 THE COURT: I'd like to say I'm following that but
7 I don't have a clue. The result of the work of the dancer
8 was to get a licensing fee? I'm sorry.

9 MR. STERLING: Well, again, it's --

10 THE COURT: You've lost me, Mr. Sterling.

11 MR. STERLING: It's a --

12 THE COURT: I'm pretty quick but I'm lost so help
13 me.

14 MR. STERLING: It's an odd fit because, again --

15 THE COURT: Do it again. It's a --

16 MR. STERLING: An odd fit.

17 THE COURT: Odd fit.

18 MR. STERLING: Yes.

19 THE COURT: Okay. I'm --

20 MR. STERLING: I'm --

21 THE COURT: No. Your accent's fine. I didn't
22 understand odd. I think I would stipulate it's an odd fit.

23 MR. STERLING: There must be a showing --

24 THE COURT: I don't understand it. There must be
25 a showing --

1 MR. STERLING: In order for (c)(1). to be
2 satisfied, there are two independent showings.

3 THE COURT: I understand how you're reading it.

4 MR. STERLING: And --

5 THE COURT: The performance of any work and the
6 result of the work. I get the end.

7 MR. STERLING: Right.

8 THE COURT: I'm actually looked into that. I do
9 get that.

10 MR. STERLING: And, so, perhaps Ms. Hartwell --
11 maybe I missed it, but there's a -- there needs to be a
12 showing that the result of the work is the primary element
13 that the club bargained for in the contract at issue here,
14 which is this performance lease. And we're not aware of
15 that argument having been made. That's a critical gap in
16 the prima facie case.

17 THE COURT: I'm not -- okay. I'm not aware that
18 reading this that, and the result of the work, that can be
19 interpreted several ways. You're saying it's -- your want
20 to interpret it that's with a contract. I assume what
21 you're going to say to me, the result of the work is what
22 the dancer did.

23 MS. HARTWELL: Did. Yes. Exactly, Your Honor.

24 THE COURT: Okay.

25 MS. HARTWELL: The performance.

1 THE COURT: Gotcha. Because I looked at this,
2 too. So, I understand your side because you put that in an
3 argument somewhere, I know you did. Because I -- you know,
4 I look at it and I -- okay. That's fine. But I understand
5 your point and I do under -- I did see that point.

6 MR. STERLING: Thank you.

7 THE COURT: That went in -- that's something I did
8 notice. So, that's a good start. Right? at least I'm
9 finding -- I'm making sure. Okay. Anything else under
10 608.0155(1)(c)(1)?

11 MR. JONES: Your Honor?

12 THE COURT: Right? Yes.

13 MR. JONES: The only thing that I want to add --
14 and this is not in the record as far as I've been able to
15 identify it. And you don't have to consider it. You can
16 certainly throw it out. But testimony under oath by the
17 named plaintiff in this case, the defendant -- the
18 plaintiff dancer, Jessica Hendrix, she says, quote:

19 They're controlling the situation. Why can't I
20 move around the club freely? Why can't I go by the
21 stage? Why am I being called to the back dressing
22 room?

23 This is a quote from her on page 104 of her
24 deposition. She is definitively identifying that she
25 disputes the issue of control, that she was controlled in

1 many ways within the club. And I don't see that in their
2 moving papers. You can throw it out if you wish but there
3 has been other locations from her giving the impression,
4 perhaps, that she thought she had some degree of freedom.
5 She clearly does not view the situation that way. And, so,
6 --

7 THE COURT: Okay. So, that's her viewpoint of
8 what she -- okay. All right. Anything -- then, let's move
9 on to subsection 2. And, so, any argument either way that
10 -- what I should find if I applied subsection 2?

11 MS. HARTWELL: So, for subsection 2, which
12 provides that:

13 Except for an agreement with the principal
14 relating to the completion schedule, range of work
15 hours, or if the word contracted for its entertainment,
16 the time such entertainment is to be presented, the
17 person has control over the time the work is performed.

18 So, it basically excludes out -- so, if it's a
19 shift, the shift is X number of hours, blah, blah, blah.
20 So, that's, like, taken out of the equation.

21 THE COURT: Correct.

22 MS. HARTWELL: So, to the extent that the
23 performer is able to choose what days, what shifts that
24 that performer wants to perform, that performer is --
25 that's one of the elements that we think we definitely meet

1 that. The testimony shows that the dancers are not
2 assigned to work any particular shift. They --

3 THE COURT: Okay. Where is that? That's in --

4 MS. HARTWELL: In this -- yes. This is here,
5 Cheetahs answers. This is Jane Doe Dancer Number 3
6 deposition transcript. She testified:

7 Dancers are not assigned to work any particular
8 shift. They're not to require to work any specific
9 days and can determine for themselves what dates and
10 what shifts they wish to perform.

11 Again --

12 THE COURT: And can they determine how many days
13 they want to work?

14 MS. HARTWELL: Yes.

15 THE COURT: Like, if they want to work just --

16 MS. HARTWELL: One day a week.

17 THE COURT: Okay.

18 MS. HARTWELL: Or if they want to work five days a
19 week.

20 THE COURT: Okay. Where is that in exhibit --

21 MS. HARTWELL: And this is Jane Doe --

22 THE COURT: Okay.

23 MS. HARTWELL: -- Dancer 3 transcript at page 30,
24 lines 10.

25 THE COURT: And that's a -- do you know where it's

1 attached? Which exhibit -- is it in yours?

2 MS. HARTWELL: It's attached as -- there's no
3 exhibit number.

4 THE COURT: I just want --

5 MS. HARTWELL: It's our -- it's attached to our
6 Motion for Summary Judgment. It did --

7 THE COURT: I just want to make sure it's in the
8 record --

9 MS. HARTWELL: And I will --

10 THE COURT: -- after --

11 THE COURT: I'm not sure what -- I will tell you
12 the exhibit. I have to --

13 THE COURT: This isn't all the -- where's all the
14 exhibits?

15 MS. HARTWELL: One second. I have to switch pages
16 to get to the exhibits.

17 THE COURT: Well, there's' probably -- I -- is
18 that all the exhibits? Okay.

19 [Colloquy at the bench]

20 THE COURT: So, it's deposition --

21 MS. HARTWELL: It's Exhibit Number --

22 THE COURT: Okay. Jane Doe 3 depo testimony.
23 Because I'm going to check this.

24 MS. HARTWELL: I believe that's Exhibit 1, Your
25 Honor.

1 THE COURT: Do we have it -- okay. It's okay.
2 That's fine. I'm going to mark it down anyway so that's
3 fine.

4 MS. HARTWELL: Okay.

5 THE COURT: I'll just put a box here to make sure
6 we check it.

7 MS. HARTWELL: Okay.

8 MS. HARTWELL: Let me go back to --

9 THE COURT: Okay. Anything else on the facts as
10 far as subsection 2?

11 MS. HARTWELL: One second. I just need to make
12 sure --

13 THE COURT: I just want to make sure it's in the
14 record.

15 MS. HARTWELL: And, then, also, with regards to
16 these -- the lease itself, in paragraph 3 it says that:

17 The performer shall exclusively choose and
18 schedule the particular days on which she desires to
19 lease the premises. All such dates for each week are
20 to be selected at least once a week in advance.

21 THE COURT: Okay.

22 MS. HARTWELL: And, so, it's --

23 THE COURT: That's a contract term.

24 MS. HARTWELL: That's the contract itself.

25 THE COURT: Okay. And, then, you have the

1 contract term and you have the deposition testimony of Jane
2 Doe 3.

3 MS. HARTWELL: Yes.

4 THE COURT: You gave me a -- what page? I -- can
5 you go back or --

6 MS. HARTWELL: Yes. It's pages 29 and 30.

7 THE COURT: Okay. I just -- because I have --
8 okay. I need to check all this. Okay.

9 MS. HARTWELL: And, then, also, --

10 THE COURT: Anything else for 2?

11 MS. HARTWELL: Pontrelli also testifies --

12 THE COURT: Okay. Her depo.

13 MS. HARTWELL: Pontrelli transcript at pages 2,
14 lines 2 through 7 and 28.

15 THE COURT: Hold on, hold on. I've got 26. Okay.
16 Well, what I have is the plaintiffs' and it goes from 26 to
17 29. So, you must have sections of hers in yours. Correct?
18 Because I'm -- I happen to have in front of me their --

19 MS. HARTWELL: We've --

20 THE COURT: You gave me the --

21 MS. HARTWELL: Ours, we attached -- I think we
22 attached the whole thing to ours.

23 THE COURT: Okay.

24 MS. HARTWELL: The whole transcript.

25 THE COURT: Okay. Do it again. Deposition -- and

1 I've got her, Diana --

2 MS. HARTWELL: Pontrelli.

3 THE COURT: -- Pontrelli.

4 MS. HARTWELL: At pages 27 --

5 THE COURT: Okay.

6 MS. HARTWELL: -- lines 2 through 7. And, then,
7 28, line 21 through 29, line 3.

8 THE COURT: Okay.

9 MS. HARTWELL: And --

10 THE COURT: We have 26 to 29. So, I'll have to
11 check on you. Okay.

12 MS. HARTWELL: And, then, we also have --

13 THE COURT: I'm going to check on that.

14 MS. HARTWELL: -- that Jane Doe also testified --
15 Jane Doe --

16 THE COURT: Dane Doe who?

17 MS. HARTWELL: -- Dancer 3 testified that the
18 dancers have the discretion to arrive and leave the club
19 when they wish. And that's at her -- in her transcript at
20 page -- pages 30 and 38.

21 THE COURT: Okay.

22 MS. HARTWELL: And, then, we also have additional
23 testimony. And this is Dancer L -- JLH.

24 THE COURT: JLH. And that's a depo?

25 MS. HARTWELL: That's depo.

1 THE COURT: Okay.

2 MS. HARTWELL: And that's at page 41, lines 20
3 through 24.

4 THE COURT: What does she say?

5 MS. HARTWELL: And she says that they're free --
6 are free to take time off. Let's see. This is weird. I'm
7 sorry. She also agrees that they are allowed to arrive at
8 the -- they're allowed to arrive and leave at their
9 discretion. And they can leave whenever they wish. And,
10 then, we have that they're free to -- and this one, now
11 we're back to Jane Doe 3, says that they're free to take
12 time off from performing at their discretion. And that's
13 Jane Doe Dancer 3 transcript at page 32.

14 THE COURT: Page -- okay.

15 MS. HARTWELL: And we believe that this easily
16 satisfies NRS 608.0155(1)(c)(2).

17 THE COURT: Okay. All right. We've got 2. Okay.
18 Plaintiffs?

19 MR. STERLING: Your Honor, the previous hearing
20 expressed, I think rightly, some -- you know, some concern
21 at the way this provision is drafted. It's a little
22 unclear.

23 THE COURT: Okay.

24 MR. STERLING: As I read it and read it again, --

25 THE COURT: I've -- yes.

1 MR. STERLING: -- I still -- I mean, certainly,
2 it's plausible that this does -- as I read it, that it
3 doesn't apply where we're contracted for as entertainment.
4 And, again, I submit to the Court, whatever is --

5 THE COURT: Yeah. I worked on that, too.

6 MR. STERLING: Yeah.

7 THE COURT: Because I read the comments that I --
8 I worked on that, counsel.

9 MR. STERLING: Okay.

10 THE COURT: And I think I -- my reading now is it
11 does. It is not an easy read and maybe the Supreme Court -
12 - because, otherwise, it doesn't really make sense. I
13 tried to say it didn't apply to entertainment and see what
14 they were saying. So, I agree with you, I did -- had
15 reservations and I have read -- so, I do feel it does apply
16 to this case.

17 MR. STERLING: Well, let me cite to the
18 controverting facts in the record, Your Honor.

19 THE COURT: That's what I -- perfect.

20 MR. STERLING: And this is tracking -- if we go
21 back to the controverting statement of facts?

22 THE COURT: Okay. I've got it.

23 MR. STERLING: Page 6.

24 THE COURT: Okay. Hold on. I got it.

25 MR. STERLING: Paragraph 13.

1 THE COURT: Yes.

2 MR. STERLING: The club established and maintained
3 three shifts --

4 THE COURT: Three shifts.

5 MR. STERLING: -- for its dancers. And the cite
6 there is to the manager, Diana Pontrelli's deposition.

7 THE COURT: Right. I actually pulled that.

8 MR. STERLING: And I can, again, -- because, it's
9 funny, I was -- I have the same cites as the defendant has
10 and I read it slightly differently. So, if we go to 25?

11 THE COURT: All right.

12 MR. STERLING: At line 21:

13 Question: Are there three shifts?

14 Answers: Three shifts.

15 Question: And what are they called?

16 And it goes to the next page.

17 Answer: Day, swing, grave.

18 Okay. What's the day shift?

19 Day shift is from 5 in the morning to 1 in the
20 afternoon, swing is from 1 to 9, graveyard is 9 to 5.

21 And, then, if we have -- also -- and this is point
22 14 controverting statement of facts, same deposition at
23 page 88.

24 THE COURT: Let me find it. I've got 82. Got it.
25 Yes.

1 MR. STERLING: The dancers -- this is line 2, are
2 hired per manager. Whoever hires them, that's who they
3 work for. If they was to work another shift, they ask
4 another manager if they can work into their shift. So,
5 actually, girls do not get hired for a shift, they get
6 hired for a particular manager who, I guess, has a
7 shift, whatever date he works.

8 Question: So, a dancer doesn't have discretion
9 just to show up and work on other shifts other than
10 what the manager who hired them?

11 Answer: Correct.

12 THE COURT: All right. So, their contract -- or,
13 their agreement to entertain at the club is with that
14 manager. So, as they have different people who are agents
15 or whatever they are within the club to select dancers.
16 And they have to go with them whenever day that is --

17 MR. STERLING: Correct, Your Honor.

18 THE COURT: -- is what you're saying. Well, that
19 may be an interpretation. But it doesn't say that the
20 manager says you have to work this shift, you have to be
21 here on time, you -- any control, just within that
22 manager's shift.

23 MR. STERLING: They'll --

24 THE COURT: I looked for testimony that the
25 manager would say: You have to be here on this shift --

1 MS. HARTWELL: Right.

2 THE COURT: -- you have to work every one of my
3 shifts. Or: You have to work three fourths of my shifts.
4 I looked -- after you cited that, I did look for -- to see
5 if there was any other testimony to counter the testimony
6 of the Jane Doe dancers.

7 MR. STERLING: If you will look at page 7,
8 controverting fact 21?

9 THE COURT: Okay. Page 7, 21. Yes.

10 MR. STERLING: On March 29 --

11 THE COURT: She refused.

12 MR. STERLING: -- 2015, this is from the club's
13 sort of log report. The club suspended a dancer because
14 she, quote: Refused to finish her six-hour, quote, shift.
15 And, again, that's connected to bad attitude. But, again,
16 shift. You're here to work. You're fired because you
17 left. You didn't complete your shift. That's now control
18 over the time in which --

19 THE COURT: Okay.

20 MR. STERLING: -- the job is being performed.
21 Same point, 22. Leaving early without any explanation.
22 Same, 23. Basically could not work any afternoon shifts on
23 Sunday, Monday, or Tuesday.

24 THE COURT: Because of the negative attitude.

25 MR. STERLING: Same on -- correct. And, on 24 --

1 THE COURT: I marked these.

2 MR. STERLING: -- could not work on Sunday,
3 Monday, or Tuesday because she asked to leave early. And,
4 then, 29, again, it's tied to attitude but it's basically
5 saying -- and, again, I think the general point here is the
6 club wants its best dancers at primetime. And, so, there's
7 a pecking order. So, it's not just simply, you know, you
8 get your license agreement and you can just show up
9 primetime. It's very much you're on day shift, you're on
10 weekdays, or whatever it might be. And we believe the
11 facts in the record, at least under *Wood v. Safeway*, create
12 an issue of fact on point 2.

13 THE COURT: Okay.

14 MS. HARTWELL: May I respond to that, Your Honor?

15 THE COURT: Yes.

16 MS. HARTWELL: With regards to the shifts, the
17 statute makes it clear that having -- that the location of
18 -- and I'll say the location of the performance, does not -
19 - the company is allowed to have shifts. It expressly
20 accepts out from whether or not they control the time of
21 the performance, a range of hours. So, if someone wants --
22 is scheduled -- decides that they want to work the
23 graveyard, the morning, or the -- I guess he said the three
24 shifts are graveyard --

25 THE COURT: Swing.

1 MS. HARTWELL: -- or the swing shift. That's
2 where the flexibility or the control comes in. They --

3 THE COURT: Okay. So, you're using the language
4 except for --

5 MS. HARTWELL: Exactly.

6 THE COURT: -- which is the precursor for number
7 2.

8 MS. HARTWELL: Exactly. And, so, and it says
9 except for range of work hours or, if the work contracted
10 for is entertainment, the time such entertainment is to be
11 presented. So, if a worker decides that they're going to
12 do the day shift, which they know the day shift is six
13 hours and they leave within three hours or four hours, then
14 they're in breach of their contract by leaving. That does
15 not make them an employee, contrary to the argument by
16 counsel.

17 THE COURT: Okay.

18 MS. HARTWELL: And, with regards to they're not
19 required, as Your Honor, I think, noted, they're not
20 required to work for any particular manager and no manager
21 can say: You must work this shift, this shift, this shift,
22 or this shift. But, even -- to the extent that a manager
23 may not want to work with a particular performer, that's a
24 different story. That doesn't require or control the
25 performer's work time, saying that they have to be any --

1 be at the club on any date or during any particular shift.

2 THE COURT: And, then, dancer's work time. Okay.

3 MS. HARTWELL: Yes. Yes. The dancer's work time.

4 THE COURT: That's fine.

5 THE COURT: Thank you, Your Honor. And, then,

6 that takes us to -- I'm going to move to number --

7 THE COURT: Three?

8 MS. HARTWELL: Three.

9 THE COURT: Okay.

10 MS. HARTWELL: We're --

11 THE COURT: Okay. Let me get my notes. Okay.

12 I've got it all lined up.

13 MR. STERLING: We stipulate to 3, Your Honor.

14 MS. HARTWELL: They'll stipulate to 3.

15 THE COURT: I've got it down here that you would -

16 - they meet the criteria --

17 MS. HARTWELL: Yes.

18 THE COURT: -- they're probably going to
19 stipulate. So, we're geniuses here. We're -- so to speak.
20 Okay. So, 3, we've got. Okay.

21 MS. HARTWELL: And, then, number 4, plaintiffs are
22 free to hire assistants like hairdressers or makeup artists
23 to assist them in the dancer's dressing room. Let's see.

24 THE COURT: Okay. That's 4.

25 MS. HARTWELL: And so -- yes. And, so, Diana

1 Pontrelli's decoration -- or, declaration, at paragraph 10.
2 She testified that:

3 The dancers are free to hire female assistants to
4 help them prepare to do their jobs, including using
5 hair and/or makeup persons in the dancer's dressing
6 room.

7 THE COURT: Yeah. You're trying to say they meet
8 that because they hire people to do their hair and their
9 makeup and --

10 MS. HARTWELL: They can -- to, like, in terms of
11 the costumes, to the extent that they want to go all out
12 and do whatever in terms of changing their look for their
13 performance, they can bring people into the club to help
14 them get ready. You know? Be a -- do extensions, put on
15 makeup. And she literally says: Do their hair, put on
16 their makeup, whatever they need to do to prepare for their
17 performance.

18 THE COURT: But it's to assist with the work. So,
19 you're saying their hair and their makeup is --

20 MS. HARTWELL: Part of the process.

21 THE COURT: -- is assisting with their dancing?

22 THE COURT: Part of the -- okay. I think you're
23 going to go into their argument. Because --

24 MS. HARTWELL: Okay. With -- okay --

25 THE COURT: Be careful how much you want to extend

1 the performance. You can't -- right?

2 MS. HARTWELL: with the -- and, now, -- and it --
3 well and, as we say under 4, it says free to hire -- like I
4 said, assistants like hair dressers or makeup artists to
5 assist them --

6 THE COURT: But are --

7 MS. HARTWELL: -- in the -- and we say in the
8 dancer's dressing room, not on the stage, in the dressing
9 room, to get ready for their performance.

10 THE COURT: Okay. To get -- you just said it. to
11 get ready for their performance of their work.

12 MS. HARTWELL: Yeah. It is. Because it's in the
13 dressing -- it's in --

14 THE COURT: Okay.

15 MS. HARTWELL: -- we say in the dressing room.

16 THE COURT: All right. I just wanted your facts.
17 Okay.

18 MS. HARTWELL: And, then, 5 is really short, too.
19 Plaintiffs invest in substantial capital in their business
20 for their costumes, cosmetics, shoes, and hairstyling. And
21 this is the last --

22 THE COURT: So, their substantial capitalization
23 is their --

24 MS. HARTWELL: Which provides --

25 THE COURT: -- their costumes?

1 MS. HARTWELL: Yes. We have:

2 The person contributes a substantial investment of
3 capital in the business of the person, including
4 without limitation, purchase or lease of ordinary
5 tools; material and equipment regardless of source;
6 obtaining of a license or other permission from the
7 principal to access any workspace of the principal to
8 perform the work for which the work was -- for which
9 the person was engaged; and --

10 THE COURT: So, you're going back to they're
11 leasing this space, what you call the lease?

12 MS. HARTWELL: -- the lease of any work space from
13 the principal required to perform the work for which
14 the person was engaged.

15 THE COURT: I'm not -- I don't think the facts
16 support it's a lease. But, okay --

17 MS. HARTWELL: With --

18 THE COURT: I understand what you're arguing.

19 MS. HARTWELL: Okay.

20 THE COURT: Please -- I'm not --

21 MS. HARTWELL: With --

22 THE COURT: Okay.

23 MS. HARTWELL: Fair enough. And, so, we have --

24 THE COURT: Fair enough.

25 MS. HARTWELL: -- that plaintiffs paid Cheetahs a

1 fee each night they performed called a house fee.

2 THE COURT: A house fee.

3 MS. HARTWELL: For the right to --

4 THE COURT: And it goes to the house mom. Yes.

5 MS. HARTWELL: For the right to use the venue, the
6 stage, the DEFAULT JUDGMENT, --

7 THE COURT: Okay.

8 MS. HARTWELL: -- the dressing area. The fee was
9 \$65 per night, according to Jane Doe Dancer 3.

10 THE COURT: How much?

11 MS. HARTWELL: Sixty-five dollars.

12 THE COURT: Okay. I didn't know. Okay. I didn't
13 catch that. But --

14 MS. HARTWELL: And that was Jane Doe Dancer 3
15 deposition --

16 THE COURT: Okay.

17 MS. HARTWELL: -- at pages 34 and 77.

18 THE COURT: Okay.

19 MS. HARTWELL: Plaintiffs also purchased their own
20 outfits, shoes, cosmetics, and accessories specifically for
21 their business of exotic dancer. Again, this is the
22 testimony of Jane Doe 3 deposition at pages 51 through 56.
23 And, also, Dancer JLH deposition at page -- pages 68, 70
24 through 72. And, then, these calls were clearly part of
25 each of the dancer's investment. And, then, Jane Doe --

1 or, Dancer JLH testified that she deducted the expenses she
2 incurred associated with exotic dancing from her taxable
3 income on her federal tax returns. She says it's a
4 business expense. And that's at her deposition, pages 82
5 through 83 and 127 through 128. And, then, Jane Doe Dancer
6 3 also stated that she spent her own money tipping the
7 Cheetahs house mom, DJ, and security guards. And that's at
8 --

9 THE COURT: Okay.

10 MS. HARTWELL: -- page 62 of her deposition. And,
11 so, based on --

12 THE COURT: Okay.

13 MS. HARTWELL: -- these reasons, we think we meet
14 --

15 THE COURT: Five.

16 MS. HARTWELL: -- more than -- we only needed to
17 meet three to be independent contractor. We think we meet
18 five.

19 THE COURT: Okay. But, looking at 5, it says a
20 substantial investment of capital. Then, if you look at
21 the end of the end of the statute, it says:

22 The determination -- which would have to be by me,
23 the Court in this case, of whether an investment of
24 capital is substantial --

25 MS. HARTWELL: Substantial.

1 THE COURT: -- for the purpose of this
2 subparagraph must be made on the basis of the amount of
3 income the person receives, the equipment commonly
4 used, and the expenses commonly incurred in the trade
5 or profession in which the person engages.

6 I'm very concerned about on the basis of the
7 amount of the income.

8 MS. HARTWELL: Of the income they received.

9 THE COURT: The \$65 is the -- when I was looking
10 for fees, I don't have any testimony. I don't know what
11 they make. I have no idea of what a \$65 investment for the
12 amount of hours they dance, I don't know what their take
13 home is, I don't have a -- I don't know. I have none of
14 that information. And that's part of it. It says I -- it
15 says --

16 MS. HARTWELL: So --

17 THE COURT: -- to find this -- I get what you say
18 the source of what might be considered a capital
19 investment. But how do I deal with that last part?

20 MS. HARTWELL: Last --

21 THE COURT: I don't have any information other
22 than you just gave me. And I assume it's there, the \$65
23 fee to mom.

24 MS. HARTWELL: So --

25 THE COURT: To the house mom. Sorry.

1 MS. HARTWELL: To the house mom. Yes.

2 THE COURT: Yeah. I didn't mean to misspeak.

3 MS. HARTWELL: And, then, we have in our
4 undisputed facts with regards to costs, fact number 33,
5 paragraph 33, that -- in the second line, Jane Doe Dancer 3
6 testified that she bought a costume everyday she performed
7 at Cheetahs at a cost of approximately \$100 each.

8 THE COURT: But how does that equate to their
9 income? It says here I have to say what -- I have to make
10 the -- or, you have to do a showing. I'm sorry. Not me.
11 You have to do -- that the basis of the amount of the
12 income -- I have to -- to make a determination -- you know,
13 under business law, whether -- you know where I'm going.

14 MS. HARTWELL: Yes. I do.

15 THE COURT: I'm sorry. I want to be clear on the
16 record. But they're saying this isn't just small, this is:
17 Hey, look at the income. Is this a substantial -- isn't
18 the word substantial? Yes. Is this investment of capital
19 substantial for the purpose of this? That's why I need
20 those facts before --

21 MS. HARTWELL: Right. And I guess we --

22 THE COURT: This -- okay.

23 MS. HARTWELL: -- we don't --

24 THE COURT: I don't think you have that.

25 MS. HARTWELL: We don't. You're right.

1 THE COURT: I know you don't have them in the
2 record. I looked for it. I assume that's going to be
3 their argument back to me. Right, plaintiffs? Or would --
4 should be your argument back to the Court. Right? I'm
5 sorry.

6 MS. HARTWELL: With -- and I can see --

7 THE COURT: He kind of said it. But I actually --

8 MS. HARTWELL: I concede, Your Honor, that they --

9 THE COURT: I mean, I read the statute.

10 MS. HARTWELL: They didn't -- we don't have --
11 they didn't disclose their income --

12 THE COURT: No.

13 MS. HARTWELL: -- to us. But we do have
14 additional in terms of facts with regards to the costs that
15 they incurred.

16 THE COURT: But, unless I know what their income
17 is, how -- I can't follow what the --

18 MS. HARTWELL: I -- understood.

19 THE COURT: -- statute says I need to do.

20 MS. HARTWELL: Understood.

21 THE COURT: It says the determination of whether
22 an investment is substantial. So, for you to want to say
23 they meet a substantial investment of capital, what the
24 statute says I have to look at has not been provided. So,
25 I want to be very clear on that.

1 THE COURT: Okay.

2 MS. HARTWELL: So, even though you've identified
3 potential sources of capital investment, the hair, the
4 makeup, the costumes, I know nothing --

5 MS. HARTWELL: About their income.

6 THE COURT: -- about the. Yeah. I have no facts
7 to be able to do that determination. So, based on that
8 alone, even before they get up, I don't have any facts that
9 they have to counter.

10 MS. HARTWELL: Fair enough. That's fair enough.

11 THE COURT: I mean, it's just the truth. I mean,
12 I'm looking at my record. So, --

13 MS. HARTWELL: And --

14 THE COURT: -- do you agree with me, plaintiffs?
15 I assume that was --

16 MR. STERLING: We do, Your Honor.

17 THE COURT: -- your argument. Right?

18 MS. HARTWELL: So, that would still leave four --
19 four out of the --

20 THE COURT: Four. Yeah. Okay. So, four, they
21 can counter four. But, five, I'm already ruling --

22 MS. HARTWELL: Right.

23 THE COURT: -- is not --

24 MS. HARTWELL: Fair enough.

25 THE COURT: -- they do not -- the defendants have

1 not met that criteria.

2 MS. HARTWELL: Fair enough.

3 THE COURT: Four, the person who is free to hire
4 employees to assist with the work.

5 MR. STERLING: May we address that point, Your
6 Honor?

7 THE COURT: Yes. You -- yes. Because I'm --

8 MR. STERLING: This is another --

9 THE COURT: -- not at all convinced that having
10 hair dressers -- because I'm really looking as to the work.
11 You know, you can't broaden the definition for one purposes
12 of the statute --

13 MS. HARTWELL: And, Your Honor, I'm going to
14 concede that one, too.

15 THE COURT: Okay. Okay. Because, honestly, if
16 you --

17 MS. HARTWELL: I'm going to -- yeah.

18 THE COURT: -- I do not find -- and I looked. I
19 do not find that you --

20 MS. HARTWELL: I'm going to concede that one, too.

21 THE COURT: Okay. So, you're -- okay.

22 MS. HARTWELL: Based on this record.

23 THE COURT: Okay. All right. All right. So,
24 they don't meet 4 and 5. So, what -- have we gone through
25 1 --

1 MS. HARTWELL: Two.

2 THE COURT: -- 2, and 3 to everybody's -- I want
3 to make sure I didn't cut in. I know you have to go but I
4 want to make sure -- this is very important to me that --

5 MS. HARTWELL: No.

6 THE COURT: -- have I cut anybody short on
7 anything on their record that they want to address this
8 Court? Because I've written it all down for either 1, 2,
9 or 3? Well, we don't care about --

10 MS. HARTWELL: We concede it. They conceded 3.

11 THE COURT: You conceded 3. So, --

12 MS. HARTWELL: So, it was really 1 and 2.

13 THE COURT: You got it. Which is what all my
14 notes are. I understood the issues, 1 and 2. Look, Mr.
15 Sterling, I want to make sure you're good with your
16 argument --

17 MS. HARTWELL: Yes, Your Honor.

18 THE COURT: -- for your Defendants' Motion for
19 Summary Judgment and your Opposition. And -- are you feel
20 like your argument's coming -- in addition to what's in all
21 of the -- you know, points and authorities, which includes
22 all the supplemental briefing. I want to be very clear on
23 that. I -- that is all part of the record.

24 MR. STERLING: Yes, Your Honor. And there's just
25 one point --

1 THE COURT: Sure.

2 MR. STERLING: So, I think we did clarify a lot
3 there that really is so -- if we have --

4 THE COURT: That's fine.

5 MR. STERLING: -- 5 and 5 are off the table, 3 is
6 stipulated --

7 THE COURT: Yeah. Right.

8 MR. STERLING: So, it's a question of whether they
9 meet both 1 and 2.

10 THE COURT: And 2. Because they need three
11 criteria.

12 MR. STERLING: As a matter of law, with no
13 reasonable --

14 THE COURT: Absolutely.

15 MR. STERLING: -- room for question.

16 THE COURT: No genuine issue of material fact.

17 MR. STERLING: Okay.

18 THE COURT: I got it.

19 MR. STERLING: And, then, I guess -- I mean, it is
20 briefed and I think we are in agreement, if those -- if
21 that necessary condition is not met, then there's no
22 presumption that --

23 THE COURT: Correct.

24 MR. STERLING: -- they're independent contractors.

25 MS. HARTWELL: Correct.

1 THE COURT: Right.

2 MR. STERLING: There's still, then, the question
3 of are they employees, which is also been briefed. But --

4 THE COURT: No. This says they aren't presumed to
5 be independent contractors under the statute.

6 MR. STERLING: Right. And, so, it goes --

7 THE COURT: They can't use the statute --

8 MS. HARTWELL: Statute as the basis.

9 THE COURT: -- to presume it. Then, we move
10 further to what goes next. It doesn't mean that they give
11 up their total independent contractor defense.

12 MS. HARTWELL: Exactly.

13 MR. STERLING: Right. Well, and --

14 THE COURT: They just don't get to use the statute
15 --

16 MR. STERLING: Right.

17 THE COURT: -- for any presumption.

18 MR. STERLING: And that briefed under --

19 THE COURT: Yes.

20 MR. STERLING: -- under -- you know, so, again, in
21 my understanding that we're taking that statute off and we
22 kind of go back just to the employee -- are they employees
23 under the constitution, are they -- which is the economic
24 realities test that was briefed as well.

25 THE COURT: Yes. I think we're back to *Terry*

1 *versus Sapphire.*

2 MR. STERLING: Right.

3 THE COURT: Because the only way they get to use
4 this presumption and say, I need -- we're back to
5 everything that was argued in *Terry versus Sapphire*, the
6 economics realities test. We would have to be.

7 MS. HARTWELL: Right.

8 THE COURT: There's -- because this is only
9 designed if that's why it's a presumption. I -- that's how
10 I look at it. If it's not right, I'm sure whatever case
11 goes up before this one will tell me. But that is how I'm
12 viewing it. So, yes, that's absolutely how I'm viewing it.

13 MR. STERLING: And, also --

14 THE COURT: And you're very familiar and you're
15 familiar. You've read *Terry versus Sapphire* probably as
16 much as this Court. And those -- let's be honest, I'm not
17 going to get summary judgments on those -- well, I'm not
18 saying I am or I'm not. I don't know. If -- it depends on
19 where we go here.

20 Okay. Thank you very much. I just wanted a full
21 record. I'm going to check the points to make sure and
22 I'll do a minute order today. I'm all ready for my
23 calendar tomorrow so I'm not holding it or anything.

24 MS. HARTWELL: Okay.

25 THE COURT: I just want to go check the points

1 because I want to be fair to both sides. If I'm making you
2 stick to what's in the record, then you're going to -- both
3 sides are going to stick to what's in my pleadings in the
4 record, which is what I'm supposed to do. So, I want to
5 check those cites.

6 MR. STERLING: Your Honor, I would like to thank
7 the Court for its time --

8 THE COURT: You're welcome.

9 MR. STERLING: -- and the effort that has been
10 brought to bear on this. If I may? In the opening remarks
11 regarding *Thomas versus Yellow Cab* --

12 THE COURT: Yes.

13 MR. STERLING: -- and differentiating it, I also,
14 in the interest of creating a full record for appeal, the
15 other issue I do feel was briefed is the idea of --

16 THE COURT: In the supplemental?

17 MR. STERLING: Actually, in both, --

18 THE COURT: Okay.

19 MR. STERLING: -- is the idea of FLSA preemption,
20 which is, you know, how is Cheetahs supposed to treat these
21 dancers as employees, which they have to do under the FLSA,
22 and, also, treat them -- if the Court were so to find, as
23 independent contractors under the state law? That is
24 classic conflict preemption and I cited the analogy, which
25 is the drug manufacturers, when they -- when the FDA says

1 you have to have X on your label and a state law says you
2 have to have not X on your label, the state will always
3 preempt it and that means it's of no effect.

4 THE COURT: Okay. So, what your argument to me is
5 because the -- Cheetahs has to treat these dancers under
6 FSLA [sic]?

7 MR. STERLING: Correct. Or if --

8 THE COURT: So, as -- I'm just trying to
9 understand his argument so I can make sure I go back.

10 MR. STERLING: And, more abstractly, the FLSA --

11 THE COURT: I'm in trouble when you say more
12 abstractly, Mr. Sterling.

13 MR. STERLING: Well, if I could do abstract and,
14 then, concrete?

15 THE CLERK: Okay.

16 MR. STERLING: The FLSA protects, you know, a set
17 definition of employees in Nevada.

18 THE COURT: Correct. I'm --

19 MR. STERLING: It's a -- and that's founded by the
20 economic realities test. If a state law -- and this is --
21 there is the citation, I believe it's either in *Thomas* or
22 in *Terry*, but it says the state law cannot be any less
23 broad than the federal law, otherwise it will be preempted.
24 And I believe the Supreme Court there is saying, look, the
25 state law cannot -- you can't have two different

1 definitions of employee to subject employers to two
2 different definitions for -- for the same purpose. I mean,
3 I suppose you could for workers' comp or something. But,
4 if we're saying for minimum wage under the FLSA, this is
5 your definition of employee. And what we're now saying is
6 for purposes of state wage law, it's different -- and I'm
7 guessing narrower, you're going to have a problem and,
8 then, it's -- concretely, Cheetahs is having a problem
9 because, again, we have all of that, the precedent on the -
10 - and, again, even in arbitration, rulings that these
11 employees are employee -- these dancers are employees under
12 the FLSA.

13 THE COURT: So, you're saying because they have
14 been found employees under FLSA [sic], they have to be
15 employees for every single purpose, including the Minimum
16 Wage Amendment Act?

17 MR. STERLING: Just --

18 THE COURT: And what case says that?

19 MR. STERLING: Just --

20 THE COURT: Because, let me tell you, *Terry versus*
21 *the Yellow Cab case, Thomas*, does not say that.

22 MR. STERLING: And, so, to be clear, not for any
23 purpose, just for purposes of minimum wage.

24 THE COURT: Okay.

25 MR. STERLING: So, the federal --

1 THE COURT: What case says that?
2 MR. STERLING: So, that --
3 THE COURT: Because I read the cases.
4 MR. STERLING: Well, I mean, it's --
5 THE COURT: It's your analogy.
6 MR. STERLING: It's my analogy.
7 THE COURT: Okay. All right. I just want to make
8 sure.
9 MR. STERLING: And, again, we've briefed it. It's
10 -- there is language in dicta in, I believe, *Terry*, when
11 they're looking -- because *Terry* was the question: Does
12 Chapter 608, what's the definition in Chapter 608?
13 THE COURT: Right. And there wasn't one.
14 MR. STERLING: And, so, they had to come up with
15 one and they used the federal standard. And one of the
16 points they mention was it's got to be the FLSA standard
17 because if it weren't, we'd have -- we'd run into
18 preemption problems.
19 THE COURT: Well, then, wouldn't that make this,
20 as a matter of law under that statute, illegal? Wrong?
21 MR. STERLING: I'm sorry? Yes.
22 THE COURT: Wouldn't that make 608 as enacted
23 under what you're saying if I rule under that? Isn't that
24 what your argument is?
25 MR. STERLING: That it would be preempted.

1 THE COURT: Well, I hope you take that up to the
2 Supreme Court because I'm not going to rule that.

3 MR. STERLING: Okay. Thank you, Your Honor.

4 THE COURT: But, -- I'm glad. I'm not going to
5 rule that so I disagree --

6 MR. STERLING: Okay.

7 THE COURT: -- on your interpretation --

8 MR. STERLING: Very well.

9 THE COURT: of FSLA [sic]. But it's in your
10 record.

11 MR. STERLING: Very well. Thank you.

12 THE COURT: Because that is something the Supreme
13 Court will probably look at, since they did *Terry versus*
14 *Sapphire*. Right, Mr. Sterling?

15 MR. STERLING: Correct, Your Honor.

16 THE COURT: Okay.

17 MS. HARTWELL: Okay.

18 THE COURT: Thank you so much.

19 MS. HARTWELL: Thank you.

20 THE COURT: I appreciate your efforts. I just
21 really wanted to work hard to make sure we all had what we
22 needed and you're both -- you know, I don't take these
23 lightly as the Judge. Okay.

24 MS. HARTWELL: Thank you, Your Honor, for giving
25 us the time.

1 THE COURT: You're more than welcome. I enjoy
2 stuff like this. I want to make sure -- and I -- you know,
3 I find it interesting. You guys are good.

4

5 PROCEEDING CONCLUDED AT 10:41 A.M.

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1 **CERTIFICATION**

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3

4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

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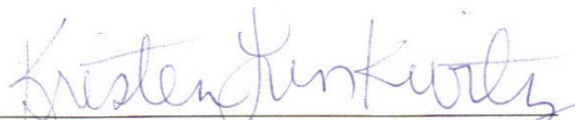
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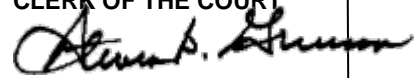
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20 **DISTRICT COURT**

21 **CLARK COUNTY, NEVADA**

22 JANE DOE DANCER, I through V, individually,
23 and on behalf of Class of similarly situated
24 individuals,

25 Plaintiffs,

26 vs.

27 LA FUENTE, INC., an active Nevada
28 Corporation, WESTERN PROPERTY
HOLDINGS, LLC, an active Nevada Limited
Liability Company (all d/b/a CHEETAHS LAS
VEGAS and/or THE NEW CHEETAHS
GENTLEMAN'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-14-709851-C
DEPT. NO.: IV

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs, individually and on behalf of a class of similarly situated individuals, hereby appeal to the Supreme Court of Nevada from the November 4, 2018

1 Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Counter-
2 Motion for Summary Judgment.

3 DATED this 31st day of January, 2019.

4 **BIGHORN LAW**

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of
3 **BIGHORN LAW**, and on the 31st day of January, 2019, I served the foregoing **NOTICE OF APPEAL**
4 as follows:

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

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

9 ☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile
10 number(s) shown below and in the confirmation sheet filed herewith. Consent to
11 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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