**BEFORE THE NEVADA STATE LABOR COMMISSIONER**

**LAS VEGAS, NEVADA**

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| **IN THE MATTER OF:** | ) |
| **MEGHAN SMITH**, Claimant | ) |
| vs. | ) |
| **THE WYNN**, Respondent | ) |

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**CLAIMANT'S POST HEARING BRIEF 1 of 2**

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**Wynn Casino's Multiple Violations of NRS 608.160, Including:**

1. **Denial of the Dealers' Right to Participate in the Actual, Physical, Contemporaneous Count of Their Own Tips;**
2. **Unlawfully Ordering Payments to Be Made From Dealer Tip Pool Funds;**
3. **Breach of Fiduciary Duty With Respect to the Tip Pool Funds; and**
4. **Unlawfully "Taking" in Violation of the Statute**

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Cecil M. Hollins, Esq.
87-16 101 Avenue
Ozone Park, New York 11416
Telephone: (718) 813-7088
Attorney for Claimant

Lawrence Jay Litman, Esq.
6130 Elton Avenue
Las Vegas, Nevada 89107
Telephone: (310) 228-7245
Attorney for Claimant

Gregory Kamer, Esq.
3000 West Charleston Blvd. - Suite 3
Las Vegas, Nevada 89102
(702) 259-8640
Attorney for Respondent

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**Meghan Smith**

In the case at bar, the Labor Commissioner has been presented with a true life, "David and Goliath" story. Meghan Smith is a card dealer. The "mighty" Wynn Casino, is a $2.7 billion dollar, luxury resort and casino.

In the discussion presented below, Meghan Smith challenges the legality of her employer's actions, regarding the dealer's tip pool funds. Specifically, she questions: (1) Wynn Casino's exclusion of the dealer's from the actual, physical, contemporaneous count of their own tips; (2) the propriety of Wynn Casino ordering payments to be made from tip pool funds; (3) Wynn Casino's ongoing practice of retaining interest earned on the tip pool funds and other breaches of their fiduciary duties; and (4) Wynn Casino's "taking" in violation NRS 608.160(1).

At the beginning of the evidentiary hearing, in the opening statement on behalf of Meghan Smith and her supporters, it was stated:

> "For the Wynn Casino, today is the day of reckoning. It is the day that the truth is revealed. It is the day justice will be served. It is the day the mighty Wynn Casino's tip pooling scheme will be exposed as a shameless "money grab" against hard working American men and women.
>
> Today is the day that no creative, wishful statutory interpretation, will overcome the truth. The facts are undisputed, the law is crystal clear. The words of the applicable statutes are precise and not open for interpretation."

In Wynn Casino's opening statement, they told the Labor Commissioner, "When the law is on your side – Hammer the law!"

Well said. The law is on Meghan's side.

## The Issues

The following issues are presented for the consideration of the Nevada Labor Commissioner:

(1) May a Nevada gaming licensee, legally prohibit tip pool members from participating in the actual, physical, contemporaneous count of their own tips in defiance of NRS 608.160(1)(a)?

(2) What penalties should properly apply where a Nevada casino licensee has prohibited its' tip pool members from participating in the actual, physical, contemporaneous count of their own tips, in defiance of NRS 608.160(1)(a)?

(3) Under Nevada law, does a casino employer breach its fiduciary duty to its employees, where instead of putting the employees tip pool funds into an interest bearing escrow account, for the exclusive benefit of the employees, the casino employer claims the interest as profit on its' own balance sheet?

**Wynn Casino is in Violation of the Provisions of NRS 608.160(1) and (2)**

**NRS 608.160 Taking or making deduction on account of tips or gratuities unlawful; employees may divide tips or gratuities among themselves.**

1. It is unlawful for any person to:

(a) Take all or part of any tips or gratuities bestowed upon his employees.

(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon his employees.

2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves. [1:17:1939; 1931 NCL § 2826] + [2:17:1939; 1931 NCL § 2827]—(NRS A 1967, 623; 1971, 1263; 1973, 644).

**The Hearing Before the Nevada Labor Commissioner**

As the arbiter of the facts, it is the responsibility of the Labor Commissioner to make determinations regarding what testimony is relevant to the proceeding, the credibility of the witnesses and the testimony. We direct the Labor Commissioner's attention to the following areas of the testimony presented:

(1) Wynn Casino's rationale for the elimination of the toke committee;

(2) All testimony pertaining to the reasons why Wynn Casino prohibits the dealers from participating in the actual, physical, contemporaneous count of their own tips;

(3) The entire unrebutted testimony of Meghan Smith, regarding Wynn Casino management, directing unlawful payments to be made from dealer tip pool funds, to pay Wynn Casino cashiers;

(4) Wynn Casino management's testimony regarding the absence of tip count errors by the dealers toke committee, for the period beginning April 28, 2005, through September 1, 2006;

(5) The testimony regarding the multiple errors that have been made by the Wynn Casino personnel entrusted with the tip count, since the elimination of the dealer toke committee, on September 1, 2006;

(6) Testimony regarding Wynn Casino's misappropriation of interest paid on dealers' tip pool funds, since opening for business on April 28, 2006; and

(7) Andrew Pascal's testimony, that even if the tip pool members had voted to exclude the CSTL's and boxmen from the tip pool, Wynn Casino management would not have honored their right to do so.

## Tips, Tokes and Tip Pools

A tip, also called a toke, as in "a token of gratitude, is a gratuity, a favor or gift, usually in the form of money, given in return for service. Toke is slang for tip.

In the context of table games on the floor of a Nevada casino, a tip is a voluntary extra payment given by a gambler to a dealer. A tip may be in the form of a casino chip, cash or any other method used to convey something of value to the intended dealer(s).

In Nevada, from the moment it is issued, a tip is the legal property of the person for whom it was intended.

With respect to the Nevada gaming industry, in all casinos that require dealer tip pooling, including Wynn Casino, any tip left by a customer, is the sole property of the dealers to whom it was paid, given or left for, regardless of the type of business, or the rules imposed by the employer. NRS 608.160(1)(a).

By definition tip pooling is simple; all tip earnings of dealer employees, in the same line of service, are intermingled and then redistributed.

"Nevada law recognizes the authority of an employer to require its employees to pool tips as a condition of employment. Forced tip-sharing does not violate Nevada law or policy, so long as the employer does not "retain any part of the tips for his own use, or reap any direct benefit from the pooling." Alford v. Harolds Club, 99 Nev. 670, 669 P.2d 721 (1983); Moen v. Las Vegas International Hotel, Inc., 402 F.Supp. 157 (D.Nev.1975), aff'd, 554 F.2d 1069 (9th Cir.1977).

Historically, Nevada casino dealers have lived off their tips.

Years ago, dealers shared the tips they made at their tables, with the other dealers working the same shift. That benefited dealers working peak hours and fostered

competition for tips. It also put pressure on players to tip dealers, who cultivated gamblers, in much the way bartenders do their good customers. At casinos where tips were divided “pit-for-pit,” the dealers definitely encouraged gamblers to tip.

Sometime in the late 1980s, a change occurred that was adopted as the gaming industry standard. The tips from all table games (e.g., blackjack, roulette, craps, baccarat, etc.) were pooled into one pot. As a result, the modern tip is no longer “cash in the envelope” at the end of a shift, but taxable income that appears on a paycheck every two weeks.

At most Nevada casinos today, the dealers collect the money themselves under the auspices of a toke committee. The current Nevada casino industry standard practice calls for tip pooling. The actual counting of the tips is conducted by a group of dealers who make up the toke committee.

Since the elimination of the dealers’ toke committee on September 1, 2006, Wynn Casino has defied the Nevada casino industry standard practice and implemented its’ own, admittedly flawed, system of counting dealer tips.

**Who Owns the Tips?**

Generally, from the moment it is issued, a tip is the legal property of the person for whom it was intended.

With respect to the Nevada gaming industry, in all casinos that require dealer tip pooling, including Wynn Casino, any tip left by a customer, is the "sole property of the dealers to whom it was paid, given or left for," regardless of the type of business, or the rules imposed by the employer. NRS 608.160(1)(a).

In other words, where a tip pool has been established, as at Wynn Casino, from the moment a tip is received by a dealer, who is a member of the tip pool, that tip legally is owned by and belongs to, the collective members of the tip pool.

Ownership is defined as the legal right, to the possession of a thing.

By law, ownership of a tip, is directly transferred from the individual doing the tipping (the "tipper"), to the recipient of the tip, here, the dealers (tip pool members).

The Wynn Casino tip pool members are the legal owners of the tips, from the moment it is received from the "tipper." As such, at no time may Wynn Casino ever claim ownership of the tips, or come to possess any ownership interest in the tips.

Accordingly, with respect to the tips, at no time may Wynn Casino claim to have rights superior to that of the dealers/tip pool members; nor may Wynn Casino, assert a right to possess the tips to the exclusion of their rightful owners, the dealers/tip pool members.

However, as demonstrated below, there may arise circumstances under which Wynn Casino dealers/tip pool members, may cause a prosecution to be initiated against Wynn Casino.

## The Law of the State: The Nevada Revised Statutes

The laws of the State of Nevada are contained in the Nevada Revised Statutes. The Nevada Revised Statutes (hereafter, NRS) are the current codified laws of the State of Nevada**.**

Nevada law consists of the Constitution of Nevada (the State constitution) and the Nevada Revised Statutes.

The Nevada Supreme Court interprets the law and Constitution of Nevada. Nevada Supreme Court Opinions are the written decisions of the Nevada Supreme Court.

The Statutes of Nevada are a compilation of all legislation passed by the Nevada Legislature during a particular Legislative Session.

The Nevada Administrative Code (NAC) is the codified, administrative regulations of the Executive Branch.

The Nevada Register is a compilation of proposed, adopted, emergency and temporary administrative regulations, notices of intent and informational statements.

## Statutory Interpretation in Nevada

Under Nevada law, statutory interpretation is the process of interpreting and applying legislation.

When the language of a statute is unambiguous, courts are not permitted to look beyond the statute itself when determining its meaning. Erwin v. State of Nevada, 111 Nev. 1535 (1995).

Nevada accepts the familiar principle that "[w]hen presented with a question of statutory interpretation, the intent of the legislature is the controlling factor and, if the statute under consideration is clear on its face, a court cannot go beyond the statute in determining legislative intent. Brown v. Davis, 1 Nev. 409 (1865), In re Walters' Estate, 60 Nev. 172 (1940), Blaisdell v. Conklin, 62 Nev. 370 (1944).

Its office has heretofore recognized that this principle has been recognized by our courts so many times it has now become axiomatic. Attorney General's Opinion No. 47, dated July 31, 1931; Attorney General's Opinion No. 596, dated March 29, 1948.

If, however, the statute is ambiguous, it can be construed 'in line with what reason and public policy would indicate the legislature intended...' 'A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses.' Robert E. v. Justice Court of Reno Township, 664 P.2d 957, 959 (Nev.1983).

"When construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance." Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 148 P.3d 790 (2006).

## The Office of the Nevada Labor Commissioner

In 1915, the Nevada State Legislature provided for the creation of the Office of the Labor Commissioner, by enacting NRS 607.160. Pursuant to NRS 607.160, it is the duty of the Labor Commissioner to enforce the labor laws of Nevada.

The Legislature did not vest in the Labor Commissioner the power to make new law, only a duty to enforce the existing laws.

**NRS 607.160 Enforcement of labor laws; imposition and collection of administrative penalties; cumulative nature of penalties and remedies; claims for wages or commissions; prosecution of claims by Attorney General.**

1. The Labor Commissioner:

(a) Shall enforce all labor laws of the State of Nevada:

(1) Without regard to whether an employee or workman is lawfully or unlawfully employed; and

(2) The enforcement of which is not specifically and exclusively vested in any other officer, board or commission.

(b) May adopt regulations to carry out the provisions of paragraph (a).

**NRS 608.270 Duties of Labor Commissioner and district attorneys.**

1. The Labor Commissioner shall:

(a) Administer and enforce the provisions of NRS 608.250; and

(b) Furnish the district attorney of any county or the Attorney General all data and information concerning violations of the provisions of NRS 608.250, occurring in the county coming to the attention of the Labor Commissioner.

2. Each district attorney shall, if a complaint is made to him by the Labor Commissioner or by any aggrieved person, prosecute each violation of the provisions of NRS 608.250 that occurs in his county. If any such district attorney fails, neglects or refuses for 20 days to commence a prosecution for a violation of the provisions of NRS 608.250, after being furnished data and information concerning the violation, and diligently to prosecute the same to conclusion, the district attorney is guilty of a misdemeanor, and in addition thereto he must be removed from office. (Added to NRS by 1965, 696; A 1967, 626; 2001, 565).

**NRS 608.280 Proceedings against district attorney to be instituted by Attorney General.** When a complaint is made to the Attorney General by the Labor Commissioner or by an aggrieved person that any district attorney has been guilty of a willful violation of NRS 608.270, the Attorney General shall make an investigation of the complaint, and if, after such investigation, he is of the opinion that the complaint is well founded, he shall institute proceedings against the district attorney for the enforcement of the penalties provided in NRS 608.270. (Added to NRS by 1965, 697; A 1967, 806).

**NRS 608.290 Criminal and administrative penalties.**

1. Any person who violates any provision of NRS 608.250 or any regulation adopted pursuant thereto is guilty of a misdemeanor.

2. In addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than $5,000 for each such violation. (Added to NRS by 1965, 697; A 1967, 626; 2003, 797).

## Gaming Definitions

The Nevada State Legislature enacted NRS Chapter 463 to address casino licensing and control of gaming. Chapter 463 includes the legal definitions gaming and gaming employees as used in the State of Nevada.

**NRS 463.0165 "License" defined.** "License" means a gaming license, a manufacturer's or distributor's license, a license issued to a disseminator of information concerning racing or a license issued to an operator of an off-track pari-mutuel system. (Added to NRS by 1967, 1599; A 1991, 1838; 1993, 309)

**NRS 463.0169 "Licensed gaming establishment" defined.** "Licensed gaming establishment" means any premises licensed pursuant to the provisions of this chapter wherein or whereon gaming is done. (Added to NRS by 1967, 1039)—(Substituted in revision for NRS 463.0118)

**NRS 463.0171 "Licensee" defined.** "Licensee" means any person to whom a valid gaming license, manufacturer's or distributor's license, license for the operation of an off-track pari-mutuel system or license for dissemination of information concerning racing has been issued. (Added to NRS by 1967, 1039; A 1967, 1599; 1993, 309)

**NRS 463.0152 "Game" and "gambling game" defined.** "Game" or "gambling game" means any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any

banking or percentage game or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409. (Added to NRS by 1967, 1039; A 1969, 462; 1979, 772; 1981, 1073; 1985, 2134).

**NRS 463.0153 "Gaming" and "gambling" defined.** "Gaming" or "gambling" means to deal, operate, carry on, conduct, maintain or expose for play any game as defined in NRS 463.0152, or to operate an inter-casino linked system. (Added to NRS by 1967, 1039; A 1995, 756).

**A Gaming License is a Privilege – Not a Right**

Having been issued a casino gaming license, Wynn Casino is a mere "gaming licensee" of the State of Nevada. As such, Wynn Casino has agreed to and is subject to gaming regulation as administered by the State of Nevada. NRS 463.0171.

**NRS 463.0129(2) …License or approval revocable privilege.**

2. No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.

3. This section does not:

(a) Abrogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason; or

(b) Prohibit a licensee from establishing minimum wagers for any gambling game or slot machine. [13:429:1955]—(NRS A 1959, 434; 1967, 1597; 1969, 633; 1977, 1428; 1979, 333; 1983, 1205; 1987, 1273; 1991, 968, 2144; 1997, 1709; 1999, 949, 1412).

A gaming license is a privilege, not a right. Romano v. Bible, 169 F3d 1182 (1999).

**Case Law: Moen, Alford & Cotter**

Like many employers before, Wynn Casino is unlawfully seeking to divert tips given to its' employees, under the guise of a "valid tip pool."

Wynn Casino would have the law interpreted so as to permit an employer to use employees tips as an alternative source of income, although in fact this is strictly prohibited by Nevada law.

In the case at bar, Wynn Casino's actions conflict with the language of the applicable statutes, case law and the legislative intent.

Similarly, other employers have long "sought means of diverting" tips given to their employees "into their own tills." Courtney Kenny, Jhering on Trinkgeld and Tips, 32 L.Q.Rev. 306, 313 (1916).

As previously stated, under Nevada law, tips are the property of the employees who receive them.

Regarding tip pooling, a federal court in the 9th Circuit has held that, "…forced tip sharing does not violate Nevada law, so long as the employer does not retain any part of the tips for his own use or reap any direct benefit from the pooling." Cotter v. Desert Palace, Inc., 402 F.Supp. 157 (1989).

Nevada case law, is even more restrictive, permitting employers to "reap only collateral benefits" from the implementation or expansion of a valid employee tip pool. Alford v. Harolds Club, 99 Nev. 670, 669 P.2d 721(1983).

United States District Court, D. Nevada.

**Robert Wallace MOEN, Plaintiff,**

**v.**

**LAS VEGAS INTERNATIONAL HOTEL, INC., formerly known as Nevada InternationalHotel, Inc., a Nevada Corporation, dba the Las Vegal Hilton, Defendant.**

Civil No. LV-2079 BRT.

Moen v. Las Vegas Intern. Hotel, Inc. 402 F.Supp. 157 (Cite as: 402 F.Supp. 157)

Oct. 2, 1975.

MEMORANDUM OPINION

BRUCE R. THOMPSON, District Judge.

This action is before the Court on defendant's motion for a summary judgment. Jurisdiction is based upon diversity of citizenship. It is an action which allegedly arises under a state statute and state law applies. In essence, the plaintiff contends that in order to obtain and retain employment with defendant as a dealer in defendant's casino, he was required to pool tips received by him with tips received by other dealers and that such tips were then subject to division among the dealers and other employees, including boxmen, casino cashiers and floormen. Plaintiff contends that such a condition of employment violates NRS Sec. 608.160, which provides as follows:

‘608.160 Taking or making deduction on account of tips or gratuities unlawful; employees may divide tips or gratuities among themselves.

‘1. It is unlawful for any person to:

‘(a) Take all or part of any tips or gratuities bestowed upon his employees.

‘(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this state any tips or gratuities bestowed upon his employees.

‘2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide tips or gratuities among themselves.’

The foregoing statute was amended in 1971. The original Act, approved February 21, 1939 (1939 Statutes of Nevada, p. 13), provided as follows:

‘CHAP. 17- An Act requiring persons who take from their employees all or any portion of any tips or

gratuities, to post in a conspicuous place on their premises a notice of the terms of the contract whereby the employer or other person is to have the benefit of any such tips or gratuities; prescribing penalties for the violation thereof, and other matters properly relating hereto.

‘(Approved February 21, 1939)

‘WHEREAS, It has become the practice of certain employers, employing other persons in and about the conduct and operation of their business, of taking all or a portion of any tips or gratuities given to or received by such employees; and

‘WHEREAS, It is the sense of this legislature that such acts tend to perpetrate a fraud or imposition upon the public because of the employers' failure to notify the public that tips or gratuities bestowed upon employees go to the employers; and

‘WHEREAS, It is the sense of the legislature that the public should be informed of any such relation, custom, or agreement between employer and employee; now, therefore.

‘The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

‘Section 1. Every person who takes all or any part of any tips or gratuities bestowed upon his employees, or who credits the same toward payment of his employee's wage, shall and is hereby required to post in a conspicuous place where it can be easily seen by the public, upon the premises where such employees are employed and work, a notice to the public that the tips or gratuities bestowed on employees go or belong to the employer. Such notice shall contain the words, ‘NOTICE: Tips Given Employees Belong to Management.’ The letters of these words shall be in bold black type at least one inch in height.

‘Sec. 2. Any person who takes all or any part of the tips or gratuities bestowed upon his employees without posting the notice required to be posted by the preceding section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment.

‘Sec. 3. This act shall be in full force and effect from and after its passage and approval.’

The purpose of that statute is stated in the preamble and shows that it was passed to protect the public from possible fraud. It is quite similar to California statutory provisions enacted in 1929, the substance of which is found in West's Annotated California Codes, ‘Labor,’ Sections 350-356. The statute has received the

attention of California courts in two reported cases. In Anders v. State Board of Equalization, 82 Cal.App.2d 88, 185 P.2d 883 (1947), the California District Court of Appeals concluded that even if the notice required by the statute is not given, such failure does not render void an agreement between the employer and employee to the effect that tips received by the employee, to the extent necessary, would be applied in satisfaction of the obligation to pay a legal minimum wage. This holding is pertinent to our case because it shows that the enforcement of the statute would be left to the misdemeanor penalty provisions and that failure to comply with the statute would not invalidate the employment agreement. Similarly, the discussion in California Drive-In Restaurant Association v. Clark, 22 Cal.App.2d 287, 140 P.2d 657 (1943), shows that under the common law of general applicability, the disposition of tips is properly a matter for contractual determination between the employer and employee.

With this background in mind, we have for determination the proper interpretation and effect of the 1971 amendment to NRS Sec. 608.160. In making this determination, we are not aided by any reported Nevada decisions. We have, however, been referred by counsel to the action in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, entitled 'Las Vegas Casino Employees' Union, Local No. 7, et al., Plaintiffs, vs. Sahara-Nevada Corporation, dba Hotel Sahara, Defendant,' Docket No. A139598, in which the District Court granted a summary judgment for the defendant in an action similar to the instant action and based upon the same statutory provisions. The case cited does have persuasive authority with respect to the proper interpretation of the Nevada statute.

Bearing in mind the preamble to the 1939 statute, of which the 1971 statute was an amendment, we conclude that in 1971, the Nevada Legislature decided that merely requiring employers to post a notice of their agreement involving the confiscation of employees' tips was insufficient and that adequate protection of the public against the presumed fraud involved in a taking of tips or gratuities or applying any part of them against the statutory minimum hourly wage established by any law could not be obtained witout an express prohibition of such practices. The Nevada Legislature, nevertheless, in subsection 2 of NRS Sec. 608.160, recognized the propriety of an agreement for the pooling and division of tips among employees. In interpreting the 1971 statute, we note that subsection 1(a) makes it unlawful for an employer to 'take' all or part of any tips or gratuities bestowed upon his 'employees.' The plural and not the singular is used. The statute does not say that he cannot take tips bestowed on an employee. This, in connection with the section

validating pooling agreements, indicates that so long as only employees share in the tips, the statute is not violated. It indicates that a tip or gratuity need not be considered a personal donation to the employee receiving it. This is a reasonable interpretation in the light of commonly known tipping practices in the State of Nevada. There is no reason to suppose that the last person in a service line is the only one entitled to share in the customer's bounty. For example, a busboy as well as a waitress contributes to the good service and well-being of a customer in a restaurant. Similarly, in a casino, the floormen, boxmen and cashiers all contribute to the service rendered to the player. Plaintiff's argument, which has to be predicated upon the contention that the tip handed to him becomes his personal property under NRS Sec. 608.160, is ridiculous as applied to a crap table, for example, which normally is manned by three employees, two dealers (one of whom is a stickman) and a boxman, all of whom are active in the play of the game and the placement and paying of bets. It is ridiculous to assume that a satisfied player who hands over a tip intends it only for the particular person to whom the tip is given.

The evident purpose and proper interpretation of the statute is that it was enacted to prevent the taking of tips by an employer for the benefit of the employer.

Plaintiff here complains that his employer, as a condition of employment, required him to divide tips or gratuities among other employees. We find nothing in subdivision 2 of NRS Sec. 608.160 to prohibit this. The subsection does not specify with whom such an agreement may be made. It does specify that only the employees can benefit. Plaintiff would have us read the statute as follows: ‘Nothing contained in this section shall be construed to prevent such employees from entering into an agreement with other employees to divide such tips or gratuities among themselves.’ An equally reasonable interpretation of the statute, which we think is the proper one in the light of well-known employment practices, is as follows: ‘Nothing contained in this section shall be construed to prevent such employees from entering into an agreement with the employer or with other employees to divide such tips or gratuities among the employees.’

Another problem inherent in the case is whether NRS Sec. 608.160 gives rise to a private action for damages on behalf of any employee. We note that NRS Sec. 608.190 provides for enforcement by an action for a penalty to be prosecuted in the proper court by the District Attorney of the County at the instance of the Labor Commissioner. We also note that NRS Sec. 608.160 is part of Chapter 608 of the Nevada Revised Statutes encompassing ‘compensation, wages and hours generally,’ and that violations of many

provisions of that Chapter have a criminal sanction and are made misdemeanors, and that NRS Sec. 608.140 specifically creates a cause of action for wages earned and unpaid and penalties and a reasonable attorney's fee. No such provision is applicable to NRS Sec. 608.160.

In the foregoing context, we have in mind the decision of the Nevada Supreme Court in Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, in which the Supreme Court held that the Nevada Dram Shop Act, NRS Sec. 202.100, which prohibits any saloon keeper from selling liquor to a person who is drunk and makes such conduct a misdemeanor, does not create a cause of action in favor of the person who has been injured by the drunkard to whom liquor was unlawfully sold. In reaching that conclusion, the Supreme Court said:

'The statute before us is but one of many in the statutory scheme regulating the sale of tobacco and intoxicating liquor to minors and drunkards. The section immediately preceding NRS 202.100 (NRS 202.070) does impose a limited civil liability upon the proprietor of a saloon who sells liquor to a minor. By providing for civil liability in one section and failing to do so in the section immediately following, the legislature has made its intention clear.'

The general law, as found in decisions of the Supreme Court of the United States, is not inconsistent with the conclusion that no civil right of action should be imputed from a statute which is expressly made enforceable by a specific civil penalty or by criminal sanction. The leading cases are Wyandotte Co. v. United States, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), and Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). In the Wyandotte case, the Supreme Court indicated that a civil action on behalf of private parties could be based on violation of the penal statute if the criminal liability was inadequate to ensure the full effectiveness of the statute and the Plaintiffs fell within the class that the statute was intended to protect and that the harm that had occurred was of the type that the statute was intended to forestall. In that case, the Supreme Court held that a penal statute could be a predicate for a civil action brought by the United States to recover damages for blocking a navigable waterway. In the case of Cort v. Ash. supra, the Supreme Court held that no private cause of action for damages was created by enactment of 18 U.S.C. Sec. 610 which made it criminal misconduct to make certain campaign contributions. In that case, the Court called attention to the following important factors:

1. Is the plaintiff one of the class for whose especial benefit the statute was enacted?

2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy for the plaintiff?

3. Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff?

In the Cort case, the Court answered all three questions in the negative. We think the same is true in this case. This plaintiff is not one of a class for whose especial benefit the statute was enacted. The legislative history shows that legislation of this type was initially passed to protect the public against a presumed fraud and that the 1971 amendment merely established greater assurance that a customer who wanted to 'toke' an employee would not ultimately learn that he had merely enriched the coffers of the employer. We have already indicated the statutory framework from which we have drawn an inference of legislative intent implicity to deny a private remedy and from which we have concluded that it is inconsistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.

Plaintiff argues that there is a dispute issue of material fact in this case which precludes a summary judgment. He contends that there is a dispute between plaintiff and defendant with respect to whether he was required, as a condition of obtaining and retaining employment with the defendant, to agree to pool tips with other employees. We agree that there is a dispute with respect to this issue. Our finding that summary judgment should be granted is based upon a determination that the issue is not a material one. We believe that NRS Sec. 608.160, as properly interpreted, does not prohibit an employer from requiring an employee to pool tips with other employees as a condition of employment. We also believe that the Legislature of the State of Nevada did not intend, by enactment of the amendment of 1971 to NRS Sec. 608.160, to create a private right of action in an employee and that the legislature did intent that the sole remedy for a violation of the statute should be an action for a penalty under NRS Sec. 608.190, subdivision (2). Accordingly.

It hereby is ordered that summary judgment be, and it hereby is, granted in favor of defendant and against plaintiff.

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Supreme Court of Nevada.

Loretta Sue ALFORD; Stella M. Colagiovane-Archuleta; Judy Gisler; Sharon Lee; Shannon O'Roarke;

**Patricia A. Seaman; Debbie Wolland; Ruth Neighoff; Susan M. Gaw; and Carol Bratcher,**

**Appellants,**

**v.**

**HAROLDS CLUB, Hughes Properties, Inc., Summa Corporation, Respondents.**

No. 13420.

Alford v. Harolds Club, 99 Nev. 670 (Cite as: 99 Nev. 670, 669 P.2d 721)

Sept. 27, 1983.

OPINION

PER CURIAM:

The instant case presents an appeal from the involuntary dismissal of appellant employees' suit alleging a casino employer improperly imposed a “tip-pooling” agreement in violation of NRS 608.160, a provision restricting an employer's access to employees' tips and gratuities. We hold that the district court correctly concluded that NRS 608.160 does not prohibit an employer from requiring employees to enter into a tip-pooling arrangement such as that imposed in the instant case. We also hold that the district court correctly determined that there was insufficient evidence to support appellants' related claims for wrongful termination, intentional infliction of emotional distress, fraud, conversion, and conspiracy to blacklist appellants from the gaming industry. Accordingly, we affirm the district court's involuntary dismissal of appellants' complaint pursuant to NRCP 41(b).

This controversy was triggered by a change in employment policy instituted by respondent Harolds Club on January 15, 1980. Prior to that date, Harolds Club allowed its casino dealers to keep tips or gratuities awarded them individually by customers. On January 15, Harolds Club instituted an employment policy change and ordered dealers to “pool” their tips and divide them evenly with other dealers working the same shift. The casino did not retain any part of the pooled tips, although Harolds Club later conceded that as a result of the change it reaped collateral benefits of higher employee morale and lower employee turnovers. Harolds Club was apparently the last of the large casinos in northern Nevada to institute such a pooling policy, which apparently brought the casino into conformity with general gaming industry practice

throughout the state.

The change in policy and the business reasons behind it were explained to employees prior to each of the three shifts working on January 15. A number of employees had heard rumors about the impending change and, after consulting with counsel, decided to refuse to comply with the new policy. Nine of the ten appellants accordingly refused to comply with the new policy, and in the period between January 15, 1980 and January 17, 1980, each of these employees was fired for refusing to comply with Harolds Club's pooling policy.[FN1] FN1. One of the appellants apparently resigned of her own accord rather than await await termination.

Less than two weeks after the first terminations, appellants filed suit claiming wrongful termination, intentional infliction of emotional distress, fraud, conversion, and conspiracy to blacklist appellants from the gaming industry. Appellants also alleged Harolds Club's tip-pooling policy violated NRS 608.160, a statute which restricts an employer's access to tips and gratuities awarded employees. At trial, the district court concluded that Harolds Club's tip-pooling policy did not violate NRS 608.160, and that there was insufficient evidence of intentional infliction of emotional distress, fraud or conspiracy to blacklist appellants from the gaming industry to present the case to the jury. Accordingly, the district court dismissed appellants' suit pursuant to an NRCP 41(b) motion.

TIP POOLING AND NRS 608.160

The underlying issue presented in this appeal is whether NRS 608.160 bars Harolds Club from imposing a tip-pooling policy as a condition of employment. The statute in question provides:

1. It is unlawful for any person to:

(a) Take all or part of any tips or gratuities bestowed upon his employees.

(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this state any tips or gratuities bestowed upon his employees.

2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

On its face, NRS 608.160 prohibits an employer from “taking” all or part of any tips or gratuities bestowed on his employees. The statute conditions this prohibition, however, by providing that it shall not be construed to prevent employees from agreeing to divide tips among themselves. The issue which must be

addressed in the resolution of this appeal is whether NRS 608.160 prohibits the employer from unilaterally imposing a tip-pooling agreement on employees as a condition of their employment, even though the employer does not retain any part of the tips for his own use or reap any direct benefit from the pooling.

We have not had occasion to address whether NRS 608.160 bars an employer from imposing a tip-pooling agreement. However, in *Moen v. Las Vegas International Hotel, Inc.*, 402 F.Supp. 157 (D.Nev.1975), *aff'd*,554 F.2d 1069 (9th Cir.1977), the court addressed an employee challenge to a tip-pooling policy similar to the one presented in the instant case. The court conducted an extensive review of the legislative history of NRS 608.160 and prior related legislation, and concluded: "The evident purpose and proper interpretation of the statute is that it was enacted to prevent the taking of tips by an employer for the benefit of the employer." 402 F.Supp. at 160. Based on this construction of the statute, the district court concluded that NRS 608.160 did not bar the employer from imposing a tip-pooling agreement among employees as a condition of employment. *Id.*

[1] Although this court is not bound by a federal district court's interpretation of a Nevada statute, we believe that the interpretation advanced in *Moen* is, in light of the legislative history and well established and commonly known Nevada employment practices, the correct one. Accordingly, the district court did not err when it found that NRS 608.160 did not prohibit Harolds Club from imposing a tip-pooling policy in the instant case.

INVOLUNTARY DISMISSAL UNDER NRCP 41(b)

Appellants also maintain that the district court erred in granting Harolds Club's motion for involuntary dismissal pursuant to NRCP 41(b)[FN2] on their claims for wrongful termination, intentional infliction of emotional distress, fraud, conversion and conspiracy to blacklist appellants from the gaming industry. This argument is without merit.

FN2.NRCP 41(b) provides, in pertinent part:

> "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other

than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

[2][3] The standard of review applicable to an involuntary dismissal under NRCP 41(b) is well established. A defense motion for involuntary dismissal pursuant to NRCP 41(b) admits the truth of the plaintiff's evidence and all inferences that reasonably may be drawn therefrom, and the evidence must be interpreted in a light most favorable to the plaintiff. *Baley & Selover v. All Amer. Van,* 97 Nev. 370, 373, 632 P.2d 723 (1981); *Humboldt Basin Newspapers v. Sunderland,* 95 Nev. 794, 797, 603 P.2d 278 (1979).

[4] After reviewing the record presented on appeal, we find that even when the evidence presented is viewed in a light most favorable to appellants, the district court did not err in concluding appellants had failed to prove a sufficient case for the matter to go to the jury. *See* NRCP 41(b). As discussed above, the district court correctly concluded that Harolds Club had the right to impose a tip-pooling policy as a condition of employment. Given that Harolds Club had the right to insist on its employees' participation in a tip-pooling arrangement, it is difficult to see how appellants could have been "wrongfully" terminated when they refused to comply with such a legitimate employment policy. The same conceptual difficulty undercuts appellants' claims for intentional infliction of emotional distress, fraud, and conversion.

[5][6] Further, the district court did not err in dismissing appellants' claim for conspiracy to blacklist. As previously noted, appellants' claim of a past and continuing conspiracy to blacklist was filed less than two weeks after they were terminated. At trial, appellants attempted to prove the existence of a conspiracy by offering evidence of events which occurred both before and after the complaint was filed. However, the district court excluded the evidence of events which occurred subsequent to the filing of the complaint. Although the district court may have erred in excluding evidence of events occurring after the complaint was filed which were offered as evidence of a continuing conspiracy, (*see Cornwell Quality Tools Co. v. C.T.S. Company,* 446 F.2d 825 (9th Cir.1971), *cert. den.,*404 U.S. 1049, 92 S.Ct. 715, 30 L.Ed.2d 740 (1972)), the court expressly stated that even had this proffered evidence been admitted, there still would have been insufficient evidence to submit the case to the jury. We have reviewed the record presented, which includes lengthy offers of proof concerning the events occurring after the complaint was filed, and conclude that there was insufficient evidence of a conspiracy presented. The district court therefore did not err in refusing to submit the case to the jury.

Those other issues raised by appellants have been considered, and are without merit. As we conclude the district court did not err in concluding that NRS 608.160 did not bar Harolds Club from instituting the challenged tip-pooling policy, and did not err dismissing appellants' related claims for wrongful termination, intentional infliction of emotional distress, fraud, conversion, and conspiracy to blacklist, we affirm the decision of the district court. END OF DOCUMENT

United States Court of Appeals,

Ninth Circuit.

**Edward A. COTTER, et al., Plaintiff-Appellant,**

**v.**

**DESERT PALACE, INC., a corporation licensed and authorized to do business in the State of Nevada, doing business as Caesar's Palace, doing business as Caesar's Palace Hotel & Casino,** and DOES I through X, inclusive, Defendant-Appellee.

No. 88-15084.

Cotter v. Desert Palace, Inc. 880 F.2d 1142 (Cite as: 402 F.Supp. 157)

Argued and Submitted June 5, 1989.

Decided July 28, 1989.

Appeal from the United States District Court for the District of Nevada.

Before FARRIS, THOMPSON and TROTT, Circuit Judges.

FARRIS, Circuit Judge:

Plaintiffs appeal from an order denying their motion for a preliminary injunction. We affirm.

BACKGROUND

The plaintiffs are professional dice dealers at Caesar's Palace Casino in Las Vegas. The dealers work in crews of four, with each crew assigned to one dice table per shift. They are paid hourly wages by the casino and receive customer tips, or “tokes.”

Prior to March 1, 1988, there was a long-standing practice at Caesar's of distributing tips on a “crew for crew” basis. At the end of each shift, the four dealers assigned to a given table would pool their tips and divide them equally among themselves. On March 1, 1988, IRS agents entered Caesar's and executed levies upon two dice dealers. That afternoon, Caesar's issued an interdepartmental memorandum changing its tip-

distribution policy. Under the new policy, dealers from all shifts are required to group all tips for a twenty-four hour period, and then to divide the total evenly, without regard to the contributions of particular crews. In order to implement the new policy, Caesar's directed the formation of a “toke committee.” On March 20, the dealers elected four representatives to sit on the committee. The dealers also voted to share tokes with sick and vacationing dealers, and to establish a Medical Assistance Plan for dealers with long-term illnesses.

On April 11, the committee informed management that it had decided on a policy of sharing tips with boxmen-supervisory workers who occasionally fill in for dealers. Caesar's promptly rejected the proposal. On June 27, the casino rejected a proposal by which each dealer would receive a share of tokes proportional to his crew's contribution to the 24-hour pool. The casino has also placed restrictions on how and where the dealers may collect, store, and distribute the tokes.

In mid-April, the committee provided management with a document entitled, “Caesar's Palace Association of Dice Dealers-Policies and Procedures.” The document stated that all dealers were “required” to join the Association, and that the object of the Association was to “deal[ ] with the communal concerns of the Dice Dealers that arise in the normal course of employment.” The document listed several functions which would be served by the Association, including “[m]eet[ing] with Hotel Management as requested,” and “[i]nforming all Dice Dealers of any related policy and/or procedure change.” On April *1144 20, the Casino responded with a memo stating that the only requirement of dice dealers was that they pool tips on a 24-hour basis, and divide them in an equitable manner. “The toke committee is required only for the purpose of distributing the tokes and nothing more.” “Management does not intend to deal with either the ‘Association’ or the toke committee with respect to concerns that arise in the normal course of employment or any related policy or procedure change.”

On March 7, 1988, 101 of the 116 dice dealers at Caesar's Palace filed suit in Nevada state court, alleging breach of contract, deprivation of civil rights, and the creation of a mandatory labor organization in violation of Nevada's right-to-work laws. N.R.S. § 613.130. Caesar's removed the action to federal district court. On June 18, 1988, the district court denied plaintiff's motion for a preliminary injunction, and granted defendant's motion to dismiss the claims based on Nevada's right-to-work laws. The court held that these claims were preempted by the National Labor Relations Act and were within the exclusive

jurisdiction of the NLRB. Plaintiffs appeal from both the denial of a preliminary injunction and the dismissal of their state right-to-work claims.

SCOPE OF THE APPEAL

We have jurisdiction to review the denial of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). Dismissal of portions of a complaint, on the other hand, is an interlocutory order which is generally not reviewable unless the trial court certifies it as final under Fed.R.Civ.P. 54(b). *Atterbury v. Carpenter,* 310 F.2d 126 (9th Cir.1962). The district court specifically refused to certify its dismissal of the right-to-work claims as a final order. Plaintiffs argue that we may nonetheless review the dismissal because it is inseparably intertwined with the decision to deny preliminary injunctive relief.

Plaintiffs rely on *Marathon Oil Co. v. United States,* 807 F.2d 759 (9th Cir.1986), *cert. denied,*480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987), where we held that an interlocutory ruling on the merits, although normally unappealable, was "inextricably bound up" with the grant of preliminary injunctive relief, and therefore could properly be reviewed on appeal from the grant of the preliminary injunction. 807 F.2d at 764.

The rationale of *Marathon Oil* does not apply. In order to *grant* a preliminary injunction, a court must first decide that the underlying claim has some chance of success. In that sense, a grant of preliminary relief necessarily addresses the merits-albeit under an attenuated standard. By contrast, a court may *deny* preliminary injunctive relief on grounds entirely unrelated to the merits of the underlying claim: adequacy of monetary relief; a balance of hardships tipping in favor of the nonmoving party. The denial of preliminary relief is thus not *inextricably* intertwined with an interlocutory ruling on the merits, and there are therefore no compelling reasons to depart from the final judgment rule. We consider the merit of plaintiffs' right-to-work claims only as an incident to our review of the denial of preliminary injunctive relief.

STANDARD OF REVIEW

"In this circuit, preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips in its favor." *Arcamuzi v. Continental Air Lines, Inc.,* 819 F.2d 935, 937 (9th Cir.1987). "As an 'irreducible minimum,' the moving party must demonstrate a fair chance of

success on the merits, or questions serious enough to require litigation." *Id.* The moving party must also demonstrate at least "a significant threat of irreparable injury." *Id. See also Apple Computers, Inc. v. Formula International, Inc.,* 725 F.2d 521, 526 (9th Cir.1984); *City of Anaheim, California v. Kleppe,* 590 F.2d 285, 288, n. 4 (9th Cir.1978). The denial of a preliminary injunction is reviewed for abuse of discretion. *****1145 *Zepeda v. United States,* 753 F.2d 719, 724 (9th Cir.1983).

POSSIBILITY OF IRREPARABLE INJURY

Plaintiffs have identified a number of ways in which they may be injured by the tip-distribution policy: heavily-tipped dealers will be forced to subsidize lightly-tipped dealers; forced sharing may destroy the dealers' incentives or discourage customers from making tips; some dealers may be deprived of a once-in-a-lifetime tip from a long-term customer who gets hot at the craps tables, some dealers may be fired for refusing to comply with the new policy. Each of these potential injuries is purely monetary. If the new policy is ultimately found to be unlawful, a dealer will be able to establish the amount of his loss by keeping records of how much his particular crew collects in tips after March 1, 1988. Injuries compensable in monetary damages are "not normally considered irreparable." *Los Angeles Memorial Coliseum Com. v. National Football League,* 634 F.2d 1197, 1202 (9th Cir.1980). Because plaintiffs have not shown a significant possibility of irreparable injury, it was not an abuse of discretion to deny preliminary injunctive relief.

FAIR CHANCE OF SUCCESS ON THE MERITS

The denial of preliminary relief is also appropriate because plaintiffs have not demonstrated a "fair chance of success on the merits," or "questions serious enough to require litigation."

1. *Breach of Contract*

Plaintiffs claim that prior to March 1, 1988, Caesar's made express and implied guarantees that dice dealers would be able to split tips on a crew for crew basis, and that the casino's unilateral decision to require 24-hour pooling constitutes a breach of contract. At the same time, plaintiffs do not deny that they are at-will employees-they are working *without* a contract. Unless the casino's decision to require 24-hour pooling violates express statutory provisions or offends a defined public policy, *see, e.g., Hansen v. Harrah's,* 100 Nev. 60, 675 P.2d 394 (1984), plaintiffs' claim for breach of contract must fail.

Nevada recognizes the common law doctrine of employment at-will. *K Mart Corp. v. Ponsock,* 732 P.2d

1364 (Nev.1987). The doctrine provides that "employment for an indefinite term may be terminated at any time for any reason or for no reason by either the employee or the employer without legal liability." *Southwest Gas Corp. v. Ahmad,* 99 Nev. 594, 596, 668 P.2d 261 (1983) (Justice Steffen, dissenting). An employer privileged to terminate an employee at any time necessarily enjoys the lesser privilege of imposing prospective changes in the conditions of employment. *Albrant v. Sterling Furniture Co.,* 85 Or.App. 272, 736 P.2d 201,*review denied,*304 Or. 55, 742 P.2d 1186 (1987). Caesar's was justified in changing the procedures by which its employees receive tips, provided that the new procedure-forced 24-hour pooling-does not violate Nevada law or policy.

Nevada law recognizes the authority of an employer to require its employees to pool tips as a condition of employment. *Alford v. Harolds Club,* 99 Nev. 670, 669 P.2d 721 (1983); *Moen v. Las Vegas International Hotel, Inc.,* 402 F.Supp. 157 (D.Nev.1975), *aff'd,*554 F.2d 1069 (9th Cir.1977). In *Alford,* nine employees who were fired after refusing to participate in "crew for crew" tip-sharing brought suit for wrongful termination. The Nevada Supreme Court held: "Given that Harolds Club had the right to insist on its employees' participation in a tip-pooling arrangement, it is difficult to see how appellants could have been 'wrongfully' terminated when they refused to comply with such a legitimate employment policy." *Alford,* 669 P.2d at 724.

Forced tip-sharing does not violate Nevada law or policy so long as the employer does not "retain any part of the tips for his own use or reap any direct benefit from the pooling." *Id.* at 723.*See*N.R.S. § 608.160. Caesar's was therefore privileged*****1146 to impose forced tip-sharing prospectively as a condition of continued at-will employment. The trial court did not abuse its discretion in denying a preliminary injunction.

2. *Mandatory Labor Organization*

Nevada Revised Statute 613.130 provides that it is unlawful for an employer to require as a condition of employment that his employees join a "labor organization." A "labor organization" is defined as:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

NRS 613.130. Plaintiffs argue that the Toke Committee is a mandatory labor organization in violation of

NRS 613.130. Shortly after the trial court denied plaintiffs' motion for a preliminary injunction, a regional director of the NLRB refused to issue an unfair labor practice complaint against Caesar's Palace for its role in forming the toke committee. The director concluded that the committee was not a "labor organization," and the NLRB dismissed plaintiffs' appeal on the same ground. We need not and do not consider the decisions by the NLRB for purposes of this appeal. Based on our own review of the record, we conclude that it was not an abuse of discretion to deny preliminary relief on plaintiffs' right-to-work claims.

The record does not reflect that the toke committee exists for the purpose of "dealing with" casino management. Caesar's has required a certain division of tips, and has given the committee authority to work out the details. When the committee has made proposals outside of this narrow context, the proposals have simply been rejected. The casino has refused to entertain serious discussion. Where an organization is "used as a management tool that was intended to increase company efficiency," it will not be considered a labor organization despite the fact that it may provide some "input in order to solve management problems." *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 244 (1985).

Plaintiffs have not shown a fair chance of success on their right-to-work claims. We need not decide whether the trial court was correct in holding that the claims were preempted by the NLRA. *See Retail Clerks International v. Schermerhorn*, 375 U.S. 96, 105, 84 S.Ct. 219, 223, 11 L.Ed.2d 179 (1963).

3. *Deprivation of Civil Rights*

Plaintiffs claim that the new tip-distribution policy is actionable under 42 U.S.C. § 1983. In order to succeed on the merits of a section 1983 claim, plaintiffs must show that they were deprived of a federal right, and that Caesar's Palace was acting under color of state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155, 98 S.Ct. 1729, 1732, 56 L.Ed.2d 185 (1978).

Plaintiffs claim that Caesar's Palace was acting under color of state law because it relied on Nevada precedent to support its right to require tip-pooling. Plaintiffs do not have a fair chance of success on this argument. In *Flagg Brothers*, plaintiffs claimed that private warehousemen were acting under color of state law because they relied on the self-help provisions of New York's version of the UCC. The Supreme Court found this fact insufficient to transform private parties into state actors.

CONCLUSION

The trial court did not abuse its discretion in denying preliminary injunctive relief. AFFIRMED.

**Reconciling the Case Law: Moen, Alford and Cotter**

In Moen v. Las Vegas Intern. Hotel, Inc., 402 F.Supp. 157(1975), an action brought by employee on complaint of violation of statute proscribing the confiscation of employees' tips by employer. The Court held that the hotel could properly require as a condition of employment, that dealer in hotel's casino, pool tips received by him with tips received by other dealers and permit division among them. The Court opined:

> "The legislative history shows that legislation of this type was initially passed to protect the public against a presumed fraud and that the 1971 amendment merely established greater assurance that a customer who wanted to 'toke' an employee would not ultimately learn that he had merely enriched the coffers of the employer. The purpose of that statute is stated in the preamble and shows that it was passed to protect the public from possible fraud."

The legal definition of "orbiter dicta" is: "an observation made in passing by a judge, on some point of law not directly in issue in the case before him and thus neither requiring his decision, nor serving as a precedent".

> "In "*orbiter dicta,*" the court postulated, "there is no reason to suppose that the last person in a service line is the only one entitled to share in the customer's bounty. For example, a busboy as well as a waitress contributes to the good service and well-being of a customer in a restaurant. Similarly, in a casino, the floormen, boxmen and cashiers all contribute to the service rendered to the player. Plaintiff's argument, which has to be predicated upon the contention that the tip handed to him becomes his personal property under NRS Sec. 608.160, is ridiculous as applied to a crap table, for example, which normally is manned by

three employees, two dealers (one of whom is a stickman) and a boxman, all of whom are active in the play of the game and the placement and paying of bets. It is ridiculous to assume that a satisfied player who hands over a tip intends it only for the particular person to whom the tip is given."

In Alford v. Harolds Club, 99 Nev. 670, 669 P.2d 721(1983), employees sought to recover against their employer, a casino operator, for allegedly violating a statutory prohibition by imposing tip-pooling arrangement upon them. The Supreme Court, held that NRS 608.160, a statute prohibiting an employer from taking all or part of any tips or gratuities bestowed on employees, did not operate to prohibit employer from unilaterally imposing a tip-pooling agreement on employees as a condition of their employment, as long as employer did not retain any part of the tips for its own use or reap any direct benefit from the pooling. The Court found:

"This controversy was triggered by a change in employment policy instituted by respondent Harolds Club. Prior to the change, Harolds Club allowed its casino dealers to keep tips or gratuities awarded them individually by customers. The policy change required dealers to "pool" their tips and divide them evenly with other dealers working the same shift. The casino did not retain any part of the pooled tips, although Harolds Club conceded that as a result of the change it reaped collateral benefits of higher employee morale and lower employee turnovers. Harolds Club was apparently the last of the large casinos in northern Nevada to institute such a pooling policy, which apparently brought the casino into conformity with general gaming industry practice throughout the state.

On its face, NRS 608.160 prohibits an employer from "taking" all or part

of any tips or gratuities bestowed on his employees. The statute conditions this prohibition, however, by providing that it shall not be construed to prevent employees from agreeing to divide tips among themselves. The issue which must be addressed in the resolution of this appeal is whether NRS 608.160 prohibits the employer from unilaterally imposing a tip-pooling agreement on employees as a condition of their employment, even though the employer does not retain any part of the tips for his own use or reap any direct benefit from the pooling.

We have not had occasion to address whether NRS 608.160 bars an employer from imposing a tip-pooling agreement. However, in Moen v. Las Vegas International Hotel, Inc., 402 F.Supp. 157 (D.Nev.1975), *aff'd*,554 F.2d 1069 (9th Cir.1977), the court addressed an employee challenge to a tip-pooling policy similar to the one presented in the instant case. The court conducted an extensive review of the legislative history of NRS 608.160 and prior related legislation, and concluded: "The evident purpose and proper interpretation of the statute is that it was enacted to prevent the taking of tips by an employer for the benefit of the employer." 402 F.Supp. at 160. Based on this construction of the statute, the district court concluded that NRS 608.160 did not bar the employer from imposing a tip-pooling agreement among employees as a condition of employment. *Id.*

Although this court is not bound by a federal district court's interpretation of a Nevada statute, we believe that the interpretation advanced in *Moen* is, in light of the legislative history and well established and commonly known Nevada employment practices, the correct one. Accordingly, the district court did not err

when it found that NRS 608.160 did not prohibit Harolds Club from imposing a tip-pooling policy in the instant case."

In Cotter v. Desert Palace, Inc. d/b/a Ceasars' Palace 402 F.Supp. 157(1989), dealers sued employer to prevent casino from adopting a forced tip-sharing policy. Prior to March 1, 1988, there was a long-standing practice at Caesar's of distributing tips on a "crew for crew" basis. On March 1, 1988, Caesar's issued an interdepartmental memorandum changing its tip-distribution policy. Under the new policy, dealers from all shifts are required to group all tips for a twenty-four hour period, and then to divide the total evenly, without regard to the contributions of particular crews. Caesar's Palace defended the new policy as it was acting under color of state law because it relied on Nevada precedent to support its right to require tip-pooling. The court held:

> "Nevada law recognizes the authority of an employer to require its employees to pool tips as a condition of employment. Alford v. Harolds Club, 99 Nev. 670, 669 P.2d 721 (1983); Moen v. Las Vegas International Hotel, Inc., 402 F.Supp. 157 (D.Nev.1975), aff'd, 554 F.2d 1069 (9th Cir.1977). Forced tip-sharing does not violate Nevada law or policy so long as the employer does not "retain any part of the tips for his own use or reap any direct benefit from the pooling." Id. at 723. See N.R.S. Sec. 608.160. Caesar's was therefore privileged to impose forced tip-sharing prospectively as a condition of continued at-will employment.
>
> Caesar's was justified in changing the procedures by which its employees receive tips, provided that the new procedure…does not violate Nevada law or policy."

**Recurring Themes That Bind Moen, Alford and Cotter**

**(1) "NRS 608.160, is a statute prohibiting an employer from taking all or part of any tips or gratuities bestowed on employees" and to protect the public against possible fraud.**

The Court in all three cases agreed, first and foremost with regard to NRS 608.160, "…The legislative history shows that legislation of this type was initially passed to protect the public against a presumed fraud and that the 1971 amendment merely established greater assurance that a customer who wanted to 'toke' an employee would not ultimately learn that he had merely enriched the coffers of the employer." The purpose of that statute is stated in the preamble and shows that it was passed to protect the public from possible fraud.

In Alford, regarding NRS 608.160, the Supreme Court of Nevada held, "…The evident purpose and proper interpretation of the statute, is that it was enacted to prevent the taking of tips by an employer for the benefit of the employer." 402 F.Supp. at 160. The Court added "NRS 608.160, is a statute prohibiting an employer from taking all or part of any tips or gratuities bestowed on employees;" and of the Federal District Court's interpretation of the Nevada statute, "…We believe that the interpretation advanced in *Moen* is the correct one, in light of the legislative history and well established and commonly known Nevada employment practices.

**(2) An employer shall not reap any direct benefit from tip pooling.**

In adopting the court's rationale regarding tip pooling in Moen, the Nevada Supreme Court held that an "…employer shall not retain any part of the tips for its own use; or (2) reap any direct benefit from the pooling. *Alford, Id.*

The court strongly emphasized the importance that "Harolds Club, only reaped collateral benefits of higher employee morale and lower employee turnovers" and that "the change brought Harolds Club, into conformity with general gaming industry practice throughout the state." In Cotter, the Court held that "Caesar's Palace was acting under color of state law instituting the new policy as it because it relied on a Nevada precedent, that required dealers to share with other dealers."

The court noted, "…Forced tip-sharing does not violate Nevada law or policy, so long as the employer does not "reap any direct benefit from the pooling and provided that the new procedure does not violate Nevada law or policy.

**(3) Tip pooling must be of employees in "the same line of service" and comply with the requirement of conformance with commonly known Nevada employment practices.**

In 1975, the federal court in Moen acknowledged there exists a "line of service" in a casino which culminated with the dealers.

Both Alford and Cotter adopted and employed *Moen's* "the line of service" rationale in limiting their expansion of the dealers tip pools, to include dealers only.

However, the courts in both Moen and Alford, recognized that while an individual employee may perform a service that contributes to a patrons overall experience, that

results in a tip, it does not mean that employee is entitled to share in the particular tip pool in which the tip was received.

In a casino, there are many “lines of service” which may or may not lead to inclusion in a particular tip pool.

Casino dealers are not in the same line of service as valet parking; who are not in the same line of service as doormen, spa workers, restaurant workers, housekeeping, security, concierge services, hotel shuttle services, etc.

While each of these individuals may at times contribute to a favorable view of the patrons overall experience, which results in a tip, they are not entitled to share in that tip, unless they stand in the same line of service.

**The Process of Counting Dealer Tips at Wynn Casino Before September 1, 2006; and What Happened After the Toke Committee Was Eliminated**

From the day Wynn Casino opened, on April 28, 2005 until September 1, 2006, the toke committee members collected the day's tips from the casino floor at 4 a.m., then counted the money and presented the results to the casino cashier for verification, as prescribed by the procedures outlined in the "*Wynn Table Game Operations Dealer Department Handbook.*" The money was then paid as part of each dealer's paycheck, supplementing their hourly wages.

However, on September 1, 2006, Wynn Casino unilaterally eliminated the toke committee.

Since that time, Wynn Casino has excluded all dealers/tip pool members from participating in the actual, physical, contemporaneous count of their own tips, as it occurs.

The task of gathering and counting the daily tips, is now in the hands of Wynn Casino management. Wynn Casino's security staff collects the tips daily, carts them away and allegedly counts the money behind closed doors, pursuant to the revised "*Wynn Table Game Operations Dealer Department Handbook.*"

Since September 1, 2006, Wynn Casino has made video footage available for review, by dealers/tip pool members, of the daily tip counts, taken off casino security cameras.

# Wynn Casino Employee Handbook: "Tokes and the Toke Committee"



## 1.11 Dealers Tokes

The following are the Policies and Procedures which are intended to govern the pooling of tokes for Dealers. Any issues not addressed in this manual should be directed to a member of the Toke Committee or the Table Games Vice President.

### 1.11.1 Program Structure

The Following flow-chart summarizes the toke process from the time gratuities are accepted to the point when they are distributed.

Gratuity is received and placed in a toke box located on each table.

The toke boxes are emptied into larger locked toke boxes by Dealers at the end of their shift.

The large toke boxes are taken to the Dealer's Lounge by Toke Committee members.

The large toke boxes are emptied on a table and sorted, racked and counted.

Toke Committee members take the racks to the satellite cage for verification and deposit.

A Toke Committee member calculates each employee's tokes for the previous day and gives the documentation to the payroll department.

The payroll department distributes the tokes to dealers through the bi-weekly paycheck.

1.11.2 General Policies

The following policies explain how tokes are to be handled when received from the guest, how the eligible toke hours will be calculated, toke cutting times, the sorting process and how vacation tokes will be paid.

Handling Tokes

- A toke (tip) is considered to be any money, whether coin or cash extended to an employee in recognition of, or in appreciation for, a job well done.
- The toke process applies only to Dealers. Box Supervisors, Floor Supervisors, Pit Managers, Assistant Shift Managers and Shift Managers are prohibited from accepting tokes.
- All tokes received must be immediately dropped into one of the toke boxes located on each table game.
- Tokes cannot be concealed or placed in pockets, wallets, pouches, handbags or any other article. They must be dropped into a toke box.
- Cash tokes must be converted into casino chips and dropped into a toke box.
- EZ Pay Slot Tickets given as tokes must be dropped in a toke box and deposited in the Satellite Cage at the end of the day.

1.11.3 Calculation of Tokes

- Tokes will be split over a 24 hour period, not shift for shift.
- All Table Games Dealers (including Blackjack, Craps and Baccarat) will pool all tokes together.
- Tokes will be paid on an hour for hour basis. Dealers will be paid one hour's tokes for each hour worked.
- In order to receive a full hour's tokes, a Dealer must be on the game for at least 20 minutes and be "on the clock" at least 20 minutes before the hour.

- When on the schedule and clocked in, Dealers will be paid tokes for the hours they are performing any job function as a Dealer.

- Dealers will not be paid tokes while working as a Floor Supervisor, Box Supervisor or any position other than Dealer.

- Dealers will not be paid tokes for time spent as a volunteer or participant at any company sponsored social event.

- If a Dealer is asked by the Human Resource Department to participate as a panel member in a Board of Review process:
  - The Dealer will receive a flat toke rate of $50 if the Board of Review is held on the Dealer's scheduled day off.
  - The Dealer will be paid the daily toke rate for 8 hours if the Board of Review is held on a scheduled work day.

- All tokes received by Dealers working tournaments or special events must be pooled with the rest of the days tokes.

- When changing to and from Daylight Savings Time, graveyard Dealers will be paid for seven (7) hours tokes on the Sunday in April the clocks are moved forward and nine (9) hours tokes on the Sunday in October when the clocks are moved backward.

- Tokes will not be paid for:
  - Jury Duty
  - Personal or medical leave
  - Funeral leave
  - Days off due to illness

- Double tokes will not be paid for any reason.

- Each Dealer will receive a full share of tokes for one floating holiday per year. This must be approved and verified by the Table Games Scheduling Department. Verification of approval must also be provided to the Toke Committee at least one week prior to the date of the floating holiday.

- Each Dealer is eligible for one day off with pay for six continuous months of perfect attendance. Full tokes will be given for each perfect attendance day off. Each perfect attendance must be approved and verified by the Table Games Scheduling Department.

- Verification of approval must also be provided to the Toke Committee at least one week prior to the date of the perfect attendance day off.

- Tokes will not be paid for Table Games meetings or training sessions. The only exception to this is training on a live game during a regular scheduled shift.

1.11.4 Toke Cutting Times

- The 24 hour toke period will begin and end at 4:00 a.m.

- All toke boxes will be pulled at 4:00 a.m. Dealers that sign in will receive tokes based on total hours worked at the day's rate for the day they signed in.

    - Late Swing shift Dealers whose shift ends after 4:00 am will receive tokes based on total hours worked at the day's rate for which they signed in. Any amount dropped in the toke box after 4:00 a.m. will be counted in the next day's tokes.
    - Early Graveyard Dealers who begin work before 4 a.m. will receive tokes based on total hours worked at the day's rate for which they signed in. Any amount dropped in the toke box before 4:00 am will be counted in the previous day's tokes.

Note: The above procedures will remain the same, regardless of the amount of tokes received by a Dealer. There are no exceptions.

1.11.5 Transporting and Sorting (Mucking) Tokes

- The toke mucking process will begin at 4:00 am daily.
- Swing Shift Dealers and Toke Committee members will pull the toke boxes from each game. Toke boxes on live games cannot be pulled before 3:40 am.
- The boxes will be emptied into the larger locked toke boxes located in each pit.
- The locked toke boxes will be brought to the Dealer's lounge by two members of the Toke Committee.
- The key to the locked toke boxes must be checked out of the Cashier's Cage by two members of the Toke Committee.
  - The Cashier's Cage will have a list of Toke Committee members eligible to check out the key.
  - The locked boxes and the key to the locked toke boxes may not be on the elevator to the Dealer's Lounge at the same time.
- Before the toke boxes are opened in the Dealer's Lounge, Surveillance must be called (#2850).
- Only Table Games Dealers may sort the tokes.
- Dealers must be in uniform when sorting and counting tokes.
  - No civilian clothes.
  - No jackets.
  - No clothes with pockets.
  - No rolled sleeves.
  - Shirts must be buttoned.
- A toke committee member will record the chip totals on the Daily Toke Report form.
- Two Toke Committee members will verify the chip totals and sign the Daily Toke Report.
- All Toke Committee members who will receive compensation for the day must print their name, employee number and sign the Daily Toke Report form.

- A Toke Committee member must call Surveillance with the total chip count before transporting the checks to the Satellite Cage.
- At least two Toke Committee members are required to transport the chips to the Satellite Cage.
- A Cashier in the Satellite Cage will verify the count, sign the Daily Toke Report and issue a deposit slip.
- A copy of the deposit slip and Daily Toke Report will be given to the Payroll Department by a Toke Committee member.
- The Payroll Department will compute the total hours worked by Dealers, calculate the hourly toke rate, and determine the daily toke disbursement per Dealer.
- A copy of the Daily Toke Disbursement form will be given to a Toke Committee member for posting in the Dealer's Lounge.
- It is the responsibility of each Dealer to check the daily Toke Disbursement form to verify the date and hours worked are correct. Any error must be brought to the attention of a Toke Committee member.

### 1.11.6 Vacation Tokes

- Eligibility Requirements for Vacation Tokes:
  - Vacation tokes will be based solely on dealing time at Wynn Las Vegas.
  - A dealer must complete one year, to the day, of employment as a Dealer at Wynn Las Vegas to be eligible for vacation tokes.
  - A Dealer who has transferred from another department at Wynn Las Vegas or from a future Wynn Resorts casino, must deal full-time for one year at Wynn Las Vegas before becoming eligible for vacation tokes.
- Vacations must be taken within 12 months following the Dealer's eligibility date. There will be no carry-over to the following year(s).

- Vacation tokes will be paid according to each Dealer's normally scheduled days off. Dealers must be in their current days off for a minimum of one month.
- It is each Dealer's responsibility to complete the necessary paperwork with the Casino Office and the Scheduling Department.
- Termination due to theft or misconduct may void all due vacation tokes at the discretion of Table Games Management.

1.11.7 The Toke Committee

A committee of Dealers will manage the toke process. The Toke Committee members will represent the interests of the Dealers, ensuring that the collecting, sorting, counting and documentation of tokes is accurate and honest. The following policies apply to the Toke Committee.

1.11.8 Elections

- The Toke Committee will consist of ten (10) Swing shift Dealers. There will be five (5) regular members and five (5) alternates.
- A list of all Toke Committee Members (with photographs) will be posted in the Dealer's Lounge.
- Toke Committee members will be elected every six (6) months. The elections will take place in January and July. Toke Committee members will assume their responsibilities on February 1st and August 1st.
- The Dealer receiving the highest votes will become the Toke Committee Chairman. The Dealer with the second highest vote count will be the Toke Committee Vice-Chairman.
- Only full time Dealers will be allowed to become Toke Committee members.
- All Table Games Dealers will be allowed to vote.

- In order to allow each Dealer to vote, the elections will be held on three (3) consecutive days: Friday, Saturday, and Sunday.
- Toke policy changes (with the exception of policies mandated by Table Games Management) will be voted on at the same time as the Toke Committee elections.
- The Table Games Office Staff will oversee and monitor the elections.
- There are no term limits for Toke Committee members.
- The opening Toke Committee (including Chairman and Vice-Chairman) will be chosen by Management and serve until February 1st of 2006.

1.11.9 Toke Policy Amendments

- Any changes or additions to the existing toke policies must be approved by a vote process.
- Suggestions for amending existing toke policies must be given to a Toke Committee member at least 2 weeks before a scheduled election.
- All suggestions for amending existing Toke Committee policies must approved by Table Games Management before the issue is placed on the ballot. Table Games Management has the authority to veto any suggested toke policy change if it feels the modification is not in the best interest of Wynn Las Vegas or the Table Games Department.
- Once placed on the ballot, an amendment must receive a simple majority to be approved.

Note: The simple majority will be calculated from the number of Dealers who actually vote, not the number of Dealers eligible to vote.

1.11.10 Responsibilities of the Toke Committee

It is the direct and primary responsibility of each member to actively participate in the collection, sorting, counting and documentation of tokes.

- Toke Committee members and alternates are required to be proficient with all aspects of the toke pooling procedures including policies and reports.
- Toke Committee Members must be able to answer toke related questions asked by other Dealers.
- Toke Committee Members and Alternates must be off the clock when performing their toke pooling obligations.
- The Chairman of the Toke Committee will create the work schedule for the Toke Committee Members and Alternates. The work schedule must be evenly divided.
- During the week, (Sundays through Thursdays) there will be three (3) Toke Committee Members or Alternates scheduled to perform the daily job functions.
- On weekends (Fridays and Saturdays) and holidays, there will be five (5) Toke Committee Members or Alternates scheduled to perform the daily job functions.
- The Chairman is responsible for auditing all the procedures of the collection, sorting, counting, and the documentation of tokes.
- The duties of the Vice-Chairman are to assist in the auditing of the toke process and assuming the responsibilities when the Chairman is not available.

1.11.11 Compensation

Toke Committee Members and Alternates will be compensated for their efforts in organizing and administering the Dealer's toke program.

- Each Toke Committee Member shall be paid $25.00 per day for their time and work.
- No Toke Committee Member can receive more than $25.00 per day.
- No Toke Committee Member can receive more than $200 per pay period.
- The Cashier's Cage will receive $50.00 per day.
- The maximum compensation per day is:
  - Weekdays: $125 (3 Toke Committee Members @ $25 each and $50 for the Cashier's Cage).
  - Weekends: $175 (5 Toke Committee Members @ $25 each and $50 for the Cashier's Cage).

## The Hearing Before the Labor Commissioner: A Brief Review of the Relevant Testimony

Englishman, Thomas Tusser is credited with the oft-repeated expression, “A fool and his money are soon parted.”

At the hearing before the Labor Commissioner, in summary, Wynn Casino’s management testified that the Toke Committee was eliminated to “save the dealers money.”

Wynn Casino management further testified the available video footage of the count, eliminated the need for any contemporaneous participation in the counting process by the dealers/tip pool members.

With respect to the tip count videos offered for review by Wynn Casino, dealers, including Meghan Smith testified. In sum and substance it was their testimony, that the footage was grainy, unclear and from a distance too far away to clearly make out either the denomination or the number of chips being counted.

Meghan Smith further testified regarding her personal observations and experiences, while a member of the toke committee.

Meghan Smith testified that while she was a member of the toke committee, on a nightly basis, Wynn Casino management, directed (ordered) the toke committee to take money from the dealer tip pool funds, and to use that money to pay (tip) the cashiers who verified the tip count.

When asked about her feelings on Wynn Casino’s elimination of the toke committee, Meghan Smith testified that she strongly felt that it was not right; and that she

and all the other dealers she had spoken with about the change, preferred to count their tips themselves.

Testimony before the Labor Commissioner, by Wynn Casino management revealed there had been no tip count errors by the dealers toke committee, from the casino's grand opening on April 28, 2005, until the elimination of the toke committee, on September 1, 2006.

Wynn Casino management also admitted that since the elimination of the toke committee, there have been multiple errors made in the counting of the tips by the Wynn Casino personnel, responsible for the count.

Interestingly, despite the existence of multiple tip counting errors, Andrew Pascal testified that the dealers' tip committee was not going to be reinstated.

Andrew Pascal further testified that even if the dealers/tip pool members had voted to exclude the CSTL's and boxmen from the tip pool, Wynn Casino management would not have honored their right to do so.

Finally, through the testimony of Wynn Casino's management, it was revealed that with regards to the dealers' tip pool funds, that those funds were not put into an interest bearing escrow account for the exclusive benefit of the dealers/tip pool members, as required by law. Instead, the money was in fact, and continues to be, deposited into an interest bearing account for the benefit of Wynn Casino, where it is credited as a profit on the company's financial statement for accounting purposes.

As per Wynn Casino's testimony, since the opening of the casino in 2005, the interest generated on those dealer tip pool funds, has never been paid to the dealers/tip pool members.

## The Nevada Revised Statutes (NRS) and Employee Tips

The Nevada Legislature enacted NRS 608.160, to protect employee tips.

**NRS 608.160 Taking or making deduction on account of tips or gratuities unlawful; employees may divide tips or gratuities among themselves.**

1. It is unlawful for any person to:

(a) Take all or part of any tips or gratuities bestowed upon his employees.

(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon his employees.

2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

Penalties for violation of NRS 608.160 are addressed in NRS 608.195.

**NRS 608.195 Criminal and administrative penalties.**

1. Except as otherwise provided in NRS 608.0165, any person who violates any provision of NRS 608.005 to 608.195, inclusive, or any regulation adopted pursuant thereto, is guilty of a misdemeanor.

2. In addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than $5,000 for each such violation.

## Fiduciaries and Fiduciary Duty

Prior to September 1, 2006, after the Toke Committee had presented the results to the cashier for verification, the tips were then converted to funds which were entrusted to Wynn Casino, until the tip pool funds were distributed to the dealers/tip pool members, in their paychecks.

As the employer of the dealers/tip pool members, upon receiving the tip pool funds, Wynn Casino, was then entrusted to secure the funds for the dealers/tip pool members. The dealers/tip pool members placed their utmost trust and confidence in Wynn Casino, to manage and protect their property, in this case, their tip money.

The relationship wherein one party has an obligation to act for another's benefit, as is the case in the relationship between Wynn Casino and its' dealers/tip pool members, with respect to the tip money, is legally defined as a fiduciary relationship.

Fiduciary is defined by the Nevada Revised Statutes.

**NRS 162.020 Definitions.**

1. In NRS 162.010 to 162.140, inclusive, unless the context of subject matter otherwise requires:

(a) "Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

(b) "Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

(c) “Principal” includes any person to whom a fiduciary as such owes an obligation.

2. A thing is done “in good faith” within the meaning of NRS 162.010 to 162.140, inclusive, when it is in fact done honestly, whether it is done negligently or not. [1:44:1923; NCL § 2985]— (NRS A 1985, 508).

**NRS 162.130 Cases not provided for in NRS 162.010 to 162.140, inclusive.**

In any case not provided for in NRS 162.010 to 162.140, inclusive, the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply.

Fiduciary, from the Latin "fiducia", meaning "trust," a person (or a business like a bank or stock brokerage) who has the power and obligation to act for another (often called the beneficiary), under circumstances which require total trust, good faith and honesty.

The most common is a trustee of a trust, but fiduciaries can include business advisers, attorneys, guardians, administrators of estates, real estate agents, bankers, stock brokers, title companies, or anyone who undertakes to assist someone who places complete confidence and trust in that person or company. Characteristically, the fiduciary has greater knowledge and expertise about the matters being handled.

A fiduciary is held to a standard of conduct and trust above that of a stranger or of a casual business person. He/she/it must avoid "self-dealing" or "conflicts of interests" in which the potential benefit to the fiduciary is in conflict with what is best for the person who trusts him/her/it. For example, a stockbroker must consider the best investment for the client, and not buy or sell on the basis of what brings him/her the highest commission. While a fiduciary and the beneficiary may join together in a business venture or a

purchase of property, the best interest of the beneficiary must be primary, and absolute candor is required of the fiduciary.

A fiduciary duty is an obligation to act in the best interest of another party. For instance, a corporation's board member has a fiduciary duty to the shareholders, a trustee has a fiduciary duty to the trust's beneficiaries, and an attorney has a fiduciary duty to a client.

A fiduciary obligation exists whenever the relationship between employer and employee, involves a special trust, confidence, and reliance on the fiduciary (employer) to exercise his discretion or expertise in acting for the client. The fiduciary must knowingly accept that trust and confidence to exercise his expertise and discretion to act on the employees' behalf.

When an employer acts for another in a fiduciary relationship, the law forbids the fiduciary employer from acting in any manner adverse or contrary to the interests of the employees, or from acting for his own benefit in relation to the subject matter. The employees are entitled to the best efforts of the fiduciary on their behalf and the fiduciary employer must exercise all of the skill, care and diligence at his disposal when acting on behalf of the employees. An employer acting in a fiduciary capacity is held to a high standard of honesty and full disclosure in regard to the employees and must not obtain a benefit at the expense of the employees.

A fiduciary relationship encompasses the idea of faith and confidence and is generally established when the confidence given by the employees is actually accepted by their employer, as in the case at bar. Mere respect for another individual's judgment or general trust in the employer's character is ordinarily insufficient for the creation of a

fiduciary relationship. The duties of a fiduciary include loyalty and reasonable care of the assets within custody. All of the fiduciary's actions are performed for the advantage of the beneficiary.

Courts have neither defined the particular circumstances of fiduciary relationships nor set any limitations on circumstances from which such an alliance may arise. Certain relationships are, however, universally regarded as fiduciary. The term embraces legal relationships such as those between attorney and client, broker and principal, principal and agent, trustee and beneficiary, executors or administrators and the heirs of a decedent's estate, as well as employer and employee.

A fiduciary relationship extends to every possible case in which one side places confidence in the other and such confidence is accepted; this causes dependence by the one individual and influence by the other.

Under Nevada law, a breach of fiduciary duty is considered fraud and therefore the three-year statute of limitations set forth in NRS § 11.190(3)(d) is applicable. Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 799, 801 P.2d 1377 (1990).

In the case at bar, the statute of limitations for breach of fiduciary duty claim began to run when the dealers/tip pool members, knew or reasonably should have known, through the exercise of proper diligence, the facts giving rise to the alleged claims. Shupe v. Ham, 98 Nev. 311, 313, 646 P.2d 1221 (1982); Millspaugh v. Millspaugh, 96 Nev. 446, 448, 611 P.2d 201 (1980).

The Nevada Supreme Court has interpreted the statute to mean not that an action accrues only when the plaintiff has all the facts needed to constitute a fraud claim, but rather that "the statute of limitation commence[s] to run from the date of discovery of

facts which in the exercise of proper diligence would enable the plaintiff to learn of the fraud." Nevada Power, 955 F.2d at 1306, quoting Howard v. Howard, 69 Nev. 12, 239 P.2d 584 (1952); Accord Sierra Pacific Power Co. v. Nye, 80 Nev. 88, 389 P.2d 387 (1964) ("mere ignorance of the existence of ... the facts which constitute the cause will not postpone the operation of the statute of limitations ... if the facts may be ascertained by inquiry or diligence"). Thus, the fraud and negligence claims accrued when the Appellant "knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action." Nevada Power, 955 F.2d at 1307, citing Oak Grove Investors v. Bell & Gossett Co., 99 Nev. 616, 668 P.2d 1075 (1983).

## Presumptions, Inferences and Spoliation of Evidence

A presumption is a rule of law requiring that if one (the "basic") fact or set of facts is established, the trier of fact must find that another (the "presumed") fact, also exists unless the trier of fact is persuaded that the latter does not exist.

A presumption differs from an inference in that an inference permits, but does not require as does a presumption, a trier of fact to conclude that another fact has been established.

Presumptions, the source of which is the common law and legislative enactments, are recognized for policy reasons, generally because they reflect natural probabilities based on logic and experience.

The Nevada Legislature has addressed the propriety of legal presumptions:

**NRS 47.180** **Presumptions generally: Effect; direct evidence.**

**NRS 47.190** **Determination on evidence of basic facts.**

**NRS 47.200** **Determination on evidence of presumed fact: Where basic facts established.**

**NRS 47.210** **Determination on evidence of presumed fact: Where basic facts lacking.**

**NRS 47.220** **Determination on evidence of presumed fact: Where basic facts doubtful.**

**NRS 47.230** **Presumptions against accused in criminal actions.**

**NRS 47.240** **Conclusive presumptions.**

**NRS 47.250** **Disputable presumptions.**

Generally, once the basic facts are proven and accepted by the trier of facts, the presumption arises.

At that point, if the party against whom the presumption works does not establish by a preponderance of evidence that the presumed fact does not exist, the judge must find that the fact exists. If the party rebuts the presumption, the presumption leaves the case entirely. All that remains of the presumption is the possibility that the judge may draw an inference from the basic facts that the presumed fact exists.

It is impossible to enumerate all the presumptions recognized in the law. Some of the more common ones are:

It is presumed that a death was not brought about by suicide.

For joint accounts it is presumed that the account is the property of those named.

It is presumed that a public employee who stays out of work during a strike is engaged in striking.

It is presumed that a person died at the end of five years of unexplained absence.

Knowledge of the contents of their books is presumed when members of a firm have access to them and an opportunity to know how their accounts were kept.

In the case at bar, it is a proper legal presumption that Wynn Casino management regularly ordered payments to be made from dealers' tips, as Wynn Casino management had complete, unqualified access to the records of the dealer's toke committee transactions, and chose not to offer any evidence (documentary or testimonial) to rebut the testimony of Meghan Smith.

NRS 47.250 allows for disputable presumptions to be made in certain situations. The list includes a presumption "[t]hat evidence willfully suppressed would be adverse if

produced." The list provided by that Statute "is illustrative, not exclusive." *See,* Privette v. Faulkner, 92 Nev. 353 (1976).

The Nevada Supreme Court recently addressed the issue of spoliation of evidence in Bass-Davis v. Davis, 134 P.3d 103, Nev. Adv. Op. 39 (2006). In that case the Court clarified the differences in the Trial Court's treatment of evidence that is "willfully suppressed" and evidence that is "negligently lost or destroyed".

Where the evidence is willfully suppressed, NRS 47.250(3) applies and a disputable (or rebuttable) presumption is made.

When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced.

Thus, before a rebuttable presumption that willfully suppressed evidence was adverse to the suppressing party applies, the party seeking the presumption's benefit has the burden of demonstrating that the evidence was suppressed with intent to harm.

Here, Wynn Casino failed to produce documentation regarding any payments ordered by management, from the dealers' tip pool funds. To do so would have been an admission of a violation of NRS 608.160.

Consequently, the presumption that the evidence was adverse applies, and the burden of proof shifts to the party who failed to produce the evidence.

To rebut the presumption, Wynn Casino must prove, by a preponderance of the evidence, that the evidence was not unfavorable.

As Meghan Smith's testimony was unrebutted, the Labor Commissioner shall then presume that the evidence was adverse to the non-producing Wynn Casino.

Unlike a rebuttable presumption, an inference has been defined as "[a] logical and reasonable conclusion of a fact not presented by direct evidence, but which, by process of logic and reason, a trier of fact may conclude exists from the established facts." Although an inference may give rise to a rebuttable presumption in appropriate cases, an inference simply allows the trier of fact to determine, based on other evidence that a fact exists. An inference is permissible, not required, and it does not shift the burden of proof. The rebuttable presumption in NRS 47.250(3) applies when a party fails to produce evidence or testimony.

Lawyers and courts use the term "spoliation" to refer to the withholding or hiding of evidence relevant to a legal proceeding.

Spoliation has two consequences: first the act is criminal by statute and may result in fines and incarceration for the parties who engaged in the spoliation, secondly case law has established that proceedings which might have been altered by the spoliation may be interpreted under a spoliation inference.

The spoliation inference is a negative evidentiary inference that a finder of fact can draw from a party's failure to produce a document or thing that is relevant to an ongoing or reasonably foreseeable civil proceeding: The finder of fact can review all evidence uncovered in as strong a light as possible against the spoliator and in favor of the opposing party.

The theory of the spoliation inference is that when a party fails to produce evidence, it may be reasonable to infer that the party had consciousness of guilt or other motivation to avoid the evidence. Therefore, the fact finder may conclude that the evidence would have been unfavorable to the spoliator.

In Nevada, there is a rebuttable presumption that "evidence willfully suppressed would be adverse if produced." A trier of fact may draw this adverse inference, but whether the evidence was willfully suppressed highly factual in nature and the arbitrator can weigh evidence presented by the parties. Bohlmann v. Printz, 120 Nev. 543, 96 P.3d 1155 (2004), Bass-Davis v. Davis, 117 P.3d 207, 209 (Nev. 2005).

In summary, where one party's testimony goes unrebutted, and the opposing party has the opportunity to adduce testimony to rebut same, the court may draw an inference that the non-rebutting party was unable to rebut said testimony.

Similarly, where relevant evidence which would properly be part of the case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the judge may draw an inference that such evidence would have been unfavorable to him.

In the case at bar, Meghan Smith testified that while she was a member of the dealers' toke committee, that each night, Wynn Casino management, ordered that money be taken from the "dealer tips," and be used to pay the cashiers who verified the tip count.

This unrebutted direct testimony demonstrates Wynn Casino's clear violation of NRS 608.160.

During the hearing before the Labor Commissioner, Wynn Casino had every opportunity to rebut the testimony of Meghan Smith.

As Meghan Smith's employer and custodian of all documents and records pertaining to the toke committee, Wynn Casino's management had every reason to refute

Ms. Smith's testimony. During the course of the hearing, Wynn Casino had every opportunity to present documentary evidence to rebut the testimony.

However, Wynn Casino did not submit any evidence, testimonial or documentary, to rebut Meghan Smith's testimony.

Where a party fails to testify or to produce evidence within the party's control, which it would be to their best interest to produce, the trier of fact may infer from such failure that such testimony or evidence would have been unfavorable. Bohlmann v. Printz, 120 Nev. 543, 96 P.3d 1155 (2004), Bass-Davis v. Davis, 117 P.3d 207, 209 (Nev. 2005).

**The Unrebutted Testimony of Meghan Smith: Wynn Casino's Unauthorized Use of Dealers' Tip Pool Funds, in Violation of NRS 608.160**

By law, a party's failure to produce a witness or document when the circumstances indicate it would be logical to do so, gives rise to an inference that the witness or document was not produced because the witness or document would have provided facts unfavorable to the party. As a result, the other party may comment on the failure to produce and obtain an adverse inference charge, which permits the trier of fact to consider as relevant evidence the inference and, further, draw the strongest inference against the party.

"It is well established that a party is entitled to jury instructions on every theory of her case that is supported by the evidence." Bass-Davis v. Davis, 117 P.3d 207, 209 (Nev., 2005). Reingold v. Wet 'N Wild Nevada, Inc., 113 Nev. 967, 970, 944 P.2d 800, 802 (1997); Bass-Davis v. Davis, 117 P.3d at 210.

In the matter before the Labor Commissioner, the "record" is incomplete.

The term "record" refers to the official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing, and tangible exhibits. As a practical matter, however, the aforementioned items are not all that belong in a "record."

In the case at bar, during the hearing before the Labor Commissioner, Meghan Smith testified that while she served as a member of the dealers' toke committee, that each night, Wynn Casino management, ordered and directed that money be taken from the "dealer tips," and be used to pay the cashiers who verified the tip count.

Leaving aside a criminal defendant's Fifth Amendment right against self-incrimination, a party, here, Wynn Casino, is expected to come forward with evidence under their control.

In fact, the law provides consequences for the failure to produce evidence. These consequences are typically in the nature of adverse inferences or presumptions resulting in the shifting of the burden of proof. When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced.

Meghan Smith's testimony was unrebutted by Wynn Casino.

The action of ordering payments from the dealers tip pool funds, constitutes an unlawful "taking" by Wynn Casino. NRS 608.160.

Furthermore, Wynn Casino had absolutely no authority to order such a payment from the tip pool. Only the rightful owners of the tips, Wynn Casino's dealers/tip pool members, could authorize any payment, no matter how small and no matter the reason.

Wynn Casino acted without any legal right with respect to the tip pool funds.

This is a serious breach of Wynn Casino's fiduciary duty, with respect to the tip pool funds.

As an employer, Wynn Casino was prohibited by law, from accessing the tip pool funds. Here, the unrebutted testimony of Meghan Smith, shows that Wynn Casino unlawfully ordered payments to be made from the tip pool funds.

**Wynn Casino's Unlawful "Toke" Procedures Are Documented In Their Employee Handbook Under "Tokes and Toke Committee Procedures**"

Wynn Casino opened for business on April 28, 2005. Unfortunately for Wynn Casino, they did so with fatal flaws in their approach to the proper handling and administration of the dealers' tips and the "toke committee."

Wynn Casino management operated under the misguided notion that until the dealers' tips were distributed to the dealers' in their paychecks, that Wynn Casino could do as they pleased with the tips.

Wynn Casino management so completely believed in their misapplication of the law regarding tip pools and their administration, that they actually incorporated their unlawful procedures in the employee handbook, under "Tokes and Toke Committee Procedures."

Regarding compensation, Wynn Casino's Employees Handbook, "Tokes and Toke Committee Procedures," page 10 (reprinted below) states in pertinent part:

(1) "Each Toke Committee Member shall be paid $25.00 (and eventually increased to $75.00) per day for their time and work; and

(2) "The Cashier's Cage will receive $50.00 per day."

In the case at bar, the problem is that Wynn Casino did not have the legal authority order payments to be made from the tip pool funds.

The unrebutted testimony of Meghan Smith is that she and "the other toke committee members were directed by Wynn Casino management, to pay (tip) the casinos' cashiers verified the tip count.

By Nevada State law, only the owners of the tip pool funds could order such payments to the cashiers.

Wynn Casino could not legally authorize the payments made to the toke committee either. In the absence of express authorization to the contrary, Wynn Casino could not even suggest a fee schedule. These matters are to be addressed at the sole direction of the dealers/tip pool members.

This action constitutes an unlawful taking by Wynn Casino. NRS 608.160.

Although the tip pool funds were treated as if Wynn Casino owned them, in fact, Wynn Casino acted without any legal right with respect to accessing the tip pool funds.

This is yet another serious breach of Wynn Casino's fiduciary duty, with respect to the tip pool funds. As an employer, Wynn Casino was prohibited by law, from accessing the tip pool funds.

As a Nevada gaming licensee, Wynn Casino has failed to act in accordance with the conditions of the issuance of its' revocable privilege.

Wynn Casino has failed to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry.

**Wynn Casino's Employee Handbook: Tokes and Toke Committee Procedures "Compensation"**



1.11.11 Compensation

Toke Committee Members and Alternates will be compensated for their efforts in organizing and administering the Dealer's toke program.

- Each Toke Committee Member shall be paid $25.00 per day for their time and work.
- No Toke Committee Member can receive more than $25.00 per day.
- No Toke Committee Member can receive more than $200 per pay period.
- The Cashier's Cage will receive $50.00 per day.
- The maximum compensation per day is:
  - Weekdays: $125 (3 Toke Committee Members @ $25 each and $50 for the Cashier's Cage).
  - Weekends: $175 (5 Toke Committee Members @ $25 each and $50 for the Cashier's Cage).

**By Failing to Place the Dealers Tips Into a Separate Interest Bearing Escrow Account for the "Exclusive" Benefit of the Dealers, Wynn Casino Has Breached Its' Fiduciary Duty to the Dealers**

Under Nevada law, as a fiduciary, Wynn Casino has an ethical obligation, to safeguard and segregate the dealers/tip pool members funds, from Wynn Casino's funds and other assets by establishing an escrow account, called a "toke account," on behalf of the dealers/tip pool members.

Nevada casino licensees are required to maintain a set of several separate bank (escrow) accounts for various transactions, including: Operating Account, Parent/Gaming Account, Credit Card Account, Payroll Account, Jackpot Account, AP Account, Medical Coverage Account, Risk Management Account, Check Cashing Accounts, Marker Accounts, and a "Toke Account".

"Toke accounts" are used to segregate the receipt of employee tokes (i.e., tips) from other receipts, before transmitting those other receipts to the Operating Account.

Generally, an escrow account is a bank account designated to keep funds held by one party separate from those of the other party. If need be, Wynn Casino may need to establish one or more escrow accounts, depending on need. Each escrow account must be maintained separately from Wynn Casino's business accounts, and other fiduciary accounts.

In the case at bar, the purpose an escrow account, would be to safeguard the dealers/tip pool members funds from loss. An interest-bearing escrow account be should be used. Wynn Casino, as a fiduciary, should endeavor to make dealers funds productive for their employees.

On a daily basis, the dealer tip pool funds constitute large deposits, which are sufficient to generate meaningful interest. Consequently, Wynn Casino has a fiduciary obligation to invest the dealers/tip pool members funds in an interest-bearing bank account.

Under no circumstances may Wynn Casino, as a fiduciary, retain the interest accrued from the dealers/tip pool members escrow account. All earned interest accrued in the escrow account belongs to the dealers/tip pool members.

At the hearing before the Labor Commissioner, Wynn Casino managements' testimony wasn't clear as to what type of account, dealer/tip pool member funds were maintained. If the funds were maintained in a "toke account," then clearly, Wynn Casino was aware of its' fiduciary responsibility and simply misappropriated the interest that accrued in the account for its' own benefit.

Either way, it is abundantly clear that Wynn Casino has breached its' fiduciary duty to the dealers/tip pool members, in three very significant ways.

First, Wynn Casino has failed to establish an escrow (toke) account on behalf of the dealers/tip pool members, to safeguard the dealers/tip pool members funds from any sudden, unexpected losses experienced by the casino.

Secondly, Wynn Casino has failed to place the dealers/tip pool funds, into such a separate interest bearing escrow (toke) account, for the exclusive benefit of the dealers/tip pool members.

Finally, under oath, Wynn Casino's management testified that with regards to the dealers' tip pool funds, that those funds were not put into an interest bearing escrow (toke) account on behalf of the dealers. Instead, Wynn Casino admits the tip pool funds

were, in fact, and continue to be, deposited into an interest bearing account for the benefit of Wynn Casino.

Accordingly, we ask the Labor Commissioner to Order that:

(1) Wynn Casino establish a separate escrow/toke account on behalf of the dealers/tip pool members, for the protection of all current and future, dealer tip pool funds entrusted to Wynn Casino;

(2) The account must be an interest-bearing escrow/toke account, established for the exclusive benefit of the dealers/tip pool members, and that all current and future interest must be retained by the dealers/tip pool members.

(3) That any and all previous interest earned on dealers/tip pool funds, misappropriated by Wynn Casino, must be returned to the dealers/tip pool members, plus interest and penalties.

We also ask the Labor Commissioner for the opportunity to participate in the calculation of the amount of any restitution that is awarded.

**This "Passage of Time" Demonstrates and Legally Requires This Tribunal to Arrive at the Only Possible Legal Conclusion -- That an Unlawful "Taking" Has Occurred in Violation of NRS 608.160(1)**

It is rare that one finds a complete manifestation of an unlawful act so completely and utterly demonstrated, as is found in the case at bar.

Wynn Casino has violated the provisions of NRS 608.160(1) by unlawfully "taking," in contravention of the statute.

The unlawful "taking" is a daily violation of the statute, which commenced on September 1, 2006, with the carting away of the tips by Wynn Casino management, in violation of the dealers/tip pool members ownership rights.

Again, the legal definition of "taking" is to deprive, to remove, or to control to the exclusion of others, even for a moment; here, Wynn Casino controlled the tips, to the exclusion of the rightful owners. Here, the per se violation of law is consummated each day that interest earned on the tip pool funds, is credited to Wynn Casino's bank account.

The inescapable dilemma for Wynn Casino is the "interest" earned on the tip pool funds, which was and continues to be claimed as income on their balance sheet.

"Interest" on the tip pool funds, only accrues with the "passage of time."

It is that passage of time, that has allowed the tip pool funds to accrue interest; and which legally demonstrates that a "taking" has occurred. Wynn Casino has held the funds to the exclusion of others, for its own financial gain, the misappropriation of the interest.

It is that "passage of time" that demonstrates, and legally requires this tribunal to arrive at the only possible, legal conclusion — that an unlawful "taking" has occurred, in violation of NRS 608.160(1).

**Wynn Casino's Denial of the Dealer's Right to Participate in the Counting of Their Own Tips, is Tortious Inteference With the Dealers/Tip Pool Members' Ownership Rights to Their "Collective" Personal Property**

Before the advent of the "tip pool," a casino dealer had the exclusive, unconditional, right to possess and control their individual tips. In other words, the dealers owned all of their tips. At the end of their shift, the dealers would simply open the tip box and take their tips. With respect to the tips, no administrative expenses were incurred by either the casino, or the dealers. Most dealers would have preferred that tip pooling had never come about.

Ownership is defined as the legal right, to the possession of a thing.

By law, ownership of a tip, is directly transferred from the individual doing the tipping (the tipper), to the recipient of the tip, in this case the dealer.

Today, Nevada law recognizes the authority of an employer to require its' employees to pool tips as a condition of employment. Alford v. Harolds Club, 99 Nev. 670, 669 P.2d 721 (1983); Moen v. Las Vegas International Hotel, Inc., 402 F.Supp. 157 (D.Nev.1975), aff'd, 554 F.2d 1069 (9th Cir.1977).

In other words, where a tip pool has been established, as at Wynn Casino, from the moment a tip is received by a dealer, who is a member of the tip pool, that tip legally is owned by and belongs to, the collective members of the tip pool. NRS 608.160(1)(a). As such, at no time may Wynn Casino ever claim ownership of the tips, or come to possess any ownership interest in the tips. At no time may Wynn Casino claim to have rights superior to that of the dealers/"tip pool" members; nor may Wynn Casino, assert a right to possess the tips to the exclusion of the dealers/"tip pool" members.

At the same time, the law also recognizes and honors the ownership rights of casino dealers, to their lawful share of any and all tips which are bestowed upon them, as dealers/tip pool members.

It is these ownership rights which have been violated by Wynn Casino's elimination of the dealers' toke committee. It is these ownership rights, which legally require the immediate and permanent restoration of the dealers' toke committee.

Again, ownership of personal property is manifested by the exercise of the unqualified right, of absolute and unconditional freedom to possess and control the property in question, to the exclusion of all others. NRS 169.145**.**

By eliminating the dealers' toke committee and denying the dealers/tip pool members the opportunity to participate in the actual physical, contemporaneous count, of their own tips, Wynn Casino's actions have risen to the level, so as to constitute tortious interference with personal property.

To behave in "tortious" manner is to harm another's body, property, or other rights. One who commits a tortious act is called a tortfeasor.

Tort law is a body of law that addresses and provides remedies for civil wrongs not arising out of contractual obligations. A person who suffers legal damages may be able to use tort law to receive compensation from someone who is legally responsible, or liable, for those injuries. Generally speaking, tort law defines what constitutes a legal injury and establishes the circumstances under which a corporation may be held liable for an individuals' injury. Tort law spans intentional and negligent acts.

In tort law, injury is defined broadly. Injury does not just mean a physical injury. Injuries in tort law reflect any invasion of any number of individual interests. This

includes interests recognized in other areas of law, such as personal property rights, as in the case at bar.

On September 1, 2006 Wynn Casino, unilaterally eliminated the dealers Toke Committee, yet failed to make any alternative accommodation, for the dealers/tip pool members, to participate in the actual, physical, contemporaneous count, of their own tips.

Wynn Casino management testified before the Labor Commissioner, that the reason the dealers toke committee was eliminated was to "save the dealers some money." Yet Wynn Casino has failed to produce one iota of evidence, either documentary or testimonial proof, as to the truth of that statement.

The admission of their errors in counting the tips, raises even more questions as to why Wynn Casino management would persist in the denial of the dealers rights to count their own tips.

The videos that Wynn Casino makes available do not serve to replace the enforceable ownership rights of the dealers/tip pool members.

Through the magic of videotape, we all have witnessed the destruction of planets, dinosaurs being brought back to life, waters being parted and pigs that can fly.

Under Nevada law, any casino that "takes" dealer tips and excludes the dealers/tip pool members from the actual, physical, contemporaneous count of their own tips, is guilty of a violation of NRS 608.160(1).

Each violation of NRS 608.160 is punishable as a misdemeanor, and a fine of $5,000.00 may be assessed for each such violation. Wynn Casino's unlawful ongoing exclusion of the dealers/tip pool members from the daily counting of the tips, constitutes tortious interference with personal property and is a continuous violation, for which

Wynn Casino has been on notice of, since the filing of this action with the Office of the Labor Commissioner.

With all due respect to Wynn Casino, the dealers/tip pool members have the absolute right and would prefer to count their own tips.

Accordingly, pursuant to the laws of the State of Nevada, the Labor Commissioner must Order Wynn Casino to reinstate the dealers' "toke committee."

**By Law, As a Consequence of Their Unilateral Implementation of the Tip Pool, Wynn Casino is Legally Required to: (1) Provide For and Maintain a Dealers "Toke Committee" and (2) Bear All Costs Associated With the Administration of that Tip Pool.**

Wynn Casino's unilateral implementation of the dealers tip pool, must be distinguished from a "tip sharing" agreement initiated by the dealers.

Where dealers make an agreement amongst themselves to share tips and then inform casino management of the "tip sharing" agreement, it is incumbent upon the dealers to bear any and all costs, associated with implementation and administration of their agreement.

Similarly, under Nevada law, where a casino unilaterally imposes "tip pooling" as a condition of employment, equity requires the employer bear the responsibility for all costs associated with the implementation and administration of the tip pool; including transportation and security of the tip pool funds collected each day.

It's kind of like parenting. When a couple has no children of their own, they have none of the costs associated with being parents. However, when that couple, decide to become parents and have a baby, they then assume responsibility for all costs associated for their baby.

Here, the idea to unilaterally impose a tip pool on the dealers, was the "baby" of Wynn Casino. Accordingly, pursuant to Nevada law, Nevada gaming industry standards and the Common Law, as a consequence of the unilateral implementation of the tip pool imposed upon the dealers as a condition of their employment, Wynn Casino is legally required to: (1) provide for and maintain a dealers "toke committee;" and (2) bear all costs associated with the administration of that tip pool.

## Conclusion

In the case at bar, the Nevada Labor Commissioner is faced with an employer, Wynn Casino, whom it seems, is determined to operate its' casino business, outside the Nevada gaming industry standards, and in fact, outside the law.

It is abundantly clear that Wynn Casino has breached its' fiduciary duty to the dealers/tip pool members, in at least four very significant ways.

First, Wynn Casino has failed to establish an escrow (toke) account on behalf of the dealers/tip pool members, to safeguard the dealers/tip pool members funds from any sudden, unexpected losses experienced by the casino.

Second, Wynn Casino has failed to place the dealers/tip pool funds, into such a separate interest bearing escrow (toke) account, for the exclusive benefit of the dealers/tip pool members.

Third, under oath, Wynn Casino's management testified that with regards to the dealers' tip pool funds, that those funds were not put into an interest bearing escrow (toke) account on behalf of the dealers. Instead, Wynn Casino admits the tip (toke) funds were, in fact, and continue to be, deposited into an interest bearing account for the exclusive benefit of Wynn Casino.

Finally, Meghan Smith testified that she served as a toke committee member. It is her testimony, that she and the other toke committee members were directed by Wynn Casino management, to pay (tip) the casinos' cashiers who verified the tip count, out of the dealers tip pool funds.

Meghan Smith's testimony was unrebutted by Wynn Casino.

With respect to monies unlawfully paid out of the dealer tip pool funds, at the direction of Wynn Casino, we also ask the Labor Commissioner for the opportunity to participate in the calculation of the amount of any restitution that is awarded.

The Wynn Casino dealers/tip pool members, are the owners of all tips that are intended for them, as dealers/tip pool members, and cannot legally be excluded from participating in the actual, physical, contemporaneous count of their own tips (money).

Wynn Casino managements' admission of their errors in the count of the tips, raises even more questions concerning the breach of their fiduciary duty.

It is troubling, that in light of their own failure to be able to consistently and accurately count the tips, Wynn Casino's management freely acknowledges the dealers toke committees' outstanding record of accuracy, before its elimination on September 1, 2006.

Instead of simply reinstituting the dealers' toke committee, Wynn Casino steadfastly maintains that it makes videos of the tip count available to the tip pool members.

That policy was unacceptable when it was instituted on September 1, 2006.

That policy is still unacceptable today!

On this issue, by law, in the eyes of any court or tribunal, the rights of the dealers/tip pool members to participate in the actual physical, contemporaneous count, of their own tips (money), must be paramount.

Respectfully, the dealers/tip pool members would prefer to count their own money (tips); as it is their absolute right to do so.

By eliminating the dealers toke committee, and denying the dealers the opportunity to participate in the actual physical, contemporaneous count, of their own tips (money), Wynn Casino's actions have risen to the level, so as to constitute a taking under Nevada law. NRS 608.160. The amount of time, since September 1, 2006 to the present, that Wynn Casino has continued this policy, qualifies this as an ongoing violation of the law.

Lost amid the demonstrated multiple "takings" in violation of NRS 608.160; and the multiple breaches of fiduciary duty with respect to the misappropriation of interest earned on the tips and toke count errors, is Wynn Casino's admission that it had no intention of complying with the letter of the law.

During the hearing before the Labor Commissioner, Wynn Casino President, Andrew Pascal testified under oath that even if the dealers/tip pool members had voted to exclude the CSTL's and boxmen from the tip pool, Wynn Casino management would not have honored their wishes.

This is another clear repudiation of the law that must be addressed.

Pursuant to Nevada law, the dealers/tip pool members have the right to enter "…into an agreement to divide such tips or gratuities among themselves." NRS 608.160(2).

It is clear that the legislative intent was to provide tip pool members with the right to choose, because after all, the tip pool funds do belong to the dealers/tip pool members.

"We hold these truths to be self-evident, that all men are created equal, , that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." *The Declaration of Independence.*

Liberty, or freedom, is what is at issue here.

The members of Wynn Casino's tip pool, must be given the opportunity to exercise their unqualified, absolute right to be free to count their own money, or in this case, tips. Anything less, is unacceptable.

Accordingly, we ask the Labor Commissioner to Order that:

(1) Wynn Casino establish a separate escrow/toke account on behalf of the dealers/tip pool members, for the protection of all current and future, dealer tip pool funds entrusted to Wynn Casino;

(2) The account must be an interest-bearing escrow/toke account, established for the exclusive benefit of the dealers/tip pool members, and that all current and future interest be retained by the dealers/tip pool members, in accordance with law;

(3) That any and all previous interest earned on dealers/tip pool funds, that Wynn Casino has misappropriated, be returned to the dealers/tip pool members, plus interest and penalties; and

(4) The dealers/tip pool members, be afforded the opportunity to participate in the calculation of the amount of any restitution that is awarded.

(5) Accordingly, as it is only proper (and legal) that the Labor Commissioner, Order the tip pool members, be granted the right to count their own money (tips).

In summary, there are currently before this tribunal, no less than five (5) violations of Nevada law, with respect to the issue of Wynn Casino's "taking," misappropriation and mismanagement of the tip pool funds.

Based on the significant number of Wynn Casino's violations of Nevada law and regulatory agency regulations, pursuant to NRS 608.195(2), we ask the Labor

Commissioner to impose the maximum penalty of $5,000 per day, per violation, for each of the five (5) aforementioned violations.

In keeping with Nevada's conservative gaming history, a strong message must be sent to Wynn Casino and other gaming licensees as a deterrent, to prevent such reckless disregard for Nevada law and gaming industry standards, in the future.

DATED: March 22, 2010 Respectfully Submitted,

CECIL M. HOLLINS, ESQ. LAWRENCE JAY LITMAN, ESQ.