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Attorney for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JANE ROES 1-4, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DÉJÀ VU SERVICES, INC., ET AL

Defendants.

Case No: 37-2018-00028014-CU-OE-CTL

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF RESPONSE TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

I, BRADLEY J. SHAFER, hereby declare as follows:

1. I am general litigation counsel for Deja Vu Services, Inc., formerly known as Deja Vu Consulting, Inc. ("Services"), and have been so since the inception of that company. I make this declaration upon personal information, unless specifically stated to the contrary. I am competent to testify to the matters stated herein and will do so upon request.

2. Various companies across the country receive consulting and/or other services from Services. I will refer to those entities herein as the "Deja Vu Group." Many businesses in the Deja Vu Group are entertainment facilities that present some form of live exotic dance entertainment to the consenting adult public (I will refer to those establishments hereinafter as the "Clubs"), and over the years I have represented, or assisted in the representation of, a large number of those businesses in a variety of litigation proceedings.

3. Over the years, the Clubs have been involved in numerous matters involving the work classification of exotic dance entertainers ("Entertainers") who perform in those facilities. These classification disputes involve the question of whether the Entertainers are truly employees or are -- what the opinions usually refer to as -- "independent contractors." These misclassification claims arise in a variety of contexts, including under federal tax law, the Fair Labor Standards Act ("FLSA"), state tax law, unemployment compensation, worker's compensation, state wage laws, Title VII, and the like. I have personally litigated many of those matters, including some in the State of California, I have assisted in the defense of others, and some of them involved dancer contracts that I prepared. In addition, outside of the Deja Vu Group, I have litigated such matters for other clients, and I have assisted in the defense of still other such claims. I discuss these matters immediately below since I believe they will provide this Court with an appropriate overview as to the chance of the Plaintiffs (or proposed Intervenors) here prevailing against *these Defendants* on

the claim of misclassification, and, therefore, with information to evaluate whether the proposed Settlement is fair.

THE DEJA VU GROUP DECISIONS

4. In 2004, a jury in San Francisco returned a verdict in the case of dancer Tracy Buel – who performed at a Club in the Deja Vu Group that is a Defendant in this action under a contract I prepared – rejecting her claim that she was an employee for minimum wage purposes. The California Court of Appeal affirmed the verdict in *Buel v. Chowder House, Inc.*, 2006 WL 1545860 (Cal. App. 1st Dist.). *See* **Exhibits 1** and **2** hereto. The appellate court noted that Ms. Buel rejected an offer of employment (like the Entertainers here); dancers needed to possess specialized skills; and Club rules were based upon legal constraints. **Exhibit 2**, at *'s 6-9.

5. In addition, in the case of *In Re: Showgirls of San Diego, Inc.* (also one of the Clubs here), the California Unemployment Insurance Appeals Board found the Entertainers at issue there to be independent contractors and not employees. I litigated that matter together with California attorneys Nancy Clarence and Dale Manicom. **Exhibit 3**.

6. The California Unemployment Insurance Appeals Board issued a similar decision with regard to another one of the Clubs in the case of *In Re: Nite Life East, LLC.* The Board, in finding the dancers there to have been independent contractors, commented that they were not under the control of the club other than for the "end product" and the "work flow so as to have a product being supplied to its customers on a regular basis"; that the Club "had to compete" for the services of the dancers and "needed the dancers as bad as the dancers needed the work"; that the Club was making every effort to treat the entertainers as independent contractors; that the dancers set the hours of their work and could not be terminated except upon notice; and that the Club had *overcome the presumption* that the dancer were employees. *See* **Exhibit 4**, at

pp. 2-3. Other decisions of the California Unemployment Insurance Appeals Board fining Entertainers to be independent contractors as opposed to employees are discussed in the subsection below describing the Non-Deja Vu Group decisions.

7. Federally, in 1996 the United States Department of Labor ("DOL") initiated an investigation of the "Deja Vu" club in Colorado Springs, Colorado, involving the work classification of the Entertainers who performed at that establishment. Jack Burns, an attorney from Bellevue, Washington, represented that Club, and I assisted him. After being provided with detailed information as to the business relationship between the Club and the Entertainers by Mr. Burns and I, the DOL cancelled the wage-hour investigation and stated that it did not "anticipate that this investigation will be re-opened." **Exhibit 5**. No other investigation was ever initiated against that facility by the DOL.

8. The IRS has also addressed, on numerous occasions, the question of whether clubs in the Deja Vu Group had a reasonable basis for classifying exotic dancers as independent contractors for tax purposes. In the few cases where the IRS determined that such Entertainers were employees and assessed employment taxes, federal courts reviewing those determinations *uniformly reversed. See, e.g., Deja Vu Entertainment Enterprises of Minnesota, Inc. v. United States*, 1 F.Supp.2d 964 (D. Minn. 1998) (**Exhibit 6**); and *Taylor Blvd. Theatre, Inc. v. United States*, 1998 WL 375291 (W.D. Ky.) (**Exhibit 7**).

9. In specific regard to the labor classification at issue here, the district court in *Deja Vu Entertainment Enterprises of Minnesota* stated:

> In summary, Deja Vu had severable [sic] reasonable bases for treating its performers as independent contractors. There is uncontroverted evidence that it is commonplace in the industry for performers to be treated as non-employees. Further, Deja Vu's attorney's and accountant's advice with respect to the classification of the performers

was reasonable. Moreover, the previous audit of Deja Vu's parent corporation provided a third reasonable basis upon which Deja Vu was entitled to rely.

1 F.Supp.2d at 969 (**Exhibit 6**).

10. The district court in *Taylor Blvd. Theatre, Inc. v. United States* further observed:

> The federal tax laws define an 'employee' as 'any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.' 26 U.S.C. § 3121(d). Often, the key factor is control. *See Chin v. United States*, 57 F.3d 722, 725 (9th Cir. 1995). Though Plaintiff exercises a degree of control over its dancers, *this control arguably does not rise to the level required for an employer-employee relationship.* It does not tell them how to dance or dictate their choice of costume. It has no control over any of the proceeds until the dancer pays the nightclub its share at the end of the evening. Dancers set up their own schedules and can perform at other clubs if they wish.

Taylor Blvd. Theatre, Inc. (**Exhibit 7**), 1998 WL 375291 at *4 (emphasis added).

11. In approximately 2012, the IRS began a comprehensive employment tax audit of Larry Flynt's Hustler Club in Las Vegas, Nevada, owned by Las Vegas Bistro, LLC (then known as Las Vegas Entertainment, LLC) and part of the Deja Vu Group. This employment tax audit included an examination as to whether the Entertainers should be reclassified as employees for federal tax purposes. I participated in that audit and met with four IRS agents in Las Vegas over a number of days. At the end of that audit, the IRS issued a "no change" assessment (meaning that absolutely no taxes were due on the comprehensive employment tax audit). The final determination (entitled "Summary of Employment Tax Examination") noted that the "examination of your

employment tax returns as reflected on this report included an examination for employment tax purposes of whether any individual should be treated as employees of the taxpayer ...," and that the "examination concluded that the following classes of workers should not be treated as employees: female professional entertainers...." *See* **Exhibit 8**.

12. *Krasinski v. Deja Vu of Saginaw, Inc.* was decided in the Referee Division of the Michigan Employment Security Commission (unemployment compensation insurance), and concerned an Entertainer who performed at the Saginaw, Michigan, Deja Vu Club. Irrespective of the contract at issue there (drafted by me), the Michigan Department of Labor had argued that Ms. Krasinksi was an employee. I litigated that matter and the Entertainer was found to have been an independent contractor and not an employee. *See* **Exhibit 9**.

13. Three decisions from the Indiana Department of Revenue similarly held that dancers at establishments that used to be part of the Deja Vu Group were independent contractors as opposed to employees. *See* **Exhibit 10**. These matters were litigated by one of my prior partners.

14. In *Kelly Perry v. Little Darlings Development Center*, a state trial court in Baltimore, Maryland, denied a dancer's claim for worker's compensation benefits and found her to have performed as an independent contractor as opposed to an employee. In the 2014 ruling, the court noted the terms of the written lease agreement; that the dancer was given the option of being an employee; and that she could have received a wage and be subject to control but that she chose instead to be a professional entertainer. Moreover, the club did not set a schedule for her; did not require a specific numbers of days of work from her; did not require her to wear specific outfits; did not choose her music or stage name; did not tell her how to dance; did not require her to sell drinks; and "importantly" did not keep her from working for other establishments. *See* **Exhibits 11** and **12** (Trans. p. H-50). My staff provided briefing for this matter.

15. On June 9, 2015, an Entertainer by the name of Brandi Campbell, who had performed at Larry Flynt's Hustler Club in Las Vegas, Nevada, owned by Las Vegas Bistro, LLC, filed a complaint in the Nevada Office of the Labor Commissioner asserting that she had been forced to perform as an "independent contractor" when she was really an employee, and that the Club had failed to pay her wages and made certain "unauthorized deductions." On July 10, 2015, Las Vegas Bistro, LLC, responded to the Office of Labor Commissioner through correspondence from the law firm of Jackson/Lewis, which included substantive briefing supplied by my staff. On November 3, 2015, the Office of the Labor Commissioner issued its ruling declining to proceed on the complaint and closing the claim. *See* **Exhibit 13**.

THE NON-DEJA VU GROUP DECISIONS

16. Three additional decisions of the California Unemployment Insurance Appeals Board, identified as *In Re: Fritz That's It*, *In Re: A Touch of Class,* and *In Re: Kit Kat Club,* all hold that the exotic dancers there were independent contractors as opposed to employees. **Exhibits 14**, **15**, and **16**.

17. On April 13, 2006, the DOL initiated a wage and hour investigation of an entity known as IEC, Inc. (which operated a chain of exotic dance establishments across the country generally under the name of "P.T.'s") with regard to the exotic dance performers who entertained in those establishments. The focus of the investigation was whether the Entertainers who performed there were employees or independent contractors, and if they were employees what, if any, wages were due and owing to them. I submitted a detailed response, and thereafter the DOL closed its investigation without requiring the Entertainers there to convert to employees and without requiring the payment of any wages or other employment benefits to the Entertainers. With the passage of time, I have not been able to find the closing letter, although I do have the initial

request for investigation and my response attached as **Exhibits 17** and **18** (without exhibits).

18. In 2006, an exotic dance establishment known as Diamond Cabaret located in Denver, Colorado (one of the IEC Clubs), was sent a complaint by the Colorado Department of Labor and Employment, Division of Labor, initiating an investigation on behalf of an anonymous entertainer asserting violations under Colorado Minimum Wage Order #22. I submitted detailed briefing to the Colorado Department of Labor and Employment, Division of Labor, as an authorized representative of Diamond Cabaret, explaining the business relationship between the establishment and the Entertainers (including the terms of the performer contracts used there, which I had prepared). On June 23, 2006, the Colorado Department of Labor and Employment, Division of Labor, issued a decision informing me that "no further action is contemplated by this office." *See* **Exhibit 19**.

19. In *Oregon v. Acropolis McLoughlin, Inc.*, 945 P.2d 647 (Or. App. 1997) (on reconsideration), the Oregon Court of Appeals found exotic dancers to be independent contractors for minimum wage purposes. **Exhibit 20**.

20. In May 2004, an order issued from the First Judicial District Court of the State of Minnesota, granting the defendant's motion for summary judgment in *Thompson v. Lounge Management, Ltd. et al.*, No CX-03-12159. Plaintiff was an exotic dancer who sued the club at which she had performed in order to obtain minimum wages for the hours that she danced. The defense was handled by a friend of mine, Randall Tigue, and I ghost-wrote for him much of the briefing that was submitted in support of the defendant's motion for summary judgment. The court ruled that Ms. Thompson had never been an employee. *See* **Exhibit 21**.

21. Also finding exotic dance entertainers to be independent contractors instead of employees is an Order of the State of Illinois Department of Human Rights in

In Re Carla McKinney, which discusses in detail the factors necessary to determine employment status. Importantly, in discussing each factor, the Chief Legal Counsel found that exotic dancers at the establishment were independent contractors. This case involved a dancer contract that I prepared, and I assisted in the preparation of the briefing. This ruling was later affirmed in *Carla McKinney v. Chief Legal Counsel of the Department of Human Rights* (Ill. App. 5th Dist. 2002). Again, I assisted in the briefing. *See* **Exhibits 22** and **23**.

22. The decision of the Indiana Department of Workforce Development, Unemployment Insurance Appeals, in the case of *In Re: Condross Corp.*, is similar. There the administrative law judge differentiated between times when the entertainers were treated as employees and times when they were characterized as independent contractors. The ALJ concluded that this distinction was significant, and that when the arrangement between the parties was altered the performers were indeed independent contractors and not employees. *See* **Exhibit 24**. The ALJ referenced that the owner had changed operations after attending a seminar in Las Vegas on the topic of the classification of exotic dancers. I was the one who taught that seminar.

23. In *Matson v. 7455, Inc.*, 2000 WL 1132110 (D. Or.), the District Court was confronted with an exotic dancer misclassification claim, and noted that there was "[n]o genuine issue of material fact calling into question the plaintiff's status as an independent contractor." **Exhibit 25**, at * 4. The court found that the dancer acknowledged her responsibility to pay all taxes; she paid taxes as an independent contractor; she was paid exclusively through fees and tips paid by her customers, which were dependent upon her own skill to attract customers; she was in control of her opportunity for profit; and rules to avoid criminal liability did not establish control. *Id.*

24. Another such ruling is a recent decision from a federal district court in Arkansas reported as *Hilborn v. Prime Time Club, Inc.*, 2012 WL 918751 (E.D. Ark.),

where the court granted summary judgment to the defendants and found the dancers to have been independent contractors and not employees under the FLSA. **Exhibit 26.**

25. In *Marlar, Inc. v. United States*, 151 F.3d 962 (9th Cir. 1998) (**Exhibit 27**), the Ninth Circuit also found that a club was reasonable in its treatment of dancers as non-employees for federal tax purposes (". . .a reasonable person could find that the dancers are lessees instead of employees," and a prior IRS audit of a competitor "approved of [its] classification of the dancers as lessees, and made no assessment of employment taxes"). *Id.* at 968 (emphasis and clarification added, footnote omitted).

26. Making this point even clearer is the simple fact that after the IRS kept trying to classify exotic dancers as employees, in the face of clear precedent to the contrary, numerous federal courts ultimately awarded a number of clubs their litigation costs because -- the federal courts concluded -- the actions of the IRS were not "substantially justified." The comments of one such court are particularly telling. *See, e.g., Marlar, Inc. v. United States*, 1999 WL 1103010 (W.D. Wash.) (**Exhibit 28**) (awarding taxpayer $50,915.25, finding that "[i]t was the government's argument that no reasonable person would act as Marlar had that was unreasonable") (emphasis added).

27. In *Sizemore v. Jezebel's, Inc.*, 152 P.3d 689; 2007 WL 656444 (Kan. App. March 2, 2007) (Table), the court found dancers to be independent contractors for worker's compensation purposes. The court noted that the language in the dancers' contract asserting independent contractor status was important; that the dancers were required to supply their own music, costumes and clothing; that the dancers choreographed their own dance routines; and that the club did not provide to the Entertainers any fringe benefits or medical insurance. **Exhibit 29.**

28. **Exhibit 30** is a decision of the West Virginia Office of Hearing Appeals in *In Re: Lady Godivas*, 2000 WL 33300345 (W.Va.Off.Hrg.App.). At issue there was the question of whether the portion of dance fees collected and retained by the club were taxable as "lease or rental fees of real property." The Administrative Law Judge noted that it was "*undisputed that exotic dancers are generally recognized as independent contractors by the courts*," and in the proceedings the *State of West Virginia STIPULATED that the dancers were in fact independent contractors. Id.* at *8.

29. **Exhibit 31** is the decision in *Tijerino v. Stetson Desert Project, LLC*, No. 2:15-cv-02563 (D. Az. June 21, 2017) regarding the status of Entertainers who performed at the Le Girls Gentlemen's Club in Phoenix, Arizona. Upon analyzing the relevant factors, the court found that the club lacked control over the dancers and the lack of permanence of the relationship tipped the scales towards independent contractor status. Ultimately and despite other case law finding Entertainers to be employees, the Court concluded that the Entertainers were non-employees as a matter of law.

30. **Exhibit 32** is a Nevada state district court decision in *Barber v. Treasures*, No. A-14-709238-C (Clark Co. Dist. Ct. Aug. 8, 2017). Again, the court found under circumstances of the case that the club exercised minimal control over the Entertainers and that the Entertainers' activities determined their opportunity for profit or loss. The court granted summary judgment in favor of the club finding them to be independent contractors.

PREVIOUS PROCEEDINGS RELATED TO THIS CASE

31. The Deja Vu Group has a history with Shannon Liss-Riordan ("Liss") filing objections to settlements that they have reached in regard to Entertainer misclassification claims.

32. In regard to what the parties have referred to as the San Francisco Settlement, she objected – as she apparently intends to do here – to both preliminary

approval and final approval. In regard to what the parties have referred to as the Limited National Settlement, she objected to final approval. In all three instances, the federal courts *rejected* her objections and granted approval to the settlements. *See* **Exhibits 33** (preliminary approval in the San Francisco Settlement), **34** (final approval of the San Francisco Settlement) and **35** (final approval of the Limited National Settlement).

33. Attached as **Exhibit 36** is a Daily Beast article concerning a settlement that Liss negotiated on behalf of certain Lyft drivers, who notably did not obtain any relief as to reclassification through Liss's efforts. In that article, Liss is quoted as saying that the "drivers' fight to be reclassified as employees 'will just have to wait for another day.'" Unlike her settlement in the Lyft case, this settlement provides reclassification to employees for the class.

I declare under penalty of perjury and the laws of the State of California that the forgoing is true and correct.

Dated: November 20, 2018

Respectfully submitted,

Bradley J. Shafer (P36604)

EXHIBIT 1

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

San Francisco Superior Courts
Information Technology Group

Document Scanning Lead Sheet

Nov-19-2004 2:36 pm

Case Number: CGC-03-424462

Filing Date: Oct-06-2004 4:16

Juke Box: 001 Image: 01054596

RT ORDERED THE FOLLOWING JUDGMENT ON VERDICT ENTEI

TRACEY BUEL VS. DEJA VU, INC. (DBA THE HUNGRY I) et al

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Instructions:
Please place this sheet on top of the document to be scanned.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

TRACEY BUEL Plaintiff, v. CHOWDER HOUSE, INC. dba HUNGRY I; BSC MANAGEMENT, LLC; and ISABELLA PERRY, as an individual, Defendants.	No. 424462 **JUDGMENT**

MARGOLIS & MORIN LLP
ATTORNEYS AT LAW
444 SOUTH FLOWER STREET
SIXTH FLOOR
LOS ANGELES
CALIFORNIA 90071

ORIGINAL

It is hereby ordered, adjudged and decreed that, pursuant to the Special Verdict filed in this action on September 20, 2004 (a copy of which is attached hereto as Exhibit A), judgment shall be and hereby is entered in favor of Defendants CHOWDER HOUSE, INC. dba HUNGRY I, BSC MANAGEMENT, LLC, and ISABELLA PERRY; and Plaintiff TRACEY BUEL shall take nothing.

Costs are awarded in favor of Defendants CHOWDER HOUSE, INC. dba HUNGRY I, BSC MANAGEMENT, LLC., and ISABELLA PERRY, jointly and severally, in the total aggregate amount of $ 11,926.91. jm

Dated: Oct 6, 2004

JUDGE, SUPERIOR COURT

JOHN E. MUNTER

SUBMITTED BY:

EDITH A. THOMAS, ESQ.

MICHAEL B. MARGOLIS, ESQ.
LINDA M. TOUTANT, ESQ.
MARGOLIS & MORIN LLP

MICHAEL B. MARGOLIS
Attorneys for Defendants

APPROVED AS TO FORM:
MINAMI, LEW & TAMAKI

LISA DUARTE, ESQ
Attorneys for Plaintiff

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CALIFORNIA 90071

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

TRACEY BUEL, Plaintiff, v. CHOWDER HOUSE, INC. dba HUNGRY I; BSC MANAGEMENT, LLC; and ISABELLA PERRY, as an individual, Defendants.	No. 424462 SPECIAL VERDICT

We, the jury in the above-entitled action, find the following Special Verdict on the following questions submitted to us on the evidence received and under the instructions given:

Question No. 1: Do you find that plaintiff was an employee of Chowder House/BSC? (check one)

Answer: Yes _____

No X

If you answer Yes, proceed to Question 2. If you answer No, skip all remaining questions, date and sign this special verdict form, and return it to the bailiff.

Question No. 2: Do you find that Chowder House/BSC terminated plaintiff's employment? (check one)

Answer: Yes _____

No _____

If you answer Yes, proceed to Question 3. If you answer No, skip all remaining questions, date and sign this special verdict form, and return it to the bailiff.

Question No. 3: Do you find that plaintiff's sexual harassment claims and complaints were neither unreasonable nor brought in bad faith? (check one)

Answer: Yes _____

No _____

If you answer Yes, proceed to Question 4. If you answer No, skip all remaining questions, date and sign this special verdict form, and return it to the bailiff.

Question No. 4: Do you find that plaintiff's filing of such sexual harassment claims and complaints was a motivating reason for the termination? (check one)

Answer: Yes _____

No _____

If you answer Yes, proceed to Question 5. If you answer No, skip all remaining questions, date and sign this special verdict form, and return it to the bailiff.

Question No. 5: Do you find that defendants had a legitimate reason or legitimate reasons for the termination of plaintiff's employment that, standing alone, would have induced them to make the same decision? (check one)

Answer: Yes _____

No _____

If you answer Yes, skip all remaining questions, date and sign this special verdict form, and return it to the bailiff. If you answer No, proceed to Question 6.

Question No. 6: What do you find to be the damages, if any, suffered by plaintiff caused by retaliatory conduct on the part of Chowder House/BSC?

Answer:

Economic damages:

Past earnings loss: $_____

Future earnings loss: $_____

Non-economic damages:

Past and future emotional distress: $_____

If you answer Question 6 with an amount of money, then answer Question 7. If you do not answer Question 6 with an amount of money, skip all remaining questions, date and sign this special verdict form, and return it to the bailiff.

Question No. 7: Do you find that Isabella Perry was either a decision-maker in the decision to terminate plaintiff's employment or a person who provided substantial input into that decision? (check one)

Answer: Yes _____

No _____

If you answer Yes, proceed to Question 8. If you answer No, skip Question 8, and proceed directly to and answer Question 9.

Question No. 8: Do you find that plaintiff's sexual harassment claims and complaints were a motivating reason for Isabella Perry's decision to terminate plaintiff's employment or for her substantial input into that decision? (check one)

Answer: Yes _____

No _____

Whether you answer Yes or No, proceed to Question 9.

Question No. 9: Do you find that plaintiff has proved by clear and convincing evidence that Chowder House/BSC was guilty of malice or oppression in the conduct upon which you base your finding of liability against them? (check one)

Answer: Yes _____

No _____

Please have your presiding juror date, sign and return this special verdict form to the bailiff.

Dated: 9/20/04

CRAIG DYNER Craig Dyner

Presiding Juror

Buel v. Hungry, I, et al.
Case No. CGC-03-424462

PROOF OF SERVICE- MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 444 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On October 5, 2004, I served the document(s) described as follows:

JUDGMENT

on all interested parties in this action
( ) by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
(x) by placing ( ) the original (**x**) a true copy thereof in sealed envelope(s) addressed as follows:

Lisa Duarte, Esq.
MINAMI, LEW & TAMAKI, LLP
360 Post Street, 8th Floor
San Francisco, CA 94108

(X) (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

( ) (BY FACSIMILE) The parties agreed to service by facsimile transmission and a written confirmation of that agreement has been made. I transmitted copies of the document(s) described above to the facsimile machine(s) maintained by the person(s) indicated on the attached service list at the facsimile machine telephone number(s) as last given by said person(s) on any document which said person(s) has filed in the case and served on the party making this service. The facsimile transmission was reported as complete and without error.

( ) (BY Overnight Delivery) I placed each such envelope in a package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, and deposited said package in a box or other facility regularly maintained by the express service carrier as per Code of Civil Procedure Section 1013(d).

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

( ) (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 5, 2004, at Los Angeles, California.

Christi Serba

MARGOLIS & MORIN LLP
ATTORNEYS AT LAW
444 SOUTH FLOWER STREET
SIXTH FLOOR
LOS ANGELES
CALIFORNIA 90071

EXHIBIT 2

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Not Reported in Cal.Rptr.3d, 2006 WL 1545860 (Cal.App. 1 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2006 WL 1545860 (Cal.App. 1 Dist.))

Court of Appeal, First District, Division 2, California.
Tracey **BUEL**, Plaintiff and Appellant,
v.
CHOWDER HOUSE, INC., Defendants and Respondents.
No. A108951.
(San Francisco County Super. Ct. No. CGC 03-424462).

June 7, 2006.

Lisa R. Duarte, Minami Lew & Tamaki LLP, San Francisco, CA, for Plaintiff and Appellant.

Edith Ann Thomas, Fallbrook, CA, Linda Michele Toutant, Margolis & Morin, Los Angeles, CA, for Defendants and Respondents.

BUSCH, J.[FN*]

FN* Judge of the Superior Court of San Francisco County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

I. Introduction

***1** Plaintiff Tracey Buel (Buel) appeals from a judgment entered on October 6, 2004, following a jury verdict in favor of defendants Chowder House, Inc. (Chowder House) d.b.a. Hungry I, Inc. (Hungry I), BSC Management, LLC (BSC Management), and Isabella Perry (Perry) (collectively, defendants). Buel charged defendants with numerous Labor Code wage and hour violations and retaliatory discharge in violation of California's Fair Employment and Housing Act (Gov.Code, §§ 12900 et seq.) (FEHA). The jury found that Buel was an independent contractor, rather than an employee of Chowder House or BSC Management. Since California's wage and hour laws and FEHA only apply to employees, the trial court entered judgment in favor of defendants. On appeal, Buel contends that the jury erred in finding her to be an independent contractor. We conclude that the jury verdict was supported by substantial evidence and affirm.

II. Factual and Procedural Background

Plaintiff Tracey Buel is an exotic dancer with over 20 years of experience in that occupation. In or about March 1997, Buel began dancing at a San Francisco nightclub called Centerfolds.[FN1] According to Buel, during the time she danced at Centerfolds, two of the managers (Perry and "Sparky") told her to let customers touch her breasts in order to make more money. Buel filed a complaint with the Department of Fair Employment and Housing (DFEH) and a lawsuit for sexual harassment against Centerfolds, Perry, Sparky, and various other individuals whom Buel believed owned Centerfolds.

FN1. During trial, the dance club was referred to by a variety of names, including Déjà Vu Centerfolds, Déjà Vu Showgirls, Showgirls Centerfolds, and Showgirls. Joseph Carouba, the chief operating member of BSC Management and the president of Chowder House, referred to the club as Centerfolds, and we shall do the same.

In late June 2001, Buel began dancing at the Hungry I, a nightclub owned by Chowder House and managed by BSC Management.[FN2] On July 6, 2001, during Buel's fifth night of performing, Perry, the entertainment director of BSC Management, walked into the club and spotted Buel. Perry

walked through the club and went upstairs to the office of the Hungry I's manager, Marvin Duane "Wiz" Johnson (Johnson). There, she told Johnson and Andy Dunitz (Dunitz), another BSC manager who was working at the Hungry I, that a new dancer downstairs was the dancer who had previously sued Perry and Sparky. Johnson then asked Buel to come up to his office.

> FN2. BSC Management provided managerial services to the Hungry I as well as over 10 other adult nightclubs in San Francisco.

The evidence regarding what transpired after Buel entered the manager's office was conflicting. According to Buel, when she walked into the office, Dunitz and Perry began to berate her for having sued Perry and the company. They repeatedly told her that they did not want her working there because she had sued them. According to Buel, Perry told her, "You can no longer work here." Buel believed she had been fired because of what Dunitz and Perry had said.

According to Dunitz, however, he never fired Buel. Instead, he asked her why she would want to work at the Hungry I in light of the past problems she had had with the people managing the club. She responded by asking, "Are you firing me?" He again inquired why she would want to work there, to which she again demanded, "Are you firing me?" Dunitz testified that he ultimately told her he was asking her to leave for the evening. Perry and Johnson also testified that Dunitz and Buel engaged in an exchange wherein Dunitz asked Buel to leave for the evening, and Buel repeatedly responded by demanding, "Are you firing me because I sued the company?" All parties agreed that after the exchange between Dunitz and Buel, Perry escorted Buel off the premises.

***2** Shortly thereafter, Buel filed complaints with the Department of Fair Employment and Housing, the National Labor Relations Board, and the Department of Labor Standards Enforcement. On September 16, 2003, Buel filed a civil action against Perry and the Hungry I for unlawful retaliation, alleging that she had been wrongfully terminated from the Hungry I in retaliation for having filed the prior DFEH complaint and lawsuit.[FN3] In a Second Amended Complaint, Buel added claims that defendants had violated the Labor Code by failing to pay her wages and requiring her to pay a stage fee. Buel also named the Hungry I as a d.b.a. of Chowder House, Inc. and added BSC Management as a Doe defendant.

> FN3. Buel also named Déjà Vu, Inc. as a defendant, erroneously alleging that Déjà Vu, Inc. owned the Hungry I. Déjà Vu, Inc. was dropped as a defendant in the Second Amended Complaint.

On July 2, 2004, Buel moved for summary judgment or summary adjudication. Buel argued that the undisputed facts established that she was an employee, rather than an independent contractor, that she was fired in retaliation for having filed a sexual harassment complaint, and that Chowder House and/or BSC Management committed numerous Labor Code violations by failing to pay her wages for hours worked, minimum wages, overtime wages, and waiting time penalties, and for engaging in illegal tip sharing. On August 6, 2004, the trial court denied Buel's motion on the ground that triable issues of fact existed as to whether she was an employee, and the matter proceeded to a jury trial on September 10, 2004. On September 20, 2004, the jury returned a special verdict finding that Buel was an independent contractor, not an employee. On October 6, 2004, the trial court entered judgment in favor of defendants.

On October 28, 2004, Buel moved for a new trial and judgment not withstanding the verdict. The trial court denied Buel's motions on December 1, 2004.

On December 30, 2004, Buel filed a timely Notice of Appeal.

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Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2006 WL 1545860 (Cal.App. 1 Dist.))

III. Discussion

A. Standard of Review

A challenge to a judgment entered following a jury trial is reviewed for substantial evidence. (See *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 ["It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury."]; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Alderson v. Alderson* (1986) 180 Cal.App.3d 450, 465.) Rather than applying the substantial evidence standard, however, Buel urges the court to review the jury's special verdict de novo. Buel argues that where the facts are undisputed, as she contends they are here, the question of employee or independent contractor status is one of law to be decided by the court. In support of this position, Buel cites *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349-355 (*Borello*), where the Supreme Court stated, "The determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences.... [Citation.] If the evidence is undisputed, the question becomes one of law [citation.]...." (*Id.* at p. 349.) (See also *Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 41(*Isenberg*) [when "the essential facts are not in conflict the question of the legal relations arising therefrom is a question of law"]; *Ware v. Workers' Comp. Appeals Bd.* (1999) 78 Cal.App.4th 508, 514 (*Ware*) ["[B]oth sides argue different conclusions even though the essential facts are relatively undisputed. This also renders the issue of employment a question of law and appropriate for this court to decide."]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 872 (*Toyota*) ["[W]here the facts are undisputed, the issue is one of law and the appellate court is free to reach its own legal conclusion from such facts [Citations.] It appears that this latter rule is applicable here as there is no dispute as to the facts; the parties have simply emphasized different factors"].)

***3** We agree with Buel that, as a general rule and as set forth in *Borello*, *Isenberg*, *Ware*, and *Toyota*, where the facts are undisputed, the determination of employee or independent contractor status is a question of law. However, we reject Buel's contention that based on this rule of law, the jury's verdict in the instant matter must be reviewed de novo. As a preliminary matter, Buel's claim that the issue presents a question of law is fundamentally inconsistent with the parties having submitted the matter to a jury for trial. However, there is no evidence in the record that Buel objected to having the issue of her employment status decided by the jury as a factual question. Buel did not object to the jury instructions or the verdict form, and, in fact, the record indicates that the jury instructions were jointly submitted by the parties, with Buel objecting only to the mixed motive instruction, which has no relevance to the issues of the appeal. Nor has Buel challenged the denial of her motion for summary judgment or her post-trial motions. "An appellate court will ordinarily not consider procedural defects or erroneous rulings in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.) Thus, the question of whether the trial court correctly treated the determination of Buel's employment status as one of fact rather than law is not before us. FN4

FN4. We therefore express no opinion as to whether it was proper for the question of Buel's status as an employee or independent contractor to have been submitted to a jury. Nor do we consider other possible formulations of the questions submitted to the jury or the court's explanation to the jury of the legal test.

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Further, and more importantly, even assuming it is our duty to review the jury verdict de novo where the material facts are undisputed, we would still apply the substantial evidence standard in this case because many of the material facts concerning Buel's employment status were in fact disputed. For example, the parties presented differing versions of the events that transpired in Johnson's office on July 6, 2001, when Buel was confronted by Dunitz, Perry, and Johnson. The testimony was also conflicting on whether Buel was required to work three shifts per week and perform two-for-one dances, evidence that goes to the significant issue of whether defendants retained the right to control Buel's work. (See *Borello, supra,* 48 Cal.3d at p. 350.) The evidence and inferences concerning whether the parties intended to create an employment or independent contractor relationship and whether the opportunity for profit depended on Buel's managerial skills were also in dispute. Consequently, this case does not fall within the rule cited in *Borello, Ware, Isenberg,* and *Toyota.*[FN5]

> FN5. Similarly, because *Borello, Ware, Isenberg,* and *Toyota,* as well as the cases Buel cites from other jurisdictions, involved a de novo review, their outcome is irrelevant to the question before this court.

Buel suggests in the alternative that we apply what can be described as a heightened substantial evidence standard ("[the substantial evidence] standard's teeth are particularly sharp when reviewing, as here, a determination of employment status under such employee-protective statutory schemes as California's FEHA and fair wage and hour laws"). While we are certainly mindful of the remedial purposes of the statutes, there is no authority for the proposition that such purposes mandate the application of an elevated substantial evidence standard.

***4** Accordingly, we review the jury verdict to determine whether it was supported by substantial evidence. As explained in *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651, " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] 'Substantial evidence ... is not synonymous with "any" evidence.' Instead, it is ' " 'substantial' proof of the essentials which the law requires." ' [Citations.] The focus is on the quality, rather than the quantity, of the evidence. 'Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial." ' [Citation.] Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence."

B. Standards for Evaluating Employment Status

In the seminal case of *Borello, supra,* 48 Cal.3d at pp. 350-355, the Supreme Court detailed the standards by which employment status is to be evaluated. The court noted that, following common law tradition, courts have uniformly recognized that a significant factor in evaluating an employment relationship is whether the putative employer has the right to control " 'the manner and means of accomplishing the result desired....' " (*Id.* at p. 350 [quoting *Tieberg v. Unemployment Ins.App. Bd.* (1970) 2 Cal.3d 943, 946].) "[T]he statutory test of 'control' may be satisfied even where 'complete control' or 'control over details' is lacking-at least where the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purpose favors a finding" of employment. (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1295 [citing *Borello, supra,* 48 Cal.3d at pp. 355-358].)

Courts have also recognized that the right to discharge at will without cause is strong evidence of an employee-employer relationship. (*Borello, supra,* 48 Cal.3d at p. 350.) Other factors relevant to the determination, derived largely from the Restatement Second of Agency, include "(a) whether the one performing services is engaged in a distinct

occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Borello, supra,* at p. 351.) As noted in *Borello,* these various factors " 'cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' [Citation.]" (*Ibid.,* fn. omitted.)

***5** Lastly, the *Borello* court noted that other jurisdictions apply a test involving six criteria. (*Id.* at p. 354.) The court explained, "Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business." (*Id.* at pp. 354-355.)

With these criteria in mind, we turn to the evidence presented in this case to ascertain whether the jury finding that Buel was an independent contractor was supported by substantial evidence.

C. Evidence of Buel's Employment Status

1. Control

The *Borello* court acknowledged that, although there are numerous factors relevant to the employment status analysis, the right to control work details remains the " 'most important' or 'most significant' consideration...." (*Borello, supra,* 48 Cal.3d at p. 350.) According to Buel, defendants exercised control over major aspects of her work, including her schedule, her dancing, and the music. Buel testified that she was required to work a minimum of three shifts per week. Although she decided what days she wanted to work, she was required to fill out a schedule sheet to give the club notice as to what shifts she would be working the following week. While she was at the club for a shift, she had to remain at the club in order to "take turns dancing on rotation." She could not be "running in and out of the club."

There was also testimony establishing that a dancer who arrived at work after 6:00 p.m. was subject to a payment to the club that varied in amount by how late the dancer was. As Buel explained, "If you weren't on stage for [the 6:00 o'clock] roll call, they would charge you extra money and make you pay $30 instead of $20...." Perry agreed that "girls would not take home as much money or would have to pay the club more money if they came to work after 6:00 p.m." Likewise, Johnson testified that there were "incentives" the Hungry I gave to try to get a dancer there by 6:00 p.m. by making it so that the earlier the girls got in, the less they had to pay the club. Finally, Joseph Carouba, who was the chief operating member of BSC Management and the president of Chowder House, testified that the club gave the dancers "an incentive to come early, because obviously everybody, if they had a choice, you know, every dancer that worked at night would come between 11:00 and 2:00, 11:00 at night and 2:00 in the morning, that's where the money is."

In addition to controlling her schedule, Buel argues that defendants also controlled her dance performance. She testified that she was required to be on stage for a "roll call" several times a night and had to participate in certain mandatory dances such as two-for-one dances and special dances for bachelors. Johnson's testimony confirmed that the dancers were asked to do a stage rotation and two-for-one

dances, but he also stated that there were no repercussions for a dancer refusing to do a two-for-one dance.

***6** According to Buel, defendants also controlled her music and costumes. Dancers brought their own music that they played on a CD player provided by the club. The dancers were told, with regards to their music selection, to be aware of their clientele. Dancers were also advised not to play music that contained lyrics about violence.

Finally, Buel argues that defendants were in fact required by law to exercise control over the dancers. Carouba testified that the club made "sure that the dancers work[ed] within the law," while Johnson testified that the club controlled the dancers to ensure compliance with Alcoholic Beverage Control (ABC) regulations so as not to jeopardize the Hungry I's liquor license.

Defendants, on the other hand, presented evidence suggesting that Buel retained substantial control over her work. Johnson testified that he considered three shifts a full schedule but that a dancer could choose not commit to three shifts due to other obligations such as school or other jobs. In response to a question as to whether three shifts were mandatory, Johnson answered, "No, I have had a lot of girls that don't work three shifts, that didn't work three shifts." Defendants also argue that they created incentives to get the dancers to arrive early precisely because the dancers control their own schedules.

In further contradiction to Buel's testimony, Johnson testified that the club did not in fact control the dancers' music or performance. The club encouraged the dancers not to play violent music, but, beyond that, the club did not dictate the kind of music to which the dancers performed. The dancers brought their own music and were responsible for putting their own music in the CD player. Further, he testified, other than to assure compliance with the ABC rules, the club did not prescribe the manner in which the dancers performed. It was up to the dancers to determine who they danced with and how they danced. Johnson testified that during the time period Buel danced at the Hungry I, he never told a dancer she had to dance for a specific customer, nor did he ever tell a dancer how to perform. Rather, any rules that regulated the dancers in their expression came from the ABC.

Similarly, the club did not control the dancer's costumes. Johnson answered, "No," when asked if he told Buel that she had to have nice costumes. According to Johnson, any dictates regarding the costumes came from the ABC regulations.

In light of the evidence presented on both sides of this issue, the jury could have concluded that this factor weighed in favor of either Buel or defendants.

2. Right to Terminate at Will

The right to discharge at will, without cause, is " '[s]trong evidence in support of an employment relationship....' " (*Borello, supra,* 48 Cal.3d at p. 350.) The evidence concerning whether defendants had the right to terminate Buel at will was contradictory. Buel testified that she was fired by Dunitz, which, she argues, is clear evidence that defendants possessed, and indeed exercised, the right to terminate her at will.

***7** On the other hand, defendants presented three witnesses (Perry, Dunitz, and Johnson) who testified that Dunitz did not tell Buel she was fired; rather, he told her to leave for the evening. Dunitz himself testified that he did not intend to fire Buel; he intended to consult with his supervisors to figure out what they should do when she came back. From this, the jury could have inferred that defendants assumed Buel could return.

Again, as with the control element, the jury could have found that the termination factor supported either party's position.

3. Distinct Occupation or Business

On the question of whether Buel was engaged in an occupation or business distinct from that of the Hungry I, Buel argues that her job was an integral part of defendants' dance club enterprise. Buel was an exotic dancer, and exotic dancing was the main attraction at defendants' dance club. Further, Buel testified that while she owned bikinis and CDs, she did not own "a dance club with the stage and the lighting and things like that" and was thus reliant on defendants to provide a facility at which she could render her services. Defendants were equally reliant on the dancers, because, as she stated, "[I]t would be hard to have a topless nightclub offering exotic dancing entertainment without the exotic dancers." According to Buel, Carouba supported the conclusion that Buel's dancing was an integral part of the Hungry I's business when he testified, "the dancers and the club owners are like business partners, and we, you know, we both have the same goal, and the goal is to get customers to come in and spend the money on the dancers."

Defendants, on the other hand, emphasize that while Buel was a dancer, they operated a nightclub where food and alcohol were served, where patrons danced and socialized, and where customers purchased private dances if they so chose. The evidence showed that their primary business was the sale of alcohol, which generated 90% of their business income. Further, they argue, Buel's own testimony demonstrated that her occupation was separate and distinct in nature because she was free to dance at other clubs that were in competition with the Hungry I, and she was free to market her dance skills however and to whomever she saw fit. They, too, emphasize that the dancers and owners are like partners, joining their distinct occupations for mutual benefits. Again, the jury could have concluded this factor favors defendants.

4. Practices in the Locality

This factor recognizes that the practices of other businesses in the locality relative to the employee/independent contractor issue are material to the determination of whether an individual is an employee or an independent contractor. (*Borello, supra,* 48 Cal.3d at p. 351.) In 2001, when Buel went to work at the Hungry I, there was only one club in San Francisco that was paying wages to the dancers. Thus, rightly or wrongly, the vast majority of the local exotic dance clubs treated the dancers as independent contractors.

5. Skill Required

***8** The evidence presented at trial largely suggested that little to no skill is required to work as an exotic dancer. Buel testified that there is no skill required to perform as an exotic dancer and that she had no formal dance training. Perry's testimony was in accord. Perry also testified, however, that the dancers needed "good presence, hygiene and rhythm" and had to pass an "audition" in order to be able to dance. She described an audition as something where "the girl prove[s] that she can actually stand up and have a stage presence, enough to handle this business." From this, the jury could have concluded that the dancers needed to possess certain specialized skills.

6. Investment in Instrumentalities, Tools, and Place of Work

Buel testified she owned bikinis and CDs that she used for her dancing. The remainder of the evidence on this factor, however, suggests that defendants supplied all other instrumentalities and tools as well as the place of work. As Buel testified, she did not own "a dance club with the stage and the lighting and things like that." Instead, those items were provided by the Hungry I. As Carouba explained, "[W]e spend our capital on creating an environment for these independent contractors to come in and make money. We provide security, we provide lighting, we provide all the things that-you know, together, the dancers and the club owners are like

business partners, and we, you know, we both have the same goal, and the goal is to get customers to come in and to spend the money on the dancers.... [I]t's our capital and our expertise that creates this environment that draws the customer in." Defendants presented no evidence to the contrary, and this factor would seem to favor Buel.

7. Permanency of Relationship

On the issue of the length of the relationship between Buel and the Hungry I, the evidence showed that exotic dancers did not stay at the Hungry I for a long time because, in the words of the Hungry I's manager, it was a "dump" that was unable to attract many customers. Most dancers worked for a "couple of days," and more than six months was "a rarity." However, dancers could work there for an indefinite period of time if they chose. Buel testified that if she had not been fired, she would still be working at the Hungry I. While Buel did dance at the Mitchell Brothers for eight-and-a-half years, her tenure in the exotic dance business is otherwise quite transient. For example, she worked at Market Street Cinema for three months in 1995 returning for the spring and summer of 1996; Chez Paree from summer to early fall of 1995; Showboat for one week in the summer of 1995; Crazy Horse from October of 1995 to March of 1996; New Century in the fall of 1995 and again from April 1996 to March 1997; Bolero for a couple of weeks in March of 1996; Centerfolds for two weeks in March 1997; Temptations during April and May 1997; Club Ante from December 1999 to August 2000; Hanky Panky for four days in August 2000; Hip Hugger from August 2001 to April 2002; and Embers for five weeks in 2003. Again, the jury could have concluded that this factor weighed in favor of either party.

8. Method of Payment

***9** The evidence on this factor was essentially undisputed. Defendants did not pay Buel for her dancing. Rather, she collected money for dances directly from the customers and kept all of the proceeds, less what was referred to as a "stage fee" that she paid to the Hungry I and any amounts shared with the disc jockey. This factor tends to favor defendants' position.

9. Regular Business of the Club

This factor looks at whether the services rendered are part of the regular business of the principal. As noted above with regard to whether Buel was engaged in an activity that was distinct from that of the club, Buel argues that she was an exotic dancer and defendants were in the business of running an exotic dance club. On the other hand, defendants contend they were a nightclub that sold food and beverages, evidenced by the fact that 90% of their income came from alcohol sales.

10. Intent of the Parties

When Buel began dancing at the Hungry I, Johnson presented her with a form entitled, "Offer of Employment Status." The form gave the dancers a choice between performing as an independent contractor pursuant to a Dancer Performance Lease or dancing as an employee pursuant to the terms set forth in the "Offer of Employment Status." Pursuant to the offer, a dancer who chose employment would be paid $8.00 per hour, would receive a bi-weekly paycheck less tax withholdings, and would be required to report tips at the end of each shift. In addition to the hourly rate, the dancer would receive commissions equaling 50% of the dance fee after the first 10 dances and 25% of each specialty dance fee. The dancer would also be entitled to retain gratuities, which were the amounts given to the dancer while she was on stage or the amounts given to the dancer by the patron over the posted dance fee. The dancer would be assigned a work schedule by the club and would be required to clock in and out. The dancer would be required to perform dance services for any customer who so requested and

would be subject to a ten dance-per-shift and seven drink-per-shift quota.

Buel admitted at trial that she did not sign the "Offer of Employment Status" to signify her intent to be classified as an employee. She also testified, however, that she did not sign the form where it indicated that she wanted to be treated as an independent contractor. She could not recall whether, when given the form by Johnson, she verbally indicated to him that she wanted to be treated as an independent contractor.

Defendants argue the evidence showed Buel "clearly understood the difference between employee and independent contractor, and the specific choice" presented by the "Offer of Employment Status." When Buel started working at the Hungry I, Johnson explained to her that she had the choice of working as either an employee or an independent contractor. She had worked as a contractor in the exotic dance industry for over 20 years but never once as an employee dancer. She knew the difference between a W-2, a form reflecting tax withholdings for employees, and a W-9, a tax document used by independent contractors. While Buel may have testified that she did not recall telling Johnson she wanted to be treated as an independent contractor, Buel completed a W-9 form when she began dancing at the Hungry I. This, defendants submit, reflects her intent to be treated as an independent contractor.

***10** Defendants also argue that the evidence portrayed Buel as a sophisticated worker and litigant who understood the difference between being an employee and an independent contractor. Before dancing at the Hungry I, Buel had filed lawsuits or claims with the labor commissioner against at least six clubs at which she had previously danced, each time arguing that the club had improperly treated her as an independent contractor and seeking recovery of unpaid wages. As further evidence that Buel was aware of the distinction between employees and independent contractors, defendants point to Buel's testimony that she knew only one club in San Francisco that paid the dancers wages as employees, and yet she chose not to apply for work there. This evidence, defendants submit, demonstrates that Buel well understood the distinction between employee and independent contractor status and that she intentionally chose to be treated as an independent contractor.

Although the parties' intent and understanding need not be determinative (*Borello, supra,* 48 Cal.3d at p. 349), it is relevant, and the jury could reasonably have concluded that the parties entered into this relationship on the basis of independent contractor status.

11. Opportunity for Profit or Loss

This factor concerns the worker's opportunity for profit or loss depending on her managerial skill. (*Borello, supra,* 48 Cal.3d at p. 355.) Buel testified that she was very dependent on the club to earn money because, while she owned bikinis and CDs, she did not own a stage on which to dance. Because she made her money by performing dances for customers, the amount of money she made each evening depended on the number of customers that came into the club. Buel further testified that she did not have any control over the number of customers that came into the club each night. Johnson testified that when he began managing the Hungry I, it was a "dump." Further, it had one of the most expensive entry fees. As a result, the club had a hard time attracting patrons, making it difficult for the dancers to make money. Buel submits this testimony shows "that the dancers, who had no control over whether the Hungry I was a 'dump' or whether it charged expensive entry fees, were highly dependent on the club to earn money. Plainly, if the club failed to attract customers through, for example, appropriate advertising, facility maintenance and competitive entry fees, the dancers could not sell as many dances, and could therefore not earn as much money." When asked whether a dancer would make more money if she was an effective sales person, she answered, "No. It depended more on the

amount of customers that were in the club."

In further support of her position that the dancers were not engaged in an entrepreneurial enterprise wherein managerial skills could maximize the chance of profit, Buel cites testimony describing the manner in which she attempted to sell a dance. In approaching a customer, she would simply ask him if he wanted a dance, and if he said no, she would tell him to enjoy the show and walk away. This, Buel contends, demonstrates that there was no managerial talent involved in procuring dance sales.

***11** On the other hand, defendants point to Buel's own testimony to argue that she did in fact use her managerial skills to affect her profit. At trial, Buel explained that "all the money [she] made there was tips that [she] received from the customers." She was permitted to request whatever dance fee she wanted, and she negotiated the price directly with the customer. She would negotiate upfront and would try to negotiate as high a price as possible. As Buel explained, she "would use ... whatever talent [she had] in sales to get as much as [she] could for the dance." In other words, "However much [she] could persuade the customer to pay...."

In sum, the jury could have concluded that Buel's opportunity for profit was directly dependent on her own salesmanship.

D. Substantial Evidence

The evidence we have discussed shows that, as to virtually every factor relevant to the independent contractor/employee issue, each side presented evidence and arguments suggesting that the factor weighed in its favor. Indeed, on the right to control element, the most significant consideration, Buel presented evidence suggesting that defendants exercised a high degree of control over her services, while defendants presented evidence suggesting that they did not. The same is true of other factors, including whether defendants had the right to terminate Buel at will, and did in fact do so. Each party could also claim the benefit of at least one of the few factors that pointed more clearly to a particular side.

Having submitted the issue for the jury to decide without objection in the trial court or challenge in this court, Buel cannot now complain about how the jury chose to resolve the conflicting evidence and inferences as to the various factors. Likewise, having failed to request that the trial court submit sub-questions to the jury concerning the different factors, Buel cannot now argue about whatever conclusion the jury may have reached as to any particular factor or dispute the weight the jury may have attributed to the different factors. We can only review the jury's general conclusion that Buel was an independent contractor.

Ultimately, while we cannot say that defendants presented overwhelming evidence of Buel's independent contractor status, we can say the record contained substantial evidence from which the jury could decide that Buel was an independent contractor. We thus conclude that the jury's verdict was supported by substantial evidence.

IV. Disposition

The judgment is affirmed. Buel shall pay defendants' costs on appeal.

We concur: HAERLE, Acting P.J., and LAMBDEN , J.
Cal.App. 1 Dist.,2006.
Buel v. Chowder House, Inc.
Not Reported in Cal.Rptr.3d, 2006 WL 1545860 (Cal.App. 1 Dist.)

END OF DOCUMENT

EXHIBIT 3

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
DECISION OF THE ADMINISTRATIVE LAW JUDGE - SAN DIEGO OFFICE OF APPEALS
(619) 521-3300

DATE MAILED: SEP 1 5 1998

CASE NO.: C-T-01863-0001

DATE PETITION FILED:
MAY 27, 1997

PETITIONER: SHOWGIRLS OF SN DIEGO INC
A DALE MANICOM ATTY
432 F STREET STE 202
SAN DIEGO CA 92101-6138

DATE AND PLACE OF HEARING:
1. AUGUST 20, 1998
SAN DIEGO, CALIFORNIA
2. AUGUST 21, 1998
SAN DIEGO, CALIFORNIA

ACCOUNT NO.: 396-6442

EMPLOYMENT DEVELOPMENT DEPARTMENT
RESPONDENT

PARTIES PRESENT:
PETITIONER
DEPARTMENT

STATEMENT OF FACTS

The petitioner filed a petition for reassessment under the provisions of section 1222 of the Unemployment Insurance Code from an assessment levied by the Employment Development Department on April 28, 1997, under the provisions of section 1127 of the Unemployment Insurance Code. The assessment period was from October 1, 1993, through December 31,1996. The assessment was for the sum of $456,823.68: $247,416.12 represented California personal income tax; and, $209,407.56 represented contributions. The tax and contributions were alleged by the Employment Development Department to be due on unreported remuneration paid to dancers, and casual laborers, who performed personal services for the petitioner as employees, rather than as independent contractors.

The petitioner operated an adult entertainment facility under the fictitious business name 'Déjà Vu'. The petitioner provided entertainment to its patrons in the form of female erotic dancers who performed nude, or semi-nude. The petitioner's income came from admission fees charged to patrons when they entered the facility, non-

alcoholic beverages sold to patrons, and fees paid to the petitioner from dancers for the use of the petitioner's facility.

During the assessment period the petitioner employed certain individuals as security, bartenders, waitresses, floor checkers, disc jockeys and managers. Those individuals were reported to the Employment Development Department on the petitioner's reports and returns as employees. The assessment in issue in this case resulted from an audit of the petitioner's reports and returns.

Throughout the period of the assessment the petitioner had an open solicitation for prospective dancers. The petitioner held an amateur night on Monday evenings during which any woman wishing to audition could do so by dancing in the petitioner's facility. The petitioner advertised the amateur night in newspapers of local circulation. The criterion for successfully passing the audition was the ability of a dancer to publicly disrobe with rhythm.

If a dancer successfully passed the audition, she was require to obtain a permit from the City of San Diego allowing her to dance nude in a facility such as the petitioner's. The petitioner then offered the dancer a written contract identified as a DANCER PERFORMANCE LEASE. The petitioner required a dancer to sign a LEASE as a condition of dancing in the petitioner's facility. Pursuant to the LEASE, the dancer had the right to perform dances in the petitioner's facility and the petitioner had the obligation to make the facility available to the dancer for her performances. The LEASE was a preprinted document in which certain spaces were left blank to accommodate the identity of the parties, amounts of money to be paid, and certain time periods. There were provisions in the LEASE for liquidated damages payable to the petitioner from a dancer if the dancer did not perform on a scheduled performance date. There were no provisions in the LEASE for liquidated damages payable to a dancer if the petitioner did not provide the dancer with a place to perform as scheduled. The LEASE provided that either party upon thirty days notice to the other could terminate it.

After a dancer signed a LEASE, the dancer provided the petitioner with the dates and times that she wished to perform. The petitioner then scheduled the dancer to perform according to her wishes.

If a dancer did not wish to report to the petitioner's facility to dance on a date previously scheduled, she did not report. The petitioner did not enforce any provision in the LEASE which provided for liquidated damages to the petitioner for the dancer's failure to report to the petitioner's facility and perform on a scheduled day.

The petitioner provided two areas in the facility for the dancers to perform in: a center stage; and, the patron seating area. Any dancer could dance in one or both of the areas. The petitioner did not

require any dancer to dance in either area. If a dancer did not wish to dance, she was not required to dance.

On any day that a dancer wanted to perform, she went to the petitioner's facility. If she wanted to dance on the center stage, she notified the disc jockey, who controlled the stage, that she was available to dance. The disc jockey then added the dancer to a rotation with other dancers performing on the same day. The dancer could dance as long as she wanted during the hours the facility was open for business, without regard to any scheduling. The dancer was free to leave the facility any time she wanted. The petitioner did require that when a dancer left the facility on a given day, she was not permitted to return that same day to dance.

The petitioner did require the dancers performing on the center stage to begin their dances clothed, and during the course of the dances disrobed so at the conclusion of the dances the dancers were nude. The petitioner required the dancers performing in the patron seating area to remain clothed. The petitioner's requirements were based upon vice law prohibitions in effect in the State of California and the City of San Diego.

When a dancer performed on the center stage she was obligated to pay the petitioner a set fee for the use of the stage. The dancer was allowed to use the center stage in rotation with other dancers. She was not restricted on the number of times, nor length of time, she could use the stage within a rotation. The dancer received her income from moneys given her by patrons who observed the dance. If a dancer did not receive what she considered to be sufficient income from her center stage dances, on any given day, the petitioner would forgive the dancer's obligation to pay the fee for the use of the center stage. The petitioner did not charge the patrons any money to observe the dancers, other than the original admission fee.

When a dancer danced in the patron seating area, she was required to pay a set fee to the petitioner for each dance. The petitioner published a menu of fees charged to patrons by dancers for the various types of dances performed in the patron seating area. The dancer could charge a patron more or less than the amounts on the published fee menu. Without regard to the amount actually charged by the dancer, the dancer was obligated to pay the petitioner the full fee set by the petitioner.

All payments of monies occurred from the dancers to the petitioner. The petitioner never paid monies directly to the dancers.

The petitioner placed no restrictions on the freedom of dancers to perform in other facilities, which were in competition with the petitioner facility. The dancers created their own choreography,

procured their own costumes, props and training. The petitioner permitted dancers the use of the facility for rehearsals, without charge.

The petitioner maintained financial records of the money it received from the dancers. When the Employment Development Department conducted the audit, the auditor requested financial records of dancers' earnings. The petitioner refused to provide any records. The auditor's assessment with respect to the dancers was estimated based upon information in the auditor's possession from similar audits.

The petitioner offered no evidence at the hearing addressing those individuals identified in the assessment as casual laborers.

REASONS FOR DECISION

If the Department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. If any part of the deficiency is due to negligence or intentional disregard of the law, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment. (Unemployment Insurance Code, section 1127.)

A petition for review or reassessment must be filed within 30 days of service of a notice of assessment or denial of claim for refund. An additional 30-day period may be granted by the administrative law judge upon a showing of good cause. If a petition is not filed within the 30-day period, or within the additional period of time granted by the ALJ, the assessment or denial of claim for refund is final at the expiration of the period. (Unemployment Insurance Code, section 1222.)

The petitioner has the burden of proof in a tax matter. (California Code of Regulations, title 22, section 5036; Isenberg v. California Employment Stabilization Commission (1947) 30 Cal.2d 34; Aladdin Oil Company v. Perluss (1964) 230 Cal.App.2d 603; Smith v. California Unemployment Insurance Appeals Board (1976) 62 Cal.App.3d 206.)

The courts have long held that the burden of proof generally is on the party attacking the employment relationship. (Isenberg v. California Employment Stabilization Commission (1947) 30 Cal.2d 34.) In proceedings before the Appeals Board and its administrative law judges the burden of proof is specifically placed by Board regulation upon the party seeking reassessment or refund. (California Code of Regulations, title 22, section 5036.)

In this case the petitioner questioned the authority of the Employment Development Department to levy the assessment in issue. From the

evidence in the record it is found that the Employment Development Department was not satisfied with the reports and returns made by the petitioner of employer contributions with respect to the dancers. The petitioner was asked to provide information concerning the dancers earning. The petitioner had information in its possession of the moneys received from the dancers. From that information the dancers earnings could have been estimated. The petitioner refused to provide the information. The auditor then estimated the earnings, taxes and contribution on the basis of the best information available. It is therefore concluded that the assessment was levied in accordance with the authority granted the Employment Development Department by the legislature under section 1127 of the California Unemployment Insurance Code.

Employer contributions to the California Unemployment Fund shall accrue and become payable by employers "with respect to wages paid for employment." (Unemployment Insurance Code, section 976.)

Contributions are due the Department from employers with respect to wages paid in employment for unemployment insurance (section 976 of the Unemployment Insurance Code), disability insurance (section 984 of the code), employment training (section 976.6 of the code), and personal income taxes (section 13020 of the code).

"Employment" means service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied. (Unemployment Insurance Code, section 601.)

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insuranoe Code, section 621(b).)

California unemployment insurance taxes accrue only on amounts paid as remuneration for services rendered by employees. The relationships of employer and employee and of principal and independent contractor have long been recognized to be mutually exclusive. They cannot exist simultaneously with respect to the same transaction. The proof of the one status automatically precludes the existence of the other. Accordingly, the services of an independent contractor are not "employment" within the meaning of Unemployment Insurance Code, section 601, and the remuneration paid for such services is not taxable. (Precedent Decision P-T-2.)

The relationship contemplated as the basis for the legislation imposing unemployment insurance taxes is that of employer and employee; a principal for whom services are rendered by an independent contractor does not come within the scope of its provisions. (Empire Star Mines v. California Emplovment Commission (1946) 28 Cal.2d 33.)

In Empire Star Mines Co., Ltd. v. California Employment Commission (1946) 28 Cal.2d 33, the Supreme Court of California stated:

> ". . . In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations]"

The following factors are considered in determining whether or not an employment relationship exists (Tieberg v. California Unemployment Insurance Appeals Board (1970) 2 Cal.3d 943,950):

(1) Which party has the right to control the manner and means of accomplishing the result desired.

(2) Whether there is a right to discharge at will, without cause.

(3) Whether or not the one performing services is engaged in a distinct occupation or business.

(4) Whether the work is usually done under the direction of an employer, or by a specialist without supervision.

(5) The skill required.

(6) Who supplies the instrumentality's, tools, and place of work of the one performing services.

(7) The length of time for which the services are to be performed.

(8) The method of payment, whether by time or by the job.

(9) Whether or not the work is part of a regular business of the beneficiary of the services.

(10) Whether or not the parties believe they are creating a relationship of master and servant.

In determining whether service was rendered in employment, the primary test is the right of the alleged employer to control the manner and means of accomplishing the desired results. (Empire Star Mines Company, Ltd. v. California Employment Commission (1946) 28 Cal.2d 33.)

In determining whether an individual is an employee, as distinguished from an independent contractor, it is the existence of the right of control, not its use or lack of use, that is critical. (Robinson v. George (1949) 16 Cal.2d 238.)

A strong factor tending to show the relationship of employer and employee is the employer's right to terminate the work at will. (Rissin v. Industrial Accident Commission (1943) 23 Cal.2d 248.)

A right to discharge at will without cause is convincing evidence of an employment relationship in those situations where a workman would feel a sufficient threat from the possibility of discharge and its consequences to yield to the pressure of the principal in regard to performing the details of the work. (Tomlin v. California Employment Commission (1947) 30 Cal.2d 188.)

A contractual provision that a workman is an independent contractor is persuasive evidence of the intended relationship, but it is not controlling and the legal relationship may be governed by the subsequent conduct of the parties. (Brown v. Industrial Accident Commission (1917) 174 Cal. 457.)

The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. (Hillen v. Industrial Accident Commission (1926) 199 Cal. 577.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

Of the analysis of factors to be considered in determining whether an individual is an employee or an independent contractor, the American Law Institute's Restatement of Agency states that "it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation." (Rest.2d Agency, section 220, pp.486-487.)

In this case there were certain conflicts in the evidence in the record, which required resolution in order to arrive at the Statement of Facts above and Reasons for Decision. After careful consideration of all of the evidence in the record, any evidence in the record which is not consistent with the Statement of Facts, or Reasons for Decision, has been found to appear unreliable, contradictory, or inherently improbable, and therefore not credible.

The petitioner contends that the relationships between the dancers and the petitioner were those of landlord/tenants because of the effect of the DANCER PERFORMANCE LEASE. From the evidence in the record it is found that the employer did not permit a dancer to dance in the petitioner's facility unless she first signed a LEASE. It is further found that after a LEASE was signed, neither the petitioner nor the dancers adhered to its provisions. The only purpose of the LEASE was to create a façade, behind which there was no substance. It is therefore concluded that the LEASE did not create landlord/tenant relationships between the dancers and the petitioner with respect to the dancers' use of the petitioner's facility.

From the evidence in the record it is found that there are certain favorable factors to establish the relationship of employer and employee between the petitioner and the dancers. Those factors are: by insuring compliance with vice laws, the petitioner controlled the manner and means in which the dancers accomplished the desired result of the dancers' performances, which was to entertain the petitioner's patrons; the petitioner provided the dancers with the facility and equipment, which was under the control of the petitioner's employee, the disc jockey; and, the services rendered by the dancers were a part of the petitioner's regular business.

From the evidence in the record it is found that there are certain favorable factors which do not establish the relationship of employer and employee between the petitioner and the dancers. Those factors are: the petitioner did not pay any money to the dancers for their services; the parties believed that they were not establishing an employer and employee relationship; the dancers were free from any control of the petitioner to dance at any establishment in competition with the petitioner; the dancers could dance at the petitioner's facility any time they wished, but were under no obligation to dance any time they did not wish to dance; although the petitioner controlled the manner and means of the dancers accomplishing the desire result, by insuring compliance with certain vice laws, the dancers did not provide their services under the petitioner's direction; each dancer provide her own costumes, props, choreography and training; and, the skill required by the dancers to accomplish the desired result was the dexterity, aptitude, and knowledge necessary to effectively and readily disrobe in public, with rhythm, a skill which is unusual, uncommon and unique.

After careful consideration of all of the evidence in the record, and after weighing all favorable factors, it is concluded that there is not a sufficient group of favorable factors to establish the relationship of employer and employee between the petitioner and the persons in the assessment identified as dancers. The petition for reassessment, as to those persons identified as dancers in the assessment, must therefore be granted.

From the evidence in the record it must be found that the petitioner introduced no evidence as to those persons identified in the assessment as casual labors. It must therefore be concluded that the petitioner has failed to meet the burden of proof placed upon it pursuant to the authorities cited above. The petition for reassessment, as to those persons identified in the assessment as causal labors, must therefore denied.

DECISION

The petition for reassessment is granted as to those persons identified in the assessment as dancers. The petition for reassessment is denied as to those persons identified in the assessment as casual labors.

Michael L. Jimmink

MICHAEL L. JIMMINK
ADMINISTRATIVE LAW JUDGE

THIS DECISION IS FINAL UNLESS APPEALED WITHIN 30 CALENDAR DAYS. FOR APPEAL OR REOPENING RIGHTS, SEE ATTACHED NOTICE.
Smn/gb

CASE NO.: C-T-01863-0001

AREA AUDIT OFFICE #755
P O BOX 155
FRESNO CA 93707-1208

EXHIBIT 4

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

NITE LIFE EAST LLC
c/o A DALE MANICOM, ATTORNEY AT LAW
Account No.: 436-9360-5
Petitioner

Case No.: **AO-121742** (T)

OA Decision No.: 1339806

EMPLOYMENT DEVELOPMENT DEPARTMENT
Appellant

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

JACK D. COX

DON L. NOVEY

(See "Further Appeal Information" sheet attached to Board decision.)

Case No.: AO-121742
Petitioner: NITE LIFE EAST LLC

The Employment Development Department (EDD) appealed from the decision of the administrative law judge which granted the petitioner's petition for reassessment.

We have carefully and independently reviewed the record in this case, and have considered the contentions raised on appeal. We find that the issue statement correctly sets forth the issues in the case and we find no material errors in the statement of facts. The reasons for decision properly apply the law to the facts. Therefore, we adopt the issue statement, the statement of facts and the reasons for decision as our own.

The EDD contends the administrative law judge findings are not supported by the facts presented in this case. We disagree.

The EDD auditor that represented the department at the hearing never visited the petitioner's place of business, only talked to two or three dancers for five to six minutes on the telephone and drew most of the evidence presented on behalf of the EDD from the petitioner's documents and the above mentioned brief conversations.

On the other hand the petitioner's witness at the hearing visited the petitioner's place of business on a frequent basis as a consultant to the petitioner. He was very familiar with the internal working relationship between the dancers and the petitioner and gave advice to the petitioner regarding the status of the dancers as independent contractors. The petitioner's witness was familiar with other, similar dance clubs. He was engaged by several of these dance clubs as a consultant as well.

From our review of the record the petitioner did not have the right to control and did not control the manner and means of the work except to demand they perform their work within the provisions of the law. This of course is the inherent right of any business enterprise with regard to contracted services.

Additionally, the petitioner maintained control of the end product in that it regulated the work flow so as to have a product being supplied to its customers on a regular basis.

The dancers maintained control over their performances primarily because there was sufficient work at other clubs. The petitioner had to compete for their services and needed the dancers as bad as the dancers needed the work. Further the petitioner was making every effort to be sure the dancers were treated as independent contractors. He relied on professional advice from the witness consultant. The witness consultant based his advice upon principles taken from decisions of administrative law judges regarding other clubs with dancers.

The dancers could not be terminated without three days notice; set their own hours of work; earned a percentage of each performance rather then being paid by the hour; provided their own music and costumes and; had business licenses from the local municipality.

We conclude from the weight of the evidence that the employer met its burden of overcoming the presumption of a master servant relationship with its dancers. Therefore the petitioner has shown the dancers working during the assessment period were independent contractors and accordingly the petition for reassessment is granted.

The decision of the administrative law judge is affirmed. The petition for reassessment is granted.

FURTHER INFORMATION

The Employment Development Department may seek judicial review. Unless it does so, this decision is final.

Tax I

EXHIBIT 5

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

U. S. DEPARTMENT OF LABOR

Employment Standards Administration
Wage and Hour Division
1961 Stout Street, Room 615
P O Drawer 3505
Denver, CO 80294
Tele: (303) 844-4405
Fax: (303) 844-5532

January 13, 1997

Mr. Jack R. Burns, Attorney at Law
Burns and Hammerly
500 108 Avenue, NE, Suite 770
Bellevue, WA 98004

Dear Mr. Burns:

RE: Wage-Hour Investigation, Case No. 95-531-00941

This is to advise you that our investigation of Deja Vu Colorado Springs, Inc., dba Deja Vu Show Girls, has been canceled. We do not anticipate that this investigation will be re-opened.

Should you have any questions, please feel free to call me at 303-844-4407 or Investigator Thom Swanson at 719-475-1202.

Sincerely yours,

Thom Swanson Acting Asst. Dist. Director
for Bezarah Gaither
District Director

drl

EXHIBIT 6

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

1 F.Supp.2d 964, 82 A.F.T.R.2d 98-5095, 98-2 USTC P 50,626
(Cite as: 1 F.Supp.2d 964)

United States District Court,
D. Minnesota,
Third Division.

DEJA VU ENTERTAINMENT ENTERPRISES OF MINNESOTA, INC., Plaintiff,
v.
UNITED STATES of America, Defendant.
No. 3-96-1078.

Feb. 13, 1998.

Internal Revenue Service (IRS) assessed employment taxes on adult entertainment club. Club moved for summary judgment and requested attorney fees. The District Court, Magnuson, J., held that: (1) club was entitled to protection of safe harbor provision for employers who misclassify their employees as independent contractors in good faith, but (2) IRS' position was not unjustified, so as to warrant attorney fee award.

Motion for summary judgment granted.

West Headnotes

[1] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors, Who Are. Most Cited Cases
Reasonable basis requirement of safe harbor provision for employers who misclassify their employees as independent contractors in good faith is to be construed liberally in favor of taxpayers. 26 U.S.C.A. § 3401 note.

[2] Internal Revenue 220 4472

220 Internal Revenue
220XIX Returns and Reports
220k4472 k. Necessity of Return and Effect of Failure to Make. Most Cited Cases
Where performers at adult entertainment club were paid directly by the customers, and then paid a per-dance stage rental fee to the club, the club did not make "payments" to the performers, so as to require the club to file Forms 1099. 26 U.S.C.A. § 6041(a).

[3] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors, Who Are. Most Cited Cases
Adult entertainment club had "reasonable basis" for treating its performers as independent contractors, rather than employees, within meaning of safe harbor provision for employers who misclassify their employees in good faith, based on widespread industry practices, technical advice provided by attorney and accountant, and past audit of club's parent corporation which found no violations resulting from corporation's treatment of its performers as independent contractors. 26 U.S.C.A. § 3401 note.

[4] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors, Who Are. Most Cited Cases
Since adult entertainment club's classification of its performers as independent contractors, rather then employees, was reasonable, it was not done in bad faith, so as to preclude eligibility for protection under safe harbor provision for employers who misclassify their employees in good faith. 26 U.S.C.A. § 3401 note.

[5] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors, Who Are. Most Cited Cases
Adult entertainment club's classification, for tax purposes, of its performers as independent contractors, rather than employees, was reasonable, where performers were paid directly by customers and then paid club a per-dance stage rental fee, performers were allowed to choose their own performance dates for each weekly schedule, and performers could work for other adult entertainment clubs if they wanted to. 26 U.S.C.A. § 3121(d).

[6] Internal Revenue 220 5343

220 Internal Revenue
220XXXIV Costs and Fees
220k5340 Awards to Taxpayers
220k5343 k. Particular Proceedings. Most Cited Cases
Although Internal Revenue Service's (IRS') position that performers at adult entertainment club were independent contractors, rather than employees, was incorrect, it was not unjustified, so as to warrant award of attorney fees to taxpayer. 26 U.S.C.A. § 7430.

***965** Paul D. Peterson,Peterson Law Office, Woodbury, MN, Robert E. Miller, for Plaintiff.

MEMORANDUM AND ORDER

MAGNUSON, District Judge.

This matter is before the Court upon Plaintiff, Deja Vu Entertainment Enterprises of Minnesota, Inc.'s ("Deja Vu") Motion for Summary Judgment. For the following reasons, the Court grants Plaintiff's motion.

BACKGROUND

Plaintiff Deja Vu operates an adult entertainment club in downtown Minneapolis, Minnesota. In 1994, the Internal Revenue Service ("IRS") contended that Deja Vu owed employment taxes for the years 1990 to 1992. The IRS asserted that the entertainers who performed at Deja Vu were "employees," and that Deja Vu had never paid any employment taxes for those employees. Deja Vu paid the assessment, and then initiated the present lawsuit, asserting that its entertainers were not employees, but were instead independent contractors.

Deja Vu was organized as a Minnesota corporation in 1990. In July of that year, the Deja Vu nightclub commenced operations. Peter Hafiz, the president of Deja Vu, has been in the adult entertainment business for about twenty years. He is responsible for the performers at the nightclub. Based on his past experience in the adult entertainment industry, Hafiz requires the performers to enter into contracts whereby they agree to pay a stage rental fee for each two-dance set to which they perform and for each individual dance they perform. The contracts specifically disavow any employer-employee relationship and require entertainers to be responsible for their own income. Additionally, the contracts provide that Deja Vu can impose any rules and regulations as necessary.

Scheduling for the club is done on a weekly basis by asking entertainers which dates they are available to perform. Entertainers are required to notify the club if they cannot perform on a scheduled date or they will be charged the contract stage rental fee. Each performer takes a turn appearing individually on stage for a two-song set. When the performers are not on stage, they are expected to circulate among customers and solicit individual dances. The club manager keeps track of the number of individual dances which the entertainers perform and calculates the rental fee due for each entertainer.

The performers' income consists entirely of money paid to them by customers. Deja Vu points out that

the club never touches any of ***966** the money paid by customers. However, the prices for the individual dances are set by Deja Vu, and the performers are expected to collect this amount from the customer. At the end of each performance date, the performers must pay their contract rent to Deja Vu. Deja Vu reports these payments as rental income on its federal income tax return. Additionally, Deja Vu may impose various fees or fines on the performers for violations of rules.

Before the Deja Vu nightclub began operations in July 1990, Hafiz had Lee Klein, an attorney, review the club's arrangements with its performers. After researching the federal tax law and reviewing the club's operations, Klein drafted the Dancer Performance Lease. Klein admitted that he had never seen a similar document used in the adult entertainment industry. However, Klein concluded that the performer's were properly characterized as independent contractors and that Deja Vu was not required to file any Forms 1099 unless the club made payments directly to the performers. This advice was confirmed by David Shindel, Deja Vu's outside accountant. According to Deja Vu, both Klein and Shindel had knowledge that the adult entertainment industry typically considered its performers to be non-employees.

In 1991, the IRS conducted an audit of Deja Vu, Inc., the 75% shareholder of Plaintiff Deja Vu. Deja Vu, Inc. operates a similar club in Ohio. The Ohio club also considers its performers to be independent contractors. Following the completion of the audit, the IRS notified Deja Vu, Inc. of some deficiencies, but did not make any adjustments concerning the club's treatment of performers as non-employees. Deja Vu notes that the IRS Revenue Agent admitted that this is a common practice in the adult entertainment industry. Deja Vu has consistently filed its federal tax returns each year, and has never treated its entertainers as employees. However, in 1994, the IRS asserted that Deja Vu's entertainers were employees and that Deja Vu was subject to employment taxes.

DISCUSSION

Deja Vu contends that the IRS erred in assessing employment taxes on the club. In support of its motion for summary judgment, Deja Vu makes two arguments. First, Deja Vu asserts that regardless of whether this Court finds that the entertainers are employees, Deja Vu is entitled to statutory protection under Section 530 of the Internal Revenue Code. Alternatively, Deja Vu contends that it has never made any payments to its entertainers; therefore, it is not responsible for withholding federal employment taxes. In addition, Deja Vu requests attorney's fees in light of the fact that it believes the IRS's position to be unjustified. The Court now turns to address these arguments.

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir.1992). The court determines materiality from the substantive law governing the claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. *See id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *See id.* at 248-49.

B. Section 530

[1] Section 530 of the Revenue Act of 1978 provides in pertinent part:

> (a) Termination of certain employment tax liability.-
>
> (1) In general.-If-

> (A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and
>
> (B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's***967** treatment of such individual as not being an employee, then for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

26 U.S.C. § 3401 note. Congress enacted this section to alleviate the "overly zealous pursuit and assessment of taxes and penalties against employers who had, in good faith, misclassified its employees as independent contractors." *Boles Trucking, Inc. v. United States,* 77 F.3d 236, 239 (8th Cir.1996) (citing *In Re Rasbury,* 130 B.R. 990 (Bankr.N.D.Ala.1991)). Deja Vu's entitlement to the protection afforded by this section turns on whether Deja Vu had a reasonable basis for treating its performers as independent contractors. This reasonable basis requirement is to be construed liberally in favor of taxpayers. *See id.* at 240 (citing H.R.Rep. No. 95-1748, at 5 (1978)).

Before Deja Vu may avail itself of the protections of section 530, it must first meet several threshold requirements. First, Deja Vu must have previously treated its performers as independent contractors. Second, Deja Vu must have filed all required federal tax returns. Third, Deja Vu must have had a reasonable basis for treating its performers as non-employees. The first requirement is easily met, because Deja Vu has never treated its performers as employees. This fact has been admitted by the IRS. (*See* Pl.'s Ex. 5 at 52-53.) However, the government asserts that the second and third requirements have not been satisfied.

1. Filing of Tax Returns

Deja Vu asserts that it has filed all federal tax returns which were required by law. In contrast, the government contends that Deja Vu failed to file required Forms 1099 for payments made to performers. Although it is not contested that Deja Vu did not routinely physically made a "payment" to its performers, the government contends that because the performers must account to the club manager for the number of dances performed, and then pay rent based on that accounting, Deja Vu is essentially making a "payment" within the meaning of section 6041(a) of the Internal Revenue Code. *See* 26 U.S.C. § 6041(a) (stating that "[a]ll persons engaged in a trade or business and making payments in the course of such trade or business to another person ... shall render a true and accurate return"). The government theorizes that when the customers pay the performers, this money really belongs to Deja Vu, and when the performers pay their rental fee to the club, the amount they are allowed to keep is a "payment" by the club. The Court finds this interpretation weak and controverted.

Black's Law Dictionary defines "payment" as "a delivery of money or its equivalent." *Black's Law Dictionary* 1129 (6th ed.1990). Additionally, most courts addressing the issue of whether a payment was made for the purposes of issuing Forms 1099 focus on the amount of control the alleged payor had over the money. For example, the court in *Manchester Music Co. v. United States,* 733 F.Supp. 473, 482 (D.N.H.1990), held that "payment occurs with the transfer of possession, dominion, or control over money or its equivalent from a person who up to that point had been exercising such prerogatives over the same to another who is due the funds." *Manchester Music* involved an owner of video games who would place the games in a proprietor's business place. The issue was whether a payment was made when two businesses divvied up the proceeds from video games. At an agreed upon time, the owner would open the coinbox in the

presence of the proprietor. The two would then split the proceeds according to the terms of a previously signed contract. The court held that a payment could not have occurred unless the entire proceeds constituted income to the "paying" party, *see id.* at 479, and that receipts could only be income to the extent that a party received and controlled the funds at issue, *see id.* at 481. Accordingly, the court reasoned that no payment had occurred because each party had a contractual right to his share of the proceeds. *See id.* at 481-82. Because each party's share constituted income to that party, the "transfer" of the other portion could not constitute a "payment." *See id.* at 482.

***968** Other courts have also decided this issue by focusing on the amount of control a party has over the funds. For example, in *JJR, Inc. v. United States*, 950 F.Supp. 1037 (W.D.Wash.1997), a case strikingly similar to the present case, the court held that customer payments to adult entertainers did not constitute income to a nightclub owner. The *JJR* court reasoned that customers' cash payments were the source of the performers' incomes, not payments from the taxpayer. *See id.* at 1045. Additionally, the court noted that the performers were not required to account to the club owner for their incomes, nor did they share their incomes with the taxpayer. *See id.*

The government argues that the above cases do not support Deja Vu's position because Deja Vu, unlike the taxpayers in the cited cases, exercises dominion and control over the relevant funds. Essentially, the government reasons that by keeping track of the number of dances the entertainers perform, Deja Vu forces the performers to account to the club for their income. This required accounting is a form of control, according to the government, and when Deja Vu allows the performers to keep a portion of their customer payments, this constitutes a payment.

[2] This Court finds the government's argument unavailing. The government's theory requires the Court to twist the facts to find a payment where none occurred. While the release of control over funds could theoretically constitute a payment of those funds, no such release occurred here. The only funds over which Deja Vu arguably had control were those required to be paid as rent under the contract, and it is undisputed that Deja Vu never paid out any of those funds after receiving them. Moreover, the mere fact that Deja Vu kept track of the number of dances done by each performer does not establish that Deja Vu controlled the performers' entire incomes. This "tracking" was necessary to fulfill the rental terms of the contract, which required that the performers pay the club a rental fee for each individual dance performed. Therefore, this Court holds that because Deja Vu never controlled its performers' incomes, and because Deja Vu never made a "payment" of any funds to its performers, the club was not required to file Forms 1099.

2. Reasonable Basis

Because Deja Vu has met the prerequisites of section 530, this Court must next determine whether Deja Vu has a reasonable basis for treating its performers as independent contractors. Section 530 provides three possible "safe havens" upon which Deja Vu may rely for not treating an individual as an employee. The provision states as follows:

> (2) For the purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:
>
> (A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;
>
> (B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions

> substantially similar to the position held by this individual; or
>
> (C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

26 U.S.C. § 3401 note. Deja Vu asserts that it qualifies for each of the above three provisions. This Court agrees, and finds that Deja Vu is not liable for the employment taxes assessed upon it. Additionally, it is important to note that while the government devotes a large portion of its brief to whether the performers are actually employees for the purposes of federal employment taxes, this point is irrelevant. The issue is not the actual status of the performers, but whether Deja Vu had a reasonable basis for treating the performers as it did. Finally, the Court is not persuaded by the government's assertions that Deja Vu acted in bad faith. If a reasonable basis existed to treat the performers as independent contractors, Deja Vu's motive is irrelevant. The Court now turns to evaluate the three bases upon which Deja Vu relies for its reasonable basis contention.

***969** [3] First, the adult entertainment industry routinely characterizes performers as independent contractors rather than employees. Evidence of this industry practice satisfies section 530(2)(C). Two other district courts have granted section 530 relief to similar adult entertainment businesses based at least in part upon industry practice. *See JJR,* 950 F.Supp. at 1044-45; *Marlar, Inc. v. United States,* 934 F.Supp. 1204, 1209-10 (W.D.Wash.1996). Moreover, Hafiz, the president of Deja Vu, offered evidence showing that, in his experience, most adult nightclubs operate in a like manner. (*See* Hafiz Dep. at 14-15; Hafiz Aff. ¶¶ 9-10, 14, 17-18.) Hafiz came to this conclusion after working in the industry for several years, and after traveling to various adult entertainment clubs before opening Deja Vu. (*See id.*) Lee Klein, Deja Vu's attorney, and David Shindel, Deja Vu's accountant, have also found that, in the adult entertainment business, performers are routinely treated as non-employees. (*See* Klein Aff. ¶¶ 6-8; Shindel Aff. ¶¶ 4, 9-11.) The government offered no proof to contradict the existence of the above industry practice, which operates to create a conclusive presumption that Deja Vu had a reasonable basis for treating performers as independent contractors. *See General Inv. Corp. v. United States,* 823 F.2d 337, 339-40 (9th Cir.1987). Therefore, this Court finds that, based on industry practice, Deja Vu was reasonable in classifying the club's performers as independent contractors.

In addition to industry practice, Deja Vu relied upon technical advice provided to it by its attorney and its accountant when it classified its performers. Klein, Deja Vu's attorney, had knowledge of the adult entertainment industry based on other similar clients whom he represents. (*See* Klein Aff. ¶¶ 2, 4-9.) In addition, Klein conducted his own analysis of the issue after researching relevant federal and state law. (*See id.* ¶ 10.) Klein thus advised Deja Vu that it would be proper to characterize its performers as independent contractors, and drew up a contract to that effect. (*See id.* ¶ 12.) Similarly, Deja Vu's accountant, Shindel, also has experience in the adult entertainment industry. (*See* Shindel Aff. ¶¶ 2-6.) Upon reviewing Deja Vu's operations, Shindel concluded that it was proper to treat the nightclub's performers as independent contractors. (*See id.* ¶ 11.) Both Klein and Shindel based their opinions on valid experience and observations. Accordingly, Deja Vu was reasonable in accepting this technical advice and treating its performers as non-employees.

Finally, Deja Vu also relied on a past audit of Deja Vu, Inc. which found no violations resulting from the corporation's treatment of its performers as independent contractors. Deja Vu, Inc. is Deja Vu's parent company in Toledo, Ohio. In 1991, the IRS audited Deja Vu, Inc., and investigated the corporation's classification of performers as independent contractors. While IRS personnel specialists were utilized, they found no violations and did not require modification of the classifications. (*See* Shindel Aff. ¶ 10; Shindel Dep. at 56; Krontz Aff. ¶

9.) Deja Vu was reasonable in relying on the results of this audit to support classification of the club's performers as non-employees.

In summary, Deja Vu had severable reasonable bases for treating its performers as independent contractors. There is uncontroverted evidence that it is commonplace in the industry for performers to be treated as non-employees. Further, Deja Vu's attorney's and accountant's advice with respect to the classification of the performers was reasonable. Moreover, the previous audit of Deja Vu's parent corporation provided a third reasonable basis upon which Deja Vu was entitled to rely.

[4] Rather than refute the above assertions, the government contends that Deja Vu acted in bad faith and is thus not entitled to the protection of section 530. (*See* Br. Opp'n at 17-22.) The government contends that Deja Vu's lease agreements with its performers are mere shams to improperly avoid payment of employment taxes. (*See id.* at 17.) However, this Court has already found that Deja Vu was reasonable in its classification of its performers as non-employees. If Deja Vu's action is reasonable, it is difficult to ascertain how it could simultaneously be in bad faith.

Moreover, the government's argument is based on its assessment that Deja Vu's performers fit the definition of "employee," as ***970** defined in 26 U.S.C. § 3121(d) ("any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee"). The IRS has promulgated regulations which indicate that an employer-employee relationship exists when the alleged employer "has the right to control and direct the individual who performs the services." Treas. Reg. § 31.3121(d)-1 (c)(2). Additionally, an independent contractor is defined as someone who "is subject to the control ... of another merely as to the result to be accomplished ... and not as to the means and methods for accomplishing the result." *Id.* Clearly, the focus of these definitions is on the amount of control exercised over the worker.

[5] Although Deja Vu exercises some control over its performers, the amount is minimal. First, as discussed earlier, Deja Vu's practice of tracking the number of individual dances done by each performer is necessary to effectuate the terms of the contract, which calls for a per-dance rental fee. Additionally, the performers are allowed to choose their own performance dates for each weekly schedule. Requiring prior notification for cancellations is only logical since Deja Vu's goal is to provide a steady stream of dancing in the club. Further, performers may work for other adult entertainment clubs if they choose. Finally, because Deja Vu has never made any payments to its performers, it was reasonable in characterizing them as non-employees. Therefore, this Court holds that Deja Vu had a reasonable basis for treating its performers as independent contractors, and is entitled to the protection afforded by section 530.

C. Payment of Wages

As an alternative basis for summary judgment, Deja Vu argues that because it never paid any wages to its performers, it cannot be liable for employment taxes. However, this Court has already determined that summary judgment is appropriate based on section 530. Thus, the Court declines to decide this issue.

D. Attorney's Fees

[6] Under 26 U.S.C. § 7430, the United States must pay attorneys' fees for the prevailing party if the United States's position in assessing a tax was not substantially justified. *See* 26 U.S.C. § 7430. The burden of proof lies with the government to prove that its position was substantially justified. *See id.* § 7430(c)(4)(B)(i) ("A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceedings was substantially justified."). Although this Court found the government's position erro-

neous in the present case, it cannot say that the position was not substantially justified. The government was aware of previous cases finding performers in adult entertainment clubs to be independent contractors. However, the government was justified in attempting to point out differences between Deja Vu's operations as compared with these cases. Although this Court found those "differences" to be immaterial, this Court is not prepared to award attorneys' fees to Deja Vu. Therefore, Deja Vu's request for attorneys' fees under 26 U.S.C. § 7430 is denied.

CONCLUSION

Deja Vu is entitled to the protection of section 530 of the Internal Revenue Code because it has satisfied each of the prerequisites of the statute. First, Deja Vu has never treated its performers as employees. Second, Forms 1099 were not required to be filed because Deja Vu never made any payments to its performers. Finally, Deja Vu's characterization of its performers as independent contractors was based on several reasonable factors. Deja Vu cited a widespread industry practice of treating similar performers as non-employees. Additionally, Deja Vu justifiably relied on the technical advice of its attorney and accountant. Finally, the prior audit of Deja Vu's parent company, which found no violations in the classification of performers, provided a third reasonable basis for Deja Vu's decision. Therefore, Deja Vu's motion for summary judgment based on section 530 is granted.

Because this Court's decision is based on section 530, it is unnecessary to reach Deja Vu's alternative basis for its summary judgment motion. Accordingly, this Court declines to decide whether Deja Vu paid wages to its performers. Additionally, although the ***971** government's position in this case was wrong, this Court does not believe that position was unjustified. Thus, Deja Vu's request for attorneys' fees is denied.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Plaintiff's Motion for Summary Disposition (Clerk Doc. No. 32) is GRANTED;

2. All assessments made by the IRS against Plaintiff for employment taxes shall be abated; and

3. Defendant shall refund all amounts paid by Plaintiff to the IRS for the employment taxes at issue in this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

D.Minn.,1998.
Deja Vu Entertainment Enterprises of Minnesota, Inc. v. U.S.
1 F.Supp.2d 964, 82 A.F.T.R.2d 98-5095, 98-2 USTC P 50,626

END OF DOCUMENT

EXHIBIT 7

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Not Reported in F.Supp., 1998 WL 375291 (W.D.Ky.), 82 A.F.T.R.2d 98-5102, 98-2 USTC P 50,521
(Cite as: 1998 WL 375291 (W.D.Ky.))

United States District Court, W.D. Kentucky.
TAYLOR BLVD THEATRE, INC. Plaintiff
v.
UNITED STATES Defendant
No. Civ.A. 3:97-CV-63-H.

May 13, 1998.

Michael T. Connelly, Connelly, Kaercher & Stamper, Louisville, KY, Edith S. Thomas, Brighton, MI, Robert E. Miller, Farmington Hills, MI, for Plaintiff's Counsel.

Gregory S. Hrebiniak, Tax Division, United States Department of Justice, Washington, DC, for Defendant's Counsel.

MEMORANDUM OPINION

HEYBURN, J.

***1** This matter is before the Court on the motion of Taylor Blvd. Theatre, Inc. (the "Plaintiff") for summary judgment on its complaint against the Internal Revenue Service (the "Defendant"). Plaintiff seeks the refund of employment withholding taxes paid to Defendant and an abatement of taxes assessed against it pursuant to Section 530 of the Revenue Act of 1978, 26 U.S.C. § 3401 note.

Plaintiff operates a Deja Vu concept nightclub in Louisville that features nude dancing performances. Since 1989, when Plaintiff began offering this form of entertainment, it has attempted to treat its dancers as nonemployees for tax purposes. To achieve this objective, Plaintiff designed the Dancer Performance Lease Agreement (the "Agreement"). Under the Agreement, Plaintiff does not pay its dancers a wage or salary. Instead, dancers lease space from Plaintiff and derive their income from the tips they receive from nightclub patrons during their stage dances and fees from private dances. The Agreement requires dancers to schedule, one week in advance, the days on which they desire to perform. For each scheduled performance date, the dancer must pay a "minimum shift rent" to the club and an additional amount for each private dance she performs for a patron. The Agreement thus envisions a financial arrangement in which money flows from the dancer to the nightclub and not vice versa.

In 1993, Defendant conducted a tax audit of Plaintiff and concluded that it should have withheld employment taxes from dancers who performed at Deja Vu in 1990. The basis for this conclusion was that the dancers were "employees" for employment tax purposes. Plaintiff paid a portion of the tax assessment and then sought relief under the safe harbor provisions of Section 530, which protects taxpayers who have consistently treated their employees as nonemployees for tax purposes and had a reasonable basis to do so.

I.

Under Section 530, a taxpayer seeking termination of employment tax liability must show that it has never treated the individual in question as an employee for employment tax purposes and has filed all required returns consistent with that individual's status as a nonemployee. *See* Section 530(a)(1). Under these circumstances, the individual will be deemed a nonemployee unless the taxpayer lacked a reasonable basis for treating the individual that way. *Id* . The taxpayer may demonstrate a reasonable basis for its tax treatment of the individual by showing reasonable reliance on any one of several authorities, including case law, tax rulings, past audits, and long-standing industry practice. *See* Section 530(a)(2). Once the taxpayer has made a *prima facie* showing of reasonable basis, the burden shifts to the government to prove the lack of any reasonable basis. *See McClellan v. United States,*

900 F.Supp. 101, 107 (E.D.Mich.1995).

It is undisputed that Plaintiff never treated its dancers as employees for tax purposes. However, Plaintiff must also show that these dancers were treated as nonemployees for tax purposes, including the filing of Forms 1099 for dancers who received payments of $ 600 or more.[FN1] There is evidence in the record that Plaintiff filed Forms 1099 for eleven dancers for tax year 1990. However, it is clear that no such filings were made for a number of dancers. Defendant contends that Plaintiff should have filed Forms 1099 for any dancer who derived $ 600 or more from private dances performed for patrons. Defendant bases this conclusion on the theory that each dancer's share of the revenue generated by private dances constitutes a "payment" by the Plaintiff to the dancer, thereby requiring the filing of a Form 1099.

FN1. Section 6041(a) of the Internal Revenue Code provides:

> (a) PAYMENTS OF $ 600 OR MORE. - All persons engaged in a trade or business and making payments in the course of such trade or business to another person ... of $ 600 or more in any taxable year ... shall render a true and accurate return to the Secretary ... setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

***2** Whether a dancer's share of the proceeds counts as a "payment" would seem to depend on the specific nature of her arrangement with the nightclub. There seems to be no dispute over how this money is earned, accounted for, and divided. After a dancer takes money from a patron in exchange for a private dance, she holds this money until the end of her shift. Plaintiff keeps a running tally of the number of private dances each dancer performs during her shift. After she completes her shift and before leaving the premises, each dancer pays Plaintiff an amount of money based on the number of private dances she performed (a percentage of the fee for each dance).

Though Defendant appears to admit that the dancers maintain exclusive possession of the proceeds of private dances until they are divided at evening's end, it nonetheless contends that the eventual division of funds is in essence a payment by the nightclub to the dancer. Specifically, Defendant argues that under the terms of the Agreement, Plaintiff had actual control over the proceeds from private dances and, therefore, its relinquishment of control over a portion of them constitutes a payment. Plaintiff's control over this money was evident, says Defendant, from the fact that it kept track of the number of private dances performed, determined dance prices, and dictated the parties' respective shares of the dance proceeds.

Defendant's argument has no support in the case law. The arrangement between Plaintiff and its dancers for dividing dance proceeds resembles in important ways that in *Manchester Music Co. v. United States*, 773 F.Supp. 473 (D.N.H.1990). In *Manchester Music*, an owner of coin-operated machines entered into an agreement with a proprietor to place the machines on his business premises and split the proceeds. The court held that this arrangement entailed no "payment" and, therefore, the machine owner was not required to issue a Form 1099 to the proprietor. The reason was that each party to the agreement was entitled to his contractual share of the proceeds. Since the machine owner could only count his own legal share of the proceeds as income to him, it would not make sense to characterize the proprietor's share as a "payment" from the machine owner to the proprietor. *See id.* at 481-82; *See also Howard's Yellow Cabs, Inc. v. United States*, 987 F.Supp. 469, 476-78 (W.D.N.C.1997) (under fare-splitting arrangement between taxicab company and drivers, division of proceeds did not constitute a "payment" requiring filing of Forms 1099). Likewise, in the instant case, each party's legal right to a portion of the dance proceeds was defined by contract, and neither

party's contractual share was income to the other. Indeed, Plaintiff reported only its share of the proceeds on its income tax return, along with cover charges and drink sales. The financial arrangement was in essence a joint venture requiring a division rather than a transfer or payment of funds.

***3** In light of these cases, Defendant's claim that Plaintiff's relinquishment of "control" over a portion of the dance proceeds constituted a "payment" is unpersuasive.[FN2] At no time did Plaintiff have either a legal right to or physical possession of any dancer's contractual share of these proceeds. Moreover, Defendant's characterization of the arrangement is a little one-sided. Plaintiff did not "dictate" the dance prices or the parties' respective shares of the proceeds. These amounts were specified by the Agreement. More importantly, the mere fact that Plaintiff kept track of the number of dances performed does not imply unilateral control over the funds. The process of "settling up" and dividing the funds at the end of each shift would require the participation and, ultimately, the consent of the dancer as well.

> FN2. Another court facing nearly identical facts recently reached the same conclusion. *See Deja Vu Entertainment Enterprises of Minnesota, Inc. v. United States,* Civil File No. 3-96-1078 (D.Minn.1998). In his unpublished opinion, Judge Magnuson noted that "[t]he government's theory requires the Court to twist the facts to find a payment where none occurred. *Id.* at 8.

In sum, since Plaintiff made no "payments" to dancers for the private dances they performed for patrons, Plaintiff was not required to file Forms 1099 for them. Plaintiff's consistent treatment of these dancers as nonemployees for tax purposes thus satisfies the threshold requirement of Section 530.

II.

The other issue of critical importance is whether Plaintiff had a reasonable basis for treating its dancers as nonemployees. As noted earlier, a taxpayer may conclusively establish such a reasonable basis by showing reasonable reliance on any one of a number of different sources. Two of those means of establishing a reasonable basis are of particular relevance here: evidence of industry practice and a past IRS audit.

Previous cases support the proposition that it is standard industry practice to treat dancers as nonemployees. *See JJR, Inc. v. United States,* 950 F.Supp. 1037, 1044-45 (W.D.Wash.1997); *Marlar, Inc. v. United States,* 934 F.Supp. 1204, 1209-10 (W.D.Wash.1996). This conclusion is also amply demonstrated by the affidavits of industry veterans such as Stanley Marks, Robert Hollis, and Lee Klein.[FN3] Defendant put forward no evidence to contradict their statements. The uncontradicted evidence in the record establishes that contractual arrangements involving stage rental fees and direct payment of the dancer by customers have long been accepted practice in the industry. Plaintiff consulted legal and accounting experts who opined that its dancers were correctly classified as nonemployees for tax purposes.

> FN3. At least one case has suggested that while it has been the industry practice not to treat nude dancers as employees, the industry is ambivalent about whether they should be treated as tenants or independent contractors. *See 303 West 42 nd Street Enterprises, Inc. v. Internal Revenue Service,* 916 F.Supp. 349, 354-55 (S.D.N.Y.1996). In that case, the court denied Section 530 relief based on the lack of a unified industry practice. *Id.* This Court's reading of Section 503 is that Plaintiff's burden is simply to show that a significant segment of the industry does not treat dancers as employees. Regardless, Defendant has not come forward with any evidence to contest Plaintiff's proof on this issue.

Plaintiff also points to a 1989 IRS audit of its 1987

tax returns. This audit resulted in a "no change" letter issued by the IRS to the Plaintiff. Defendant contends that Plaintiff could not reasonably rely on this audit, because it was not an employment tax audit. However, the language of Section 530 requires the opposite conclusion. Section 530 says that a taxpayer may not rely on an audit commenced after December 31, 1996, unless that audit included an examination for employment tax purposes. *See* Section 530(e)(2)(A). The clear implication of this provision is that a taxpayer can reasonably rely on any audit if it was commenced before the specified date. This conclusion is consistent with the IRS's own training materials. Therefore, Plaintiff is entitled to rely on the 1989 audit to establish a reasonable basis for treating its dancers as nonemployees.

***4** Both evidence of industry practice and the past audit operate as a conclusive presumption that Plaintiff's tax treatment of its dancers was reasonable. Nonetheless, Defendant suggests that evidence of Plaintiff's bad faith should somehow negate this proof. Defendant initially argues that Plaintiff showed bad faith by engaging in sham transactions to evade the tax requirements for employees. This argument falsely assumes that the financial arrangement between the parties essentially had no economic effect and merely obscured the true nature of the employment relationship. But the Agreement clearly entails that dancers will be paid exclusively by patrons and will pay the nightclub a rental fee. That the concept of renting space in which to engage in nude dancing seems somewhat peculiar does not necessarily imply that the arrangement is a sham.

Defendant also seems to argue that since the dancers should in fact be considered employees, Plaintiff was not reasonable in classifying them otherwise. It is difficult to see how there could be bad faith when Plaintiff has proven that it had a reasonable basis for its actions under Section 530 based on industry practice and a past audit. Plaintiff's burden is not to show that the dancers ought to be considered nonemployees for tax purposes, but rather than it had reasonable grounds to do so. *See 303 West 42 nd Street Enterprises, Inc. v. Internal Revenue Service,* 916 F.Supp. 349, 353 (S.D.N.Y.1996) ("Section 530 allows a taxpayer to treat a worker as a non-employee, regardless of the individual's actual status under the common law test ... as long as the taxpayer's treatment of the worker for tax purposes has been consistent and a reasonable basis exists for such treatment."). Whether the IRS subsequently determined based on its own investigation that it makes more sense to classify these dancers as employees should have no bearing on Plaintiff's eligibility for the safe harbor provisions.

Moreover, this argument is premised on acceptance of the view that the dancers should be considered Plaintiff's employees. The federal tax laws define an "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."). 26 U.S.C. § 3121(d). Often, the key factor is control. *See Chin v. United States,* 57 F.3d 722, 725 (9 th Cir.1995). Though Plaintiff exercises a degree of control over its dancers, this control arguably does not rise to the level required for an employer-employee relationship. It does not tell them how to dance or dictate their choice of costume. It has no control over any of the proceeds until the dancer pays the nightclub its share at the end of the evening. Dancers set up their own schedules and can perform at other clubs if they wish. In short, since it is not obvious that Plaintiff's dancers should be classified as "employees" under a common law test, reaching a different conclusion based on industry practice or a prior tax audit does not produce an inference of bad faith.[FN4]

FN4. In addition, the cases cited by Defendant do not support the conclusion that Plaintiff should have known its dancers were "employees." The case of *Mladinich v. United States,* 379 F.Supp. 117, 120 (S.D.Miss.1974) is readily distinguishable,

because the dancers in that case were paid a weekly salary by their employer and had no control over their schedules. Similarly, the case of *303 West 42 nd Street Enterprises, supra,* involved booth performers, not nude dancers. Finally, the cases cited by Defendant holding that nude dancers are "employees" were decided under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq. See, e.g., Reich v. Circle C Investments, Inc.,* 998 F.2d 324 (5th Cir.1993); *Reich v. Priba Corp.,* 890 F.Supp. 586 (N.D.Tex.1995). Though some of the language in these cases could be taken to suggest that nude dancing clubs control the work of their dancers, they were nonetheless decided under an entirely different legal standard. *See Reich v. Priba Corp.,* 890 F.Supp. at 592 ("The terms 'employee' and 'independent contractor' are not to be construed in their common law senses when used in federal social welfare legislation."). Rather than using the common law test, the FLSA requires courts to examine the "economic reality" of the employment relationship to determine whether it is one of economic dependence or whether, in fact, the worker is an independent businessperson. *Id.* Since the two tests could produce vastly different conclusions in practice, and it is possible to be classified as an "employee" under one and not the other, the FLSA cases would not be helpful in the context of a federal tax law question.

***5** The Court concludes that Plaintiff had a reasonable basis for classifying its dancers as nonemployees for tax purposes. Since Plaintiff has consistently treated its dancers in this manner, it is entitled to take advantage of the safe harbor provisions of Section 503.[FN5]

FN5. The Court need not consider the separate argument made by Plaintiff that it paid no "wages" to its dancers and, therefore, could not be liable for employment withholding tax.

III.

Plaintiff has asked the Court to award attorney's fees under 26 U .S.C. § 7430, which permits recovery of attorney's fees when the government's basis for assessing taxes was not substantially justified. The Court concludes that it would be premature to consider this issue at this time.

ORDER

Plaintiff has moved for summary judgment. The Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment is SUSTAINED and, pursuant to Section 530 of the Revenue Act of 1978, 26 U.S.C. § 3401 note, Plaintiff is entitled to a refund of certain employment withholding taxes paid and an abatement of certain other taxes assessed against it.

IT IS FURTHER ORDERED that on or before June 1, 1998, Plaintiff should make any further motions to conclude this case, including any motion for attorney's fees.

W.D.Ky.,1998.
Taylor Boulevard Theatre, Inc. v. U.S.
Not Reported in F.Supp., 1998 WL 375291 (W.D.Ky.), 82 A.F.T.R.2d 98-5102, 98-2 USTC P 50,521

END OF DOCUMENT

EXHIBIT 8

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Internal Revenue Service
MS 4412 LVG:KT
110 City Parkway
Las Vegas, NV 89106

Department of the Treasury

Taxpayer Identification Number:
[redacted]

Tax Year:
2011

Form Number:
941, 945

Person to Contact:
Kaitlynn Tsai

Employee Identification Number:
[redacted]

Contact Telephone Number:
(702) 868-5206

Fax Number:
(877) 832-3621

Last Date to Respond to this Letter:
July 18, 2013

Date: **July 11, 2013**

Las Vegas Entertainment LLC
Larry Flynt's Hustler Club
6007 Dean Martin Dr
Las Vegas, NV 89118

Dear Mr. Jason Mohney:

I have completed the examination of your tax return for the year(s) shown above. I am pleased to inform you I'm proposing no change to your tax return as indicated in the enclosed Form 4666, *Summary of Employment Tax Examination.* As my findings are subject to the approval of the Director, Specialty Programs, you will receive a final no change letter when we finish processing your file.

If you have any questions, please call me at the telephone number shown above within 10 days from the date of this letter. If you write, please include your telephone number and the most convenient time for me to call.

Thank you for your cooperation.

Sincerely,

Kaitlynn Tsai
Examining Officer

Enclosures:
Form 4666

Form **4666** (Rev. October 2010)

Department of the Treasury - Internal Revenue Service

Summary of Employment Tax Examination

Name and Address of Employer

Las Vegas Entertainment LLC
Larry Flynt's Hustler Club
6007 Dean Martin Dr
Las Vegas, NV 89118

Employer Identification Number [redacted]

Date of Report 07/11/2013

Type of Report

☐ Delinquent tax (Return not filed)
☐ Increase (Decrease) in tax (Return filed)
☑ Agreed (This report is subject to review and you will be notified by the Director when it is accepted)
☐ Unagreed

Following is a summary of the results of my examination of your returns as shown on the attached pages of this report.

Tax, Credits and Penalties

a	b	c	d	e		f	g
Calendar Year	Return Form Number	Delinquent Tax, Increase (Decrease) in Tax	Increase (Decrease) in Allowed Credits	Penalty		Total Adjustment and Penalties (c-d+e)	Page Number of Report
				Code Section	Amount		
2011	941	No change					
2011	945	No change					
Total ▶							

Other Information

This does not constitute an income tax examination

This examination report is subject to the approval by the Chief, Employment Tax Operations

Form 2504-WC, Section 7436 issues.

The examination of your employment tax returns as reflected on this report included an examination for employment tax purposes of whether any individuals should be treated as employees of the taxpayer for the purpose of Section 530 of the Revenue Act of 1978, as amended by Section 1122 of the Small Business Job Protection Act of 1996. The examination concluded that the following classes of workers should not be treated as employees:

Female Professional Entertainers, Locally Known Disc Jockeys (that worked in the After Hours Club), Celebrity Disc Jockeys, Independent Hosts, Independent Card Passers

These classes of workers were determined to be employees:

Examiner's Name: Kaitlynn Tsai

Area: West Territory

EXHIBIT 9

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Department of Labor
MICHIGAN EMPLOYMENT SECURITY COMMISSION

REFEREE DIVISION

IN THE MATTER OF THE CLAIM OF

EMPLOYER INVOLVED

Deja Vu of Saginaw
6500 Bay Road
Saginaw, MI 48094

S.S No.

APPEAL No. L89-03729

REFEREE: EVERETT J. BERGERON

The employer, on September 28, 1988, filed an appeal from the findings of a Notice of Redetermination issued by the Michigan Employment Security Commission on September 28, 1988. The Redetermination found in part, as follows:

> "This determination declared there is an employer/employee relationship between your corporation and Carol Krasinski."

The Redetermination further found that the services performed by Carol Kraskinski are an integral part of your corporate business. Services rendered contribute to the economic vitality of your business. Therefore, the Determination dated August 25, 1988 was affirmed.

The employer's appeal came on for hearing in Saginaw, Michigan on May 15, 1989, at which time Mr. David Voges, Assistant Attorney General, appeared, along with David Hertzler, a field auditor. The employer was represented through their attorney, Bradley Shafer, William Morris, Theresa Ann Antonucci, and Lu Ann Stacy Braman, as witnesses for the employer.

The employer operates what is known as a juice bar, no alcoholic beverages are sold. The business is incorporated and the principal place of business is in Saginaw, Michigan. The employer has employed a bar person, doorman, waitresses and a disc jockey. The employer also uses professional performers.

When the performers apply for work, they are required to fill out an application for employment. The application asks, in addition to their name and address, if they were ever arrested for possession or sale of narcotics or any other drug, if they were ever arrested or convicted for being a prostitute, and it further provides that the performer will comply with the employer's rules. (See Exhibit 5, Page 9)

The employer's rules provide, in part, as follows:

> "Each dancer is responsible for her schedule and should know it. If there are any changes, the manager should be informed."

Another rule provides that all dancers should have music and lighting worked out with the DJ befoe they go on stage. Another rule provides, "Do not make dates with customers while in or out of the club." A fourth rule provides, "Take tips only on the side. Taken in front or the back will be $20.00", meaning a $20.00 fine. Another rule provides that "while nude coffee table dancing, you must remain on your feet." (See Exhibit 5, Page 12)

At the time an applicant is hired to work, they are required to enter into what the employer termed a lease agreement. Under the agreement, it was decided that the applicant would be an independent contractor, and the applicant would pay the employer $25.00 each day, or sell five drinks per evening. They were required to pay the employer thirty percent of their income that evening.

After the applicant was hired, they could perform if and when they wished. The performer would tell the employer when she wished to work. Her name was put on a schedule and she was expected to appear at the time scheduled and dance.

When performing, the performer supplied her own music, costumes and props, and they told the disc jockey the lights they wished to use.

When performing, the performer could do any number of dances. If they danced on stage, they were permitted to retain all of their tips. On the other hand, the performer charged $10.00 to perform a couch dance, coffee table dance, or dance with a customer. The thirty percent of the money taken in was paid over to the employer at the end of the evening.

More than one performer could perform at the same time, but if they broke certain the performers would be required to pay a penalty of $50.00.

The performer could work at any other place while associated with Deja Vu, such as other clubs or bachelor parties.

At the end of the calendar year, the employer did not issue to the performer any Internal Revenue Forms. The performer was expected to report her earnings to the Internal Revenue Department, and pay all taxes due.

The sole question in this case is, did the performers, while performing, fall under the control and direction of the employer. The question relates to Section 42(5) of the Michigan Employment Security Act. This section provides, in part, as follows:

> "(5) Services performed by an individual for remuneration shall not be deemed to be employment subject to this act, uless the individual is under the employer's control or direction as to the performance of the services both under a contract for hire and in fact."

FINDINGS OF FACTS AND REASONS: (CONTINUED)

The decision in this appeal is relatively simple. The performs did not fall under the control and direction of the employer, except they were expected to comply with the employer's rules. The performers could set their own hours, they paid their own taxes, and provided their own supplies. There is little in the record to permit the employee to conclude that the employer controlled and directed the performer. This performer in the performance of her work not only actually, but it was intended that she would be employed as an independent contractor, and such she was not an employee within the meaning of the Act.

DECISION

The findings of the redetermination issued by the Commission on September 28, 1988 are hereby reversed. It is decided that the professional performers did not fall under the control and direction of the employer, and as such the employer is not liable for taxes on their earnings.

Everett J. Bergeron

EVERETT J. BERGERON, REFEREE

MAILED AT FLINT, MICHIGAN JUN 21 1989

THE APPEAL OR REQUEST FOR REHEARING MUST BE RECEIVED ON OR BEFORE

(SEE ATTACHED SHEET)

APPEAL TO THE BOARD OF REVIEW

The Michigan Employment Security Board of Review consists of five members appointed by the governor. It is not part of the M.E.S.C.

An appeal to the Board of Review can be filed by mail or in person. An appeal cannot be filed by telephone, but information about the appeal process can be obtained by calling (313) 876-5230.

To be filed on time, a written appeal to the Board of Review must be RECEIVED by the Board of Review at 7310 Woodward Avenue, Room 324, Detroit, Michigan 48202 or at any M.E.S.C. branch office, or at any agent office of the M.E.S.C. outside of Michigan, within 30 calendar days after the mailing date of the attached decision (as indicated on the last page of the decision).

REQUEST FOR REHEARING OR REOPENING BEFORE REFEREE

Where the appeal to the Referee has been dismissed for lack of prosecution or a party is in possession of newly discovered material information not available when the case was heard by the Referee, it is more sensible for the dissatisfied party to request a rehearing before the Referee instead of appealing to the Board of Review. A request for rehearing before the Referee must be RECEIVED by the Referee Division at 7310 Woodward Avenue, Detroit, Michigan 48202, or by any of the Commission's branch offices, within 30 calendar days after the date of this decision.

If no appeal to the Board of Review or request for rehearing is received within 30 calendar days after the date of this decision, the law provides that this decision may be reopened and reviewed by a Referee, only for "good cause", and only if such request for reopening is RECEIVED by the Referee Division or by any of the Commission's branch offices within 1 year after the date of the mailing of this decision.

BY-PASS OF BOARD/DIRECT APPEAL TO THE CIRCUIT COURT

Normally a party dissatisfied with a Referee decision or order can appeal to circuit court only after first appealing to the Board of Review and then appealing the resulting Board decision, if unfavorable, to the state circuit court.

But, according to Section 38 of the M.E.S. Act (M.C.L.A. 421.38), under limited circumstances a party may "by-pass" the Board of Review and appeal directly to a circuit court. Section 38(2) provides that a by-pass will occur if a written stipulation agreed to by the claimant and employer (or their agents and attorneys) is filed within 30 calendar days of the mailing of the Referee decision or order.

The stipulation must be mailed to the M.E.S.C. Referee Division, 7310 Woodward Avenue, Detroit, Michigan 48202. It is suggested that a copy of the stipulation also accompany the appeal filed with the circuit court.

The appeal to circuit court must be filed with the clerk of the appropriate circuit court within 30 calendar days of the mailing of the Referee order or decision.

If a claimant is a party to the case, the appropriate circuit court is the circuit court of the county in which the claimant resides or of the county in which the claimant's place of employment is or was located.

If a claimant is not a party to the case, the appropriate circuit court is the circuit court of the county in which the employer's principle place of business in this state is located.

The responsibility for properly and timely filing an appeal with the clerk of the court rests with the party filing the appeal.

EXHIBIT 10

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

STATE OF INDIANA

DEPARTMENT OF REVENUE
TAX POLICY & APPEALS DIVISION
STATE OFFICE BUILDING
ROOM 205

INDIANAPOLIS, 46204-2253

LETTER OF FINDINGS

GROSS INCOME TAX

FOR THE CALENDAR YEARS 1986, 1987 AND 1988

TAXPAYER: SENNECA PRODUCTS CORPORATION
5119 BROADWAY
GARY, INDIANA 46409

NUMBER: 90-0157 ITC
ISSUED: APRIL 24, 1992

An administrative hearing was held at 9:00 a.m., Eastern Standard Time, on March 25, 1992. The taxpayer, Senneca Products Corporation, was represented by Thomas E. Maier, Attorney at Law; David Strom, President, Senneca Products, Inc.; Ann Wilson, Manager, Allied News Corporation; and Karen Sykes. The Hearing Officer was Joanne Yeager. David Krahulik, Hearing Officer, also attended the hearing. The audit was conducted by Lester G. Schmock, #407.

ISSUE

Gross Income Tax - Employee vs. Independent Contractor

Authority: IRC Section 3401; IRC Section 6041; IC 6-3-1-5; Theresa Enterprises, Inc., d/b/a The Hello Doll v. United States, 78-2 USTC

The taxpayer protests the classification of dancers as employees of the taxpayer.

STATEMENT OF FACTS

The taxpayer operates bookstores, with separate sections in the rear of the bookstores. The back section has three booths which offer "California style peep shows." A blank schedule is posted for each of the three booths located in the rear of the store. Dancers fill in the time slots on the schedule on a first-come first-serve basis. The dancers decide how many hours, if any, they will work.

Each booth has a clear plexiglas divider, a transparent tube that leads to a locked money box, a chair for the customer, and a phone. Customers deposit money into the transparent tube. The money falls to the locked box and remains there until the end of the dancer's shift. At that time, the taxpayer gives the dancer fifty percent (50%) of the proceeds and keeps fifty percent (50%) as gross income to the taxpayer. The taxpayer does not report as gross income or keep any record of the amounts retained by the dancers.

Gross Income Tax - Employee vs. Independent Contractor

DISCUSSION

The taxpayer protests the classification of dancers as employees of the taxpayer. The taxpayer sets forth that the dancers meet the provisions of an independent contractor and not those of an employee.

The taxpayer cites Theresa Enterprises, Inc., d/b/a The Hello Doll v. United States, 78-2 USTC for the factors to be examined in an independent contractor relationship. Theresa provides several criteria to differentiate between an employee and an independent contractor; (1) independent contractors are not required to comply with instructions about when, where, and how to work, (2) independent contractors use their own methods in doing work and receive no training from the purchaser of the services, (3) independent contractors have a transient nature, (4) independent contractors' services rendered are artistic in nature and not subject to control as to how they are to be performed, (5) independent contractors can work when and for whom they choose, (6) independent contractors are free to follow their own pattern of work, and (7) independent contractors furnish their own tools, materials, costumes, or props for dance routines.

The taxpayer's dancers satisfy all of the above provisions. The dancers schedule their own hours. They control how many hours they work and are not penalized by the taxpayer if they do not show up for their scheduled hours. The taxpayer does not train the dancers in any way. The dancers are predominantly transient. The taxpayer has no control over the performance of the dancers and makes no requests other than that the dancers keep their performances legal. The dancers have complete discretion regarding whether they perform for a customer. Additionally, because the dancers do their own scheduling, they set their own

pattern of work. The dancers also provide their own costumes. Therefore, the dancers meet all relevant provisions of an independent contractor as set forth in Theresa.

Moreover, Indiana Code 6-3-1-5 refers to Internal Revenue Code 3401(d) to define employer. IRC 3401(d) defines "employer" as "the person for whom an individual performs." The Code takes exception to that definition if the "person for whom the individual performs or performed the services . . . does not have control of the payment of the wages for such services." The Code defines the term "employer" further to mean "the person having control of the payment of such wages." Therefore, if an entity does not control the payment of wages for services rendered, the entity is not an employer. The taxpayer does not issue the dancers a paycheck, pay them an hourly wage, or control the amount of money deposited into the locked money box. The dancers control the amounts deposited into the locked money box by accepting or refusing customers and by doing shows with variable rates of charge. Thus, the taxpayer clearly does not control payment to the dancers for the services rendered by the dancers. The taxpayer is not the employer of the dancers pursuant to the provisions of IRC 3401(d).

Consequently, pursuant to IRC Section 3401(d) and Theresa, the dancers are not employees of the taxpayer. The dancers are independent contractors.

Further, the taxpayer failed to file information return forms on the dancers. Pursuant to IRC Section 6041(a) and IC 6-2.1-5-10, all persons engaged in a trade or business and making payment to another person of salaries of $600 or more are required to make returns in regard thereto. The taxpayer failed to file such returns. The taxpayer is hereby officially put on notice that such returns are due on dancers satisfying the above criteria.

The dancers performing at the taxpayer's establishment are independent contractors and not employees.

Cont. . . . . .

FINDING

The taxpayer's protest is sustained. The taxpayer does not owe Gross Income Tax on that portion of the total amount collected by the dancers which was retained by the dancers.

INDIANA DEPARTMENT OF REVENUE
Tax Appeals Division

Joanne Yeager
Hearing Officer

Robert Robinson
Administrator

JY/RR:dh

cc: Thomas E. Maier - With Power of Attorney

STATE of INDIANA

INDIANAPOLIS, 46204-2253

DEPARTMENT OF REVENUE

TAX POLICY & APPEALS DIVISION
STATE OFFICE BUILDING
ROOM 205

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LETTER OF FINDINGS

WITHHOLDING TAX

FOR THE CALENDAR YEARS 1985, 1986, 1987 AND 1988

TAXPAYER: SENNECA PRODUCTS CORPORATION
5119 BROADWAY
GARY, INDIANA 46409

NUMBER: 90-0159 WTH
ISSUED: APRIL 30, 1992

An administrative hearing was held at 9:00 a.m., Eastern Standard Time, on March 25, 1992. The taxpayer, Senneca Products Corporation, was represented by Thomas E. Maier, Attorney at Law; David Strom, President, Senneca Products, Inc.; Ann Wilson, Manager, Allied News Corporation; and Karen Sykes. The Hearing Officer was Joanne Yeager. David Krahulik, Hearing Officer, also attended the hearing. The audit was conducted by Lester G. Schmock, #407.

ISSUE

Gross Income Tax - Employee vs. Independent Contractor

Authority: IRC Section 3401; IRC Section 6041; IC 6-3-1-5; Theresa Enterprises, Inc., d/b/a The Hello Doll v. United States, 78-2 USTC

The taxpayer protests the classification of dancers as employees of the taxpayer.

STATEMENT OF FACTS

The taxpayer operates bookstores, with separate sections in the rear of the bookstores. The back section has three booths which offer "California style peep shows." A blank schedule is posted for each of the three booths located in the rear of the store. Dancers fill in the time slots on the schedule on a first-come first-serve basis. The dancers decide how many hours, if any, they will work.

Each booth has a clear plexiglas divider, a transparent tube that leads to a locked money box, a chair for the customer, and a phone. Customers deposit money into the transparent tube. The money falls to the locked box and remains there until the end of the dancer's shift. At that time, the taxpayer gives the dancer fifty percent (50%) of the proceeds and keeps fifty percent (50%) as gross income to the taxpayer. The taxpayer does not report as gross income or keep any record of the amounts retained by the dancers.

Gross Income Tax - Employee vs. Independent Contractor

DISCUSSION

The taxpayer protests the classification of dancers as employees of the taxpayer. The taxpayer sets forth that the dancers meet the provisions of an independent contractor and not those of an employee.

The taxpayer cites Theresa Enterprises, Inc., d/b/a The Hello Doll v. United States, 78-2 USTC for the factors to be examined in an independent contractor relationship. Theresa provides several criteria to differentiate between an employee and an independent contractor; (1) independent contractors are not required to comply with instructions about when, where, and how to work, (2) independent contractors use their own methods in doing work and receive no training from the purchaser of the services, (3) independent contractors have a transient nature, (4) independent contractors' services rendered are artistic in nature and not subject to control as to how they are to be performed, (5) independent contractors can work when and for whom they choose, (6) independent contractors are free to follow their own pattern of work, and (7) independent contractors furnish their own tools, materials, costumes, or props for dance routines.

The taxpayer's dancers satisfy all of the above provisions. The dancers schedule their own hours. They control how many hours they work and are not penalized by the taxpayer if they do not show up for their scheduled hours. The taxpayer does not train the dancers in any way. The dancers are predominantly transient. The taxpayer has no control over the performance of the dancers and makes no requests other than that the dancers keep their performances legal. The dancers have complete discretion regarding whether they perform for a customer. Additionally, because the dancers do their own scheduling, they set their own

pattern of work. The dancers also provide their own costumes. Therefore, the dancers meet all relevant provisions of an independent contractor as set forth in Theresa.

Moreover, Indiana Code 6-3-1-5 refers to Internal Revenue Code 3401(d) to define employer. IRC 3401(d) defines "employer" as "the person for whom an individual performs." The Code takes exception to that definition if the "person for whom the individual performs or performed the services . . . does not have control of the payment of the wages for such services." The Code defines the term "employer" further to mean "the person having control of the payment of such wages." Therefore, if an entity does not control the payment of wages for services rendered, the entity is not an employer. The taxpayer does not issue the dancers a paycheck, pay them an hourly wage, or control the amount of money deposited into the locked money box. The dancers control the amounts deposited into the locked money box by accepting or refusing customers and by doing shows with variable rates of charge. Thus, the taxpayer clearly does not control payment to the dancers for the services rendered by the dancers. The taxpayer is not the employer of the dancers pursuant to the provisions of IRC 3401(d).

Consequently, pursuant to IRC Section 3401(d) and Theresa, the dancers are not employees of the taxpayer. The dancers are independent contractors.

Further, the taxpayer failed to file information return forms on the dancers. Pursuant to IRC Section 6041(a) and IC 6-2.1-5-10, all persons engaged in a trade or business and making payment to another person of salaries of $600 or more are required to make returns in regard thereto. The taxpayer failed to file such returns. The taxpayer is hereby officially put on notice that such returns are due on dancers satisfying the above criteria.

The dancers performing at the taxpayer's establishment are independent contractors and not employees.

Cont. . . . . .

FINDING

The taxpayer's protest is sustained. The taxpayer does not owe Withholding Tax on that portion of the total amount collected by the dancers which was retained by the dancers.

INDIANA DEPARTMENT OF REVENUE
Tax Appeals Division

Joanne Yeager
Hearing Officer

Robert Robinson
Administrator

JY/RR:dh

cc: Thomas E. Maier - With Power of Attorney

STATE OF INDIANA

DEPARTMENT OF REVENUE
TAX POLICY & APPEALS DIVISION
STATE OFFICE BUILDING
ROOM 205

INDIANAPOLIS, 46204-2253

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LETTER OF FINDINGS

GROSS INCOME TAX

FOR THE CALENDAR YEARS 1986, 1987 AND 1988

TAXPAYER: ALLIED NEWS CORPORATION
107 STATE STREET
HAMMOND, INDIANA 46320

NUMBER: 90-0155 ITC
ISSUED: APRIL 30, 1992

An administrative hearing was held at 9:00 a.m., Eastern Standard Time, on March 25, 1992. The taxpayer, Allied News Corporation, was represented by Thomas E. Maier, Attorney at Law; David Strom, President, Senneca Products, Inc.; Ann Wilson, Manager, Allied News Corporation; and Karen Sykes. The Hearing Officer was Joanne Yeager. David Krahulik, Hearing Officer, also attended the hearing. The audit was conducted by Lester G. Schmock, #407.

ISSUE

Gross Income Tax - Employee vs. Independent Contractor

Authority: IRC Section 3401; IRC Section 6041; IC 6-3-1-5; Theresa Enterprises, Inc., d/b/a The Hello Doll v. United States, 78-2 USTC

The taxpayer protests the classification of dancers as employees of the taxpayer.

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The taxpayer cites Theresa Enterprises, Inc., d/b/a The Hello Doll v. United States, 78-2 USTC for the factors to be examined in an independent contractor relationship. Theresa provides several criteria to differentiate between an employee and an independent contractor; (1) independent contractors are not required to comply with instructions about when, where, and how to work, (2) independent contractors use their own methods in doing work and receive no training from the purchaser of the services, (3) independent contractors have a transient nature, (4) independent contractors' services rendered are artistic in nature and not subject to control as to how they are to be performed, (5) independent contractors can work when and for whom they choose, (6) independent contractors are free to follow their own pattern of work, and (7) independent contractors furnish their own tools, materials, costumes, or props for dance routines.

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pattern of work. The dancers also provide their own costumes. Therefore, the dancers meet all relevant provisions of an independent contractor as set forth in Theresa.

Moreover, Indiana Code 6-3-1-5 refers to Internal Revenue Code 3401(d) to define employer. IRC 3401(d) defines "employer" as "the person for whom an individual performs." The Code takes exception to that definition if the "person for whom the individual performs or performed the services . . . does not have control of the payment of the wages for such services." The Code defines the term "employer" further to mean "the person having control of the payment of such wages." Therefore, if an entity does not control the payment of wages for services rendered, the entity is not an employer. The taxpayer does not issue the dancers a paycheck, pay them an hourly wage, or control the amount of money deposited into the locked money box. The dancers control the amounts deposited into the locked money box by accepting or refusing customers and by doing shows with variable rates of charge. Thus, the taxpayer clearly does not control payment to the dancers for the services rendered by the dancers. The taxpayer is not the employer of the dancers pursuant to the provisions of IRC 3401(d).

Consequently, pursuant to IRC Section 3401(d) and Theresa, the dancers are not employees of the taxpayer. The dancers are independent contractors.

Further, the taxpayer failed to file information return forms on the dancers. Pursuant to IRC Section 6041(a) and IC 6-2.1-5-10, all persons engaged in a trade or business and making payment to another person of salaries of $600 or more are required to make returns in regard thereto. The taxpayer failed to file such returns. The taxpayer is hereby officially put on notice that such returns are due on dancers satisfying the above criteria.

The dancers performing at the taxpayer's establishment are independent contractors and not employees.

Cont. . . . . .

FINDING

The taxpayer's protest is sustained. The taxpayer does not owe Gross Income Tax on that portion of the total amount collected by the dancers which was retained by the dancers.

INDIANA DEPARTMENT OF REVENUE
Tax Appeals Division

Joanne Yeager
Hearing Officer

Robert Robinson
Administrator

JY/RR:dh

cc: Thomas E. Maier - With Power of Attorney

EXHIBIT 11

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

IN THE CASE OF KELLY L. PERRY	*	CAL 13-29136
Claimant/Respondent	*	
vs.	*	
LITTLE DARLINGS DEVELOPMENT CTR.	*	Appeal of WCC No. W040549
"Employer" Petitioner	*	
and	*	
ILLINOIS NATIONAL INS. CO.	*	
Insurer/Petitioner	*	

* * * * * * * * * * * * * * * * *

ORDER

On May 16, 2014 the court heard cross motions for summary judgment filed by the parties. The court found that the claimant Kelly L. Perry an independent contractor. For reasons given in an oral opinion on May 16, 2014; it is this 21st day of May, 2014 by the Circuit Court for Prince George's County,

O R D E R E D, that Petitioners' Motion for Summary Judgment is hereby **GRANTED;**

O R D E R E D, that Respondent's Motion for Summary Judgment is hereby **DENIED,**

O R D E R E D, that this case is **CLOSED STATISTICALLY.**

Judge Leo Green, Circuit Court for Prince George's County

TRUE COPY.—TEST.—

Marilyn N. Bladen
#570

CASE CLOSED
STATISTICALLY
ENTERED
6/3/14

cc: Daniel Moloney, Esq.
cc: Melanie C. Lynn, Esq.

EXHIBIT 12

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

KELLY L. PERRY,

Petitioner,

vs.

Case Number:
CAL-1329136

LITTLE DARLINGS DEVELOPMENT CENTER, ET. AL.,

Respondent.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motions Hearing)

Upper Marlboro, Maryland

Friday, May 16, 2014

BEFORE:

HONORABLE JUDGE LEO EDWARD GREEN, JR.

APPEARANCES:

For the Petitioner:

MELANIE LYNN, ESQUIRE

For the Respondent:

DANIEL P. MOLONEY, ESQUIRE

Electronic Proceedings Transcribed by: Kimberly Clay

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1-800-950-DEPO (3376)

C O N T E N T S

-oOo-

P R O C E E D I N G S

(2:02 p.m.)

THE COURT: All right. Court calls Kelly Perry v. Little Darlings Development Center. This is not -- CAL-1329136. I thought you guys were going to settle this thing.

MR. MOLONEY: Good afternoon, Your Honor.

THE COURT: Okay.

MS. LYNN: We were what?

THE COURT: I thought you were going to settle this thing.

MR. MOLONEY: I -- we had hoped we were but -- but we're going to -- we're going to throw it up to you, Your Honor.

THE COURT: All right. I got to tell you --

MR. MOLONEY: It maybe a couple -- I'm assuming probably a couple of other bodies after this I would imagine, but --

THE COURT: What's that?

MR. MOLONEY: I'm kidding. We were joking about --

THE COURT: No, I mean I'm working through --

MS. LYNN: Dan and I are going to be in a relationship for a long time is what he's trying to say.

THE COURT: Well, I don't have a relationship. But with Mark Magaw yeah, I've known him since 5th grade. It's hard to get around that.

MS. LYNN: I see him several times a week.

THE COURT: I know. You guys see each other. All right. Talk to me, Ms. Lynn. This is your motion.

MS. LYNN: It is.

THE COURT: And I've got to tell you, I thought about this. I've gone back and forth, back and forth, back and forth. My first initial inclination was one way. And I went in and ended up back and forth. But tell me why I should grant this.

MS. LYNN: I think there's three specific compartments to this motion --

THE COURT: Right.

MS. LYNN: -- Your Honor. Two are substantive and one is procedural.

THE COURT: Okay.

MS. LYNN: The first component is the lease agreement itself. The lease agreement did give Kelly Perry the choice to be an independent contractor or an employee. You saw in my Exhibit A of my motion --

THE COURT: Right. I saw it --

MS. LYNN: -- it lays out exactly what --

THE COURT: -- and she can pick the --

MS. LYNN: And it specifically says on there, it's your choice. And so Ms. Perry being 18, educated, or over 18 at the time, she's 33 or something now -- educated, college educated, can read and write English, she knew what she was choosing at the time.

And she enjoyed all the benefits of being an independent contractor when she worked at Little Darlings as -- they're called independent professional entertainers. Okay. What would you like for me --

THE COURT: We all --

MS. LYNN: -- to call them?

MR. MOLONEY: I don't mind if we -- if we call them dancers in here. I think we all know what's going on, Your Honor.

THE COURT: We do, don't we?

MS. LYNN: We do what?

THE COURT: We all know what's going on with this.

MS. LYNN: Right. I mean --

THE COURT: We're all adults.

MS. LYNN: I'll say dancer, okay.

THE COURT: You may --

MS. LYNN: Or IP.

THE COURT: Yeah.

MS. LYNN: Okay. Okay. So she knew --

MR. MOLONEY: That's the term I'm going to use, Your Honor.

MS. LYNN: IP, is that what you're (indiscernible)?

MR. MOLONEY: Sure.

THE COURT: She's a performer.

MR. MOLONEY: Yeah.

THE COURT: She's a performer. She's an artist.

MR. MOLONEY: Right.

MS. LYNN: She is.

MR. MOLONEY: There's a market for these types of performances and -- and that's what she does. There you go.

THE COURT: Deputy.

(Laughter.)

THE COURT: All right. Go ahead.

MS. LYNN: So --

THE COURT: He's embarrassed. You're not. Okay. Go ahead.

MS. LYNN: I'm not emembarrassed because I've been living with this case for a year. I've met Ms. Perry. I've -- the club manager is my client.

So --

THE COURT: No problem.

MS. LYNN: -- you know --

THE COURT: Don't worry about it.

MS. LYNN: So the lease agreement in and of itself is one component that Your Honor does need to look at in determining whether this motion for summary -- or whether the Claimant was an independent contractor.

Her intent is important. It is something that other courts have looked at when determining whether dancers --

THE COURT: Yeah. And those were sort of out of state. There's nothing really in state other than the one decision that he gives me from the United --

MS. LYNN: Actually, Your Honor, I did want to point out that there wasn't a lease agreement in that Butler case.

MR. MOLONEY: Yeah, actually, yes there was.

MS. LYNN: There wasn't.

MR. MOLONEY: I'm sorry. I don't want to interrupt your argument but, yes, there was. That's -- I mean, you can't just say wrong things in here.

MS. LYNN: Okay. I mean --

MR. MOLONEY: It's in the --

MS. LYNN: I did not see one.

THE COURT: Yeah. Well, I didn't -- well, we'll deal with that. I want to get to your end of it. Okay. Yes. Keep going.

MS. LYNN: Okay. So anyway, although that's not the controlling factor, it is one that you can't ignore. I mean it's persuasive evidence as to the intent of the party.

These are adults. They're entering into a contract, and the lease does cover the lack of control or the amount of control that Kelly Perry has over her position as a independent professional entertainer at Little Darlings when she's there. It lays out specifically everything that she can and cannot do.

With regard to control, under the common law, control is the most important factor. It's one of five.

Now, counsel does put forth this Butler case but that has to do with the Fair Labor Standards Act, and it's the economics reality accessed and six factors that the court looks at in order to determine whether there was an employment relationship.

It essentially, in this particular case, Your Honor, must be ignored. It's a smoke screen. It's not the applicable law. The common law is the

applicable law in this case. It's the Iowa v. Orient Express case.

And the control factor is the one that Your Honor should focus on with regard to whether this Claimant was an independent contractor or an employee.

I laid out all of the facts in my motion. And line by line I laid out at least ten things that Ms. Perry had control over. Her make up, when she wanted to work, when she didn't want to work. And so --

THE COURT: All the artistic things that she would do or not do.

MS. LYNN: Right. And, you know, Commissioner Webster exhaustively asked her questions about, "Can you wear sneakers if you want to work?" "Yes, I can."

I can -- they didn't tell me anything about -- they didn't tell her anything about the who, what, when, where, why and how of doing her job. The only thing that they've said was "We're a totally nude club, so at the end of your performance you need to be nude."

And so that in and of itself -- I laid out the case law. That in and of itself does not make Ms. Perry an employee. The Marine case indicates that -- and it -- that a business can tell an independent

contractor what type of product or result that they want out of the work that they're contracting for.

And so Ms. Perry could be nude for a second. She could be nude the entire time. It was her specific choice how to present her product, in this particular case her nudity. How she got there was her business. Commissioner Webster also said that.

And so you'll see in the cases that I presented, the manner or the form that she produced her product was solely her choice. She could wear what she wants, wear her hair anyway she wants, she could dance when she wanted, she could come to work when she wanted, she could not come to work when she wanted.

All the Employer did was say, "Look, if you put yourself on the schedule could you let us know whether you're going to be here or not." And so that in and of itself, again, doesn't transform her from an independent contractor to an employee status.

THE COURT: Let me ask you one question that kind of threw me a little bit.

MS. LYNN: With what I just said?

THE COURT: No.

MS. LYNN: Or what I --

THE COURT: Not with what you said. Something that's come up when I was reading all of

that. Actually the better question goes to him on that but --

MS. LYNN: Let me -- I'm sorry, not to -- did you get my reply with all the --

THE COURT: Yeah. I did.

MS. LYNN: Okay.

THE COURT: I read your reply. But this incident occurred after her performance; correct?

MS. LYNN: Where she fell?

THE COURT: Yeah.

MS. LYNN: Yes. She testified, I believe, and Dan can correct me if -- we thought originally that she fell when she was getting off the stage, but she didn't. She said that she was already done her performance and she was just standing there walking -- walking in the club and slipped.

MR. MOLONEY: I think she was getting down off the stage from the performance.

MS. LYNN: Okay. I don't -- I don't think so but --

THE COURT: That's what --

MS. LYNN: -- that's not --

THE COURT: Well -- and I'm not sure that makes a whole lot of difference in this regard but it can from a public policy statement. And I'll just

throw it out because I'm going to hit you with the same question.

The question I have is in this independent contractor, you're looking in a -- this case that you cite gives some -- some credence to your side, but problem is, is that's in an employment picture.

Here we say we start moving from an independent contractor into an employee, what's to happen if she decides to do something on stage or she decides to do something offstage as part of an artistic impression and pulls her back out.

Let's just say she decides to do back flips or --

MS. LYNN: Splits.

THE COURT: What?

MS. LYNN: Or pole dancing.

THE COURT: Or pole dancing.

MS. LYNN: Right.

THE COURT: Or she decides to do a split.

MS. LYNN: Right.

THE COURT: You know, have we transformed her from being an independent contractor into an employee and then -- but the Employer -- the owner is basically saying you can do anything you want right now.

But if they become an employee, then they're

going to have some restrictions because they're going to worry about it and her artistic -- I know those aren't your terms but that's used in some of these cases that you've cited to me. Artistic matters then become enhanced and they do become employees in that regard. Do you follow me?

There's an artistic side of this; correct? Exotic dancer. Is that not -- we talked about definitions in the beginning.

MS. LYNN: Well, I think Mr. Moloney brings up skill but that is actually not a factor in what the -- Maryland decides or if the common law decides as whether an employment relationship exists or not. He does -- or he does argue that in his case --

(Simultaneous talking.)

THE COURT: Yeah. I know.

MS. LYNN: -- because that's what --

THE COURT: That there is --

MS. LYNN: -- Butler says.

THE COURT: -- skill.

MS. LYNN: -- says.

THE COURT: Yeah.

MS. LYNN: But, Your Honor, when it comes to Butler it's a totally different standard. I mean, it's a Fair Labor Standards Act. Six -- it's six components

and they look at the totality of the circumstances; okay?

THE COURT: Well, that's a different situation they're looking at -- from a economic standpoint. We're looking at it from a public safety situation; correct? Or a employee safety situation when we're looking at workers' comp.

MS. LYNN: When we look at workers' comp?

THE COURT: Yeah.

MS. LYNN: Yeah, I mean, negligence isn't an issue.

THE COURT: Yeah.

MS. LYNN: But --

THE COURT: No. I know.

MS. LYNN: Right.

THE COURT: We're really looking at -- yeah. Okay. You did do --

MS. LYNN: But it --

THE COURT: -- a great deal of research on this. I'll give you that.

MS. LYNN: Yes. And I --

THE COURT: Definitely.

MS. LYNN: And, Your Honor, I have asserted all of the undisputed facts, and I've given you a case or some type of legal evidence to contravene any

argument that Mr. -- or I should say Claimant has made with regard to this case. And that has not been reciprocated, and that does bring me to my procedural argument.

THE COURT: Okay.

MS. LYNN: Which is, you know, my motion for summary judgment was just, you know, laden with facts from the -- both transcripts. The law, it was on point. And, you know, the standard for overcoming a motion for summary judgment is to provide details, facts under oath that the other side -- at some type of disputed fact.

The Respondent's motion does none of that. In fact, he says there are undisputed facts but then doesn't say what they are. He also says that he's going to file his own motion for summary judgment which contradicts the two paragraphs above -- him saying that there were undisputed facts.

And then he just attaches this Butler case, he doesn't -- that's just attaching a law. It's essentially akin to just bald allegations and law with no particular argument whatsoever. I mean, he has not set forth any type of dispute in order to overcome my motion for summary judgment on its face.

And so even though he responded, I still

replied to the information that he put in -- or the allegations that he made with specific facts and law to support, again, the motion for summary judgment in favor of the club and the insurer in this particular case.

And so I -- procedurally he hasn't met the standard to -- to overcome my motion on its face regardless of what it says.

THE COURT: Yeah. You've done a fabulous job in this legal -- this is great legal research -- legal right. I'm not going to deny that. Okay. Let me hear from him.

MS. LYNN: Okay.

THE COURT: I'll get your last word. You'll get last word. Mr. Moloney.

MR. MOLONEY: Thank you, Your Honor. There's a few things; one, I filed a cross-motion for summary judgment.

THE COURT: No, I know you did.

MR. MOLONEY: Assuming you've read it --

THE COURT: I've read it.

MR. MOLONEY: -- okay? And --

THE COURT: That's what I think she's alluding to in the end.

MR. MOLONEY: I gather that -- that no one's

going to give me kudos for my (indiscernible) writing, but that's fine. I'll survive.

THE COURT: No. That's okay. You give me --

MR. MOLONEY: But did --

THE COURT: -- a good case to read.

MR. MOLONEY: There's a few, you know -- be that as it may, whatever -- whatever counsel thinks about what we've put into our -- either our response --

THE COURT: Don't worry about that.

MR. MOLONEY: -- and to our motion.

(Simultaneous talking.)

THE COURT: Don't worry about it.

MR. MOLONEY: There's a few --

THE COURT: Tell me why --

MR. MOLONEY: -- roadblocks --

THE COURT: -- I should not --

MR. MOLONEY: There's a few hurdles that you have to jump over to -- to grant summary judgment in favor of -- of the Employer in this case.

The first one is -- and I think it's the one that -- that everybody missed. I've certainly -- I've put into my motion, I argued it at the commission, that the first one is -- is I think the highest hurdle of all and it's -- it's probably the most straightforward, and that is that the Maryland Workers' Compensation Act

9-236, essentially give us a catchall that everybody who falls into this category is an employee, period.

Now, I'm not going to -- I don't want to read it to you again, Your Honor, I know you have it up there in my motion but I just want to point out to you.

And this is -- and this has been -- this was established below, and I've put in my undisputed facts that were not disputed by counsel. But this as straightforward as it gets in giving a Circuit Court something to hang its hat on, and that is every individual is a covered employee while performing service for compensation, and everyone agrees she did get some compensation.

That was even agreed to below that -- that selling the drinks they -- they split the money. So the club actually paid her money. So that's compensation and that's not been disputed whatsoever.

Every individual is a covered employee while performing a service for compensation in the -- if they're performing in that -- in that company's regular business which everyone of these federal courts have said this is -- these are not bars, these are -- these clubs are -- are there for -- for the dancers.

So this is their regular business. This is what she's doing. If one; they don't maintain a

separate business which she doesn't; and two, they don't represent to the public that they're going to perform this business for them. She only did this for them.

So 9-236, that's the first hurdle you have to jump over, Your Honor, if you want to say I'm going to grant their motion for summary judgment and I'm going to just -- I'm going to write a decision that flies in the face of clear and unambiguous Maryland statutory law. That would be number one; okay?

Number two would be that this -- this statute is remedial in nature and -- and everyone agrees on that.

THE COURT: No. I don't disagree with you on that.

MR. MOLONEY: You cannot contract around this -- this statute. As a matter of fact. the Iowa -- the Orient -- Iowa v. the Orient -- court has specifically said the -- the reason -- parties subjected belief is not dispositive of -- of what they are because we want to make sure the people don't try to get hoodwinked and contracted around this statute.

This statute was enacted to protect folks, and no matter what your subjective belief is, you can't contract around this thing and then act differently.

So the -- the written agreement, like we talked about on the phone that day where you said, "Dan, I'm inclined to grant this. There's a contract here. That's game, set, match."

THE COURT: No, I said that. I definitely said that. There's no question about it. I --

MR. MOLONEY: Now, before I've given you anything to hang your hat on.

THE COURT: No, no. And I definitely said that.

MR. MOLONEY: Right.

THE COURT: But as the time went on, to be candid with you, you know, I've gone back and forth with this one.

MR. MOLONEY: Right.

THE COURT: And that -- I think a good judge does that.

MR. MOLONEY: I think so too. And I've been in this courtroom a lot and I've got a lot of respect for this Court and -- but I'll say this though. So you've got to -- you've got to overcome that -- that first (indiscernible) -- that section which is very important to me.

And the Iowa's court addresses that at the end of the case saying -- and by the way, all of this

setting aside in that -- in that Iowa's case about a sole proprietor agreement and whether the agreement controls, 9-236 says if you meet these three criteria, you're an employee, period.

So that's number one, okay? Number two is that we all agree in this room, I think, that the -- the written agreement, while certainly may be persuasive, it's certainly not dispositive.

And the case law says that. The emperor has no clothes kind of thing, and I know you read the case, Your Honor.

THE COURT: Right.

MR. MOLONEY: But if you sign an agreement saying that -- that you're an independent contractor and then you act otherwise at all, you're not. And we --

THE COURT: She can come and go --

MR. MOLONEY: -- agree on that.

THE COURT: -- as she pleases here.

MR. MOLONEY: Understood. Understood. But here's the -- here's the thing, if the -- if the standard was control, she keeps saying control, control, but that's not the standard.

It's the right to control, and the Iowa's court has given you that. That is verbatim from the

opinion. It's the right to control should he care to exercise it.

Doesn't have to exercise it. And I'm not -- this is not -- counsel can jump out of her chair and tell me -- because I'll read it to you. That's the law. The law is the right to control should he care to exercise it. And it's any degree of control.

So we're not -- I don't have a high bar in this case, Your Honor. I don't have to -- I don't have to show that be here this day at this time, do this, do this, do that.

All I have to show is they have the right to exercise some sort of control, and as minuscule as it may be. And that's what the court says, period. And we're not -- I'm not talking about a court in New Mexico. I'm not talking about a court in even Virginia or DC.

I'm talking about a court here in Maryland saying, the bar for someone to be an -- an employee versus an independent contractor is very low. Some right to control should he care to exercise it.

And I can point to three or four things and this is the same thing Commissioner Webster hung his hat on; you have to come to this meeting. If you -- you have to report for work at least once a week.

If you report, you have to stay for six hours. You have to be on the main stage at some point during the rotation and when you're on the main stage, by the end of your act -- let's just say it, you have to have all your clothes off; okay?

And that shows at least some degree of the ability to control. And as a matter of fact, they went ahead and exercised it. Again, Your Honor, the standard -- it's very clear.

And I know I -- this is just my Irish persona, I get feisty when I'm arguing these things but it is -- it is such a low bar. All you have to be able to say is I have the right to exercise some degree of control.

And this case law specifically says employer has the right to -- right to control -- right to exercise some control over the employee should he care to exercise it.

And I'm telling you, Your Honor, that is as low a bar as we have whether it be in workers' comp or any area of the law. So that's -- that's number two. That's the other roadblock that you have to jump over. You have to say there's no control here whatsoever.

And not only was there no control here whatsoever, there was no right to possibly even

consider controlling these people which I've just given you four things that they required them to do, okay, including rules and their -- and their -- just like in the Unique Butler case, there were rules in there that they had to follow.

And that case is directly on point. And the reason that it is, Your Honor, is that Judge Nickerson is not analyzing this under some other abstract statute. He's just saying, are you an employee or an independent contractor? And on the first page of his opinion it says --

(Simultaneous talking.)

THE COURT: Oh yeah, there was. Yeah, he --

MR. MOLONEY: Yeah, okay.

THE COURT: -- he brought --

MR. MOLONEY: So it's -- I mean the --

THE COURT: You're wrong about that.

MR. MOLONEY: The difference is --

MS. LYNN: What did he say?

THE COURT: Melanie.

MR. MOLONEY: -- the difference in --

THE COURT: There was an opt out in that other one. There was --

MS. LYNN: Oh, an agreement?

THE COURT: It's --

MS. LYNN: Okay. Then I apologize --
THE COURT: -- right in the first --
MR. MOLONEY: And I --
MS. LYNN: I didn't mean --
MR. MOLONEY: -- mean to suggest --
MS. LYNN: I didn't mean to mislead the Court, Your Honor.
THE COURT: No. It's the first -- no and you didn't --
MS. LYNN: I've read a lot --
THE COURT: -- because I've read it.
MS. LYNN: -- of cases and some have --
MR. MOLONEY: You know what the --
THE COURT: No. It said the Defendant asserts that the dancers are permitted to elect in writing to become either an employer or independent contractor.
That's in the first -- and then in the next it says to date, including Plaintiff -- "to date no dancer, including the Plaintiff, has elected to be classified as an employee."
MR. MOLONEY: And that's the --
MS. LYNN: Okay. Again, I don't --
MR. MOLONEY: And that's -- those are the facts here. I would submit to you, the only difference

between this case and that one is that -- that address is two doors down. I mean, it's literally the same thing.

They actually exercise a little bit more control in this case in that they actually instruct the dancers what to charge for the dances. Unique Butler got to decide for herself what to charge. That even cuts more in favor of her being an independent contractor whereas Kelly Perry was an employee.

But again, setting aside all of this, the first -- the first roadblock that this court has to get around is 9-236 which is crystal clear and I know you've read it because I put it in my cross-motion.

The second thing that this court has to -- has to jump over or at least dance around, Your Honor, is there certainly --

THE COURT: No pun intended.

MR. MOLONEY: No pun intended. Thank you, Your Honor. There certainly is at least -- it's such a low standard -- the right to control should he care to exercise it.

I'm speaking in -- I'm speaking verbatim now, from the Court of Special Appeals, "should he care to exercise it for the right to control," that's number two.

I've given you at least four things wherein they potentially could control her and in fact did. The third thing is some credence has to be given in this room to the presumption that -- that the people that hear these cases everyday got this one right.

And there's a presumption that the commission was --

THE COURT: And I'll be happy to give that to Commissioner Webster. I know him personally and professionally. No question about it.

MR. MOLONEY: And he held this case for six weeks before --

THE COURT: I have a great deal of respect for him, you know. There's no question about it.

MR. MOLONEY: Okay. And so that's -- that's three. I think I said five but I think it's four. And then finally -- finally Judge Nickerson, considering precisely the same case -- and the -- the Fair Labor Standards Act defines an employee as somebody who works for someone, which is exactly how the Maryland Labor and employment article defines an employee, somebody working for someone for pay.

He analyzes all of the factors but the only one that we really care about here is right to control. He's analyzing a woman who has even a little bit more

autonomy than Kelly Perry had, and he still says this -- this factor cuts in favor of an employee status.

I mean, what -- what you have to do then, Your Honor, the very last thing -- the very last hurdle you have to overcome if -- if you're going to grant this motion when we won below. When I've got the statute --

THE COURT: Do you agree --

MR. MOLONEY: -- directly on point.

THE COURT: -- that the facts are in dispute, no dispute to facts?

MR. MOLONEY: As long as the extra facts I've put in my cross-motion -- Ms. Lynn agrees that those -- those also were raised, well, then yeah, there's -- I think this case is right for summary judgment one way or the other.

THE COURT: Okay. Fair enough.

MR. MOLONEY: And then the final --

MS. LYNN: We do agree on that.

MR. MOLONEY: Yeah.

THE COURT: Okay. Good.

MR. MOLONEY: And then the final thing you have to do is -- and I know you don't have to write an opinion, but forgive me for saying it this way, is you've got to find --

THE COURT: No. I'm not going to write an opinion on this one.

MR. MOLONEY: Okay. Is you've got to either write or give an opinion from the bench where you decide under the same exact facts that William Nickerson got it wrong, John Webster got it wrong considering the same kinds of things.

The statute, despite the way it's written and the Iowa's court telling you that the bar in this case is shockingly low, you've got to grant summary judgment against this woman who simply --

MS. LYNN: Well, here's a question --

MR. MOLONEY: -- went to work --

THE COURT: -- I have from you from a public -- and I don't sit as a public policy judge. I'm not a public policy judge. Those are the good people in Annapolis.

But if you allow this to be a covered act, what happens, like I said, if she goes and decides to do a split, she tears her knee out, she blows -- tears a meniscus? That's a minor knee problem where or blows her -- or breaks her ankle instead. And like in this situation, she broke her ankle.

Let's just say she does some gymnastics act or some artistic dance or like counsel said, you used

to -- which is probably a better example.

She does pole dancing and she flies off for whatever reason and falls and breaks her rib. You know, I thought about that from that end. At one point, you know, at what point do we draw the line?

Because, I mean, she's entitled to do whatever her artistic dance is up top with no control, but then she's going to be covered if she does something wild and crazy off -- in the thing?

MR. MOLONEY: I think the short answer is absolutely, and that's -- that's the law in the state of Maryland whereas if I may -- you're an employee, you're an employee, you're an employee. And this is a no fault statute; okay.

So if she does -- obviously she does something that rises to the level of willful misconduct or -- or whatever -- whatever may be on drugs or drinking, those are -- those are totally separate issues.

But if you work for an employer and you're doing something that arises out of -- occurs in the scope of your employment, and if your employment happens to be dancing and (indiscernible) entertainment, yeah, absolutely that will be covered. And we want that to be covered.

That's why the -- that's why the statute was enacted. Even the construction worker who goes on the job site in the morning and his job is to whatever --

THE COURT: Well, construction work is different. Let me think about what my thought was. Last night I would have loved to have been at Bruce Springsteen's concert up in Philadelphia, but obviously I had to work. But no, it wasn't last night, it was the night before.

Anyway -- but we bring in, I mean, you go -- I'm of Irish decent. I don't have any problem saying this, you go to a pub, you --

MR. MOLONEY: As am I.

THE COURT: As are you. But the bottom --

MS. LYNN: How much?

THE COURT: Okay. But you go there and you see a ton of entertainers that come into the pubs. Rams Head's a very good example for me to go down there. You know, I go there once a month -- watch somebody.

They're independent contractors but they come and go all the time. They, I mean -- and sometimes you see the same folks there. In some of these pubs you see the same person singing every time you go. But -- or is to say, they're not -- they're employees then?

MR. MOLONEY: They're absolutely independent contactors and I'm glad you -- you've raised that question because I think it's -- it's a relatively straightforward analysis Your Honor, in that --

THE COURT: But she's an entertainer, too.

MR. MOLONEY: Absolutely not. And the judge and every federal court has said every time they've addressed it, that there's no degree of skill required to be an exotic dancer. You're simply there to take your clothes off.

That's straight from Judge Nickerson, and that's straight from all the cases Ms. Lynn cites. There is no degree of skill.

THE COURT: Nickerson probably went to Harvard. I went to UB. So --

(Simultaneous talking.)

MR. MOLONEY: Well --

MS. LYNN: And again, it's not a factor that's considered in --

MR. MOLONEY: It's not. It's not.

MS. LYNN: -- this particular case.

THE COURT: I know. I know.

MR. MOLONEY: But within --

THE COURT: I'm just making a --

MR. MOLONEY: But your analogy is -- is

appropriate, Your Honor, and it should be addressed. The difference in -- in the whatever the, you know, Celtic (indiscernible) who decides to go perform at Rams Head and -- and agree with Rams Head, we're going to bring our talent into your facility for a -- for a set price and we're going to provide this -- this service for this night and we're contracting with you is entirely different from some young lady who walks into a facility and says I want to -- I want to work here. We've never had anyone be an employee, sign this lease agreement.

And we all know. We're all lawyers in this room. We all know why this agreement was written this way. It's to contract around somebody like me someday saying no, no, no, these people are employees. That's why these cases are being brought up all around the country. And I'm sure Your Honor's aware that -- that there are -- there --

THE COURT: Oh no. I read the Daily Record.

MR. MOLONEY: Oh.

THE COURT: I see it sometimes.

MR. MOLONEY: Having said all that, the difference here is that we're working for the same person nightly, providing a service for them for their business, not that -- and we're not in -- and the

difference between the -- the entertainer who's going and entertaining in a bunch of different clubs, again, goes --

THE COURT: But she can go to different clubs.

MR. MOLONEY: But she didn't.

(Simultaneous talking.)

THE COURT: She --

MR. MOLONEY: But she didn't and she wasn't. She -- and 9-236 --

THE COURT: But the owner --

MR. MOLONEY: -- says --

THE COURT: -- doesn't have the control to say she can go to different -- she can go to anywhere she wanted to --

MR. MOLONEY: You know what and --

THE COURT: -- right, under this independent contract.

MR. MOLONEY: You know what -- and you know what I can do tomorrow?

THE COURT: In theory --

MR. MOLONEY: Right.

THE COURT: In theory she could go to anywhere else and work any -- any place else. She could go -- I mean, I don't know the names. She could

go --

MS. LYNN: She could go to Norma Jean's, right, two doors down like you said.

MR. MOLONEY: Okay. Let me --

THE COURT: Okay. Thank you.

MR. MOLONEY: You know what? In theory, tomorrow I can go -- and while I'm -- while I'm working in my law firm tomorrow I can go and take cases and do whatever for another firm. Doesn't mean I'm not still John Holt's employee.

THE COURT: Not exactly.

(Simultaneous talking.)

MR. MOLONEY: Absolutely. I don't have --

MS. LYNN: I can't do --

MR. MOLONEY: -- an employment agreement.

MS. LYNN: -- that.

MR. MOLONEY: Absolutely. I don't have any employment agreement. Fine, then take it out on the lawyer then. If I'm the -- if I'm --

THE COURT: It is a fiduciary relationship there.

MR. MOLONEY: That's fine. Then take it --

THE COURT: But employers --

MR. MOLONEY: -- out of the --

THE COURT: -- are a different ball game

there.

MR. MOLONEY: Do you --

THE COURT: I don't think you want to go down there.

MR. MOLONEY: All right, well, here's what's been -- any employee can have a second job anywhere else. Any employee can go and do things on the side and moonlight. Absolutely.

I mean, Your Honor, to say that just because you're able to do something somewhere else makes you an independent contractor versus an employee is a really slippery slope.

THE COURT: But she's an entertainer. That's --

MR. MOLONEY: She's not an entertainer. The courts have said repeatedly these are not entertainers. There's no degree of skill required for this. The whole point of this club is to have women in there take their clothes off.

And what we've got is an owner of a club who's obviously got a smart lawyer saying, have them sign this agreement because then we won't be stuck with workers' comp, unemployment, having to pay them fair wages.

And the courts are saying over and over, and

especially in the state of Maryland, the courts are saying just because you have one of these independent contractor agreements doesn't mean you don't have to pay people wages, doesn't mean we're going to let you around the FLSA.

And it doesn't mean we're going to let you around the Workers' Compensation Act which is specifically this -- the courts in the State have held, you cannot contract around. It's based on your actions.

And if they exercise -- not even exercise, that's the wrong word. If they have the right to exercise any degree of control, anything -- I mean, and that's -- this is verbatim, they're employees. They exercise some control over -- they have the right to exercise some control.

A workers' comp commissioner has determined that that rose to the level of some right to control to make -- make her an employee. A federal judge has -- has given the same kind of analysis in this jurisdiction, the statute says specifically --

THE COURT: Let me ask you a question about that for a second. I read this. There's no question I did. It was submitted. I read a ton of stuff and there's no question about that. What type of authority

is this for me?

MR. MOLONEY: Just persuasive. It's not binding.

THE COURT: It's almost like an unreported decision; isn't it?

MR. MOLONEY: It's -- it's --

THE COURT: It's not a reported decision. It's not done to have -- it doesn't have a Federal Reporter Number or anything else; does it?

MR. MOLONEY: It is nothing but persuasive. But if reading that doesn't persuade you at all towards --

THE COURT: Well, no, I've read --

MR. MOLONEY: -- comparative --

THE COURT: -- it. There's no question I read it. No question I've considered this. There's no --

MR. MOLONEY: Just like giving a page from a treatise. I mean, and if you read that and say, you know what Dan, I thought what you said, it made some sense, and I'm going to incorporate that into my opinion or how I decide. That's a -- you don't have --

THE COURT: No, no --

MR. MOLONEY: That's not binding.

THE COURT: No. That's --

MR. MOLONEY: I'm saying on the record, that's not binding.

THE COURT: That's what I'm saying. It's not a binding authority. If it was federal it wouldn't be binding upon me --

MR. MOLONEY: It wouldn't anyway. Exactly. Just like the --

THE COURT: Not --

MR. MOLONEY: Just like the -- just like the -- even what Commissioner Webster did below. I mean it's just -- it's just here to persuade you. It's prima facie evidence but you can overturn it. I'm sure you have over turned the commissioners before.

THE COURT: Oh sure.

(Simultaneous talking.)

MR. MOLONEY: I'm just --

THE COURT: Some good commissioners --

MR. MOLONEY: Yeah.

THE COURT: -- that I liked. There's no question about it.

MR. MOLONEY: I'm just trying to --

THE COURT: Some people I've known --

MR. MOLONEY: -- and I've got a --

THE COURT: -- as long if not longer than Mark Magaw. So --

MR. MOLONEY: Yeah. I just think it's --

THE COURT: If you need to know --

MR. MOLONEY: I think it's --

THE COURT: -- who that is, I think you don't need to know who that is.

MR. MOLONEY: -- I do know --

THE COURT: I think you --

MR. MOLONEY: -- I do know -- know who it --

MS. LYNN: I'm sure he does, public safety.

THE COURT: Yeah. But --

MR. MOLONEY: Of course. But I think it -- I think it's there to persuade you and just like the cases that -- and --

THE COURT: Oh, no. The cases she cites --

MR. MOLONEY: -- and now Ms. Lynn cites --

THE COURT: -- me are the same way. They're out of state, their persuasive authority. There's nothing on point here in Maryland.

MS. LYNN: And that's why when he continues to say that the law in Maryland, the law in Maryland, it's not -- there is no law in Maryland with regard to these particular --

THE COURT: Well, he's going back --

MS. LYNN: -- facts.

THE COURT: -- to the statute which is where

-- that gave me some pause and some sway that way. I mean, I'll be -- like I told you, I've gone one way, I've gone other.

I'm going back and forth with this one in chambers. My law clerk will tell you, a couple judges may tell you too.

MR. MOLONEY: Well, then the final analysis is, and this is very important, Your Honor. And I'm not saying that this is -- this is absolutely positively what -- what Annapolis would say is the law in Maryland.

But I think this is what the statute says, and that is, that tie goes to the runner. If you are absolutely 50-50 in this case and you don't know which way to turn, the statute's remedial in nature.

And the whole point of the statute -- it's a benevolent statute meant to help workers and not shield employers from -- from their responsibilities to their -- to their workers.

So if you've got this -- if you flip a coin and it absolutely lands on its side, not even considering the presumption of the commission's correctness, the benevolent purposes of this act would require you to say that I'm going to -- I've got to -- I've got to side with the Employer and that -- with

the employee, and that would be a public policy argument which I know you don't like. So at the end of the day --

THE COURT: No. I understand that. As a Circuit Court judge I'm different than a District Court judge. I look at the public policy and sometimes I do call public policy in different things.

I'm just saying that the folks in Annapolis do it -- are charged with it more than I am in the thing. That's all I'm saying.

MR. MOLONEY: I think given the state of -- given the state of the -- actually I'm not going to comment about that on the record.

THE COURT: Right.

MS. LYNN: Your Honor --

MR. MOLONEY: That's all I have. Thank you very much, Your Honor.

THE COURT: Yeah. Thank you.

MS. LYNN: Mr. Moloney still, again, wants to ignore the lease agreement. This -- the law doesn't say ignore the lease agreement, we're only going to look at the five factors that are outlined in Iowa v. Orient Express or in, you know, this statute that he's relying heavily on; 9-236.

It says that a lease agreement in and of

itself is not sufficient to establish an independent contractor relationship. Well, that's not what we're arguing here.

The lease agreement coupled with all the factors that do favor the status of independent contractor when you analyze them under the control and the other four factors do show that she's an independent contractor.

This -- you can't take Ms. Perry as somebody who the law is -- oh, she doesn't know what she's doing, so we're going to, you know, jump in and save her.

She is a college educated RN and she was simply waiting for her license to come through which was why she was working at Little Darlings. And so you can't say that Ms. Perry needs protection.

What Ms. Perry did was take advantage of the system. She read this agreement, she signed it, she wanted to keep all of the tips from her customers. She wanted to keep all of her money. And until she fell, that was fine.

So she's trying to take the benefits of what she was -- what she agreed to under the lease agreement, and also the benefits of the workers' compensation statutes in her favor. And she can't have

it both ways.

And if Your Honor grants counsel's motion for summary judgment then she is having it both ways. She -- so the lease agreement can't be ignored. It's not sufficient in and of itself --

THE COURT: It's not definitive.

MS. LYNN: -- but it should be -- it should be considered. Now, with regard to all of the factors that counsel indicated was the club's right to control, that's just a complete mischaracterization of the right to control.

What he described was what Ms. Perry and the club agreed to was going to be the parameters of their relationship in the lease agreement. They expected her to uphold her portion of -- of the lease agreement and they, in turn, did the same.

If the club is not making -- Ms. Perry could come and go as she pleased. She could make her own schedule. She could work day, she could work nights, she could work any night.

It's not unreasonable for someone to -- if they say that they're going to show up, for you to say, hey, why don't you let me know that you're not. And so I -- what Mr. Moloney is arguing is a just complete lack of any type of interaction between people who are

coming into the club and the dancers who perform there, and that's just not realistic.

The meeting that he indicates -- actually he hasn't really argued any facts besides those four with regard to right control. And in my motion, I do have law and facts that contradict every single point that he's made verbally --

MR. MOLONEY: I'm sorry --

MS. LYNN: -- to Your Honor today.

MR. MOLONEY: -- is the argument just that -- that she's a better writer than me? Is that the whole thing here? Because you only need one factor. One --

MS. LYNN: No, what you need in a motion for --

MR. MOLONEY: I'll agree on the record. She's a better lawyer than me, okay?

THE COURT: You don't have to do that. There are better judges than me, I'll go there, okay?

MS. LYNN: Your Honor, and so -- I mean, I don't know if that was supposed to, you know, take me off of my game or whatever. But regardless of who's a better lawyer or not, the point is that, I mean, you do have a standard with regard to a motion for summary judgment and he didn't meet it.

And so, I mean, whether the law's in his

favor or it's not in his favor, he didn't put it down on paper and that's what the law for motions for summary judgment requires, not bald allegations, not, you know, a conversation essentially.

And with regard to, you know, Commissioner Webster's findings, there actually is no -- there are findings in the order. So --

THE COURT: It's just a straight order.

MS. LYNN: It's just a straight order. And what you will see is Commissioner Schott, who's also a esteemed commissioner at the commission level, two months later found that Awata Camara (phonetic), a dancer at Norma Jean's, the same club that is in the Butler --

THE COURT: The one two doors down --

MS. LYNN: -- case.

THE COURT: -- you said; right?

MS. LYNN: Two doors down; right? She found --

THE COURT: I'm taking your word on that, counsel.

MS. LYNN: I'm sorry?

THE COURT: I'm taking your word that it's two doors down.

MS. LYNN: That's what he said.

MR. MOLONEY: Roughly.

MS. LYNN: I don't know if it's two doors or down.

THE COURT: Well, it's probably close.

MS. LYNN: Anyway, same club; okay. Commissioner Schott, Maryland workers' comp unreported opinion, not appealed, found Camara at Norma Jean's to be an independent contractor. And --

(Simultaneous talking.)

MR. MOLONEY: Now that's not relevant. Maybe Camara had an even worse lawyer than me --

MS. LYNN: Why is that not --

MR. MOLONEY: -- which you've already established.

MS. LYNN: -- relevant? That's -- why is that not -- why is your unreported opinion better than my unreported opinion. At least mine's in the same jurisdiction --

MR. MOLONEY: Well, mine's from a --

MS. LYNN: -- the same --

MR. MOLONEY: -- federal judge --

MS. LYNN: -- court.

MR. MOLONEY: -- with analysis, actually.

MS. LYNN: And the same timing.

MR. MOLONEY: We're starting to bicker now.

THE COURT: We're digressing here. Anything else, Ms. Lynn?

MS. LYNN: I just would have, Your Honor, you know, like I said, substantively he hasn't -- he hasn't met his burden with regard to the right to -- or control or meeting the standard in Maryland.

The lease agreement should not be ignored. It is controlling. It evidences an agreement between the two parties, and that is what the club expected Ms. Perry to do and Ms. Perry expected the club to do their part, and all of the factors, including the lease agreement, show that she was an independent contractor.

THE COURT: All right. The court is prepared to rule. It has considered the motions and the pleadings, the filings in this matter and will rule from the bench.

This is a workers' compensation appeal following a dance performance at Little Darling's Development Center. Claimant, Kelly Perry, slipped and broke her ankle.

At the time, it is alleged that the Claimant was an independent contractor pursuant to the terms of the written lease agreement which everybody agrees with -- that she signed on the date she began dancing there.

Despite her status as an independent

contractor, Claimant filed for workers' compensation benefits alleging that she was an employee. On September 6, 2013 Commissioner Webster found that the Claimant was an employee and that the injury was compensable.

The Employer-Insurer, appealed the decision on September 20th, 2013. There was some procedural errors in this matter which the Claimant failed to file a timely response and the Employer-Insurer filed for a motion default. The motion was denied because the Claimant filed in opposition with her response. Today the Court is presented with an Employer's motion for summary judgment and the
Claimant's motion for summary judgment.

The Employer-Insurer, argues that the Claimant was not a covered employee but an independent contractor. The Employer-Insurer alleges that on October 10, 2012 Claimant entered into the club with the intent to become a professional entertainer.

The Claimant was given the option of being an employee where she could receive -- would receive a wage, a set schedule and other duties or an independent professional entertainer where she would pay rent to the club for privileges of using the stage to perform her dances this being explained to the Claimant and

explicitly in the contract, she chose to be an IPE or an independent professional entertainer.

At the time of the signing of the contract, Claimant was over the age of 18, certainly proficient in reading and writing and certainly, as counsel has eluded to in the transcript below, noted that she is studying to be a nurse.

For a dancer with an independent professional entertainment status, the club did not set a schedule or require the number of days of work to work per week, require the specific outfits, require the specific hair or makeup, choose the music, choose the stage name, order how to dance, require her to sell drinks, pay or control the consumption of alcohol, nor, importantly, was she kept from working for other establishments.

Because the club was a full nude club, IPEs were required to be fully nude at the end of the dances. Following a dance or October 19th, Claimant fell and broke her ankle while exiting the stage. The Employer-Insurer directs the Court's attention to 9-202 in addressing whether the Claimant was a covered employee.

And C; to overcome the presumption of a covered employee, an employee shall establish that the individual performing services is an

independent contractor in accordance with common law or specifically exempted from employment under this statute.

In determining who is a covered employee under the -- under the Workers' Compensation Act, courts and the Workers' Compensation Commission look to five factors:

Whether the employer selected or hired the worker, whether the wages were paid to the worker, whether the employer had the ability to discharge the worker, whether the employer had the ability to control the worker's conduct, and whether the worker worked with part of the employer's regular business. That comes from the Oriental Express Delivery which is at 190 Md. App. 438.

The key here, the Court looks at, when the Court looks at -- there is -- it's lack of control over the Claimant enumerated above the clear indication that the Claimant was an independent contractor.

It's not enough just to say that they had that but the person -- she was -- she came in the club, she rented a portion of the premises to perform. There's a difference in that as opposed to being something in opposite regards.

The Court finds for the reasons given by the

Employer-Insurer in her brief that the summary judgment should be granted in favor of the Employer-Insurer. And for those reasons, the Court will grant that.

As to the Claimant's motion for summary judgment, there are procedural errors but the Court has ruled on the motion for summary judgment in favor of the Employer, so therefore will deny the Claimant's summary judgment in that regard.

Court will, I believe, remand it to the -- reverse the Workers' Compensation Commission, enter an order for those reasons and close the case statistically.

As I do in every case, Ms. Lynn, consistent with every workers' compensation case I've tried in the five and a half years, the prevailing party prepares the order.

All right. I'll give you a disposition date of June the 6th --

MS. LYNN: Your Honor, I have the order prepared. I will email it to you.

THE COURT: Okay. Fair enough. You don't have --

MR. MOLONEY: Thank you very much --

THE COURT: -- a problem with that.

MR. MOLONEY: -- Your Honor.

THE COURT: Pleasure. Come on up. Hit the button.

(At 2:48 p.m., proceeding concluded.)

REPORTER'S CERTIFICATE

This is to certify that the proceedings in the matter of Kelly L. Perry versus Little Darlings Development Center, et. al., Case No. CAL-1329136, heard in the Circuit Court for Prince George's County on May 16, 2014, were electronically recorded.

I hereby certify that the proceedings, transcribed by me to the best of my ability, in complete and accurate manner, constitute the official transcript thereof.

In witness whereof, I have hereunto subscribed my name this 10th day of July, 2014.

EXHIBIT 13

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

BRIAN SANDOVAL
Governor

BRUCE BRESLOW
Director

SHANNON M. CHAMBERS
Labor Commissioner

STATE OF NEVADA

Department of Business & Industry

OFFICE OF THE LABOR COMMISSIONER

http://www.LaborCommissioner.com

REPLY TO:

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CARSON CITY, NEVADA 89706
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FAX (775) 687-6409

November 3, 2015

LAS VEGAS BISTRO, LLC DBA LARRY FLYNT'S HUSTLER CLUB
6007 DEAN MARTIN DRIVE
LAS VEGAS, NV 89118

Reference: Wage Claim filed on 6/8/2015
File No. 27644

Please be advised that the claim filed with our office by Brandie E. Campbell against Las Vegas Bistro, LLC dba Larry Flynt's Hustler Club has now been closed. No further correspondence is needed on this claim.

Thank you for your cooperation,

Malia Ervin
Compliance/Audit Investigator
Office of the Labor Commissioner
702-486-2786
mrervin@laborcommissioner.com

EXHIBIT 14

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
DECISION OF THE ADMINISTRATIVE LAW JUDGE ORANGE COUNTY APPEALS OFFICE
(714) 562-5560

DATE MAILED: JUN 27 1995

CASE NO: C-T-67077

DATE PETITION FILED:
AUGUST 19, 1993

PETITIONER: FRITZ THATS IT
C/O ROBERT L MCCUE JR. CPA
P.O. BOX 3073
PALM SPRINGS CA 92263

DATE AND PLACE OF HEARING:
MAY 4, 1995
SANTA ANA CA

EMPLOYMENT DEVELOPMENT DEPARTMENT
RESPONDENT

PARTIES PRESENT:
PETITIONER
DEPARTMENT

STATEMENT OF FACTS

The petitioner petitioned for review of a denial of its claim for a refund of $39,919.47 representing amounts paid by the petitioner pursuant to an assessment levied by the department for sums alleged to have been due for contributions, personal income tax, penalties and interest.

The assessment covered the period of April 1, 1990 to March 31, 1993 in represented amounts alleged to be due on unreported remuneration paid to dancers, disk jockeys, cleaning persons and day laborers.

At the hearing and in its petition, the petitioner specified that its petition was directed only to the workers designated as dancer entertainers.

The petitioner operates a bar and restaurant featuring entertainment consisting of dancers who perform dances on stages erected within the establishment for the entertainment of the customers. The dancers perform both clothed and partially

clothed at which time they are known as topless dancers. The dancers provide their own clothing, their own dance routines and the means for providing the music for their dancing. That is, the dancers can and do provide magnetic tapes or other such instrumentalities which are utilized in the employer's audio system to broadcast the music to which the dancers dance.

The dancers entered into a written agreement with the petitioner wherein the parties mutually agreed that the services would be performed by the dancers as independent contractors with the pertinent provisions of the written agreement being that the dancers would provide visual entertainment in the form of dancing services for customers of the client, providing their own costumes and choreographing with the dancer free to perform services at any time in which the client requires the performance of such services. Specifically, the dancers would not be required to perform services according to scheduled dates and times although they would be expected to provide the petitioner with a notice of availability. Other provisions were that the dancer would not be required to devote any minimum number of hours per month to the services and were free at all times to perform services for other clients at their own discretion.

With respect to taxes the agreement provided that the dancers would be responsible for payment of all their own personal liability for federal and state taxes and would provide their own workers compensation insurance coverage.

With respect to compensation the agreement provided that the petitioner would pay the dancers $3.50 per hour for such services.

Representative testimony at the hearing from four workers who performed as dancers for the petitioner and additional affidavits from four other such individuals consistently and uniformally asserted that the dancers were free to perform when and if they desired and were not required to adhere to any specific work schedule. They were free to offer their services to other clients and did so even during the course of the relationship with the petitioner. Any compensation received from the petitioner was negligible in that the vast majority of their income was derived from tips tendered by customers of the establishment in response to the dancers performance.

An additional consistent assertion of the witnesses was that the dancers were not even required to dance when they were present in the facility. When they desired to do so they would simply place their name on a roster and would then take turns dancing if their name came to the top of the list.

The available evidence not in agreement with the general consensus of the witnesses referred to above consists of an affidavit from a former worker who performed services for the petitioner prior to the period of assessment involved herein and who performed services in three different capacities for the petitioner. She performed as a dancer, as a waitress and as a bartender at different periods of time. She has litigation pending with the petitioner concerning two alleged on the job injuries which have become an area of dispute between her and the petitioner in one instance because of the contention of the petitioner she was injured while performing as an independent contractor and in the other instance apparently questioning the actual validity of the claim. As a result of that and other disputes between them, there is an apparent hostility between the two. Be that as it may, she asserts in her affidavit that she performed services as what she describes as a dancer/waitress meaning she did both in direct connection with each other. In other words, she would dance and then perform as a waitress and then dance, etc. She was directed to clock in and out on a time clock and if she failed to do so was not paid. She contends she was required to go topless on the stage when she was dancing and to wear appropriate clothing or unclothing. She contends she had to dance to a certain number of songs and perform topless to a designated number of songs. She contends the order of dancing for the dancers was established by the petitioner and could not be changed except by appropriate members of management. Finally, she contends that she was required to perform on a regular schedule in which there was a black board at the petitioner's place of business with each dancer's name listed and then the day of the week that they were to work and the shift.

The other items of evidence of significance were photographs taken by the department representative at the petitioner's place of business showing a automatic time clock and an adjacent group of time cards. There was also a placard entitled "New Time Card Rules" indicating that any worker who clocked in one minute late would be docked one hour and anyone who clocked out one minute early would be docked one hour.

The petitioner did have a number of acknowledged employees other than the dancer entertainers and the evidence was unclear as to whether it was contended that these rules applied to the dancer entertainers or to the acknowledged employees. The representative testimony at the hearing indicated that the dancers frequently didn't bother with time cards as there was little interest in the nominal hourly wage with the great bulk of their compensation consisting of tips as discussed earlier.

REASONS FOR DECISION

Employer contributions to the Unemployment Fund shall accrue and become payable by employers "with respect to wages paid for employment" (Unemployment Insurance Code, section 976).

Contributions are due the Department from employers with respect to wages paid in employment for unemployment insurance (section 976 of the Unemployment Insurance Code), disability insurance (section 984 of the code), employment training (section 976.6 of the code), and personal income taxes (section 13020 of the code).

Section 601 of the Unemployment Insurance Code provides as follows:

"601. 'Employment' means service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied."

Section 621(b) of the Unemployment Insurance Code defines "employee" to include "Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."

The following factors are considered in determining whether or not an employment relationship exists (Tieberg v. California Unemployment Insurance Appeals Board (1970) 2 Cal. 3d 943,950):

1. Which party has the right to control the manner and means of accomplishing the result desired;

2. Whether there is a right to discharge at will, without cause;

3. Whether or not the one performing services is engaged in a distinct occupation or business;

4. Whether the work is usually done under the direction of an employer, or by a specialist without supervision;

5. The skill required;

6. Who supplies the instrumentalities, tools, and place of work of the one performing services.

7. The length of time for which the services are to be performed;

8. The method of payment, whether by time or by the job;

9. Whether or not the work is part of a regular business of the beneficiary of the services.

10. Whether or not the parties believe they are creating a relationship of master and servant.

A contractual provision that a workman is an independent contractor is persuasive evidence of the intended relationship, but it is not controlling and the legal relationship may be governed by the subsequent conduct of the parties (Brown v. Industrial Accident Commission (1917) 174 Cal. 457).

In the present case the workers whose status is in issue, the dancer entertainers, did perform their services under a written agreement wherein the expressed intent of the parties was that they were to perform as independent contractors and be responsible for their own taxes. This is therefore highly persuasive evidence of the intended relationship but is not controlling.

Accordingly, it is necessary to evaluate the conduct of the parties under the criteria of the Tieberg case.

Initially, the evidence is not sufficiently clear to make a direct finding at the outset that he petitioner did or did not have a right to control the manner and means by which the dancers accomplished the desired result. Therefore, it is necessary to look to the ancillary factors discussed in the Tieberg case to determine whether or not that right of control existed.

With respect to whether or not the dancers were performing services while engaged in a distinct occupation or business, the evidence is not entirely clear. However, what is clear, is that the individual dancers were unanimously of the opinion that they were engaged in a distinct occupation and were able at all times to offer their services either to the petitioner or to anyone else where they felt that they could receive satisfactory remuneration for their work. None actually was known to be attempting to market herself as an individual engaged in business as a dancer other than for their offering such services to various potential customers, usually through word of mouth.

The type of work being done is one which could be under the direction of an employer or by an individual without supervision.

With respect to the skill required, the skill of the dancers would obviously be an immensely important factor in their success and in their being able to achieve adequate remuneration for their services since it consisted almost entirely of voluntary

contributions from customers of the establishment who would tip for what they considered to be a satisfactory performance. Accordingly, it is concluded that there was a substantial amount of skill required for the performance of the services.

The dancers supplied their own costumes, music and choreographing while the petitioner provided the place where the services were to be performed, the stage on which the dancing was done and the audio equipment necessary for the playing of the music provided by the dancers. Therefore, this criterion is of little help in resolving the issue to be dealt with herein.

The agreement between the petitioner and the dancers did not contemplate any specific length of time for which the services were to be performed, the oral testimony available at the hearing establishes that there was no specific length of time for the dancers to perform their services which was entirely up to the individual dancer both as to when and even if they were to perform the services.

The overwhelming consensus of the testimony was that any remuneration paid by the petitioner was incidental and nominal and not really a factor in the relationship. Substantially all of the remuneration of the dancers was in the form of voluntary tips from customers of the establishment and therefore payment was not by time or by the job but rather at the whim of individual customers expressing appreciation for a performance.

The dancers did perform their services as a part of their regular business of the petitioner in that it was for the entertainment of its customers and in the hope of attracting such customers.

Finally, it is noted initially, the parties believed and intended that the relationship was to be that of an independent contractor as opposed to an employee.

It is recognized that some of the conclusions set forth above are at variance with the affidavit of the one former employee who furnished an affidavit to the department making assertions which if found true would clearly establish an employment relationship. Little weight has been given to that declarant's declarations because of the fact that her period of relationship with the petitioner was prior to the assessment period so she could not know what type of conduct was engaged in by the petitioner and dancers employed during the period covered by the assessment and the fact that the declarant has some obvious bias and prejudice against the petitioner.

Finally, the photograph of the time clock and the time cards when viewed solely on its own would suggest very strongly an employment relationship. However, the evidence shows that there were a number of acknowledged employees and the evidence is fairly conflicting as to whether or not the dancer entertainers were subject to the time clock rules so the conclusion is reached that the existence of the time clock and the time cards is not particularly persuasive as to the existence or nonexistence of the employee relationship.

Based upon an evaluation of the conduct of the parties, their written intent as expressed in the written agreement and the nature of the services provided, it is concluded that the individuals designated as dancers/entertainers performed their services as independent contractors and not as employees of the petitioner.

Accordingly, the petition for refund is granted insofar as it was based upon remuneration alleged to have been paid to the dancer entertainers for services performed as such entertainers. In the event that one or more of those individuals performed other services for the petitioner, such as waitressing, the granting of this petition is not to be deemed to relieve the petitioner from any legal responsibilities with respect to any other such relationship with one or more of the same individuals identified as dancers/entertainers.

DECISION

The petition for refund is granted as to those workers designated as dancer/entertainers.

W. J. LEHAN
Administrative Law Judge

WJL:sc
THIS DECISION IS FINAL UNLESS APPEALED WITHIN 20 CALENDAR DAYS. FOR APPEAL OR REOPENING RIGHTS, SEE ATTACHED NOTICE.

EXHIBIT 15

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
DECISION OF THE ADMINISTRATIVE LAW JUDGE SAN DIEGO OFFICE OF APPEALS
(619) 688-0125

DATE MAILED: JUN 5 1995

CASE NO: C-T-62699-0001

DATE PETITION FILED:
NOVEMBER 19, 1995

PETITIONER: A TOUCH OF CLASS
BETH A VIERSEN
P O BOX 910262
SAN DIEGO CA 92191

DATE AND PLACE OF HEARING:
MAY 12, 1995
SAN DIEGO, CALIFORNIA

EMPLOYMENT DEVELOPMENT DEPARTMENT
RESPONDENT

PARTIES PRESENT:
PETITIONER
RESPONDENT

STATEMENT OF FACTS

A petition for reassessment was filed by petitioner under the provisions of section 1222 of the California Unemployment Insurance Code on an assessment levied by the Department on October 21, 1992 under the provisions of section 1126 and 1127 of the code. The assessment covered the period January 1, 1990 through June 30, 1992 and was in the amount of $5,233.70 contributions, originally $7,988.36 in California income tax which was later reduced by the Department to $2,782.70, and originally $1,322.20 penalty which was reduced by the Department to $801.54 plus interest as provided by law. This assessment represented contributions in California personal income tax determined to be due on unreported remuneration paid to individuals performing services as erotic dancers and masseuses.

There was a prior separation issue case involving one of the dancers who worked with petitioner which is presently in Superior Court on a writ and thus no decision has been rendered in that case. There is a finding of fact between petitioner and one of the dancers in Municipal Court which found that the relationship between those parties was that of independent contractors. All of the alleged employee here were basically in the same situation as the alleged employee who was found to be an independent contractor.

The alleged employees responded to ad's in the paper and if accepted were sent out on assignments which petitioner received from clients for erotic dancing or massage. The payment to the alleged employees was flat rate and these people were skilled and licensed. The petitioner did not observe the performance of the assignments and had no control or right to control the details of the performances. The parties signed an independent contractor agreement. The work was basically single incidents in which the petitioner assigned people to go out and perform services for which she had a call. The people performing the services provided all of the tools and

equipment necessary to perform the work including clothing, massage tables, oils, linens, table sheets, disinfectant and towels. The service providers used their own vehicles to get to and from the assignments without compensation. The contract contained a term which required seven days written notice in order to terminate the independent contractor agreement. Many of the people working for a petitioner had other jobs at the same time.

REASONS FOR DECISION

Section 601 of the Unemployment Insurance Code et seq provide generally for the definition of the subject of employment.

In Empire Star Mines Co., Ltd. v. California Employment Commission (1946) 28 Cal. 2d 33, the Supreme Court of California stated:

". . . In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations]"

". . . Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee."

The following factors are considered in determining whether or not an employment relationship exists (Tieberg v. California Unemployment Insurance Appeals Board (1970) 2 Cal. 3d 943,950):

1. Which party has the right to control the manner and means of accomplishing the result desired;

2. Whether there is a right to discharge at will, without cause;

3. Whether or not the one performing services is engaged in a distinct occupation or business;

4. Whether the work is usually done under the direction of an employer, or by a specialist without supervision;

5. The skill required;

6. Who supplies the instrumentalities, tools, and place of work of the one performing services.

7. The length of time for which the services are to be performed;

8. The method of payment, whether by time or by the job;

9. Whether or not the work is part of a regular business of the beneficiary of the services.

10. Whether or not the parties believe they are creating a relationship of master and servant.

Here it is found that the finding of fact and judgement in the Municipal Court case is res adjudicata as to the subject of the parties relationship at least as far as that particular individual was concerned and it is further found that all of the people doing the work for petitioner were in the same situation. Upon considering and weighing all of the factors involved, it is found that because there was really no right to control the details of the work and the service providers provided all of their own tools and equipment to perform the services and a relatively high degree of skill was required that therefore the parties were independent contractors and not employer and employee.

DECISION

The petition for reassessment is granted.

STUART C. WILSON
Administrative Law Judge

THIS DECISION IS FINAL UNLESS APPEALED WITHIN 30 CALENDAR DAYS. FOR APPEAL OR REOPENING RIGHTS, SEE ATTACHED NOTICE.
gb

EXHIBIT 16

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

NITE LIFE EAST LLC
c/o A DALE MANICOM, ATTORNEY AT LAW
Account No.: 436-9360-5
Petitioner

Case No.: **AO-121742** (T)

OA Decision No.: 1339806

EMPLOYMENT DEVELOPMENT DEPARTMENT
Appellant

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

JACK D. COX

DON L. NOVEY

(See "Further Appeal Information" sheet attached to Board decision.)

Case No.: AO-121742
Petitioner: NITE LIFE EAST LLC

The Employment Development Department (EDD) appealed from the decision of the administrative law judge which granted the petitioner's petition for reassessment.

We have carefully and independently reviewed the record in this case, and have considered the contentions raised on appeal. We find that the issue statement correctly sets forth the issues in the case and we find no material errors in the statement of facts. The reasons for decision properly apply the law to the facts. Therefore, we adopt the issue statement, the statement of facts and the reasons for decision as our own.

The EDD contends the administrative law judge findings are not supported by the facts presented in this case. We disagree.

The EDD auditor that represented the department at the hearing never visited the petitioner's place of business, only talked to two or three dancers for five to six minutes on the telephone and drew most of the evidence presented on behalf of the EDD from the petitioner's documents and the above mentioned brief conversations.

On the other hand the petitioner's witness at the hearing visited the petitioner's place of business on a frequent basis as a consultant to the petitioner. He was very familiar with the internal working relationship between the dancers and the petitioner and gave advice to the petitioner regarding the status of the dancers as independent contractors. The petitioner's witness was familiar with other, similar dance clubs. He was engaged by several of these dance clubs as a consultant as well.

From our review of the record the petitioner did not have the right to control and did not control the manner and means of the work except to demand they perform their work within the provisions of the law. This of course is the inherent right of any business enterprise with regard to contracted services.

Additionally, the petitioner maintained control of the end product in that it regulated the work flow so as to have a product being supplied to its customers on a regular basis.

The dancers maintained control over their performances primarily because there was sufficient work at other clubs. The petitioner had to compete for their services and needed the dancers as bad as the dancers needed the work. Further the petitioner was making every effort to be sure the dancers were treated as independent contractors. He relied on professional advice from the witness consultant. The witness consultant based his advice upon principles taken from decisions of administrative law judges regarding other clubs with dancers.

The dancers could not be terminated without three days notice; set their own hours of work; earned a percentage of each performance rather then being paid by the hour; provided their own music and costumes and; had business licenses from the local municipality.

We conclude from the weight of the evidence that the employer met its burden of overcoming the presumption of a master servant relationship with its dancers. Therefore the petitioner has shown the dancers working during the assessment period were independent contractors and accordingly the petition for reassessment is granted.

The decision of the administrative law judge is affirmed. The petition for reassessment is granted.

FURTHER INFORMATION

The Employment Development Department may seek judicial review. Unless it does so, this decision is final.

Tax I

EXHIBIT 17

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

U. S. Department of Labor

Employment Standards Administration
Wage and Hour Division

April 13, 2006

Troy Lowrie
Owner
IEC
1601 W Evans Ave
Denver, CO 80223

ATTENTION: JIM WHITE - AREA DIRECTOR

FACSIMILE: (303) 934-3101

RE : U.S.DEPARTMENT OF LABOR FEDERAL WAGE-HOUR AUDIT

Dear Mr Lowrie:

This office is responsible for the administration and enforcement of the Fair Labor Standards Act of 1938 (FLSA) which sets forth employers' responsibilities concerning minimum wage, overtime, child labor, and record keeping requirements. We also have certain responsibilities under the Immigration Reform and Control Act.

An audit will need to be conducted on payroll records for all employees. The authority to conduct this audit is found in Sections 9, 10 & 11 of the Act. Regulation 516.7 requires the employer to produce the records listed in 516.2.

This audit will cover the two year period beginning May 1, 2004 to May 1, 2006. Please have this information available on May 1, 2006 at 9:30 a.m.

1. Business information -- ownership, officers of the corporation, gross sales for 2004, 2005 and 2006 to date and Federal Tax ID number.

2. Employee information, addresses, social security numbers, telephone numbers. A birth date is required for employees under 18 years of age. Copies of this information for the audit file will be needed.

3. Payroll records for the entire period -- dates of pay, gross pay, and rates of pay. Please provide a copy of the last payroll for the audit file, and a number count of the employees on this payroll. Check Registers.

4. Time and/or production records -- original time records (cards or sheets), other time records and piece rate records if applicable.

5. Please have available I-9s on all employees.

6. Employees will be interviewed, if applicable, at your establishment. It would be appreciated if a site would be made available for these interviews.

7. Please provide an employee handbook.

8. Provide a listing of all employees paid a salary. Please provide a notation if this employee is exempt or non-exempt from the overtime provisions.

9. If the corporation headquarters is not located in Denver, Colorado, please provide the complete name, address, telephone number and facsimile number.

10. Please provide a two to three paragraph description of IEC.

11. Date business was established, number of employees and/or Independent/Subcontractors on current payroll and the payroll dates.

12. If applicable, please provide other businesses that list the officers as principals.

13. Please list the business office address where regular business activities are conducted.

The audit will consist of a discussion with you or your representative, a review of records and a final conference to discuss the investigative findings.

If you have any questions, please contact me at 303.730.7017 or 720.264.3266.

Very Truly Yours,

Mindy Alvarado
Wage and Hour Investigator

EXHIBIT 18

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

BRADLEY J. SHAFER
ALSO MEMBER, AZ BAR

LAW OFFICES
SHAFER & ASSOCIATES, P.C.
A PROFESSIONAL CORPORATION
3800 CAPITAL CITY BLVD., STE. #2
LANSING, MI 48906
E-MAIL: shaferassociates@acd.net
PHONE: 517-886-6560
FAX: 517-886-6565

ANDREA E. PRITZLAFF

April 20, 2006

U.P.S. OVERNIGHT DELIVERY
United States Department of Labor
Employment Standards Administration
Wage and Hour Division
1999 Broadway, Suite 2445
P.O. Box 46550
Denver, CO 80201-6550

ATTN: Ms. Mindy Alvarado, Wage and Hour Investigator

Re: Wage-Hour Audit for IEC

Dear Ms. Alvarado:

This letter is in partial response to your correspondence dated April 13, 2006, directed to Troy Lowrie of IEC. It is my understanding that you have requested information from Mr. Lowrie regarding prior litigation where the issue as to whether exotic dance entertainers are employees or independent contractors was addressed. Given the fact that I have handled these types of litigations matters across the United States, and I was the author of the dancer contract that the clubs which are related to IEC use, Mr. Lowrie requested that I respond directly to you.

First, let me reiterate what I believe Mary Bowles-Cook has already explained to you, and that is that IEC does not engage the services of exotic dancers. IEC is only a management/accounting firm. Accordingly, it does not contract with entertainers.

Nevertheless, in particular response to your inquiries, it is my understanding that IEC has already sent to your attention a copy of the Entertainment Lease that the related clubs use with the entertainers who perform on their premises. I will, therefore, concentrate on other litigation matters that have addressed this issue.

The documents you will find attached (which I will discuss in greater detail below) are copies of various decisions finding exotic dance entertainers to be non-employees. I was the attorney on a number of those cases, many of which had at issue contracts very similar to the IEC Entertainment Lease in dispute here. I would also point out to you that a number of the attached decisions come from the State of California which is, of course, probably the most "lenient" state in finding "employee" status. Nevertheless, the four California decisions attached each found the exotic dancers to be independent contractors as opposed to employees. This includes the ruling in **In Re:**

Showgirls of San Diego, Inc. (attached as Exhibit A), where the administrative law judge specifically ignored the contract at issue (finding that the parties were not abiding by it), but nevertheless determined the dancer to be a non-employee. I was the lead attorney on that case, and Dale Manicom (identified in the ruling) was my local counsel.

As you are aware, laws and legal standards in regard to the distinction between employees and independent contractors varies both by state, and also by subject-matter (unemployment compensation, tax issues, labor laws, etc.). In addition, the legal test under the Fair Labor Standards Act ("FLSA") also varies, to a certain extent, from federal circuit to federal circuit. And, as the Tenth Circuit U.S. Court of Appeals (which obviously governs matters in Colorado) has said, the test factors use to determine employee status are "simply analytical tools, their weight, number and composition are variable." **Dole v. Snell**, 875 F.2d 802, 805 & n.2 (10th Cir. 1989).

With this in mind, let me first turn to what I believe is the overriding and controlling issue here; that being the lack of payment from the club to the entertainers. When I say that I believe that this factor is controlling, that is because the lack of payment establishes that what the courts have referred to as the "***antecedent question***" of employment is not satisfied, and therefore the "worker" cannot be determined to be an employee.

There is a great deal of existing case law dealing with this issue. The most succinct description is found in **O'Connor' v. Davis**, 126 F.3d 112 (2d Cir. 1997), attached as Exhibit B hereto, where the Second Circuit U.S. Court of Appeals was asked to consider the common law factors of employment status in regard to a worker who had made a Title VII claim. The court noted that both parties on appeal, as well as the District Court below, had addressed themselves to the question of whether the plaintiff there was an employee utilizing those legal standards.

The appellate court observed, however, that it thought that such an analysis was flawed because it ignored "the ***antecedent question*** of whether O'Connor was ***hired*** by [the defendant] for any purpose." **Id.**, at 115 (emphasis and clarification added). Noting that other courts had agreed with its view, the Second Circuit observed:

> "As the Eighth Circuit has explained, courts turn to common-law principles to analyze the character of an economic relationship '***only in situations that plausibly approximate an employment relationship***.' **Graves v. Women's Prof'l Rodeo Assoc.**, 907 F.2d 71, 74 (8th Cir. 1990). ***Where no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist because although 'compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee***

> ***relationship***.' **Graves**, 907 F.2d at 73. **See also Neff v. Civil Air Patrol**, 916 F. Supp. 710, 712-13 (S.D. Ohio, 1996); **Smith v. Berks Community Television**, 657 F. Supp. 794, 796 (E.D. Pa. 1987); **cf. Haavistola v. Community Fire Co.**, 6 F.3d 211, 219 (4th Cir. 1993).
>
> This 'essential condition' of remuneration has been recognized in this Circuit as well. In **Tadros v. Coleman**, 898 F.2d 10, 11 (2d Cir. 1990), we explicitly upheld the dismissal of the Title VII claims of a plaintiff who worked as a volunteer on the faculty of Cornell Medical College on the ground that the plaintiff was not an employee under Title VII. As a volunteer, the plaintiff received no salary, health benefits, retirement benefits, and also had no regular hours assigned to him by the hospital. In concluding that the plaintiff was not an employee, the district court in **Tadros** held that '[a] Title VII plaintiff is ***only an 'employee if the defendant both pays him*** and controls his work.' 717 F. Supp. 996, 1004 (S.D.N.Y. 1989)."

O'Connor, 126 F.3d at 115-116 (emphasis added).

Pursuant to this line of authority, the Second Circuit held that the "***preliminary question of remuneration***" was dispositive of the case, and that because the plaintiff had never received any salary or other wages from the alleged employer, she could ***not*** be held to be an employee of the defendant.

O'Connor was a decision that evaluated an employment relationship in the context of the "common law" factors as are generally found in the Restatement of Agency, § 220. There may or may not be a real distinction between the common law, and the economic reality test which is used for determining employment status under the FLSA. *See, e.g.,* **Oregon v. Acropolis McLoughlin, Inc.,** 150 Or.App. 180 (1997), *on reconsideration*, attached as Exhibit C. Regardless, however, cases cited in the **O'Connor** quote above, as well as others, establish beyond any question that lack of payment by the alleged employer to the putative employee precludes a finding of employee status as a matter of law even under the FLSA standards.

Cases holding that lack of remuneration precludes a finding of employment in the economic realities context include **Neff v. Civil Air Patrol**, 916 F. Supp. 710, 711-715 (S.D. Ohio 1996) (in a Title VII case evaluating whether the claimant was an employee and therefore subject to the protections of the Act, the court, in utilizing the economic realities test as a basis for the determination, concluded that the plaintiff could ***not*** be found to be an employee as a matter of law and that the plaintiff had not produced any evidence that could lead a "reasonable juror to conclude that she worked ***in expectation of compensation***"); **Tadros v. Coleman**, 717 F. Supp. 996, 1002-1006 (S.D.N.Y. 1989) (a person who is not ***paid for services*** is not "economically dependent on the

business to which [they] render [] service," and therefore does not fall within the definition of being an employee under the economic realities test), *aff'd*, 898 F.2d 10 (2nd Cir. 1990); **Graves v. Woman's Professional Rodeo Assoc., Inc.** 907 F.2d 71, 72-74 (8th Cir. 1990) (court noting that while compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, "it is an ***essential condition*** to the existence of an employer-employee relationship," and that the court will turn to the "economic realities" test "only in situations that plausibly approximate an employment relationship" -- since there was no payment in the case at bar, the court did not evaluate the relationship under the economic realities test because the relationship ***did not "make it past this first cut"***) (emphasis added); and **Smith v. Berks Community Television**, 657 F. Supp. 794-796 (E.D. Penn. 1987) ("control" in the relationship was not dispositive in evaluating economic dependence in a Title VII claim in order to determine whether the worker was an employee or an independent contractor, as the worker must be "***paid by***" the alleged employer, which was not the case there, and therefore no employment relationship could be found) (emphasis in original).

And, cases directly under the FLSA are no different. *See, e.g.*, **Patel v. Wargo**, 803 F.2d 632, 635 (11th Cir. 1986) (no employment relationship as there was no evidence that the plaintiff "contemplated compensation for his acts"); **Villarreal v. Woodham**, 113 F.3d 202, 205 (11th Cir. 1997) ("in general, work constitutes employment when there is an ***expectation*** of in-kind benefits in exchange for services") (emphasis added); and **Walling v. Nashville Chattanooga & St. Louis Ry.**, 60 F. Supp. 1004, 1007 (D. Tenn. 1945), **aff'd.**, 155 F.2d 1016 (6th Cir. 1946), 329 U.S. 696 (1946), and 330 U.S. 158 (1947) (payment of wages is "one of the indicia of the employment").

As the Supreme Court noted in consideration of the definition of "employee" as set forth in the FLSA, that definition was:

> "Obviously not intended to stamp all persons who, ***without any express or implied compensation agreement***, might work for their own advantage on the premises of another."

Walling v. Portland Terminal Co., 330 U.S. 148, 152, 67 S.Ct. 639, 91 L.Ed.2d 809 (1947) (emphasis added).

This matter was clarified by the decision of the Supreme Court in **Tony and Susan Alamo Foundation v. Sec. of Labor**, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985). At issue there were what were alleged to be *volunteer* "associates" of an evangelical Foundation. These workers received "no cash salaries, but ***the Foundation provide[d] them*** with food, clothing, shelter and other benefits." **Id.** at 292 (emphasis added).

The Court began its analysis by observing that the question of whether the FLSA protections applied to the "associates" was governed by a two-step analysis. First, the determination would have to be made as to whether the individual workers were, or the business "enterprise" was, engaged in interstate commerce. **Id.** at 295 & n. 8. Second, the associates must be found to be "employees" within the meaning of the Act. **Id.** at 295. In regard to this latter (and, more importantly, dispositive) issue, the Court noted:

> "An individual who, 'without promise or expectation of compensation, but solely for his ***personal purpose*** or pleasure, worked in activities carried on by other persons either for their pleasure ***or profit***,' is ***outside the sweep of the Act.***"

Id. at 296 (emphasis added), *citing* **Walling**, 330 U.S. at 152.

Thus, the Supreme Court concluded that the question of whether or not the associates received remuneration would be ***dispositive*** of the question of whether those workers were covered by the protections of the FLSA. Succinctly, the Court concluded in regard to this legal analysis:

> "The Act reaches ***only*** the 'ordinary commercial activities' of [the religious organization at issue there], 29 C.F.R. § 779.214 (1984), ***and only those who engage in those activities in expectation of compensation***."

471 U.S. at 302 (emphasis and clarification added).

Here, the Entertainment Lease, at paragraph 12(A), explicitly states in emphasized language that the entertainer will not be paid any wages, be reimbursed for any expenses, or provided any employee-related benefits.

Of probably the most relevance of any decision concerning the antecedent question of employment issue is a recent ruling of the Illinois Court of Appeals involving a *"P.T.'s"* club in that state. As I am sure that you are aware, a number of the operating clubs which are related to IEC (and which are referenced in Ms. Bowles-Cook's letter to you of April 18, 2006), conduct business under the *"P.T.'s"* name, and this case involved one such club. It utilized the same contract as the one sent to you by Mr. Lowrie in regard to this audit. In **Carla McKinney v. Chief Legal Counsel of the Department of Human Rights**, No. 5-00-0670 (Ill.App. 5th Dist. 2002) (Exhibit D), the appellate court determined that because of a lack of remuneration by the *P.T.'s* club there, it could not "find any employer/employee relationship upon which to fulfill the provisions of the Act." **Id.** at p. 5. While the Court of Appeals did not discuss the various factors to be considered in determining employment status as set forth above, it still held that:

> "We agree with PT's that independent contractors are not covered by the protections of the Illinois Human Rights Act. *See*, **Wanless [v. Human Rights Comm'n**], 296 Ill.App.3d [401,] at 404 [(1998)]. Nevertheless, we need not reach that question since we are able to affirm the Department's dismissal on the ground that ***petitioner did not meet the definition of an employee since PT's did not pay her any wages or salary***."

McKinney at p. 6 (clarification and emphasis added).

The fact that this decision involved a civil rights claim, as opposed to an FLSA matter, makes no difference. The "antecedent question" of employment is relevant to both. Moreover, the **Carla McKinney** proceeding in general is also relevant to the factors utilized in the economic realities test under the FLSA.

While the appellate court did not address the factors to necessarily determine employment status, the underlying Order of the State of Illinois Department of Human Rights in the **Carla McKinney** matter (also found at Exhibit D) does. Importantly, in discussing ***each*** factor, the Chief Legal Counsel found that exotic dancers at the *P.T.'s* establishment were independent contractors. *See*, Order, ¶¶ 3 - 7.

In regard to the factor of control, the Order found that "dancers determine their own schedules;" that they exercise complete control over their work activities;" and that they are "in total control of the content of their routine while on stage." Order ¶ 3. In light of these circumstances, it was found that this "level of control indicates that dancers are independent contractors rather than employees." **Id.**

Concerning the right of discharge, the Order found that "either party can terminate the relationship without cause," and that if the entertainer chose to do so, she would be "entitled to receive the tips earned from her performances." Order ¶ 4. Since an entertainer retained the right to keep the gratuities previously earned, this factor also weighed in favor of a determination of independent contractor status. Additionally, the Order acknowledged that "dancers are not paid by Respondent," and that the only remuneration entertainers receive are "from the tips provided by customers of the Respondent." Order, ¶5. Therefore, the "method of payment" factor also weighed toward independent contractor status.

In finding that the "level of skill required and the amount of work to be done" factor also indicated that entertainers were independent contractors, the Order cited that "the amount of remuneration dancers receive is related to their ability to dance," and that "dancing was the only duty assigned to the dancers by Respondent. Order, ¶ 6. Finally, the Order recognized that "dancers have

discretion over the content of their dance routines and are responsible for providing any costumes or materials required for that routine." Order, ¶ 7. Taken in conjunction with the finding that "dancers have control over their own work schedule," it was determined that the "source of tools, materials or equipment and the work schedule" factor also weighed in favor of the determination that an entertainer is an independent contractor and not an employee. **Id.**

I am sure that you will find that all of these factors listed in the **Carla McKinney** matter, which specifically involves the operation of a "*P.T.'s*" club, have been utilized by various courts across the United States in order to determine the "economic realities" under the FLSA. This decision by the Illinois Court of Appeals is therefore quite telling, and should be, I believe, dispositive of your investigation here.

Irrespective of the antecedent question of employment, and the **Carla McKinney** matter in particular, there are numerous decisions across the country which have held, under various laws, that entertainers performing pursuant to these type of agreements are "independent contractors" (or more appropriately, "***non***-employees") as opposed to true employees. I should also point out that the majority of these decisions have been handed down in more recent years, after clubs have been provided appropriate legal advice and guidance in regard to these issues following some earlier decisions finding exotic dancers to the employees where the club owners there had absolutely no clue in regard to FLSA compliance matters.

Exhibit E is a ruling in **Krasinski v. Deja Vu of Saginaw, Inc.**, decided in the Referee Division of the Michigan Employment Security Commission (unemployment compensation insurance), involving dancer Carol Krasinski. I personally tried this case. **Krasinski** concerned an entertainer at a "Deja Vu" club, and involved a lease agreement similar to the Entertainment Lease at issue here. I was also co-author of that document as well.

Irrespective of the lease agreement, the Michigan Department of Labor had argued that Ms. Krasinski was an employee. The hearing referee found quite to the contrary. Simply put, the holding stated:

> "The decision in this appeal is relatively simple. The performers [**sic**] did not fall under the control and direction of the employer, except they were expected to comply with the employer's rules. The performers could set their own hours, they paid their own taxes, and provided their own supplies. There is little in the record to permit the employee to conclude that the employer controlled and directed the performer. This performer in the performance of her work not only actually, but it was intended that she would be employed as an

> independent contractor, and such she was not an employee within the meaning of the Act." At p.3 (emphasis added).

Attached as Exhibit F you will also find three decisions from the Indiana Department of Revenue holding certain dancers to be independent contractors as opposed to employees. Although the three opinions (which are virtually identical) do not reflect any discussion with regard to Dancer Performance Leases, our files (this firm handled these litigation matters) reflect that Dancer Performance Leases -- identical to the one at issue in **Krasinski** -- were submitted in the taxpayers initial response to the preliminary adverse ruling. The response indicated that the Dancer Performance Leases were, at the time of submission, being utilized between the companies and the dancers, and although no such documents had actually been executed at the time of the initial tax investigation, the new leases simply had codified the relationship between the businesses and the dancers that had existed in the past.

Again, in all three of these decisions, the Indiana Department of Revenue reversed the administrative rulings which had held that the dancers were employees, specifically found the dancers to be independent contractors, and did *not* invalidate the Dancer Performance Leases.

Attached as Exhibit G is the June 27, 1995, decision of the California Unemployment Insurance Appeals Board, identified as **In Re: Fritz That's It**. In reading over that decision, I am sure that you will come to the conclusion that the business relationship in **Fritz That's It** would appear to be much closer to an employment arrangement than would be the case here, as reflected by the terms of the Entertainment Lease. Regardless, the California Unemployment Insurance Appeals Board found that the entertainers at issue there were independent contractors.

Attached as Exhibit H you will see another decision from the California Unemployment Insurance Appeals Board (decided June 5, 1995), denoted as **In Re: A Touch of Class**. This decision also held exotic entertainers to be independent contractors, as opposed to employees. Part of that case was decided under the legal doctrines of *res judicata* and collateral estoppel (claim and issue preclusion) for the reason that there had already been a municipal court adjudication that a named participant was an independent contractor. Consequently, the administrative law judge determined that the issue could not be relitigated with regard to the actual person involved. With regard to the general arrangement, the judge held as follows:

> "Upon considering and weighing all of the factors involved, it is found that because there was really no right to control the details of the work and the service providers provided all of their own tools and equipment to perform the services and a relatively high degree of skill was required that therefore the parties were independent contractors

and not employer and employee."

Attached as Exhibit I is a more recent decision (August 2, 1996) from the California Unemployment Insurance Appeals Board in the case of **In Re: Kit Kat Club**. Again, the dancers in **In Re: Kit Kat Club** were found to be independent contractors as opposed to employees.

Attached as Exhibit J is a recent decision of the Indiana Department of Workforce Development, Unemployment Insurance Appeals, in the case of **In Re: Condross Corp.**. There, the administrative law judge differentiated between times when the entertainers were treated as employees, and times when they were characterized as independent contractors. The ALJ concluded that this distinction was significant, and that when the arrangement between the parties was altered so that no payment was made to the entertainers, they were indeed independent contractors and not employees. You should also note paragraph 10 of that decision where the administrative law judge states that based "upon information received at a seminar in Las Vegas, Nevada, the employer, for audit year 2000, changed the method of operation with regard to its business." In fact, that "received information" consisted of a seminar that *I* presented on these labor law issues at a convention in Las Vegas. Again, the ALJ there substantiated the transition of the entertainers to be independent contractors, and I guess that I can take some of the credit for that as well.

Attached as Exhibit K is a May 2004, order from the First Judicial District Court of the State of Minnesota, granting the defendant's motion for summary judgment in **Thompson v. Lounge Management, Ltd. et al.**, No CX-03-12159. Plaintiff was an exotic dancer who sued the club she had performed at in order to obtain minimum wages for the hours that she danced. Based upon briefing I provided to the attorney representing the club at issue there ("Lounge Management"), the court found that it was "apparent that under any factor and test that the Court adopts, the arrangement between Lounge Management and the Plaintiff was not an employee/employer relationship." Order, p. 11. I believe that you will find that the legal standards utilized under the Minnesota minimum wage law are essentially the same as under the FLSA.

I should also point out the Oregon Court of Appeals decision in **Oregon v. Acropolis McLaughlin, Inc.**, 150 Or. App. 180 (1997), *on reconsideration*, which I referenced above and which is attached as Exhibit C. Yet, again, the exotic dancers at issue there (this time in consideration of a minimum wage claim) were determined by that appellate court to be independent contractors and not employees.

So that this letter would not read like a book, I have only provided very abbreviated descriptions of the decisions that I have attached. However, as you read them over, you will find that the determinations of non-employee status for exotic dancers utilize the same elements under the FLSA. I am sure that you will agree with me that under existing case law, the entertainers who

perform at clubs related to IEC are not employees and therefore are not subject to the provisions of the FLSA.

I will be more than happy to discuss this letter and the attachments with you at your convenience, and I will also provide to you any further or additional information that you may need in order to complete your audit. My office number is on the face sheet of this letter, but because of the time difference, please feel free to also contact me on my cell phone at 517-285-5222.

Sincerely,

SHAFER & ASSOCIATES, P.C.

By: Bradley J. Shafer

BJS:tjs
Enclosures
cc w/encls: Mr. Troy Lowrie

bcc w/o encls.: Mr. Michael Ocello

EXHIBIT 19

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

BILL OWENS
Governor

RICK GRICE
Executive Director

MICHAEL MCARDLE
Director

DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF LABOR

6/23/2006

Bradley Shafer
Shafer & Associates
3800 Capital City Blvd, Suite #2
Lansing, MI 48906

Claim Number: 2637-06
Claimant: Anonymous

Thank you for your timely response to our inquiry.

We are informing you that no further action is contemplated by this office.

Respectfully,

Piera Bocciarelli
Compliance Officer
(303)318-8452

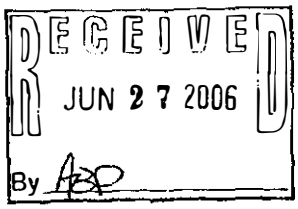

EXHIBIT 20

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Court of Appeals of Oregon.
STATE of Oregon, ex rel. Jack R. ROBERTS, Commissioner of the Oregon Bureau of Labor and Industries, Appellant,
v.
ACROPOLIS MCLOUGHLIN, INC., an involuntary dissolved Oregon corporation, and Haralambos Polizos, individually, Respondents,
and
Kostantinos Polizos, Defendant.
9503-01597; CA A93158.

On Appellant's Petition for Reconsideration July 29, 1997; On Respondent's Motion to Dismiss; Alternatively, Response to Appellant's Petition for Reconsideration Aug. 15, 1997.
Decided Sept. 24, 1997.

Bureau of Labor and Industries (BOLI) brought action against club on behalf of dancers to enforce minimum wage statute. The Circuit Court, Multnomah County, Anna J. Brown, J., entered judgment for state on assigned and unassigned claims of all dancers for wages prior to 1993, denied claims as to work performed by dancers after 1993, and entered directed verdict for club as to one dancer's assigned claim for wages after that date. BOLI appealed. The Court of Appeals, Riggs, P.J., affirmed in part and reversed and remanded in part. BOLI moved for reconsideration. After allowing reconsideration, the Court held that, after 1993 when club instituted policy in which all dancers were hired through agency or agent, dancers who were hired to dance at club were not employees of club for minimum wage statute purposes.

Former opinion modified and affirmed.

West Headnotes

Labor and Employment 231H 2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2234 Independent Contractors
231Hk2236 k. Persons in Particular Employments. Most Cited Cases
(Formerly 232Ak1121 Labor Relations)
After club instituted policy in which all dancers were hired through agency or agent, dancers hired to dance at club were not "employees" of club for purposes of minimum wage statute, where most of dancers worked at club intermittently for brief periods, dancers worked simultaneously at other clubs, club did not control method of work, dancers were paid exclusively through tips and income was largely dependent on physical appearance and skill, dancers provided their own equipment, club did not have right to fire dancers, dancers considered themselves self employed and club did not have much control over dancers' opportunity for profit. ORS 653.010.

****648** Hardy Myers, Attorney General, Virginia L. Linder, Solicitor General, and Mary H. Williams, Assistant Attorney General, for petition.

Gordon L. Osaka and Williams, Zografos & Peck, Portland, contra.

Before RIGGS, P.J., and LANDAU and LEESON, JJ.

***182** RIGGS, Presiding Judge.

The Oregon Bureau of Labor and Industries (BOLI) has filed a petition for reconsideration of our opinion in this case, *State ex rel. Roberts v. Acropolis McLoughlin,* 149 Or.App. 220, 942 P.2d 829 (1997) , contending that we erroneously determined that BOLI did not preserve its first two assignments of error and did not request *de novo* review of the record. We allow reconsideration, modify our former

opinion and affirm the trial court.

BOLI brought this action under ORS 653.010 *et seq* to enforce the minimum wage provision for dancers working at "The Acropolis," the club of defendant Acropolis McLoughlin, Inc. (Acropolis). BOLI sought injunctive and declaratory relief with regard to dancers dancing at The Acropolis after September 1993, which the court denied on the ground that the dancers were not employees entitled to minimum wage. The specific circumstances of each claim and the court's dispositions are set forth in our original opinion. *Acropolis McLouglin,* 149 Or.App. at 222, 942 P.2d 829.

On appeal, the state framed the questions presented:

"Does the 'economic realities test' based on the federal Fair Labor Standards Act apply to a determination whether individuals are employees or independent contractors for purposes of the state minimum wage provisions pursuant to ORS chapter 653?

"Under the economic realities test, does the evidence support the conclusion *as a matter of law* that the dancers in the defendant club are employees and not independent contractors?

"If the economic realities test does not apply to the definitions in ORS 653.010, under the common law factors the trial court presented in the jury instruction, does the evidence support the conclusion *as a matter of law* that the dancers in the defendant club are employees and not independent contractors?" (Emphasis supplied.)

***183** For its first assignment of error, BOLI said:
****649** "The trial court erred in denying the state's claim for declaratory relief."

For its second assignment of error, BOLI said:
"The trial court erred in denying the state's claim for injunctive relief."

In its statement of the standard of review, BOLI said:

"This court reviews the trial court's application of the common law test instead of the economic realities test for distinguishing employees from independent contractors and the question of the dancers' status for errors of law.

"Complaints for injunctive relief are proceedings in equity. This court reviews *de novo* to determine whether the evidence presented justifies the granting of injunctive relief. ORS 19.125. Similarly, where a declaratory judgment proceeding is in the nature of a suit in equity, this court tries all factual issues *de novo.*" (Citations omitted.)

The first portion of BOLI's argument was directed at its contention that the trial court
"erred in refusing to apply the 'economic realities' test to determine whether the dancers working for defendant after September 1993 were and are employees or independent contractors."

The portion of its brief addressing that contention asserted that the trial court erred as a matter of law in not applying the economic realities test to decide whether the dancers working at The Acropolis after September 1993 were and are employees.

In our opinion, we concluded that because BOLI argued to the trial court that criteria of both the economic realities and common-law tests should be considered, BOLI had not preserved its argument on appeal that *only* the economic realities test is applicable. We adhere to that conclusion. In its petition, BOLI now contends that its position on appeal is merely that the unique factors of the economic realities test should be *considered* in making the determination of an employment relationship. Contrary to the implication of BOLI's argument, it is clear that the trial court did consider ***184** factors from both the economic realities and common-law tests. In the light of the argument made to the trial court that criteria of both tests are applicable, there was no error.

BOLI says in its petition that

"[o]ne of the reasons for pursuing this appeal is BOLI's interest in having this court determine *which* test applies to state minimum wage cases." (Emphasis supplied.)

This court will take up that question when it is argued on appeal *and* preserved at trial.

In the second portion of its argument under the first two assignments of error, BOLI argued that under the economic realities test, "the evidence in this case" shows that dancers working for defendant after September 1993 were employees. We disposed of that contention, along with the first contention, for the reason that, in the light of the arguments made to the trial court, there could be no error in failing to apply the economic realities test exclusively. We adhere to that determination.

Finally, in the remaining portion of its brief addressing the first and second assignments of error, BOLI contended that, even under the trial court's modified common-law definition of employee, the dancers should be considered employees of Acropolis. Although no assignment specifically asserted error in the trial court's findings, as opposed to its application of the law, we give BOLI the benefit of the doubt and now conclude that BOLI's final argument under the first and second assignments of error can be read as a request for *de novo* review. The question that we consider on *de novo* review is whether, under the mixed economic realities/common law standard formulated by the parties for the trial court, the court erred in finding that the dancers after September 1993 were not employees of Acropolis. The court's jury instructions, which are not challenged on review and which encompass the legal standard that the parties presented to the court, are set out in full in our former opinion. FN1 ***185 **650**149 Or.App. at 227, 942 P.2d 829. We summarize the pertinent facts, as we find them:

> FN1. As we noted in our former opinion, claims for the period *before* September 1993, were tried to a jury. We do not review *de novo* the jury's findings with respect to those claims.

The Acropolis is open from 11:00 a.m. until 2:00 a.m., seven days a week. The club has been in existence since 1976 and has provided entertainment in the form of nude dancing since 1988. It provides meals, alcoholic beverages and nude dancing during all hours of operations. Haralambos Polizos is the manager of The Acropolis and president of the defendant corporation, Acropolis McLoughlin, Inc. Polizos advertises the business of The Acropolis on the building marquee and through a yearly calendar containing pictures of nude or partially dressed women. Meals at The Acropolis are about one-half of the price of meals at restaurants that do not provide nude dancing entertainment.

From April 1991 to September 1993, the hiring, scheduling and management of dancers was the job of Don Cloud, who was an employee of Acropolis. Dancers auditioned for Cloud and the customers, bartenders and waitresses, but only waitresses and bartenders made the decision whether to hire a dancer. Waitresses, bartenders and Polizos' son, Konstantinos, kept a list of those dancers who would not be permitted to return to The Acropolis. Cloud was required not to schedule those dancers. Dancers worked in three shifts. Polizos decided how many dancers were needed and how many stages would be open for each shift; Cloud scheduled the dancers. Dancers paid no fee to Cloud.

From June 1991 to January 1993, dancers were paid minimum wage by Acropolis for all shifts, and Acropolis issued to dancers and Cloud Internal Revenue Service W-2 Forms reflecting their wages and withholdings. In January, Polizos decided that during the busier shifts the dancers were earning enough in tips alone and did not need to be paid wages. He continued to pay minimum wage to those dancers working the quieter shifts on Sunday and Wednesday afternoons and to those who complained that they had earned no tips on a shift. He was aware of the minimum-wage law but was not aware that tips could not be counted against the minimum wage.

Dancers were required to abide by rules established by Polizos, which included complying with requirements of ***186** the Oregon Liquor Control Commission (OLCC): No drugs, no prostitution, no stage props, no touching of customers or self, no "table dancing" and remaining at least one foot from the customer. Dancers were required to arrive about 15 minutes early for their shifts and, until September 1993, were not permitted to wear street clothes on stage during their performance. There was a dressing room on the premises. Dancers showed their identification to a bartender or doorman when they arrived, to determine whether they were above minimum age. Until September 1993, dancers were also required to check in at the bar before their work shift and sign out at the bar after their shift. The first dancer to arrive for a shift got to leave first. If a dancer arrived late for her shift, the bartender or waitresses would report that to Polizos or Cloud. If a dancer did not show up for a shift at all, the last dancer to arrive for the previous shift was required to stay and dance a second shift. Dancers reported their work hours to Cloud, who maintained records for each dancer. In their five-hour shifts, dancers performed four-song sets, taking breaks between sets and while other dancers performed their sets. Until September 1993, dancers and staff of The Acropolis brought their concerns to Polizos. After September 1993, dancers were required to bring their concerns only to the agent.

Dancers were not required to have specialized training. All testified that they had had nude dancing experience before dancing at The Acropolis. Dancers provided their own costumes and taped music and were responsible for developing their own routines. Bartenders and waitresses controlled the tape player and its volume to accommodate the competing needs of customers, waitresses and dancers. Before September 1993, dancers were expected to wear high heels when they danced and to remove all their clothing by the fourth song in their set. One dancer testified that if dancers wore street clothes during the finale, the bartender would turn off the music, and the dancers would not be allowed to go home until all the dancers were ****651** either nude or in costume. Dancers had no say in the operation of The Acropolis.

In September 1993, Polizos terminated Cloud's employment and arranged for an agency by the name of "Hot Stuff" to schedule dancers for The Acropolis. Hot Stuff leased ***187** stages at The Acropolis for $500 per month and agreed to provide dancers for the shifts Polizos established. Dancers requested shifts from Hot Stuff and picked up their "bookings" from the offices of Hot Stuff. Hot Stuff would try to schedule dancers for their requested performance times, but it was not always possible. Dancers paid Hot Stuff a $2 to $4 booking or stage rental fee for booking them at The Acropolis. Dancers were not required to accept a booking from Hot Stuff. Acropolis no longer paid wages to dancers for any shift. It issued no W-2 Forms to dancers or to Hot Stuff.

After it entered into its agreement with Hot Stuff, Acropolis no longer was involved in the disciplining of dancers. If a bartender or waitress had a concern about a dancer, that concern would be brought to Hot Stuff. If a dancer had a concern, she would address it to Hot Stuff. Dancers reported violations of OLCC rules to Hot Stuff. Dancers notified Hot Stuff of performance cancellations; Hot Stuff booked a replacement dancer. Waitresses and bartenders notified Hot Stuff if a dancer did not show up, and Hot Stuff provided the replacement. If dancers timely canceled a performance, their booking fee was returned. If they canceled late, they forfeited their booking fee and their next performance.

Dancers signed a service agreement with Hot Stuff, in which they agreed that they were an independent business with a separate business telephone listing, that they were not solely dependent on Hot Stuff and that they booked their performances through at least one other agency or performed at least at one club that was not booked by Hot Stuff. Dancers testified that they did not contribute to the terms of their agreement with Hot Stuff. Hot Stuff printed business cards for dancers. Dancers performed at

several clubs in addition to The Acropolis.

In April 1994, Polizos terminated Acropolis' relationship with Hot Stuff and entered into a similar agreement with an agency run by Brett Owenby, who had worked previously for Hot Stuff. In August 1994, Polizos terminated Acropolis' relationship with Owenby and began dealing with Michael Henry, doing business as Star Promotions (Star). ***188** Star originated in 1992 and characterizes itself as an entertainment coordinator, booking dancers not only at The Acropolis but also at three other establishments. Star Promotions pays Acropolis $100 per month to lease stages at The Acropolis, and Henry receives a bonus from Acropolis of approximately $100 per month for doing a good job. Star uses space for its office in Acropolis' empty warehouse and pays no rent. Defendants have no input into the terms and conditions of the dancers' contracts with Star. Dancers audition for Star at a location other than The Acropolis. Under their agreements with Star, the dancers are "volunteers" who "donate their time and talent to perform on said stages." Dancers have no input as to the terms and conditions of the agreements with Star. A dancer who wishes to dance at The Acropolis must schedule a shift through Star.

Dancers pay Star a stage rental fee of $4 to $7 for performing at The Acropolis, depending on the time of performance, and dancers' income comes exclusively from customer tips. As under Hot Stuff, dancers are paid no minimum wage by Acropolis. They are free to chose their own stage name, hair style, costume, music and dance routine. They provide their own music and determine how much of their costume they will remove. They are not required to undress completely and can wear whatever they want on stage, even street clothes. They are free to do what they want in between their performances, except that they must wear a "cover-up" if they circulate among the customers.

Dancers have monthly meetings at Star's office. Dancers developed and voted on their own list of Conduct Recommendations, with input from Polizos and The Acropolis bartenders and waitresses. After September 1993, dancers no longer check in at The Acropolis bar and are no longer required to perform a finale.

****652** At the relevant time, Acropolis employed 27 bartenders, waitresses, cooks and doormen. Those employees were required to punch a time clock. Acropolis scheduled their work time, determined their compensation, coordinated work and vacation schedules and hired and fired them. Those employees were paid an hourly wage of $5 to $7. They were provided with one free meal and drink per day. Cooks and ***189** doormen were provided with uniforms, and bartenders and waitresses were required to dress in black and red. Each employee had a 10-minute break after lunch time.

In contrast to the circumstances of waitresses, bartenders, cooks and doormen, dancers did not punch a time clock. They were not provided with a free meal or drink. Acropolis did not schedule their work hours or vacations. They did not receive a 10-minute break. Acropolis cross-trained its waitresses and bartenders. It did not cross-train dancers. Bartenders, waitresses, cooks and doormen attended monthly meetings with Polizos. Dancers did not attend those meetings but attended only their separate meetings at the office of Star. There was testimony from dancers and Cloud that, although tipping by dancers was not required, it was "traditional" for dancers to tip bartenders, waitresses and doormen. There was testimony from one dancer that bartenders started their shifts with 100 one dollar bills that they would give customers change in one dollar bills to be used to tip dancers and that bartenders would not give one dollar bills as change if they did not like the dancer. There was testimony that a doorman was terminated for demanding a tip from a dancer.

Polizos rents his stages for private parties for $90 for two hours. When there is a private party, Polizos requests two additional dancers from Star. On two occasions, when stages leased by Star needed repairs, Acropolis made the repairs.

Several dancers testified at trial. Susan Mazur testified that she danced at The Acropolis from August 1992 to April 1994, and that her job was to "try to promote beer sales by entertaining the guys, making them want to stay there and come back and want to spend their money." In 1992, 1993 and 1994 she filed federal and state income tax returns in which she declared herself to be a self-employed dancer, taking business expense deductions for makeup, tanning, costumes and jewelry. She and the other dancers who testified said that they regarded themselves as self-employed and that they worked with other booking agents who would book performances for them at other establishments.

***190** A jury found that, with regard to wage claims prior to September 1993, the dancers' relationship with Acropolis was one of employment. In BOLI's view, the changes that occurred in September 1993 in the day-to-day management of the dancers did not alter the relationship of the dancers and Acropolis. Although there was evidence that the September 1993 changes in the management of the dancers did not affect many of the factors that were relevant to the court's inquiry, considering all of the criteria that the trial court had before it we find that the relationship between Acropolis and the dancers after September 1993 was not one of employment:

1) The durations of the relationships of the dancers and The Acropolis. With the exception of four or five dancers, dancers typically danced at The Acropolis intermittently, for brief periods, and simultaneously worked for other clubs.

2) The right or lack of right of Acropolis to control the method of doing the work. BOLI argues that Acropolis and its various booking agents after 1993, especially Star, were not sufficiently distinct to be treated separately for the purpose of the determining whether Acropolis had a right to control the dancers. In other words, although Acropolis purported to book dancers for its club through an agent, the agents were connected so closely to Acropolis, rather than to the dancers, that Acropolis had not relinquished control over the dancers. In our view, the evidence shows that the entities were separate. Unlike Cloud, Henry was not compensated as an employee by Acropolis. Although Star received no fee from Acropolis for its services, it used Acropolis space for its office, rent free. Although Star "leased" stages from Acropolis, it received a monthly bonus equal ****653** to the lease amount. Acropolis had no say in the agreements between Star and the dancers. From its office space, Star booked dancers for other clubs. Contrary to BOLI's contention, these facts lead us to conclude that the entities were separate. We find, as BOLI contends, that Acropolis' use of a booking agent did not mean that Acropolis had given up control of its stages; it retained control of the general venue and circumstances of the dancers' work, such as the stage to be danced on, the length of the shift, the number of stages used, and the length and number of sets. However, we find, additionally, that the dancers ***191** were not subject to the control of either Acropolis or the agent with regard to the manner of performing their work.

3) Form of payment. Dancers were not paid by Acropolis or Star but through customer tips only. As BOLI points out, this factor is of relatively little weight here, where the issue is whether Acropolis *should* have been paying minimum wage to the dancers.

4) Equipment. Dancers provided their own equipment including costumes, makeup and music. The stage that Acropolis provided was not equipment but the situs of the performance. *See Cy Investment, Inc. v. Natl. Council on Comp. Ins.,* 128 Or.App. 579, 584 876 P.2d 805 (1994).

5) Extent to which dancers' income depended on their skills. Although dancers were not required to have any specific training to dance at The Acropolis, the evidence was that their tips were 80 percent dependent on their ability to entertain, which included their dancing and personal skills and their ability to use makeup and costumes. Evidence also was introduced that tips were dependent in part on a dancer's physical appearance, which, of course, is

not exclusively a question of skill.

6) Acropolis' right to discipline or fire dancers. There is no evidence that either the Acropolis or the agent ever fired a dancer. When a dancer decided not to dance at The Acropolis, there was no requirement to notify Acropolis. The dancer simply asked the agent not to schedule a shift.

7) The parties' view of their relationship. The dancers testified that they regarded themselves to be self-employed.

8) Control over opportunity for profit. BOLI takes the position that the dancers' opportunity for profit was, in fact, dependant on Acropolis, through its provision of the venue, its setting of general shift times and lengths, its control of the number of dancers and stages used, control of music volume and exclusive control of the operation of The Acropolis. Certainly, the dancers could not have earned income from dancing at The Acropolis in the absence of that venue. There was testimony, however, that a dancers' profits were almost exclusively dependent on the skill of the dancer ***192** and that dancers danced at other establishments, not just The Acropolis.

At trial, BOLI took exception to the trial court's failure to instruct the jury that the relative investments of the parties in the business is a factor to be considered in determining the nature of the relationship. Although no assignment of error challenges the trial court's failure to instruct the jury on that factor, BOLI asserts on review that, in considering the post-September 1993 period, that factor weighs in favor of an employment relationship. BOLI contends that the investments made by the dancers in their costumes and music are minimal compared to Acropolis' investment in its business, which includes the building, seating, stages, food, beverages and service. Defendants note that a dancer's investment goes beyond the mere physical trappings of the work, such as costume and music, and includes skill and experience, which cannot be measured comparatively.

Further, BOLI asserts, the trial court erred in failing to consider the extent to which the dancers are an integral part of Acropolis' business. BOLI notes that the dancers are featured in advertising and that The Acropolis' food prices are low because The Acropolis' beverage sales are enhanced by the presence of dancers. It contends that both this factor and the investment factor go to the essence of the "economic realities" ****654** test: the dependance of the dancers on The Acropolis for their earnings.

Were it not for the fact that the dancers testified that they danced at other establishments as well as The Acropolis, we might be persuaded by BOLI's arguments concerning the need to consider factors bearing on dancers' economic dependence. Additionally, the economic reality with regard to each dancer necessarily depends on the circumstances of the individual dancer, evidence that is not in this record. We are not persuaded that the two criteria aid in the determination of an employment relationship in this case.

Considering the factors discussed, we conclude that they weigh in favor of the determination that the relationship between Acropolis and the dancers after 1993 was not one of employment. Accordingly, the trial court did not err in ***193** holding that Acropolis was not subject to minimum-wage requirements for the dancers after 1993.

Our findings apply as well to the claims of Susan Mazur. BOLI's third assignment of error challenged the trial court's granting of defendants' motion for directed verdict with respect to the assigned wage claim as it relates to the dancer Mazur for the time period after September 1993. In our first opinion, we concluded that there was evidence from which it could be found that Mazur was an employee. On *de novo* review, we conclude now that there was no employment relationship.

Reconsideration allowed; former opinion modified; affirmed.

Or.App.,1997.

State ex rel. Roberts v. Acropolis McLoughlin, Inc.
150 Or.App. 180, 945 P.2d 647, 5 Wage & Hour Cas.2d (BNA) 920

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EXHIBIT 21

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF GOODHUE | FIRST JUDICIAL DISTRICT

Regan Thompson,

Plaintiff,

vs.

Lounge Management, Ltd.,
a Minnesota Corporation,
d/b/a Class Act and Peelers;
Richard Jacobson; John
Doe; and Mary Roe,

Defendants,
and Third Party Plaintiffs,

vs.

Jesse Ronning,

Third Party Defendant.

Court File No. CX-03-1259

ORDER GRANTING SUMMARY JUDGMENT AND SUMMARY JUDGMENT

The above-entitled matter came on for hearing before the undersigned on the 9th day of April, 2004 at the Goodhue County Government Center, City of Red Wing, County of Goodhue, State of Minnesota. The matter was before the Court on cross motions for summary judgment.

The Plaintiff was represented by Jason C. Kohlmeyer, Esq. Defendant Lounge Management/Peelers, Richard Johnson, John Doe and Mary were

represented by Randall D.B. Tigue, Esq. Third party Defendant Jesse Ronning made no appearance.

Based upon the files, records, arguments of counsel, memorandum submitted, and all proceedings herein, the Court makes the following:

ORDER

1. That the Plaintiff's motion for summary judgment is hereby **DENIED**.

2. That Defendant's motion for summary judgment is hereby **GRANTED**.

3. That Plaintiff's claims are dismissed on the merits with prejudice.

4. That Defendants' counterclaims against Plaintiff and third party claims against Jesse Ronning are dismissed as moot.

5. That the following memorandum is hereby incorporated by reference.

Dated: May 10, 2004.

BY THE COURT:

Kevin F. Mark
Judge of District Court

SUMMARY JUDGMENT

The foregoing Order Granting Summary Judgment hereby constitutes the Judgment of the Court.

Dated: May 6, 2004.

BY THE COURT:

Yvonne J. Black
Court Administrator
by Brenda Johnson-Ehlers
deputy

Memorandum

Summary judgment is available to all parties in a civil action. Minn. R. Civ. P. 56.01 and 56.02. The use of summary judgment should be judiciously applied. It is a "blunt instrument" because it determines the issues based upon the pleadings and discovery before trial. It "should be employed only where it is perfectly clear that no issue of fact is involved." Donnay v. Boulware, 144 N.W.2d 711,716 (1966). In any event, this Court has the obligation to grant summary judgment if the rules and law point to that conclusion. The rule provides:

> Judgment shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.

Minn. R. Civ. P. 56.03.

The court will determine if there is an issue of material fact to be tried, but it will not resolve any issues of fact. Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630 (Minn. 1978). The party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact, and the non-moving party has the right to have all the doubts and inferences resolved in his favor. Vieths v. Thorp Finance Co., 305 Minn. 522, 232 N.W.2d 776 (1975). If the movant's papers show that no genuine issue of material fact exists, then the burden shifts to the opposing party to introduce outside evidence to rebut this conclusion. Minn. R. Civ. P. 56.05. This is not to say that any question of fact that is left will stop summary judgment, it is only a genuine issue of material fact that will preclude the granting of summary judgment. A material fact is one that will affect the

outcome of the case depending on its resolution. Rathbun v. W. T. Grant Co., 300 Minn. 223, 219 N.W.2d 641 (1974).

The non-moving plaintiff does bear the burden of making "a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989), quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The party opposing the motion must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial. Marose v. Hennameyer, 347 N.W.2d 509 (Minn. 1984). The non-moving party must show more than that there is some "metaphysical doubt" as to a material fact. Id., citing Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The facts of the present motion are not in controversy and the Court finds that summary judgment is appropriate. The undisputed facts are as follows.

From May of 2002 until March of 2003, Regan Thompson, ("Plaintiff") worked as an exotic dancer at Defendant Lounge Management ("Lounge Management"). Plaintiff would dance at Lounge Management's establishment Class Act ("Class Act"). During the course of her arrangement with Lounge Management, Plaintiff would lease space on the dance floor at Class Act for $60.00 a night on weekdays and $75.00 per night for weekends. During the rented time periods, Plaintiff would take off her clothes and perform exotic dances in order to solicit tips from the patrons. Performers at Class Act would

also pay the disc jockey $10.00 per day to play the dancers' chosen music while she performed on stage.

In addition to granting the dancers use of the stage, Lounge Management also allowed access to all of the Class Act facilities for the purposes of performing stage dances for tips, private dances for $20.00, and VIP dances for $125.00. The dancers would retain 100 percent of their earnings from tips, except that the dancers were required to reimburse $25.00 of the $125.00 on the VIP dances as and for rent for the facilities in the VIP room. No wages were ever paid to the dancers by Lounge Management, nor were the dancers ever given any health or retirement benefits. The Plaintiff was also required to provide her own costumes and was given very little, if any, direction when she began working at Lounge Management. Dancers, including the Plaintiff, are all required to sign an entertainment lease with sets forth the agreement between the dancer and Lounge Management. In that agreement, dancers stipulated to their status as an independent contractor rather than an employees.

After being suspended from dancing at Class Act, Plaintiff filed suit claiming that Lounge Management owed her minimum wage for all hours she danced at Class Act. She based her theory upon her status as an employee of Lounge Management. Lounge Management disputes the notion that she is an employee, arguing that she is an independent contractor is not entitled to any minimum wage reimbursement.

Upon review of the law on the issue of the correct characterization of exotic dancers as employees or independent contractors, the Court found a

divergence of opinions and tests offered by many federal and state courts. Under any test evaluated, however, the Court determines that the overwhelming evidence in this case suggests that Plaintiff is an independent contractor.

In Minnesota, there is no authoritative case on the exact issue of whether or not exotic dancers qualify as employees or independent contractors for the purposes of determining an establishment's obligation to pay them minimum wage. Thus, the Court must look to other cases not involving the issue of minimum wage for exotic dancers but rather the more general issue of employees versus independent contractors for any purpose.

In Jenson v. Department of Economic Security, 617 N.W.2d 627 (Minn. Ct. App.2000) the Minnesota Court of Appeals adopted a five part test in determining the status of individuals as employees or independent contractors: "(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge." *Speaks, Inc. v. Jensen,* 309 Minn. 48, 50-51, 243 N.W.2d 142, 144 (1976) (quoting *Guhlke v. Roberts Truck Lines,* 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964)). The label parties give to their relationship is not determinative; the relationship is determined by law. Id. (citing Edelston v. Builders & Remodelers, Inc., 304 Minn. 550, 229 N.W.2d 24 (1975)). This test was also used in another employee/independent contractor case of Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 676 (Minn.1977).

A different set of factors was used in Hanson v.Friends of Minnesota Sinfonia, 181 F.Supp.2d 1003 (D.Minn.2002), a musician filed suit against his chamber orchestra, claiming that he was an employee and could sue them under the ADA. In rejecting the claim and determining that musicians were independent contractors, the Court used a four part test: (1) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (2) whether the worker accumulates retirement benefits; (3) whether the "employer" pays social security taxes; and (4) whether the worker accrues yearly leave. Those factors that are equally irrelevant or of indeterminate weight and thus do not favor either party over the other, should be disregarded in light of the particular facts that apply in each case. See Eisenberg v. Advance Relocation & Storage, 237 F.3d 111, 114 (2d Cir.2000).

In essence, the tests are very similar. Both tests evaluate the termination issue and the Jenson test seems to encompass all of the four part test, since they both have benefit components. Therefore, the Court will choose a test from a foreign jurisdiction that is most similar to test enunciated in Jenson.

A similar case was brought in Oregon, where exotic dancers sued for a minimum wage payment. In determining that the dancers were independent contractors and not employees, the court stated;

> "In deciding whether an individual is an employee within the meaning of the F.L.S.A., the label attached to the relationship is dispositive only to the degree that it mirrors the economic reality of the relationship; Under this "economic reality" test, "the focal inquiry in the characterization process is thus whether the individual is or is not, as a matter of economic fact, in business with [herself]." *Id.* Five criteria have emerged to guide this determination: (1) the permanency of the working relationship, (2) the

opportunity for profit and loss, (3) investment in material, (4) the degree of control, and (5) the individual's skill.

Matson v. 7455, Inc., 2000 WL 1132110 (D. Or.)) The Court in Matson also found that the agreement between the parties was the most telling indicator of dancer's status as an independent contractor.

The Court is satisfied that the test set forth in Matson is sufficiently similar so that it can be used to determine the status of the Plaintiff in this case. Each factor will be addressed below. In addition, the Court will analyze a few additional factors furthered in other jurisdictions.

Permanency of Working Relationship

Plaintiff signed an agreement with Lounge Management establishing her rights and responsibilities entitled "Entertainer Licensing Agreement". Nothing the documentation signed by the parties suggested that the arrangement was for a set time period such as a year or two years. The agreement explicitly states that the arrangement can be terminated by either party with seven days notice, with an exception for flagrant violations of the house rules or the law.

This factor really favors neither side, since generally employees do not sign an agreement when they begin working which dictates the length of their service.

The Opportunity for Profit and Loss

The arrangement between the parties acknowledged that the Plaintiff could earn as much or as little as she desired while performing at Class Act. In her deposition, she acknowledged that her income was dependent upon her ability to sell private and VIP dances to customers on the premises.

Furthermore, Lounge Management or Class Act did not "line up" customers for the Plaintiff to perform on stage, nor did they assist her in obtaining clients for her private or VIP dances.

The same rationale is applicable to a potential loss by the Plaintiff. If Plaintiff does not sell private or VIP dances and has a poor night in tips from stage dances she could lose money on her investment in renting the dance floor. Lounge Management was under no obligation to reimburse her for any loss that she might sustain from her inability to solicit clients.

Clearly this factor suggests that the Plaintiff was an independent contractor and not an employee of Lounge Management.

Investment in Material

The costs required for Plaintiff to dance exotically at Class Act were borne by her alone. There was no understanding that the club would pay for any aspect of her fees to perform. Plaintiff was required to rent the stage and the room for VIP dances. She was also required to invest significant resources in costumes, shoes, props, make-up, hair-styling, tanning, and aerobic workouts so that she might solicit tips and private dances from the patrons. Furthermore, in order to perform at Lounge Management she needed to pay the DJ to play her chosen songs.

The Degree of Control

Plaintiff was not under any significant control of Lounge Management. She was allowed to determine her schedule with the understanding that other dancers may have already reserved certain times for entertaining. Plaintiff was

also allowed to choose her own costumes. She was granted the use of the dance floor for a fee to Lounge Management and was able to dance in the manner she thought best to attract tips and private dances. Plaintiff was also allowed to choose the songs that she desired while dancing on stage. Additionally, Lounge Management did not exercise any significant control over the financial affairs between the Plaintiff and her clients.

Individual's Skill

Plaintiff was not assisted in any significant manner by Lounge Management in obtaining clients for regular stage tips. Plaintiff's income was solely based upon her skill as an exotic dancer and her ability to solicit tips and private dances. Her initiative was the key factor in her making money at Lounge Management. She was required to convince the customers that they should buy a private dance from her. Lounge Management was not involved in any solicitation in order to assist Plaintiff in obtaining VIP and private dances.

Other Factors

Language of Written Agreement

In the "entertainer licensing agreement" the parties agreed that the there was no employment status between Lounge Management and the Plaintiff. Under section 7- Status of the Parties, the agreement states in bold caps that "the parties hereto specifically and mutually negate any employment relationship between them". While such an agreement containing explicit language may not be the only factor to consider, it is certainly relevant and reveals the intent of the parties at the time the agreement was signed.

Wages

Plaintiff admits that no wages were ever paid to her from Lounge Management. The question of remuneration has been held by several courts to be dispositive of the issue of whether or not someone is an employee or an independent contractor. (See O'Connor v. Davis, 126 F.3d 112 (2d Cir 1997) citing Graves v. Women's Prof'l Rodeo Assoc. 907 F.2d 71, 74 (8th Cir. 1990)) The simple fact that no wages were paid to the Plaintiff from lounge management certainly makes her claimed status as an employee less likely.

Employment Records

Under the law, Lounge Management was required to keep certain employment records of their employees. Such documentation would include W-2 forms, payroll information, and tax withholding materials. Lounge Management maintained none of these records relating to Plaintiff.

Plaintiff was also required under federal law to report tips of more than $20.00 per night to her employer. This obligation was on the Plaintiff and she failed to report any amount of tips to Lounge Management.

Conclusion

It is apparent that under any factor and test that the Court adopts, the arrangement between Lounge Management and the Plaintiff was not an employee/employer relationship. The undisputed evidence suggests that Plaintiff was not employed by Lounge Management, bur rather acted as an independent contractor. Therefore, Plaintiff is not entitled to any reimbursement for minimum wage from Lounge Management.

Based upon the Court's finding that the Plaintiff was not an employee of the Defendants, all other claims by all of the named parties become moot. The claim by Defendants against Plaintiff for wage reimbursement cannot be sustained in light of the independent contractor status of the Plaintiff. Plaintiff would only be required to reimburse Defendants for wages she earned if she was an employee and failed to turn over her earnings to the employer. Thus, no reimbursement claim exists for the benefit of Defendants.

Additionally, the independent contractor status does not allow recovery for the Plaintiff under her illegal tip sharing claim. The statute cited, Minn. Stat. § 177.24, speaks to rights of employees and obligations of employers. Neither party in this case is an employee or employer to the other, therefore no tip sharing claim can be maintained by the Plaintiff against the Defendants.

Since no employer/employee relationship exists between the Plaintiff and Class Act, the Defendant's third party claim against Jesse Ronning also becomes moot. In their complaint, Defendants request that if a judgment is entered against them for illegal tip sharing, the costs should be defrayed to Mr. Ronning, since the Defendants had no knowledge of tip sharing enterprise and it was solely at the direction of Mr. Ronning. Since no claim survives which would allow such recovery by the Plaintiff against the Defendants, no indemnity can be sought against Mr. Ronning.

KFM

EXHIBIT 22

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

STATE OF ILLINOIS
DEPARTMENT OF HUMAN RIGHTS

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	
CARLA MCKINNEY	)	CHARGE NO.: 2000CF0677 EEOC NO.: 21BA00209

ORDER

This matter coming before the Chief Legal Counsel upon Complainant's Request for Review ("Request") of the dismissal by the Department of Human Rights ("Department") of Charge No. 2000CF0677, Carla McKinney, Complainant, and MRC, LLP d/b/a PT's Sports Cabaret and International Entertainment Consultants, Inc. d/b/a PT's Sports Cabaret*, Respondent; and the Chief Legal Counsel having reviewed the Investigation Report of the Department together with Complainant's Request and supporting materials; and the Chief Legal Counsel being fully advised of the premises;

NOW, THEREFORE, it is hereby ORDERED that the Department's dismissal is SUSTAINED on the following ground:

LACK OF JURISDICTION

In support of which determination the Chief Legal Counsel states the following findings of fact and reasons:

1. Complainant, a dancer, filed a charge of discrimination with the Department on October 22, 1999, amended on January 18, 2000, and on April 5, 2000, alleging that Respondent discharged her because of her race, black, in violation of Section 2-102(A)

* The parties dispute the correct legal name for Respondent. Respondent's verified response indicates that its legal name is International Entertainment Consultants, Inc. d/b/a PT's Sports Cabaret ("IEC"). Complainant maintains that IEC is not registered to do business in Illinois with the Illinois Secretary of State's Office. However, MRC, LLP d/b/a PT's Sports Cabaret ("MRC") is registered to do businesses in Illinois. Thus, the charge was amended to include both names of the Respondent. Hereinafter, IEC and/or MRC will be referred to as "Respondent."

of the Illinois Human Rights Act. On June 7, 2000, the Department dismissed Complainant's charge for Lack of Jurisdiction. On July 13, 2000, Complainant filed this timely Request.

2. The Department's investigation revealed that the Department does not have jurisdiction over Complainant's charge. Section 2-101(A) of the Act states that an "employee" includes "[a]ny individual performing services for remuneration within this State for an employer." 775 ILCS 5/2-101(A). In this case, the evidence shows that Complainant is not an employee within the meaning of the Act; Complainant is an independent contractor. Determining whether an individual is an independent contractor or an employee requires the consideration of the following five factors: 1) the amount of control and supervision; 2) the right of discharge; 3) the method of payment; 4) the level of skill required and the amount of work to be done; and 5) the source of tools, materials or equipment and the work schedule. Whittington v. K-Mart Corporation, ___ Ill. HRC REP. ___, Charge No. 1987SF0520, ALS No. 4205, (November 18, 1992), citing, Bob Neal Pontiac-Toyota, Inc. v. Illinois Industrial Commission, 89 Ill.2d 403, 433 N.E.2d 678, 680 (1982).

3. THE AMOUNT OF CONTROL AND SUPERVISION: The right to control the manner in which the work is done is the most important factor in the analysis. Whittington at 6. The more control a party exercises over an individual the more likely an employer/employee relationship exists. In this case, the dancers exercise complete control over their work activities. The evidence shows that the dancers determine their own schedule by informing Respondent what days and hours they are available to work. From this information, Respondent schedules the dancers to work shifts based upon their availability. The evidence further shows that the dancers determine their own price for private dances which they perform while not on stage. Finally, the dancers are in total control of the content of their routine while on stage. This level of control indicates that the dancers are independent contractors rather than employees.

4. THE RIGHT OF DISCHARGE. Regarding the right of discharge, the evidence shows that either party can terminate the relationship without cause. Thus, if a dancer terminated the relationship without cause, the dancer is entitled to receive the tips earned from her performances. This factor favors an independent contractor status given that the dancers have the authority to terminate the contract and retain the right to keep their tips previously earned.

5. THE METHOD OF PAYMENT. The manner in which dancers are paid for their services further indicates an independent contractor status. "[W]here an employer agrees to pay a specific sum for a particular job, the method of payment favors independent contractor status." Whittington at 7. The evidence shows that dancers are not paid by Respondent. The only remuneration dancers receive are from the tips provided by customers of Respondent. The dancers are not employees given that they are not paid according to the amount of time they work. Therefore, the manner in which the dancers receive payment for their services indicates that they are independent contractors.

6. THE LEVEL OF SKILL REQUIRED AND THE AMOUNT OF WORK TO BE DONE: Employers generally seek independent contractors to perform unique or specialized services. In the present case, the amount of remuneration dancers receive is related to their ability to dance. Furthermore, the evidence shows that dancing was the only duty assigned to the dancers by Respondent. These facts favor a finding that dancers are independent contractors.

7. THE SOURCE OF TOOLS, MATERIALS OR EQUIPMENT AND THE WORK SCHEDULE: An employee/employer relationship exists when the employer provides the tools, materials or equipment needed for performing job tasks. In the present case, the evidence shows that dancers have discretion over the content of their dance routines and are responsible for providing any costumes or materials required for that routine. Additionally, dancers have control over their own work schedule. As stated in paragraph 3, dancers may refuse to work on certain days or at certain times if they are unavailable. These facts favor a finding that dancers are independent contractors, not employees.

8. In sum, consideration of all the above factors demonstrates that the dancers are independent contractors. The evidence does not indicate that the dancers are employees of Respondent. Therefore, the Department does not have jurisdiction over Complainant's charge.

9. In her Request, Complainant alleges that both the five-factor test employed by Whittington and the sixteen-factor test employed by the Equal Employment Opportunity Commission, weigh in favor of a finding of an employee/employer relationship. The record, however, demonstrates that Complainant is an independent contractor. Further, Complainant attaches to her Request a copy of an application for employment which she admits is merely similar to the one she received from Respondent. Complainant has not shown good cause why she failed to present this information previously and, accordingly, it cannot be considered at this time. Roadl v. Midco International, 296 Ill.App.3d 213, 694 N.E.2d 179, 183 (5th Dist. 1998). Complainant's Request is not persuasive.

10. In the final analysis, the Department does not have jurisdiction over Complainant's charge because Complainant is not an employee within the meaning of the Act.

11. This is a Final Order. A Final Order may be appealed to the Appellate Court by filing a petition for review, naming 1) the Chief Legal Counsel, 2) the Department, and 3) Respondent as appellees, with the Clerk of the Appellate Court within 35 days after the date of service of this Order. The Department deems "service" complete 5 days after mailing.

ENTERED THIS 11th DAY OF September, 2000.

Chief Legal Counsel

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

CHARGE NO. 2000CF0877

AFFIDAVIT OF SERVICE

RUTH WILLINGHAM, being first duly sworn on oath, states that she served a copy of the attached ORDER upon each person named below this 18th day of September, 2000, in the manner indicated below.

(X) FIRST CLASS MAIL

Julie Griffeth, Esq.
Kevin C. Kaufhold, Esq.
Kaufhold and Associates, P.C.
5111 W. Main St., Lower level
P.O. Box 23439
Belleville, IL 62226-0409

Randall W. Kelly, Esq.
Attorney at Law
15 Bronze Pointe North
Belleville, IL 62226

(X) BY HAND DELIVERY

Carlos J. Salazar, Director
Department of Human Rights
100 W. Randolph St.
Suite 10-100
Chicago, IL 60601

Ruth Willingham
RUTH WILLINGHAM

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 18th DAY OF September, 2000

Yolanda Glynn Goodwin

OFFICIAL SEAL
YOLANDA GLYNN GOODWIN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8/8/2004

EXHIBIT 23

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

NO. 5-00-0570

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CARLA McKINNEY, Petitioner, v. CHIEF LEGAL COUNSEL OF THE DEPARTMENT OF HUMAN RIGHTS; THE DEPARTMENT OF HUMAN RIGHTS; MRC, LLP, d/b/a PT'S SPORTS CABARET; and INTERNATIONAL ENTERTAINMENT CONSULTANTS, INC., d/b/a PT'S SPORTS CABARET, Respondents.	Administrative Review from an Order of the Chief Legal Counsel of the Department of Human Rights. No. 2000-CF-0877

RULE 23 ORDER

Carla McKinney (petitioner) appeals, pursuant to section 8-111(A) of the Illinois Human Rights Act (775 ILCS 5/8-111(A) (West 2000)) and Illinois Supreme Court Rule 335 (155 Ill. 2d R. 335), from an order of the chief legal counsel of the Department of Human Rights (the Department) dismissing for lack of jurisdiction petitioner's charge of discrimination against the respondents, MRC, LLP, and International Entertainment Consultants, Inc., both of which are doing business as PT's Sports Cabaret (and to which we will refer collectively as PT's). On appeal, we decide whether the dismissal of the charge by the Department is clearly erroneous. We affirm.

FACTS

Petitioner was a dancer at PT's "adult entertainment" club in Sauget, Illinois. On October 25, 1999, petitioner filed a charge of discrimination against PT's, alleging that the

was discharged on October 1, 1999, because of her race (black). On April 6, 2000, petitioner filed an amendment to her charge, adding the name of a second corporation doing business as PT's but otherwise alleging the same charge of discrimination.

PT's filed a verified response to petitioner's charge, admitting that petitioner was discharged on or about October 1, 1999, and that her race was black but denying that she was discharged because of her race. In the response, PT's alleged that petitioner was discharged because she refused to be reassigned to a different club and that her job performance was not satisfactory at all times. Additionally, PT's alleged petitioner's "charge of discrimination should be deemed null and void" because petitioner and all of the other entertainers at PT's are not employees but "are all independent contractors."

On June 7, 2000, after an investigation, the Department dismissed the charge for lack of jurisdiction. In an investigative report filed with the notice of dismissal, the Department found that petitioner stated that "the only remuneration she received was from customers who watched her dance." The Department noted:

> "Section 2-101(A)(1)(a) *** defines an employee as any individual performing services for remuneration within this State for an employer. [775 ILCS 5/2-101(A)(1)(a) (West 2000).] Evidence shows dancers tell Respondent when they can work. Respondent then complies and posts schedules based on this information. Section 2-102(A) *** is limited to actions against employers. Since Respondent does not control the dancers' time, Respondent *** does not meet the definition of an employer as defined in Section 2-101(B)(1) of the [Illinois Human Rights] Act. Further, without remuneration between Complainant and Respondent, there is no employee-employer relationship with respondent.
>
> Since there is no employee-employer relationship, a finding of lack of jurisdiction is recommended for [the Department]."

Petitioner contested the Department's decision by filing a timely request for review with the chief legal counsel. In her request, petitioner alleged that she filled out an application for employment before dancing at PT's. After she began dancing, PT's selected her dances and instructed her on her appearance and behavior while she mingled with the customers: she was required to wear long evening gowns and jewelry and have her hair curled and her fingernails neatly polished. Petitioner admitted that PT's did not pay her, but she stated that she averaged about $350 to $400 in tips on a normal shift, often more.

On September 11, 2000, the Department's legal counsel entered an order dismissing petitioner's charge, finding that the Department did not have jurisdiction over the charge because petitioner was not an employee, since PT's did not pay her any wages or salary for her services. The Chief Legal Counsel determined that petitioner was an independent contractor under the test set forth in *Whittington & K-Mart Corp.*, No. 1987BF0520 (Ill. Hum. Rts. Comm'n, November 18, 1992), and *Bob Neal Pontiac-Toyota, Inc. v. Illinois Industrial Comm'n*, 89 Ill. 2d 403 (1982).

ANALYSIS

1. Standard of Review

An administrative agency's decision on questions of fact are held to be *prima facie* true and correct and will be reversed only if against the manifest weight of the evidence. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 98 (1992). Questions of law decided by an administrative agency are reviewed *de novo*. *Exelon Corp. v. Illinois Environmental Protection Agency*, 166 Ill. 2d 200 (1994). However, if the issue on appeal involves an examination of the legal effect of a given set of facts, it is a mixed question of law and fact, and the agency's decision must be affirmed unless it is clearly erroneous. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). Mixed questions of law and fact occur when the historical facts are admitted or

established, the rule of law is undisputed, and the underlying issue is whether the facts satisfy the statutory standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 72 L. Ed. 2d 66, 80 n.19, 102 S. Ct. 1781, 1790 n.19 (1982).

In the case at bar, the relevant facts concerning petitioner's relationship to PT were not disputed. The main question facing the Department and the chief legal counsel was whether petitioner was an employee within the meaning of the Illinois Human Rights Act. Since the pivotal question before the Department concerned the legal effect of a given set of facts, the question is a mixed question of law and fact. Thus, we must affirm the Department's decision unless it is clearly erroneous. *City of Belvidere*, 181 Ill. 2d at 205.

2. Jurisdiction under the Illinois Human Rights Act

The purpose of the Illinois Human Rights Act is to secure freedom from discrimination against any individual "in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations." 775 ILCS 5/1-102(A) (West 2000). Article 2 of the Illinois Human Rights Act prohibits employers from discriminating against employees based upon age, race, physical handicap, gender, or religion. 775 ILCS 5/2-101 *et seq.* (West 2000). However, even where conduct is discriminatory, there is no violation of the Illinois Human Rights Act unless an employer/employee relationship exists. *Wanless v. Human Rights Comm'n*, 296 Ill. App. 3d 401, 404 (1998).

In *Wanless*, the court considered a factual scenario similar to that presented here. In that case, the petitioner also appealed from a dismissal of a claim of discrimination based upon a finding that the petitioner, an attorney, was not an employee of the respondent, a bank. *Wanless*, 296 Ill. App. 3d at 402. The court upheld the Department's dismissal, agreeing that the respondent paid the petitioner no remuneration for his services (all attorney fees were paid to the petitioner's professional corporation), and therefore, no

employer/employee relationship existed upon which jurisdiction would lie. *Wanless*, 296 Ill. App. 3d at 403-04. As an alternative and additional basis for its ruling, the court in *Wanless* found that the petitioner was an independent contractor rather than an employee. *Wanless*, 296 Ill. App. 3d at 404.

In the case at bar, both parties agree that PT's paid petitioner no hourly wages or salary for her work as a dancer at its club. Without remuneration by PT's, we cannot find any employer/employee relationship upon which to fulfill the provisions of the Act. Even if petitioner's allegation that she was fired for the discriminatory reason that she is black is true, the Act provides no remedy without an initial finding that petitioner is an employee of PT's. See 775 ILCS 5/2-101(A) (West 2000); *Travis v. Human Rights Comm'n*, 241 Ill. App. 3d 649 (1992) (the charge of discrimination was dismissed, and the dismissal was upheld on appeal because the named respondent was not the petitioner's employer within the meaning of the Illinois Human Rights Act).

Petitioner argues, however, that PT's cannot avoid her charge of discrimination by failing to pay wages. Petitioner contends that PT's should not benefit, *i.e.*, be absolved of liability under the provisions of the Illinois Human Rights Act, simply because it did not pay her any wages, a situation petitioner claims is in violation of the Fair Labor Standards Act of 1938. 29 U.S.C. §201 *et seq.* (2000). Unfortunately, none of the cases that petitioner cites support her position.

Petitioner correctly notes that courts around the nation have considered the specific issue of whether dancers in clubs similar to PT's are employees and should be paid wages. See *Harrell v. Diamond A Entertainment, Inc.*, 992 F. Supp. 1343 (M.D. Fla. 1997) (and cases cited therein). The facts in these cases are very similar to the facts herein, in that they dealt with dancers in adult entertainment clubs who received no wages or salary but were paid exclusively by tips received from customers. The similarity ends there, however. All of the

cases are actions under the federal Fair Labor Standards Act of 1938 in which the dancers, or the Secretary of Labor on behalf of the dancers, were seeking damages against the club owners for their failure to pay minimum wages. *Harwell*, 992 F. Supp. at 1345; *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 326 (5th Cir. 1993); *Reich v. Priba Corp.*, 890 F. Supp. 586, 594 (N.D. Tex. 1995).

Since petitioner's action is not brought under the federal act and does not seek damages against PT's for the failure to pay minimum wages, the cases she cites have no relevance or application to this cause of action for discriminatory termination under the Illinois statute. Although petitioner argues that PT's should not benefit from its violation of the federal act, we cannot change or overlook the definitions that control discrimination suits under the Illinois Human Rights Act. Regardless of whether petitioner could prevail on a claim under the federal act, her claim under the Illinois Human Rights Act fails because under its clear terms petitioner is not an employee.

PT's argues that petitioner's charge was correctly dismissed not only because she received no remmeration for her dancing but also because she is an independent contractor rather than an employee and that, as an independent contractor, the provisions of the Illinois Human Rights Act do not apply to her. We agree with PT's that independent contractors are not covered by the protections of the Illinois Human Rights Act. See *Wanless*, 296 Ill. App. 3d at 404. Nevertheless, we need not reach that question since we are able to affirm the Department's dismissal on the ground that petitioner did not meet the definition of an employee since PT's did not pay her any wages or salary. We do not find the Department's dismissal of petitioner's charge of discrimination to be clearly erroneous.

CONCLUSION

For all of the reasons stated, we affirm the Department's dismissal of petitioner's charge of discrimination against PT's.

[redacted]

[redacted]

STATE OF ILLINOIS, APPELLATE COURT, FIFTH DISTRICT, ss.

AT AN APPELLATE COURT, begun and held at Mt. Vernon, on the First Tuesday, in the month of September, in the year of our Lord, two thousand one, the same being the 4th day of September in the year of our Lord two thousand one.

Hon.	GORDON E. MAAG,	Presiding Justice.
Hon.	TERRENCE J. HOPKINS,	Justice.
Hon.	MELISSA A. CHAPMAN,	Justice.
Hon.	LOUIS E. COSTA,	Clerk.

BE IT REMEMBERED that on the 30th day of January, 2002, the final judgment of the Appellate Court was entered of record as follows:

CARLA MOONEY,

Petitioner,

No. 5-00-0670
Term, 2001

v.

CHIEF LEGAL COUNSEL OF THE DEPARTMENT OF HUMAN RIGHTS; THE DEPARTMENT OF HUMAN RIGHTS; MRC, LLP, d/b/a PT'S SPORTS CABARET; and INTERNATIONAL ENTERTAINMENT CONSULTANTS, INC., d/b/a PT'S SPORTS CABARET,

Respondents.

Administrative Review from an Order of the Chief Legal Counsel of the Department of Human Rights.

No. 2000-CF-0877

RULE 23 ORDER

It is the decision of this Court that the order on appeal be AFFIRMED, and stand in full force and effect. And it is further considered by the Court, that costs of appeal shall be taxed as provided by law.

As Clerk of the Appellate Court, Fifth District of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order of the said Appellate Court, in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this 7th day of March, 2002.

L E Costa

Clerk of Appellate Court.

EXHIBIT 24

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

STATE OF INDIANA
DEPARTMENT OF WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS
DECISION OF LIABILITY ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF:

EMPLOYER ATTORNEY:
ROBERT B. GOLDING, JR.
AMBER, GOLDING & HOFSTETTER
RE: CONDROSS CORPORATION
9250 COLUMBIA AVENUE, SUITE 2
MUNSTER, IN 46321

Case Number: 01-19659

Account No.: 362554

Date Mailed: 9/11/01

Hearing Date: 8/23/01

Certified Mail No: 7001 1140 0002 8056 0494
7001 1140 0002 8056 0500

CONFIDENTIAL RECORD PURSANT TO IC 22-4-19-6, IC 4-1-6

This decision will become final fifteen (15) days after the mailing date in the absence of judicial review proceedings. The appealing party must give notice of an intent to institute judicial proceedings to the Liability Administrative Law Judge before the decision of the Liability Administrative Law Judge becomes final. IC 22-4-32-7, et seq.

STATUTORY PROVISIONS INVOLVED: IC 22-4-11-1, IC 22-4-8-1, et seq., IC 22-4-29-2, and IC 22-4-32-1, et seq.

SUMMARY OF CASE: This matter arose on the protest of Condross Corporation (employer) to the Notice of Audit Findings, dated June 12, 2001, holding that certain individuals performing services for the employer were employees of the employer and not independent contractors. The employer filed its protest through counsel on June 22, 2001, and said protest is timely. The hearing was held on August 23, 2001, in Indianapolis, Indiana.

The employer appeared by Theodore Rossi, President during part of the period in question, Ann Rossi, Current President, and Victor Lucio, Secretary. The employer was represented by Robert B. Golding, Attorney at Law, Amber, Golding, and Hofstetter, Munster, Indiana. The Department appeared by Ed Tillery, Audit Examiner. The Department was represented by A. Kristine Musall, Staff Attorney.

FINDINGS OF FACT:

1. The employer is a tavern which features "exotic" dancers.

2. The Department's witness was assigned to do an audit of the employer for audit years 1998 and 1999, in the performance of his duties as an audit examiner for the Department.

3. The audit examiner spoke with the employer's accountant, and reviewed records of the employer and determined that individuals dancing at the employer's establishment were employees of the employer, and not independent contractors.

4. The audit examiner did not interview any of the dancers in question in arriving at his employee status determination.

5. The Department issued a Notice of Audit Findings for calendar years 1998, 1999, and 2000, dated June 12, 2001. Although the initial audit years were only 1998 and 1999, 2000 was also added based upon the information the audit examiner obtained relative to the first two years.

6. With regard to audit year 2000, the audit examiner had conversations with the employer's accountant, who indicated dancers performed at the employer's facility but that they were independent contractors. The audit examiner received no financial information relative to audit year 2000.

7. As the audit examiner did not receive the requested financial information from the employer relative to the dancers for audit year 2000, he estimated the employer's wages for audit year 2000.

8. The employer operated essentially in the same manner during audit years 1998 and 1999; however, effective with audit year 2000, the employer changed its method of operation. The employer is a tavern, serving liquor, beer, and wine, and providing entertainment by dancers/showgirls. Some dancers performed at the employer's establishment on a steady basis, while some worked there sporadically. Some were classified as "road girls" which went from club to club, usually remaining at one club for approximately a week. For audit year 1998, the employer and the dancers entered into contractual relationships. In audit year 1998, the contract between the employer and the respective dancers provided:

   (a) The dancers agreed to perform the duties set forth in the contract.
   (b) The duties included performing as a dancer/showgirl, to perform exotic, artistic, tasteful, and lawful dances on stage as the employer would direct them.
   (c) The dancers agreed to perform private, exotic, artistic, tasteful, and lawful dances.
   (d) The dancers were to be ready, willing, and able to perform commencing at the start of all performance periods that the employer would schedule.
   (e) The dancers agreed to have house drinks and bottles with paying customers pursuant to employer rules, and to collect money for the music fund.
   (f) The dancers agreed to perform all other lawful duties that reasonably would relate to performing as a dancer/showgirl.
   (g) The dancers were required to perform all their duties to the best of their ability and to the reasonable satisfaction of the employer.
   (h) The dancers agreed to perform on all days and times as the employer directed.
   (i) The dancers were to perform at the location of the employer's facility or at other such locations as the employer would direct.
   (j) The dancers were not allowed to delegate their duties.
   (k) Although the dancers agreed to furnish all costumes for their performances, the employer had the right to disapprove any costumes and could direct the dancers to wear certain costumes at certain times.
   (l) The employer agreed to pay the dancers $50.00 per 8 hours scheduled performance period.

(m) The contract indicated that the parties agreed that the dancers were independent contractors, responsible for paying their own taxes.

(n) The dancers agreed that they were not employees because, among other things, the employer did not have the ability to direct them to do duties other than those of a dancer/showgirl, including but not limited to building maintenance and cleaning.

(o) The employer could prorate any compensation for shorter scheduled performance periods, if the employer decided to reduce the period in question.

(p) The employer also agreed to pay commissions to the dancers for house drinks that the customers bought for the dancers.

(q) The dancers agreed that they could not be absent or tardy when scheduled to perform, and that they could not leave the premises until the end of their scheduled performance period.

(r) The employer had the right to make compensation deductions from the dancers' remuneration for rule violations and/or damage to employer property.

(s) The dancers also agreed to a confidentiality term and covenant not to compete term set forth in the contract.

(t) The employer had the right to terminate the dancers for violations of the contract.

(u) The employer agreed to pay a contingent bonus to the dancers upon the completion of certain conditions set forth in the contract.

9. The Department introduced into the record a copy of a contract purportedly entered into between the employer and the dancers for audit year 1999; however, the contract was incomplete in that page 3 of the contract was missing and that document was not admitted into the record.

10. Based upon information received at a seminar in Las Vegas, Nevada, the employer, for audit year 2000, changed the method of operation with regard to its business.

11. In audit year 2000, the dancers would perform when they wished to, providing their own costumes. However, the employer would not compensate the dancers; rather, the dancers would pay a space rental fee to the employer, perform the dancing services for customers, and then keep whatever remuneration received from the customers in the form of tips, or payments for private dances.

12. In audit year 2000, the dancers would execute an agreement indicating that they understood that they were independent contractors, and were responsible for paying taxes. They also released the employer from all responsibility regarding taxes, withholding, and insurance liability. They also agreed to three rules which included agreeing to obey laws, not damaging employer property, and not engaging in any activity which could create a safety hazard.

13. As the employer did not provide requested wage information relative to the dancers for audit year 2000, the audit examiner, based upon the information that he had considered for audit years 1998 and 1999, estimated the employer's wages for audit year 2000, in the amount of $47,850.00.

14. The employer issued IRS Form 1099's to the dancers for audit years 1998 and 1999, but not 2000.

15. The employer was not sure if the dancers had other dancing jobs.

CONCLUSIONS OF LAW:

1. The Liability Administrative Law Judge has jurisdiction over this matter pursuant to IC 22-4-32-1.

2. The Department's audit examiner made his determination by applying the test set forth in IC 22-4-8-1(a) to the facts of the case.

3. The nature of the relationship between the employer and the dancers changed significantly between audit year 1999, and audit year 2000.

4. Prior to the above change, although the employer contended that the dancers were independent contractors, the employer exerted significant direction and control over the services performed by the dancers for the employer.

5. Prior to the change between audit years 1999 and 2000, the dancers would perform services for the employer, and would receive remuneration for these services from the employer. As of audit year 2000, the dancers would pay a rental fee to the employer to utilize space of the employer, and would not receive remuneration from the employer, but would be paid by customers in the establishment for whom the dancers provided entertainment.

6. According to IC 22-4-29-2: "In addition to all other powers granted to the director by this article, the director or the director's duly authorized representatives shall have the power to make assessments against any employing unit which fails to pay contributions, interest, or penalties as required by this article, or for additional contributions due and unpaid, which assessment shall be deemed prima facie correct."

7. According to IC 22-4-11-4: "If the commissioner finds that any employer has failed to file any payroll report or has filed a report with which the commissioner finds incorrect or insufficient, the commissioner shall make an estimate of the information required from the employer on the basis of the best evidence reasonably available to the commissioner at the time and notify the employer thereof by mail addressed to the employer's last known address...."

DECISION: The issue involved herein is whether the individuals who dance at the employer's establishment are employees of the employer or independent contractors. The Department has determined, based upon the application of the so-called "(A)(B)(C) test" set forth in IC 22-4-8-1(a), that the dancers are employees of the employer under Indiana law. IC 22-4-8-1(a) provides that:

> Services performed by an individual for remuneration shall be deemed to be employment subject to this article irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the board that (A) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract of service and in fact; (B) Such service is performed outside the usual course of the business for which the service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or is a sales agent who receives remuneration solely upon a commission basis and who is the master of his own time and effort.

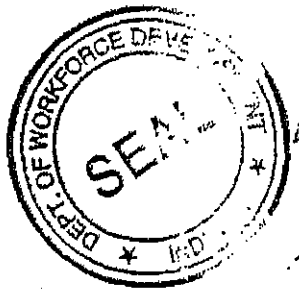
The burden of proof is, therefore, on the employer to show that persons should be excluded from coverage under the statute. Boerger Insurance, Inc. v. Indiana Employment Security Board (1973), Ind.App., 301 N.E.2d 797. In this case, the Department determined, based upon the audit examiner's findings, that the dancers in question were employees of the employer. As stated previously, the burden of proving that the determination of the Department is incorrect is upon the employer. In order for an employer to sustain this burden of proof, it must establish that the "(A)(B)(C) test" requirements of IC 22-4-8-1 have been strictly met. Furr v. Indiana Employment Security Board (1965), 137 Ind.App. 519, 210 N.E.2d 127. These requirements must be considered conjunctively. Boerger Insurance, Inc., Supra.

In the present case, the Liability Administrative Law Judge finds that a distinction must be made between the circumstances of the relationship between the dancers and the employer prior to audit year 2000, and beginning with audit year 2000. With regard to audit years 1998 and 1999, the Liability Administrative Law Judge finds that the employer exerted significant direction and control over the dancers in question pursuant to the terms of the contract entered into between the employer and the dancers. In addition, the Liability Administrative Law Judge finds that the nature of the employer's business is a tavern providing adult entertainment in the form of exotic dancers. The dancers performed services for the employer, and received remuneration from the employer resulting from those services. The Liability Administrative Law Judge finds that for audit years 1998 and 1999, the relationship between the employer and the dancers was that of employment, that the dancers were employees of the employer, and that the remuneration paid to the dancers by the employer constituted wages for unemployment benefit purposes.

However, with regard to audit year 2000, the relationship between the employer and the dancers was significantly changed to the extent that the Liability Administrative Law Judge finds that for calendar year 2000, the dancers became independent contractors. Although the nature of the employer's business remained essentially the same, the employer no longer paid remuneration to the dancers. Rather, the dancers paid a rental fee to the employer for utilization of space in the employer's facility, and received payment from customers for whom the dancers performed entertainment. In addition, the employer's direction and control was reduced to mere common sense rules of prohibitions against breaking laws, damaging employer property, or causing safety hazards. Therefore, the Administrative Law Judge finds that the relationship between the employer and the dancers was not that of employment, that the dancers were independent contractors and not employees of the employer, and that no wages were paid by the employer to the dancers. The Liability Administrative Law Judge finds the circumstances in this case to be analogous to those in Kirby v. Indiana Security Board (1973), 40 Ind.Dec. 10, 158 Ind.App. 643, 304 N.E.2d 225, where the Court held that an employment relationship did not exist between the owners of a licensed beauty shop and the beauty operators who leased booth space from the owners of the beauty shop in which to perform their trade.

The protest of the employer is therefore **DENIED IN PART AND GRANTED IN PART.** With regard to audit years 1998 and 1999, the relationship between the employer and the dancers is found to constitute employment, that the dancers were employees of the employer, and not independent contractors, and that remuneration paid to the dancers by the employer was wages for unemployment purposes. The employer is therefore liable for contributions to the Department based upon those wages. With regard to audit year 2000, the relationship between the employer and the dancers does not constitute employment, the dancers were independent contractors, and not employees of the employer, and the employer did not pay remuneration to the dancers; therefore, there is no liability for unemployment contributions.

DATED AT INDIANAPOLIS, INDIANA, THIS 24TH DAY OF AUGUST, 2001.



ROBERT K. ROBISCH
ATTORNEY AT LAW
LIABILITY ADMINISTRATIVE LAW JUDGE

RKR/mjw 9/10/01

EXHIBIT 25

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

United States District Court, D. Oregon.
Karen MATSON, aka Kerissa, Plaintiff,
v.
7455, INC., an Oregon corporation, dba Jiggles of Tualatin, and Frances Schmitz, an individual, Defendants.
No. CV 98-788-HA.

Jan. 14, 2000.

Charles J. Merten, Attorney at Law, Beaverton, OR, for petitioner.

Andrew M. Cole, Attorney at Law, James C. Tait, Tait & Associates, Oregon City, OR, for defendants.

OPINION AND ORDER

HAGGERTY

I INTRODUCTION

***1** The plaintiff, Karen Matson, a former exotic dancer at the "Jiggles" nightclub in Tualatin, Oregon, alleges seven claims for relief against Defendant 7455, Inc., the owner of the nightclub, and Defendant Frances Schmitz, the general manager of the nightclub. These claims consist of the following: 1.) failure to pay minimum wage in violation of the Federal Labor Standards Act (F.L.S.A.), 29 U.S.C. § 206; 2.) liquidated damages for willful violation of the Federal Labor Standards Act; 3.) failure to pay wages in violation of Oregon Revised Statutes § 652.140; 4) penalty wages pursuant to Oregon Revised Statutes §§ 652.150 and 653.055; 5) wrongful termination; 6.) conversion; and 7.) coercion. These claims were filed in this court pursuant to federal jurisdictional statutes 28 U .S.C. §§ 1331 and 1367(a).

Pending before the court is the defendants' motion for summary judgment (doc. # 49) against all of these claims. For the reasons set forth below, this court grants the defendants' motion with respect to the plaintiffs' F.L.S.A. minimum wage claim and orders that all other claims are now moot.

II FACTUAL BACKGROUND

Plaintiff worked as an exotic dancer at Jiggles from May, 1993 through September, 1993; from May, 1994, through June, 1995; from April 1996 through October, 1997; and in 1988. The defendants claim that throughout this period, the plaintiff worked as an independent contractor at Jiggles pursuant to a written agreement between the parties stating the following:

> Be it herein known that the undersigned is an individual contractor and is solely responsible for payment of his/her federal, state, and social security taxes and state industrial accident insurance and does hereby relieve 7455 Inc. DBA Jiggles from any or all responsibility for payment of said taxes on my behalf.

The plaintiff concedes to signing this agreement. FN1 However, she claims that she did not fully understand the implications of the agreements. Nevertheless, consistent with the agreement, she filed tax returns as an independent contractor until 1994. She has not filed her income tax returns since 1994.

> FN1. The plaintiff signed three identical agreements on April 13, 1988, September 16, 1990, and April 22, 1993.

Throughout her time at Jiggles, the plaintiff was subject to the following system of compensation that was in place for all dancers at the club: For use of building, stage, dressing rooms, bar, staff, facilities and access to defendants' clientele, dancers payed a "house fee" in the amount of $30.00 per six hour shift. Dancers payed this fee in cash or in an

equivalent amount by inducing patrons to purchase at least five "ladies drinks" per shift. The defendants fixed the price of table dances at $5.00 for topless dances and $10.00 for nude dances. The dancers collected and kept as compensation for their services these fees, plus any additional tip offered by a customer. These fees and tips were the dancers' sole form of compensation.

In 1993, the plaintiff worked 580 hours at the defendants' club and earned an average of between $4,000 to $6,000 per month for an average hourly wage of between $82.75 and $124.14. In 1997, the plaintiff worked 975 hours and earned an average wage between $6,000 to $8,000 per month for an average hourly wage between $73.85 and $98.46 per hour.[FN2] These average hourly wages were far beyond the required state and federal minimum wage in1993 or 1997.[FN3] The plaintiff has not specified her earnings at Jiggles for 1994, 1995, or 1996; however, the record indicates that in 1994, she worked 1021 hours; in 1995, 326 hours; and in 1996, 582 hours.

FN2. These numbers are based on the plaintiff's estimations as noted in her deposition testimony.

FN3. For the years 1991 through 1996, the Oregon minimum wage was $4 .75 per hour, and for 1997-98, the Oregon minimum wage was $5.50 per hour.

***2** During her tenure at Jiggles, the plaintiff was subject to designated "house rules" implemented by the defendants concerning the conduct expected of dancers at the club. These rules included a provision that no dancer was to come closer than six inches from a customer, or to make any intimate contact with a customer. Jiggles imposed this provision on the dancers to avoid criminal liability.[FN4] The defendants enforced this rule with warnings, and after repeated violations, with nominal fees, which were collected from the offending dancers and given to a charity.[FN5]

FN4. The defendants claim that the purpose of this rule was to avoid prostitution charges for the club. A person commits the crime of prostitution if a "... person engages in or offers or agrees to engage in sexual contact in return for a fee." ORS 167.007(1)(a). "Sexual contact" means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party." ORS 167.002(5). "A person commits the crime of promoting prostitution if, with intent to promote prostitution, the person knowingly ... [o]wns, controls, manages, supervises, or otherwise maintains a place of prostitution or a prostitution enterprise ..." ORS 167.012(1)(a).

FN5. According to the defendants, these rules were kept behind the bar in the club and are posted in the dancers' dressing room; however, the plaintiff claims that the rules were only posted in the dressing room for a brief period of time while she was working at Jiggles.

The plaintiff attended several meetings with other dancers where the house rules were discussed. In these meetings, the plaintiff expressed her disapproval of these rules and objected to them as being too confining and controlling. The plaintiff believed that if she was an independent contractor, the defendants did not have the right to tell her what she could and could not do. Particularly, she objected to the rule requiring her body to be at least six inches from the customer at all times. Additionally, the plaintiff objected to the defendants' table dance prices because she felt that the defendants had no right to limit the price for a dance.

The plaintiff asserts that she frequently expressed to Jiggles managers and co-workers, her disagreement with work rules and characterization of dancers as independent contractors. However, the plaintiff's deposition testimony indicates that until

this lawsuit was filed, she never demanded from the defendants that she be paid a minimum wage in addition to her other compensation from the club. Rather, she only talked about this minimum wage amongst her co-workers.

The plaintiff was fined twice for not obeying the defendants' rules. First, in approximately 1995, the plaintiff was fined $10.00 for not calling to notify the defendants that the plaintiff would be late for her shift. Second, on October 30, 1997, the plaintiff was called up by the shift manager, Veronica Duman, and fined $20.00 for violating the "six-inch" house rule.[FN6] Ms. Duman claimed that Matson had violated the rule by touching a customer. The plaintiff asserts that she argued with Ms. Duman over this fine, but she agreed to pay the money because Ms. Duman told her that she could not dance again without paying the $20.00. However, the plaintiff then asked for a written receipt for the $20.00. The plaintiff objected to the narrative in the receipt that the plaintiff had her "boobs in the face" of a customer, and the plaintiff demanded that Ms. Duman rewrite the receipt. When Ms. Duman refused to change the receipt, the plaintiff refused to pay the $20.00 fine. Ms. Duman and Defendant Frances Schmitz then asked her to go home. Subsequently, the plaintiff asked the defendants if she could come back to work, but they refused to invite her back. The plaintiff concedes that she has never heard the defendants make any derogatory statement against her.

> FN6. The plaintiff had been warned on other occasions about physical contact with the customers but was never fined.

***3** The plaintiff then filed this lawsuit. The plaintiff's First and Second Claims for Relief allege that in addition to the compensation she has already received from her work at Jiggles, she is entitled to a minimum wage pursuant to Oregon Revised Statutes § 652.140 and 29 U.S.C. § 206 (Fair Labor Standards Act). The plaintiff seeks $2,755 for 1993, $4,859.75 for 1994, $1,548.50 for 1995, $2,764.50 for 1996, and $5,362.50 for 1997, plus pre and post-judgment interest and attorney's fees. In her Third and Fourth Claims for Relief, the plaintiff is seeking penalty wages and liquidated damages for a willful violation of the state and federal wage laws. In her Fifth Claim for Relief, the plaintiff alleges wrongful termination due to her resistance to unlawful employment practices by defendants. In her Sixth Claim for Relief, the plaintiff alleges that by charging a house fee for the use of the facilities at the defendants' establishment and by imposing fines for failure to obey house rules, the defendants converted $17,983.00 during the period of the plaintiff's employment. In her Seventh Claim for Relief, the plaintiff alleges that she was coerced into paying fines and house fees by threat of termination.

III SUMMARY JUDGMENT STANDARD

FRCP 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact, and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party shows the absence of any issue of material fact, the non-moving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Id.* at 324. A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989). An issue of fact is material if, under the substantive law of the case, resolution of the factual dispute could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Factual disputes are genuine if they "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. On the other hand, if after the court has drawn all reasonable inferences in favor of the nonmoving party, "the evidence is merely colorable, or is not significantly probative, summary judgment

may be granted." *Id.* at 249-50. When a nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required. *California v. Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1470, (9th Cir.1987), *cert. denied*, 484 U.S. 1006 (1988) (cite omitted). The Ninth Circuit has stated, "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Id.* at 1468.

IV DISCUSSION

A. FEDERAL LABOR STANDARDS ACT WAGE CLAIM

1. Plaintiff's independent contractor status

***4** The plaintiff alleges that she was not paid a minimum wage in violation of the Fair Labor Standards Act, 29 U.S.C. § 206; however, this Act only affords "minimum wage" protection to employees and not independent contractors. In this case, there is no genuine issue of material fact calling into question the plaintiff's status as an independent contractor at Jiggles; therefore, her F.L.S.A. claim fails, and summary judgment is granted with respect to this claim.

"In deciding whether an individual is an employee within the meaning of the F.L.S.A., the label attached to the relationship is dispositive only to the degree that it mirrors the economic reality of the relationship." *Donovan v. Tehco*, 642 F.2d 141, 143 (5th Cir.1981); Under this "economic reality" test, "the focal inquiry in the characterization process is thus whether the individual is or is not, as a matter of economic fact, in business with [herself]." *Id.* Five criteria have emerged to guide this determination: (1) the permanency of the working relationship, (2) the opportunity for profit and loss, (3) investment in material, (4) the degree of control, and (5) the individual's skill. *Id.*

An application of these factors to the instant case undisputably leads to the conclusion that the plaintiff was an independent contractor "who [was], as a matter of economic fact, in business with [herself]." The written agreement that was signed by the plaintiff three different times during her tenure at Jiggles is the most telling indicator of her status as an independent contractor. This agreement expressly articulated that the plaintiff was "an individual contractor [who was] solely responsible for payment of [her] federal, state, and social security taxes and state industrial accident insurance" and that she did hereby "relieve 7455 Inc. DBA Jiggles from any or all responsibility for payment of said taxes on [her] behalf." Additionally, the plaintiff was paid exclusively through fees and tips for table dances, income which was largely dependent on the plaintiff's own skill to attract customers and not on any salary or hourly wage set by the defendants. Through this method of compensation, the plaintiff was in control of her opportunity for profit.

Nevertheless, the plaintiff argues that the degree of control that the defendants kept and exercised over the job performance of the dancers compels the conclusion that Matson was an employee. In particular, the plaintiff points to the "six inch" rule as demonstrative of this control. This rule prohibits dancers from coming within six inches of the customer. The plaintiff's argument fails because this rule is not reflective of the defendants' control over her job performance. Instead, it was implemented by the defendants to avoid potential criminal liability for acts of prostitution in their nightclub.

Thus, the plaintiff has failed to establish any material fact disputing her status as an independent contractor. Accordingly, her F.L.S.A. claim cannot survive summary judgment.

2. F.L.S.A. claim analyzed under the assumption that the plaintiff was an employee.

***5** Even if the plaintiff was assumed to be an employee by this court, her F.L.S.A. claim still fails

under the summary judgment standard as she has not provided any support for her allegation that she was improperly compensated under the Act. The plaintiff simply rests on her pleadings in support of this allegation without establishing any material fact disputing appropriate compensation under the federal law.

The plaintiff claims that the defendants did not pay her a "minimum wage" in violation of the Federal Labor Standards Act, 29 U.S.C. § 206. In support of this argument, the plaintiff specifically cites to 29 U.S.C. § 203(m). This statute allows an employer to take a credit for tips received by a "tipped employee" to offset the minimum wage due under the federal law; however, this credit is limited. Only a portion of the tips may count toward the "minimum wage" requirement. Section 203(m) describes how tips are to be included in the "minimum wage" calculation.

In determining the wage an employer is required to pay a "tipped employee," FN7 the amount paid such employee by the employer shall be an amount equal to -

> FN7. A "tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips. The plaintiff clearly falls within this category.

> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996 [minimum wage on that date was ($4.25)], and
>
> (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the [minimum wage in effect].
>
> The additional amount on the account of tips may not exceed the value of the tips actually received by an employee.
>
> Moreover, Section 203(m) states that an employer cannot use tips to offset a "minimum wage" requirement unless the employee has been notified of it.

The plaintiff argues that in violation of Section 203(m), the defendants failed to pay any cash wages, and solely left her to be compensated with tips from the customers for whom she danced. However, the plaintiff fails to understand that Section 203(m) does not apply to the mandatory fees she received from the customers. The $5 and $10 mandatory fees paid by the customers for table dances were not tips as defined by 29 C.F.R. § 531.52-a regulation interpreting 29 U.S.C. § 203:

> A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment or a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity.

29 C.F.R. § 531.55 gives further insight on the definition of a tip:

> A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t).

***6** These definitions make it abundantly clear that the fixed fees collected by the plaintiff in exchange for table dances are not "tips." No limitation in the F.L.S.A. statute exists precluding the use of such fixed fees in the calculation of an employee's minimum wage.

Nevertheless, in addition to these fixed fees, it is true that the plaintiff received actual "tips" from Jiggles' patrons. These tips implicate Section

203(m) and can only be used to offset a portion of the minimum wage requirement; FN8 however, the plaintiff did not maintain records distinguishing her tips from the fixed fees, and she now claims that she has no method of separating the tips from the mandatory fees. With such a deficient record, the plaintiff cannot specify an amount by which she was allegedly undercompensated, and she has no factual basis upon which to assert an F.L.S.A. claim. Moreover, she has not alleged or provided any evidence of the amount of total compensation which she earned at Jiggles in 1994, 1995, or 1996. She has only provided estimates of total compensation for 1993 and 1997 through deposition testimony-years in which her average hourly wage was far beyond the minimum wage. In 1993, the plaintiff's hourly wage was between $82.75 and $124.14. In 1997, the plaintiff's hourly wage was between $73.85 and $98.46. FN9

> FN8. The plaintiff also claims that the defendants did not give the notice required by Section 203(m) of their intention to offset her minimum wage with monies received by her from customers. First, this requirement of notice only applies to the actual "tips" that she received. This requirement does not apply to the $5 and $10 fixed fees since they do not implicate Section 203(m) as discussed above. Second, as the plaintiff concedes on page 2, paragraph 4,of her own affidavit, she was originally told by the defendants that her compensation was to come solely from the customers in the form of tips and fees. Thus, it does not make logical sense for the plaintiff to simultaneously assert that she was not on notice that her wages consisted solely of fees and tips from customers.

> FN9. These estimates were calculated without separation of mandatory fees and tips as there is no record of this separation.

Under such deficient facts, the plaintiff cannot meet her initial burden under the F.L.S.A. An employee carries the initial burden of proving that "[s]he has in fact performed work for which she was improperly compensated and ... [producing] sufficient evidence to show the amount and the extent of that work as a matter of just and reasonable inference." *Donovan v. Simmons Petroleum Corporation*, 725 F.2d 83, 85 (10th Cir.1983), *citing Anderson v. Mt. Clemens Pottery Co*, 328 U.S. 680, 686-87 (1946). Although this is a very minimal burden, the plaintiff has presented absolutely no evidence that she was wrongfully compensated.

Thus, there is no genuine dispute as to any material fact, and the defendant is entitled to summary judgment as a matter of law on the plaintiff's F.L.S.A. claim. Pursuant to this ruling, all other claims for relief are moot. The plaintiff's Liquidated Damages claim for willful violation of the F.L.S.A. is moot as it was dependent on a finding of liability on the plaintiff's F.L.S.A. claim. The plaintiff's state statutory and common law claims for relief are moot as this court no longer has federal subject matter jurisdiction over them pursuant to 28 U.S.C. §§ 1331 and 1367(a).

THEREFORE, IT IS HEREBY ORDERED:

1. The defendant's motion for summary judgment is granted with respect to the plaintiff's Fair Labor Standards Act claim.

2. All other claims for relief alleged by the plaintiff are moot.

3. All of the plaintiff's claims for relief are dismissed.

D.Or.,2000.
Matson v. 7455, Inc.
Not Reported in F.Supp.2d, 2000 WL 1132110 (D.Or.)

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EXHIBIT 26

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

2012 WL 9187581
Only the Westlaw citation is currently available.
United States District Court,
E.D. Arkansas,
Western Division.

Crystal HILBORN, et al., Each Individually and on behalf of Others Similarly Situated, Plaintiffs
v.
PRIME TIME CLUB, INC., Individually and d/b/a Prime Time, Defendant.

No. 4:11CV00197 BSM. | July 12, 2012.

Attorneys and Law Firms

Anne Michelle Milligan, Joshua Sanford, Sanford Law Firm, Little Rock, AR, for Plaintiffs.

Allen C. Dobson, Cross, Gunter, Witherspoon & Galchus, P.C., Little Rock, AR, for Defendant.

Opinion

ORDER

BRIAN S. MILLER, District Judge.

***1** The motion for summary judgment of defendant Prime Time Club, Inc. ("Prime Time") [Doc. No. 86] is granted for the reasons set forth below.

I. BACKGROUND

Prime Time is a gentlemen's club in Little Rock, Arkansas and plaintiffs are former exotic dancers who performed at the nightclub. The main issue presented is whether Prime Time is an "employer" and whether plaintiffs were "employees" as defined by the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. and the Arkansas Minimum Wage Act ("AMWA").

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if, after viewing the evidence in the light most favorable to plaintiffs, no genuine issues of material fact exist and Prime Time is entitled to judgment as a matter of law. *Nelson v. Corr. Med. Servs.,* 533 F.3d 958, 961 (8th Cir.2008). Plaintiffs cannot survive the motions for summary judgment merely by pointing to disputed facts; the facts in dispute must be material to the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1985). If the facts alleged by plaintiffs, when viewed in the light most favorable to their case, would not allow a reasonable jury to find in their favor, then summary judgment should be granted in favor of Prime Time. *Bloom v. Metro Heart Group of St. Louis, Inc.,* 440 F.3d 1025, 1029 (8th Cir.2006).

III. DISCUSSION

Prime Time moves for summary judgment arguing that plaintiffs are not covered by the FLSA and AMWA because they were not "employees" of Prime Times. Based on the stipulation of facts, it is hereby determined that plaintiffs were not "employees" as defined by the FLSA and AMWA and therefore summary judgment is granted on all claims.

Neither the FLSA nor the AMWA provide much guidance as to the parameters of the employer-employee relationship. *See Marshall v. Truman Arnold Dist. Co., Inc.,* 640 F.2d 906, 908 (8th Cir.1981). In determining whether a worker is an "employee" under the FLSA, courts examine a number of factors, including (1) who has the right to control the manner in which work is performed, (2) who assumes the risk of loss or is rewarded if there is a profit, (3) who invests in the worker's equipment and materials required to perform the work, (4) who employs the worker's helpers, (5) what special skills does the worker possess, (6) the degree of permanence of the working relationship, and (7) whether the worker performs integral tasks of the business. *See e.g., id.*

Pursuant to the stipulation and the record herein, it appears that plaintiffs (1) exercised significant control over the manner in which their performances were conducted, (2) experienced certain risks of profit or loss beyond that which normal employees experience, (3) invested significantly in equipment and materials attendant to their performances while there was no evidence of them investing directly in Prime Time's business or employing helpers in the process, (4) possessed and exhibited special skills with respect to their activities at the nightclub albeit none of the skills exhibited required a certification, and (5) did not exhibit a degree of permanence representative of employer-employee relationships, instead, enjoying the freedom to work for others, including Prime Time's competitors. All of these

factors indicate that plaintiffs were not employees as defined by the FLSA. Further, in that the definition of “employee” found in the AMWA is similar to the one found in the FLSA, plaintiffs were not “employees” as defined by that act.

IV. CONCLUSION

***2** For the reasons provided, Prime Time's motion for summary judgment [Doc. No. 86] is granted and plaintiffs' claims are hereby dismissed with prejudice. Furthermore, jurisdiction over the parties' disputes is retained to administer, supervise, construe, and enforce any and all settlement agreements and related releases of the parties, in or regarding this litigation, as well as this order.

IT IS SO ORDERED.

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EXHIBIT 27

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

151 F.3d 962, 82 A.F.T.R.2d 98-5476, 98-2 USTC P 50,619, Unempl.Ins.Rep. (CCH) P 16060B, 98 Cal. Daily Op. Serv. 6134, 98 Daily Journal D.A.R. 8491
(Cite as: 151 F.3d 962)

United States Court of Appeals,
Ninth Circuit.
MARLAR, INC., Plaintiff-Appellee-Cross-Appellant,
v.
UNITED STATES of America, Defendant-Appellant-Cross-Appellee.
Nos. 96-36036, 96-36104 and 96-36218.

Argued and Submitted Feb. 3, 1998.
Decided Aug. 5, 1998.

Owner of club featuring nude and seminude dancers sought refund of employment taxes paid. Government counterclaimed for taxes, penalties and interest. Owner moved for summary judgment. The United States District Court for the Western District of Washington, Carolyn R. Dimmick, Chief Judge, 934 F.Supp. 1204, granted motion and awarded litigation fees to owner. Government appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) owner was entitled to safe haven treatment from employment taxes, and (2) whether government's position was substantially justified, so as to preclude award of litigation fees, had to be determined on remand.

Affirmed in part, and remanded in part.

West Headnotes

[1] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors, Who Are. Most Cited Cases
Under statute providing taxpayer safe haven from assessment of employment taxes, any reliance on industry practice must be reasonable. 26 U.S.C.A. § 3401 note.

[2] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors, Who Are. Most Cited Cases
Since reasonable person could have found that nude dancers at taxpayer's club were lessees instead of employees, taxpayer's reliance on industry practice of treating dancers as lessees was reasonable, as required to invoke protection of statute providing safe haven from assessment of employment taxes. 26 U.S.C.A. § 3401 note.

[3] Internal Revenue 220 4472

220 Internal Revenue
220XIX Returns and Reports
220k4472 k. Necessity of Return and Effect of Failure to Make. Most Cited Cases
Industry practice is irrelevant, for purposes of determining whether taxpayer is required to file Form 1099, which reports the payments made by a trade or business. 26 U.S.C.A. § 6041(a).

[4] Internal Revenue 220 4472

220 Internal Revenue
220XIX Returns and Reports
220k4472 k. Necessity of Return and Effect of Failure to Make. Most Cited Cases
Transferor of funds does not make a “payment,” so as to require a Form 1099, when it acts as a mere conduit or disburser of the funds. 26 U.S.C.A. § 6041(a).

[5] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors,

Who Are. Most Cited Cases

Internal Revenue 220 4472

220 Internal Revenue
220XIX Returns and Reports
220k4472 k. Necessity of Return and Effect of Failure to Make. Most Cited Cases
Owner of nude dancing club did not make a "payment" to its dancers, so as to require a Form 1099, when it exchanged cash for scrip issued by club, since owner did nothing more than exchange one item of value for another; accordingly, owner's failure to file such forms for dancers did not preclude owner from invoking protection of statute providing safe haven from assessment of employment taxes. 26 U.S.C.A. §§ 3401 note, 6041(a).

[6] Internal Revenue 220 4363

220 Internal Revenue
220XIV Taxes on Specific Articles and Transactions
220XIV(D) Employment Taxes
220k4363 k. Independent Contractors, Who Are. Most Cited Cases

Internal Revenue 220 4472

220 Internal Revenue
220XIX Returns and Reports
220k4472 k. Necessity of Return and Effect of Failure to Make. Most Cited Cases
Rent credits that owner of nude dancing club gave to dancers when they accepted drinks from customers did not constitute a "payment," so as to require a Form 1099, since owner was merely acting as a conduit of funds; accordingly, owner's failure to file such forms for dancers did not preclude owner from invoking protection of statute providing safe haven from assessment of employment taxes. 26 U.S.C.A. §§ 3401 note, 6041(a).

[7] Internal Revenue 220 5342

220 Internal Revenue
220XXXIV Costs and Fees
220k5340 Awards to Taxpayers
220k5342 k. Reasonableness or Merits of Government's Position; Bad Faith. Most Cited Cases
For United States' position to be "substantially justified," so as to preclude award of litigation costs to taxpayer, it need not be correct; rather, it need only have a reasonable basis in law and fact. 26 U.S.C.A. § 7430.

[8] Internal Revenue 220 5341

220 Internal Revenue
220XXXIV Costs and Fees
220k5340 Awards to Taxpayers
220k5341 k. In General. Most Cited Cases
Whether government's position that owner of nude dancing club did not qualify for safe haven from assessment of employment taxes was substantially justified, so as to preclude award of litigation costs to owner, had to be determined on remand. 26 U.S.C.A. §§ 3401 note, 7430.
***963** Wendy S. Pearson (argued), Pearson Law Offices, Seattle, WA; F. Michael Kovach, Mair, Camiel & Kovach, Seattle, WA, for plaintiff-appellee-cross-appellant.

Bruce R. Ellisen (argued) and Alice L. Ronk, Tax Division, United States Department of Justice, Washington, DC, for defendant-appellant-cross-appellee.

Appeals from the Judgment and Order of the United States District Court for the Western District of Washington; ***964**Carolyn R. Dimmick, Chief District Judge, Presiding. D.C. No. CV-95-00729-CRD.

Before: BROWNING, SKOPIL, and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether an adult-entertainment club, on the facts of this case, is liable for federal

employer taxes on the amounts nude dancers received from customers.

I

Marlar, Inc., operates an adult entertainment establishment, known as "Club Extasy," offering nude and seminude dancing to the public. During the two tax years at issue, 1990 and 1991, Marlar's operations were as follows. Upon entering the club, customers had to pay a cover charge and buy a soft drink. Without further expense, they could mingle with the dancers and watch them perform on the main stage. Alternatively, they could pay extra for more, one might say, personalized attention. Any customer could offer a "ladies' drink" (a $10, 12-ounce soft drink) to the dancer of his choice. If the dancer accepted the drink, she would sit and talk with the customer in return. During this conversation, she would usually take the opportunity to market one of the performances in her repertoire, such as a "table dance" ($5), a "couch dance" ($12), or a "private stage dance" (prices variable). FN1

FN1. These rates, which Marlar posted inside the club, were only the standard rates, charged for standard performances. The parameters of such personal performances were regulated by local ordinance. Dancers, however, regularly offered optional illegal performances, called "dirty dancing," at higher-than-posted rates. "Dirty dancing" involved displaying more skin or maintaining more body contact than allowed by law.

Consistent with near-uniform industry practice in the Seattle area, Marlar treated its dancers as "lessees" rather than employees or independent contractors. Each dancer signed a "Dancer Performance Lease," under which Marlar, as "landlord," provided stages and dance facilities. In exchange, the dancer, as "tenant," paid a "rental fee." FN2

FN2. This fee was $40 per day plus a $2 surcharge for each couch dance plus a $5 surcharge for each private stage dance.

The dancers received *no* payment from Marlar or the customers for main-stage dancing, aside from the occasional tip. They earned their money from the one-on-one performances. Their compensation came in three forms. First, customers usually paid cash for the personal performances. The dancers kept 100% of the amounts received. Second, customers sometimes paid the dancers with scrip, known as "Extasy Bucks," which the customers purchased from the club with their credit cards. The dancers redeemed the scrip for cash from the club, which retained ten percent of the face value as a "service charge." Third, the dancers received from the club a $10 credit (treated as a rent abatement) for each of the first four ladies' drinks purchased for them on a given night. FN3 The dancers do not report their earnings to Marlar, and Marlar claims not to know their relative incomes.

FN3. Because the nightly base rent is $40, the credits would reduce the rent to zero if the dancer received four drinks.

Marlar has never paid employment taxes on the dancers' remuneration or filed employment tax returns. In 1994, the IRS audited Marlar, determined that the dancers were employees, and assessed employment taxes totalling $282,082.11 (plus interest and penalties) for tax years 1990 and 1991. Marlar made a partial payment of this assessment and then brought this action for a refund. FN4 The United States filed a counterclaim for the balance of the assessment.

FN4. Marlar paid the employment taxes attributable to one worker's earnings for each quarter in tax years 1990 and 1991. The total amount of the taxes paid was $2,928.

Before the district court, Marlar moved for summary judgment. Marlar contended that: (1) the dancers were its lessees, rather than its employees; and

(2) even if the dancers were its employees, it was nonetheless entitled to the protections of § 530 of the Revenue***965** Act of 1978, Pub.L. No. 95-600, 92 Stat. 2763, 2885-86, § 530.[FN5] This section provides a safe-harbor which shields a taxpayer of employment tax liability if, *inter alia*, (a) the taxpayer's treatment of the workers as non-employees was in *reasonable reliance* on industry practice, and (b) the taxpayer *filed all requisite federal tax returns* consistent with the treatment of the workers as non-employees. *See id.* The United States opposed the motion for summary judgment, contending that there were genuine issues of material fact as to (1) whether the dancers were lessees, as opposed to employees, and (2) whether Marlar met the two requirements for relief under § 530.

> FN5. Section 530 was originally enacted by Congress to provide interim relief for taxpayers who were involved in employment tax controversies with the IRS. It was temporarily extended twice and then extended indefinitely by § 269 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324, 552, § 269. Section 530 was never codified, but it is reproduced in the notes following 26 U.S.C. § 3401.

The district court granted Marlar's motion for summary judgment. *See Marlar v. United States*, 934 F.Supp. 1204, 1210 (W.D.Wash.1996). Although the court agreed with the government that there was a genuine issue as to whether the dancers were lessees, *see id.* at 1208, it held that § 530 relieved Marlar from employment tax liability, *see id.* at 1210. The court found that a significant segment of the industry treats the dancers as lessees, not employees, and that Marlar patterned its business relationship with its dancers on this industry practice. *See id.* at 1209.

Marlar then applied for an award of litigation costs, including attorney's fees, under Internal Revenue Code (I.R.C.) § 7430. The district court granted the costs after finding that the government's position "was not consistent with the plain language of section 530" and that "[t]he government offered no evidence that Marlar's practice was inconsistent with 'long-standing recognized practices of a significant segment of the industry.' " The court, however, capped the hourly rate of attorney's fees at $75, on the basis that there were no special circumstances justifying a larger amount. The court thus awarded Marlar $27,332.65 in costs and fees.

The government appealed both the grant of summary judgment and the grant of litigation costs. Marlar cross-appealed, challenging the $75-per-hour limitation on attorney's fees.[FN6]

> FN6. Marlar also contended, in its cross appeal, that there is an alternative basis for summary judgment: it had no obligation to withhold taxes because it did not pay the dancers. We need not reach this issue, however, for the reasons discussed below.

II

There are two federal taxes at issue in this appeal: Federal Insurance Contributions Act ("FICA") taxes and Federal Unemployment Tax Act ("FUTA") taxes.[FN7] Whereas an employer is subject to both taxes, a lessor is subject to neither. When a lessee receives payments from its customers, the lessor does not incur either FICA or FUTA tax liability. The government's theory in this case is that Marlar chose to treat the dancers as "lessees" only to avoid paying these taxes.

> FN7. FICA imposes two obligations on an employer. First, the employer is required to withhold the *employee* share of the tax. *See* I.R.C. § 3102(a). Second, the employer has to pay *its* share of the tax. *See* I.R.C. § 3111. FUTA also imposes a tax on the employer based upon the amount of wages paid to employees. *See* I.R.C. § 3402(a).

Section 530 of the Revenue Act of 1978 is a safe-harbor rule which shields certain persons from em-

ployment tax liability even if they might be employers. FN8 To reiterate, except***966** as provided elsewhere in the statute, § 530 relieves a taxpayer of employment tax liability if *both* (1) the taxpayer reasonably relied on something such as industry practice, and (2) the taxpayer filed all necessary forms consistent with the treatment of the workers as not being employees. Consequently, as applied to this case, § 530 shields Marlar from employment tax liability-even if the dancers are actually "employees"-provided Marlar shows that it (1) reasonably relied on the long-standing recognized practice of the Seattle-area nude-dancing industry, and (2) filed all requisite forms consistent with the treatment of the dancers as lessees.

FN8. Section 530 provides, in relevant part:

> (a) Termination of certain employment tax liability.
>
> (1) In general. If-
>
> (A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and
>
> (B) in the case of periods after December 31, 1978, *all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,* then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no *reasonable basis* for not treating such individual as an employee.
>
> (2) Statutory standards providing one method of satisfying the requirements of paragraph (1). For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in *reasonable reliance* on any of the following:
>
> (A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;
>
> (B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or
>
> (C) *long-standing recognized practice of a significant segment of the industry in which such individual was engaged.*
>
> Revenue Act of 1978, § 530 (emphasis added).

The government contends that the district court's grant of summary judgment was in error because of two genuine issues of material fact. First, the government argues, although Marlar relied on industry practice, there is sufficient evidence demonstrating that this reliance was not "reasonable." Second, the government claims there is a genuine issue as to whether Marlar filed all necessary forms; specifically, the government claims that Marlar may have been required, with respect to each dancer, to file Form 1099, which reports payments made in a trade or business, a form it never filed. We address these two arguments in turn.

A

The district court held that Marlar satisfied the first requirement of § 530 because "it is undisputed that the industry treats dancers as lessees" and because

Marlar relied on this practice. *Marlar,* 934 F.Supp. at 1210. The court did not grapple with the issue of whether Marlar's reliance on industry practice was *reasonable.* Instead, the court simply concluded "that § 530's safe haven provision applies to Marlar, when virtually the entire industry treats dancers as lessees." *Id.* at 1209.

The government challenges the district court's interpretation of the statute. According to the government, the statute requires that reliance on industry practice be reasonable. In this case, the government claims, there is at least a genuine factual issue as to whether Marlar's reliance was reasonable.

1

[1] As an initial matter, we must agree with the government that, under § 530, any reliance on industry practice must be "reasonable." As Congress provided, in no uncertain terms:

> [A] taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in *reasonable reliance* on any of the following:
>
> ....
>
> (C) long standing recognized practice of a significant segment of the industry in which such individual was engaged.

Revenue Act of 1978, § 530(a)(2) (emphasis added). The text unmistakably requires "reasonable reliance," not just mere reliance. When "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (quoting *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)).

Marlar's interpretation of § 530-that mere reliance on industry practice is sufficient-ignores the word "reasonable." To Marlar, it would seem, Congress could have deleted the word "reasonable" without any ***967** loss of meaning whatsoever; the safe-harbor would be available so long as "the taxpayer's treatment of such individual for such period was in reliance on [long-standing industry practice]." Because "legislative enactments should not be construed to render their provisions mere surplusage," *Dunn v. Commodity Futures Trading Comm'n,* 519 U.S. 465, 117 S.Ct. 913, 917, 137 L.Ed.2d 93 (1997), we must, and do, reject Marlar's interpretation and hold that the statute indeed requires reasonable reliance.[FN9]

FN9. Marlar has given us no reason to ignore § 530's text. Indeed, the plain language is supported by the safe-harbor's legislative history. There is some indication that Congress understood that mere reliance should be insufficient; for example, one legislative report observes that a taxpayer should not be allowed to rely on industry practice when doing so would "constitute negligence or intentional disregard of rules or regulations, or fraud." S.Rep. No. 95-1263, 95th Cong., 1st Sess. (1978), U.S.Code Cong. & Admin.News 1978 p. 6761.

> Moreover, the cases cited by Marlar are not inconsistent with our conclusion that a taxpayer's reliance must be reasonable for § 530 to apply. *See Springfield v. United States,* 88 F.3d 750, 754 (9th Cir.1996); *General Inv. Corp. v. United States,* 823 F.2d 337, 341 (9th Cir.1987). In those cases, the reasonableness of the reliance was not at issue; we simply addressed what constituted a long-standing industry practice.

2

[2] Nevertheless, although we agree with the government's construction of the statute, we do not

share the government's belief that the mere presence of the word "reasonable" necessarily converts our inquiry into a factual one suitable for trial. To the contrary, we conclude that there is no genuine issue that Marlar's reliance was in fact reasonable.

We begin by noting that the district court was unable, on summary judgment, to determine whether the underlying relationship between Marlar and its dancers was one of employer-employee or lessor-lessee. *See Marlar,* 934 F.Supp. at 1208. The court recognized that the classification turns on the common law test of an "employee," *see id.* at 1206-07 (quoting 26 U.S.C. § 3121(d)(2)), a test which looks to a multitude of factors, the most significant of which is the degree of control the master exerts over the worker. *See General Inv. Corp. v. United States,* 823 F.2d 337, 341 (9th Cir.1987). As the district court noted, summary judgment was inappropriate because "relevant facts are disputed here as to the degree of Marlar's control and the dancer's independence." *Marlar,* 934 F.Supp. at 1208. The government has never contended that the dancers are employees as a matter of law,[FN10] and for good reason: Because the dancers have discretion in deciding for whom, when, and how to perform, there is a serious question as to whether they are employees under the common law definition.[FN11] Most notably, the ***968** dancers can refuse to perform for a customer; indeed, they can even decide not to do *any* personalized dances on a given night. Moreover, if they do choose to dance, they negotiate with the customer on what the performance will entail and how much it will cost. A reasonable person could conclude that Marlar's dancers, in light of their discretion, are not employees but lessees. Assuredly, "reasonable minds could differ as to the import of the evidence." *Anderson v. Liberty Lobby,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FN10. The most the government has said is that the entire leasing arrangement might have been a mere "sham"-a transaction lacking in economic substance, entered into solely to create tax benefits. *See Erhard v. Commissioner,* 46 F.3d 1470, 1476 (9th Cir.1995). According to the government, the dearth of economic substance in the lessor-lessee relationship is evidenced by Marlar's failure to enforce the terms of the lease. As Marlar's president, Larry Miller, testified: "[I]n our practice, we essentially collected rent, asked [the dancers] to comply with city regulations, and beyond that, we really did not pay attention to much of this contract." Indeed, the only provision of the lease that appears to have been enforced was the requirement that the tenant perform on the landlord's main stage. Nevertheless, although we agree that this failure to enforce the lease diminishes the possibility that a reasonable person could find the relationship to be one of lessor-lessee, we are unable to conclude that there is *no* genuine issue of fact. Even though the arrangement between the club and its dancers lacks some characteristics typical of a lease, it also lacks the control typically found in an employment relationship, as discussed *infra.* The leasing arrangement is colorable.

FN11. The adult entertainment cases, *Reich v. Circle C. Investments, Inc.,* 998 F.2d 324, 329 (5th Cir.1993), and *Matcovich v. Anglim,* 134 F.2d 834, 837 (9th Cir.1943), do not belie this conclusion. Although both courts held the dancers to be "employees," they did so only after a trial-not on summary judgment-thus suggesting that there *had* been a genuine issue of fact on the issue of control. Moreover, because any two companies in an industry might differ in the amount of control they exert over their workers, it is certainly possible that one might be an "employer" while the other is not. Accordingly, Marlar might not be an employer even though the establishments at issue in *Circle C. Investments* and

> *Matcovich* were employers. Significantly, in those cases, there was no suggestion that the performers had discretion to refuse customers and to negotiate performance content and price.

This conclusion is most significant in determining the reasonableness of Marlar's reliance. Because a reasonable person could find that the dancers are lessees instead of employees, it certainly follows that a reasonable person could also find that the industry's practice-of treating the dancers as lessees-is legally correct. Considering the ambiguity of the relationship between the club and its dancers, we cannot fault Marlar for relying on the industry practice. In short, the reliance was reasonable because a reasonable person could find the practice to be correct.

Moreover, this conclusion is reinforced by the IRS's own evaluation of the industry's tax treatment of nude dancers. Prior to this suit, the IRS audited one of Marlar's competitors, JJR Inc., a company that conducted its business much the same way as did Marlar.[FN12] The IRS approved of JJR's classification of the dancers as lessees, and made no assessment of employment taxes. *See JJR, Inc. v. United States*, 950 F.Supp. 1037, 1044 (W.D.Wash.1997). In light of its informed determination, it should come as no surprise to the IRS that we too hold the industry's treatment of the dancers as lessees to be reasonable.

> FN12. JJR is the subject of the companion case before us, as to which we have filed a memorandum disposition contemporaneously herewith.

B

[3] To fit within the safe-harbor of § 530, however, reasonable reliance on industry practice is not sufficient standing alone. A taxpayer must also file "all Federal tax returns (including information returns) required to be filed by the taxpayer ... on a basis consistent with the taxpayer's treatment of [the worker] as not being an employee." Revenue Act of 1978, § 530(a)(1)(B). According to the government, one of the returns that Marlar had to file-but did not-was Form 1099, which reports the "payments" made by a trade or business. For purposes of this appeal, Form 1099 is required of "[a]ll persons engaged in a trade or business and making *payment* in the course of such *trade or business* to another person" in excess of $600. I.R.C. § 6041(a) (emphasis added). As its plain language suggests, § 6041 is triggered by payments of $600 or more made in a *trade or business;* there need not be an employer-employee relationship. Industry practice is also irrelevant. To the extent the district court suggested otherwise, it was incorrect. *See Marlar*, 934 F.Supp. at 1209-10 ("There is no evidence that other clubs filed Forms 1099 during the period in question-1990 and 1991.... Here it is undisputed that the industry treats dancers as lessees. A lessor/lessee relationship does not require filing of a Form 1099."). Because Marlar operated a business for the tax years in question, it conceivably might have been required to file Form 1099.

The dispositive issue is whether Marlar made "payments" to the dancers within the meaning of the statute. The dancers received three forms of compensation: (1) cash from the customers; (2) scrip from the customers which was exchanged for cash; and (3) rent credit for the ladies' drinks. If any of these transfers constitute "payments" from the club to the dancers, there would be a genuine issue as to whether Marlar made payments in excess of $599 in any year, thereby triggering the § 6041 reporting requirement.

[4] Neither the Code nor the regulations define "payment." We need not, and do not, attempt to determine ourselves the precise contours of the definition of "payment." The government conceded at oral argument that Marlar made no "payment" when the customers***969** gave the dancers cash. The only question before us, therefore, is whether Marlar made a "payment" when it exchanged cash for scrip

or when it awarded ladies' drink rent credits. To answer this question, we need simply recognize the eminently logical proposition that a transferor of funds does not make a "payment" when it acts as a mere conduit or disburser of the funds. If, for example, the dancer asks the club to cash a check or to exchange two ten-dollar bills for a twenty, the club clearly has made no "payment" for the purposes of triggering a Form 1099 reporting requirement.[FN13]

FN13. Were we to disagree, there would be no logical way to preclude a patently absurd result: a messenger, a postal worker, and an armored-car employee would all be required to file a Form 1099 whenever they carried funds in excess of $600, as they too operate as a conduit. Because statutes should be interpreted so as to avoid patently absurd results, *see, e.g., United States v. Wilson,* 503 U.S. 329, 334, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992); *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 266, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), we cannot accept such a broad definition of "payment."

1

[5] The exchange of cash for scrip was functionally no different than cashing a check or asking for change. In either case, the club was a mere disburser of funds; it did nothing more than exchange one item of value for another. The club did not have any meaningful influence over the amount of income that the dancers received from the customers. As discussed above, the dancers could decide independently when to perform personalized dances.[FN14] Because the club was simply a financial intermediary-scarcely more significant than a messenger transferring the cash from customer to dancer-the club made no "payments" when it exchanged cash for scrip.

FN14. The dancers could not refuse to perform on the main stage; however, they received no remuneration for such dances, aside from the occasional inconsequential tip. Marlar's control over this aspect of the dancers' tenure at the club does not suggest in any way that Marlar was something more than a mere conduit of the funds transferred via scrip from customer to dancer. Similarly, Marlar's ability to hire and to fire dancers, to demand "house" meetings, and to penalize dancers for tardiness and breaking other rules-though relevant to the characterization of the working relationship as employer-employee or lessor-lessee-does not affect Marlar's status as a conduit. Notwithstanding this control over the dancers, the purchase of a personalized dance was, in substance, a transaction between the customer and the dancer only; Marlar did not have a relevant role in this transaction.

The government nevertheless asserts that a relevant consideration is that Marlar retained 10% of the face value of the scrip as a "service charge." However, the fact that Marlar shared the dancers' receipts does not imply that Marlar made "payment" of these receipts.[FN15] Just as there would be no payment from club to dancer if Marlar charged a check-cashing fee or a change-providing fee, there is no "payment" when Marlar exchanges cash for scrip.

FN15. The Fifth Circuit case of *United States v. Fleming,* 293 F.2d 953 (5th Cir.1961), is not to the contrary. Although the cab company and the cab drivers in *Fleming* also shared their gross receipts, there is a dispositive distinction: the company was more than a financial intermediary exacting a service charge. The company prohibited the drivers from using the cabs for any personal matters, so the drivers could not refuse generally to pick up passengers. *See id.* at 957. Moreover,

> although the drivers had a theoretical right to refuse individual trips, they "almost never exercised [this right] in practice." *Id.*

2

[6] The rent credits attributable to ladies' drinks were not "payments" either. Once again, Marlar was nothing but a conduit of funds. Whether a dancer talked to a customer and accepted the drink was entirely up to the dancer. The dancers were allowed to refuse, and often did refuse, an offer for a drink and the accompanying credit. Marlar imposed no obligation whatsoever. The mere fact that the proceeds from the sale of a ladies' drink took a momentary stop in Marlar's cash register does not render the rent credit a "payment" from the club to the dancer.

C

Thus, Marlar satisfied both requirements for § 530 protection: It reasonably relied on industry practice, and it filed all necessary forms. Because Marlar fell within the safe-***970** harbor, the district court did not err in granting its motion for summary judgment.[FN16]

> FN16. Having concluded that Marlar fell within the § 530 safe-harbor, we need not consider the alternative basis for affirming the district court raised in Marlar's cross-appeal.

III

[7] Marlar requested and the district court awarded litigation costs, including attorney's fees, pursuant to I.R.C. § 7430, a fee-shifting statute applicable to tax cases in which the United States is a party.[FN17] There are several limitations to a district court's power to award fees, but only one that is relevant to this case: Fees shall not be awarded if the United States establishes that its position in the proceeding was "substantially justified." I.R.C. § 7430(c)(4)(B)(i). The Supreme Court has interpreted "substantially justified" to mean "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988).[FN18] The United States' position need not be correct to be "substantially justified"; it need only have "a reasonable basis in law and fact." *Id.* at 566 n. 2, 108 S.Ct. 2541.

> FN17. Section 7430 states, in relevant part:
>
> > In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for -
> >
> > ....
> >
> > (2) reasonable litigation costs incurred in connection with such court proceeding.
>
> I.R.C. § 7430(a).

> FN18. *Underwood* addressed the attorney's fees provision within the Equal Access to Justice Act, 28 U.S.C. § 2412(d), a provision which is substantially identical to § 7430.

[8] As explained above, the district court incorrectly thought that § 530 merely requires reliance on industry practice, and not *reasonable* reliance on such practice. Consequently, the court underestimated the government's argument. We do not decide, however, whether the government's position rises to the level of "substantially justified." The district court is in a better position to decide this attorney's fees question. *See Harmon v. San Diego County*, 736 F.2d 1329, 1331 (9th Cir.1984). We therefore remand the issue for reconsideration in light of our interpretation of § 530.

IV

For the foregoing reasons, we affirm on the merits and remand the attorney's fees question to the district court. Each party shall bear its own costs on appeal.

AFFIRMED IN PART AND REMANDED IN PART.

C.A.9 (Wash.),1998.
Marlar, Inc. v. U.S.
151 F.3d 962, 82 A.F.T.R.2d 98-5476, 98-2 USTC P 50,619, Unempl.Ins.Rep. (CCH) P 16060B, 98 Cal. Daily Op. Serv. 6134, 98 Daily Journal D.A.R. 8491

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EXHIBIT 28

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Not Reported in F.Supp.2d, 1999 WL 1103010 (W.D.Wash.), 83 A.F.T.R.2d 99-2859, 99-1 USTC P 50,575
(Cite as: 1999 WL 1103010 (W.D.Wash.))

H

United States District Court, W.D. Washington.
MARLAR, INC., Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.
No. C95-729L.

May 18, 1999.

ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

LASNIK, J.

***1** Plaintiff Marlar, Inc. (“Marlar”) seeks as award of attorneys' fees and costs incurred by Marlar in litigating the above-captioned matter before this Court. 26 U.S.C. § 7430 (1988) governs plaintiff's request [FN1] and authorizes an award for reasonable administrative and litigation costs to the prevailing party. 26 U.S.C. § 7430(a).

> FN1. Although 26 U.S.C. § 7430 has been amended twice since 1988, the amendments did not become effective until after this litigation was commenced and, therefore, are not applicable here. All citations to the U.S.C. refer to the 1988 version.

I. “SUBSTANTIALLY JUSTIFIED”

A taxpayer is entitled to litigating costs, including attorneys' fees, if:

> (a) the taxpayer has exhausted its administrative remedies (26 U .S.C. § 7430(b)(1));
>
> (b) the taxpayer has not unreasonably protracted the proceedings (26 U.S.C. § 7430(b)(4));
>
> (c) the taxpayer establishes that the position of the United States in the proceeding was not substantially justified (26 U.S.C. § 7430(c)(4(A)(i));
>
> (d) the taxpayer has substantially prevailed with respect to the amount in controversy or the most significant issues presented (26 U .S.C. § 7430(c)(4)(A)(ii)); and
>
> (e) the taxpayer meets certain net worth requirements (26 U.S.C. § 7430(c)(4)(A)(iii)).

The United States does not dispute, for purposes of Marlar's fee application, that Marlar has exhausted its administrative remedies, did not unreasonably protract any portion of the proceedings, has substantially prevailed in the proceedings, and satisfies the applicable net worth requirements. The United States maintains that Marlar is not entitled to litigation costs, however, because the United States' position was substantially justified.

The Supreme Court has defined “substantially justified” as follows:

> We are of the view, therefore, that as between the two commonly used connotations of the word “substantially,” the one most naturally conveyed by the phrase before us here is not “justified to a high degree,” but rather “justified in substance or in the main”-that is, justified to a degree that could satisfy a reasonable person. That is no different from the “reasonable basis both in law and fact” formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.... To be “substantially justified” means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.... [A] position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.”

Pierce v. Underwood, 487 U.S. 552, 565-66 and n.2 (1988) (citations omitted).

This matter was remanded from the Ninth Circuit for a

determination of whether the United States was substantially justified in taking the position that the safe-harbor provisions of § 530 of the Revenue Act of 1978 FN2 were inapplicable. In particular, the issue is whether Marlar's reliance on industry practice was reasonable as required by § 530(a)(2)(c). *See Marlar, Inc. v. United States*, 151 F.3d 962, 970 (9th Cir.1998). The government has not challenged Marlar's assertion that there was a long-standing industry practice of treating dancers as lessees in the Seattle-Tacoma area. Rather, the government argues that Marlar did not reasonably rely on such a practice because a reasonable taxpayer would have questioned its legality.

FN2. Section 530 provides:

> (a) Termination of certain employment tax liability. -
>
> (1) In general.-If -
>
> (A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and
>
> (B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayers's treatment of such individual as not being an employee, then for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.
>
> (2) Statutory standards providing one method of satisfying the requirements of paragraph (1).-For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:
>
> (A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;
>
> (B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or
>
> (C) long-standing recognized practice of a significant segment of the industry in which such individual is engaged.

***2** The context in which the Court's analysis takes place involves two layers of reasonableness: (1) was Marlar's reliance on industry practice reasonable and (2) was the government's belief that Marlar was not entitled to the protections of the § 530 safe-harbor reasonable or "substantially justified." The first issue was discussed by the Ninth Circuit:

> We begin by noting that the district court was unable, on summary judgment, to determine whether the underlying relationship between Marlar and its dancers was one of employer-employee or lessor-lessee.... Because a reasonable person could find that the dancers are lessees instead of employees, it certainly follows that a reasonable person could also find that the industry's practice- of treating the dancers as lessees-is legally correct. Considering the ambiguity of the relationship between the club and its dancers, we cannot fault Marlar for relying on the industry practice. In short, the reliance was reasonable because a reasonable person could find the practice to be correct.

Marlar, 151 F.3d at 967-68. In addition, reliance on the industry custom of treating dancers as lessees was reasonable because (1) the local industry had operated under lessor/lessee agreements for a number of years without IRS challenge, (2) the IRS had audited a similar operation owned by one of Marlar's competitors and had re-

quired no changes in the treatment of the dancers, and (3) Marlar's operations were similar to those at issue in the "caddy case," Revenue Ruling 69-26, 1969-1 C.B. 251, and dissimilar to the operations of other adult entertainment facilities that had been held liable for employment taxes. Thus, Marlar's reliance on the long-standing, well-known practice of a significant segment of the industry was reasonable.

The safe-harbor provisions of § 530 made the United States' pursuit of its claims against Marlar substantially unjustified. As discussed above, Marlar was entitled to the protections of § 530 because it acted in accordance with an industry custom which it could reasonably believe to be legal. The government has never argued that the appropriate characterization of Marlar's dancers could be determined as a matter of law, rightly acknowledging that reasonable persons could differ on that issue. If a reasonable person could think that treating dancers as lessees was permissible under the tax code, Marlar's reliance on an industry practice that did just that was reasonable.[FN3]

> FN3. Section 530 shields a taxpayer from retroactive liabilities where it acted reasonably and had no reason to know that the government interpreted or intended to interpret the tax code differently. The government is, in effect, precluded from changing the applicable rules and demanding back taxes from a taxpayer. In this action, the government seeks to recharacterize Marlar's dancers as employees not for purposes of future tax calculations, but to create a retroactive tax liability. This § 530 does not allow.

Marlar's reliance on an industry custom that had been in place for a number of years, had survived IRS scrutiny in the past, and was supported by a Revenue Ruling was reasonable. It was the government's argument that no reasonable person would act as Marlar had that was unreasonable. The government's litigating position on the applicability of § 530, which was dispositive of the entire case, was not, therefore, substantially justified.

II. "REASONABLE LITIGATION COSTS"

The cost recovery statute provides for the recovery of "reasonable litigation costs," including:

> ***3** reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate.

26 U.S.C. § 7430(c)(1)(B)(iii). Marlar has requested payment of all of its litigating expenses, including attorneys' fees at rates between $150 and $195 per hour, billable staff time at rates between $65 and $75 per hour, and costs of $2732.43. Marlar requests a total of $69,711.38. The United States maintains that there are no "special factors" that would justify an award above the statutory $75 per hour rate.

In *Pierce v. Underwood*, 487 U.S. at 572, the Supreme Court found that "the 'special factor' formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." If an attribute of counsel or the type of legal analysis required was probably considered by the market when determining an appropriate hourly rate, then that factor is not "special," but rather routine. *Pierce*, 487 U.S. at 571-74.

Although there is no question as to counsels' competence and expertise in this area of tax law, the Court concludes that there are no special factors that would justify an upward departure from the $75 per hour statutory fee.

Both parties agree that, if an award of costs is granted, Marlar is entitled to cost-of-living-adjustments as follows:

$101.41 in 1994	$104.29 in 1995
$107.38 in 1996	$109.83 in 1997
$111.54 in 1998	$112.50 in 1999.

The Court therefore awards the following:

1994 Attorneys Fees	44 hours	@ $101.41 per hour =	$ 4,461.60
1995 Attorneys Fees	111.14 hours	@ $104.29 per hour =	$11,590.79
1996 Attorneys Fees	191.13 hours	@ $107.37 per hour =	$20,523.54
1997 Attorneys Fees	6.5 hours [4]	@ $109.83 per hour [5] =	$ 713.90
1998 Attorneys Fees	2.97 hours	@ $111.54 per hour =	$ 330.07
1999 Attorneys Fees	81.75 hours	@ $112.50 per hour =	$ 9,196.88
WSP Legal Assistant			$ 573.00
FMK Legal Assistant			$ 750.00
Other litigation costs			$ 2775.47
			$50,915.25

FN4. Through her letter of May 17, 1999, plaintiff's counsel corrected an error in plaintiff's Schedule A, amending the 1997 hours from 5.5 to 6.5.

FN5. The Court used an adjusted hourly rate for 1997 of $109.83, as agreed by the parties, rather than the $109.38 used in plaintiff's Schedule A.

III. CONCLUSION

For all of the foregoing reasons, plaintiff's motion for attorneys' fees is GRANTED. It is hereby ORDERED that defendant the United States of America shall pay plaintiff Marlar, Inc. the sum of $50,915.25 pursuant to 26 U.S.C. § 7430.

W.D.Wash.,1999.
Marlar, Inc. v. U.S.
Not Reported in F.Supp.2d, 1999 WL 1103010 (W.D.Wash.), 83 A.F.T.R.2d 99-2859, 99-1 USTC P 50,575

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EXHIBIT 29

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

152 P.3d 689 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Tabitha SIZEMORE, Claimant/Appellant,
v.
JEZEBEL'S, Respondent/Appellee,
and
LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier/Appellee.

No. 96,537. | March 2, 2007.

Appeal from Workers Compensation Board. Opinion filed March 2, 2007. Affirmed.

Attorneys and Law Firms

Russell B. Cranmer, affiliated attorneys of Pistotnik Law Offices, P.A., of Wichita, for appellant.

Michael D. Streit and Janell Jenkins Foster, of Wallace, Saunders, Austin, Brown & Enochs, Chartered, of Wichita, for appellees.

Before MARQUARDT, P.J., PIERRON, J., and KNUDSON, S.J.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Tabitha Sizemore appeals the Workers Compensation Board's (Board) order denying her workers compensation benefits. We affirm.

On September 15, 2004, Sizemore signed a license agreement with JV Diamond, Inc., d/b/a Jezebel's (Jezebel's) to provide dancing entertainment for Jezebel's customers. On December 31, 2004, Sizemore slipped and fell while dancing on stage after a customer threw beer on the stage. Sizemore filed an application for a hearing and claimed that she injured her back in the accident.

A hearing was held and the administrative law judge (ALJ) awarded compensation to Sizemore for the accidental injury she sustained on December 31, 2004. Jezebel's appealed to the Board. The Board reversed the ALJ's award, finding that Sizemore was an independent contractor for purposes of the Workers Compensation Act. Sizemore timely appeals.

Jezebel's argues that this court must review the Board's decision under a substantial competent evidence standard. However, when the facts in a workers compensation case are not disputed, the question is whether the Board correctly applied those facts to the law, which the appellate court reviews de novo. *Smith v. Winfield Livestock Auction, Inc.*, 33 Kan.App.2d 615, 618, 106 P.3d 94, *rev. denied* 279 Kan. 1007 (2005). Here, the facts regarding this issue are not in dispute.

The Kansas Workers Compensation Act, K.S.A. 44-501 *et seq.*,

> " 'shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.' K.S.A. 44-501(g)." *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 14, 81 P.3d 425 (2003).

> "The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. [Citation omitted.]" *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991).

Sizemore signed a contract with Jezebel's which stated that she is an independent contractor and not an employee. Paragraph 2 of the contract terms states, "Dancer is not an employee or agent of the Company, but instead an independent contractor." Jezebel's kept a tentative schedule of when the dancers performed. A dancer was fined by Jezebel's if she was late, left work early, sat on a customer's lap, or failed to show up during her scheduled time. Jezebel's did

not pay the dancers; rather, the dancers earned their wages through customer gratuities.

***2** Jezebel's gave dancers significant freedom in creating and performing their dancing. Dancers choreographed their own routines. Jezebel's merely prohibited dancers from disobeying county ordinances regarding a dancer's activities. Dancers chose their own costumes; however, during the day, Jezebel's required the dancers to wear a gown. Finally, dancers supplied their own music and sound equipment, or could rent music and equipment from Jezebel's.

A party challenging the Board's decision bears the burden of proving its invalidity. *Foos v. Terminix,* 277 Kan. 687, 693, 89 P.3d 546 (2004). If there is a rational basis for the Board's interpretation of statutory provisions, it should be upheld upon judicial review. *McIntosh v. Sedgwick County,* 34 Kan.App.2d 684, 688, 123 P.3d 740 (2005), *aff'd* 282 Kan. 636, 147 P.3d 869 (2006).

Commonly recognized tests for determining an independent contractor relationship may also support a finding that Sizemore was an independent contractor. Indications of an independent contractor relationship include: (1) the existence of a contract for the performance by a person of a certain kind of work at a fixed price; (2) the independent nature of the business or distinct calling; (3) the employment of assistants with the right to supervise their activities; (4) the obligation to furnish necessary tools, supplies, and materials; (5) the right to control the progress of the work, except as to final results; (6) the time for which the worker is employed; (7) the method of payment-whether by time or by job; and (8) whether the work is part of the regular business of the employer. *McCubbin v. Walker,* 256 Kan. 276, 281, 886 P.2d 790 (1994).

A majority of the factors from the above test, along with the contract she signed with Jezebel's, support a finding that Sizemore was an independent contractor. Sizemore signed a contractual agreement acknowledging an independent contractor relationship and agreed to dance solely for customer gratuities. Sizemore was required to supply her own music, sound equipment, and costumes/clothing. Dancers were required to pay for these items if Jezebel's provided them. Sizemore also choreographed her own dance routines. Finally, Jezebel's did not provide any wages, fringe benefits, or medical insurance; rather, Sizemore danced for tips from customers.

The right to control, supervise, and direct an alleged employee's work is the primary test for determining an employer/employee relationship. *Falls,* 249 Kan. at 64. Almost all of the above factors favor an independent contractor relationship. Accordingly, the Board did not err in reversing the ALJ's award.

In addition, the Board's decision was a negative finding. Such a finding will not be disturbed by an appellate court absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. *General Building Contr., LLC v. Board of Shawnee County Comm'rs,* 275 Kan. 525, 541, 66 P.3d 873 (2003). Sizemore has presented no proof to overcome the negative finding.

***3** Affirmed.

Parallel Citations

2007 WL 656444 (Kan.App.)

End of Document

EXHIBIT 30

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

2000 WL 33300345 (W.Va.Off.Hrg.App.)

Office of Hearings and Appeals

State of West Virginia

IN THE MATTER OF THE PETITIONS CUTTYS CORPORATION DBA LADY GODIVAS

Docket Nos. 98-225 C, 98-226 U
File No. 55 074 7230 001

IN THE MATTER OF THE PETITIONS FCK ENTERPRISES, INC. DBA LADY GODIVAS

Docket Nos. 98-227 C, 98-228 U
File No. 55 075 2567 001

IN THE MATTER OF THE PETITIONS HAMM INC. DBA LADY GODIVAS

Docket Nos. 98-229 C, 98-230 U
File No. 55 073 8450 001

IN THE MATTER OF THE PETITIONS CAPABARA INC. DBA LADY GODIVAS

Docket Nos. 98-231 C, 98-232 U
File No. 55 074 5007 001

IN THE MATTER OF THE PETITIONS FJT ENTERPRIZES, INC. DBA BIG BERTHAS

Docket Nos. 98-233 C, 98-234 U
File No. 55 071 1554 001

IN THE MATTER OF THE PETITIONS FORT KNOCKS, INC. DBA LADY GODIVAS

Docket Nos. 98-235 C, 98-236 U
File No. 55 073 4019 001

IN THE MATTER OF THE PETITIONS LJB ENTERPRISES, INC. DBA LADY GODIVAS

Docket Nos. 98-237 C, 98-238 U
File No. 55 071 6650 001

IN THE MATTER OF THE PETITIONS CLUB MANAGEMENT CORP. DBA LADY GODIVAS

Docket Nos. 98-239 C, 98-240 U
File No. 55 073 6656 001

IN THE MATTER OF THE PETITIONS FRIAR TUCKS INC.

Docket Nos. 98-241 C, 98-242 U
File No. 55 073 4007 001

IN THE MATTER OF THE PETITIONS RIVERVIEW INN, INC. DBA LADY GODIVAS

Docket Nos. 98-243 C, 98-244 U
File No. 55 074 4102 001

IN THE MATTER OF THE PETITIONS THE ACADEMY INC. DBA LADY GODIVAS'S

Docket Nos. 98-245 C, 98-246 U
File No. 55 074 1198 001
April 11, 2000

DIVISION'S REPRESENTATIVES:
***1** Wayne Williams
Staff Attorney
Alice Hall
Manager of Tax & Revenue, Auditing Division

PETITIONERS' REPRESENTATIVES:
James W. St. Clair
Attorney
Paul DesFosses
CPA
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Bookkeeper
Frank Masiarczyk,
President of Lady Godivas
Chris Masiarczyk
Vice-President of Fort Knocks, Inc.
Calvin Lavender
Vice-President of FCK

HEARING HELD:
March 23, 1999, at 9:30 a.m.

State Tax Department

Office of Hearings and Appeals

1001 Lee St., East

Charleston, WV 25301

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX--PURCHASERS' USE TAX--TAX AUDITOR'S PRESENCE NOT REQUIRED-- Petitioners' objection to the admission into evidence of the tax assessments and audit memorandum unless and until the tax auditor was present was properly overruled because the Petitioners did not raise any objections to the technical aspects of the audit, including the accuracy of the entries recorded.

CONSUMERS SALES AND SERVICE TAX--PURCHASERS' USE TAX--NO DEDUCTION FOR THE COST OF GOODS SOLD-- West Virginia Code § 11-15-2(i) defines “gross proceeds” as the amount of money received by the vendor without any deduction for the cost of goods sold or any other expense. As such, strip club operators licensed to sell alcoholic beverages who set the price of such drinks and mandate that no interaction between dancers and customers commence without

payment thereof and also treat same as alcoholic beverages on their books and records are subject to sales and use tax on the full amount of the drinks sold and cannot deduct the portion ultimately kept by the dancers.

***2 CONSUMERS SALES AND SERVICE TAX--PURCHASERS' USE TAX--WITHHOLDING AND EMPLOYMENT TAX CASES NOT CONTROLLING--** Although exotic dancers are considered to be independent dancers for withholding tax and employment tax purposes, cases cited by the Petitioners are not precedent in sales and use tax cases to authorize the exclusion of the dancers' share of the income from the Petitioners' gross proceeds, where the Petitioners and not the dancers controlled the money, used an outside accountant to verify same, and where the Petitioners made sure that all payments were made before any services or activities were performed by the dancers.

CONSUMERS SALES AND SERVICE TAX--PURCHASERS' USE TAX--NO EXEMPTION AS A LEASE OR RENTAL OF REAL PROPERTY-- In the absence of a lease or rental agreement executed between club owners and the dancers detailing the nature of their relationship, the amount of money retained by the club owners is fully taxable and not exempt as a lease or rental payment; no showing was made that the assessment is incorrect and contrary to law, in whole or in part. W. Va. Code § 11-10-9.

CONSUMERS SALES AND SERVICE TAX--PURCHASERS' USE TAX--PERSONAL SERVICES EXEMPTION NOT APPLICABLE-- Services performed by strippers upon the person of a customer are not exempt as personal services under 110 C.S.R. 15, § 8.1.2.1 in the absence of proof that the dancer's were engaged in the business of barbering, massaging, manicuring, etc., and where they had no such licenses, did not hold themselves out to the general public as such, and where both state law and Petitioner's own policy forbade any such touching between dancers and customers.

CONSUMERS SALES AND SERVICE TAX--PURCHASERS' USE TAX--GRATUITIES NOT INVOLVED-- Petitioners' reliance upon the Lakeview Inn and Country Club case, thereby analogizing that payments made to dancers are the same as tips paid to banquet staff, is misplaced since Petitioners, alone, set the price for lap dances, couch dances, massages, manicures, etc., and where payment thereof is not discretionary on the part of the dancers.

CONSUMERS SALES AND SERVICE TAX--NO DOUBLE TAXATION-- The fact that the Petitioners may have erroneously paid sales tax on T-shirts and other items of tangible personal property which it in turn resold to patrons is not double taxation because (1) Petitioners are entitled to receive their refund within three (3) years after paying the tax, and (2) Petitioners did not produce any evidence proving that the Petitioners both paid and collected sales tax on the same transactions.

ADMINISTRATIVE DECISION

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers' use tax assessments against Cuttys Corporation, dba Lady Godivas (“Petitioner”). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

***3** The consumers sales and service tax assessment was for the period of January 11, 1996 through December 31, 1997, for tax of $2,746.00, additions to tax of $-0-, and interest of $273.00, for a total assessed liability of $3,019.00.

The purchasers' use tax assessment was for the period of January 11, 1996 through December 31, 1997, for tax of $2,381.00, additions to tax of $-0-, and interest of $210.00, for a total assessed liability of $2,591.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers' use tax assessments against FCK Enterprises, Inc., dba Lady Godivas (“Petitioner”). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of October 1, 1996 through December 31, 1997, for tax of $9,264.00, additions to tax of $-0-, and interest of $524.00, for a total assessed liability of $9,788.00.

The purchasers" use tax assessment was for the period of October 1, 1996 through December 31, 1997, for tax of $8.784.00, additions to tax of $-0-, and interest of $472.00, for a total assessed liability of $9,256.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers' use tax assessments against Hamm Inc., dba Lady Godivas ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $10,502.00, additions to tax of $-0-, and interest of $1,480.00, for a total assessed liability of $11,982.00.

The purchasers' use tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $7,698.00, additions to tax of $-0-, and interest of $985.00, for a total assessed liability of $8,683.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers' use tax assessments against Capabara Inc., dba Lady Godivas, ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of January 1, 1997 through December 31, 1997, for tax of $2,749.00, additions to tax of $-0-, and interest of $153.00, for a total assessed liability of $2,902.00.

The purchasers' use tax assessment was for the period of January 1, 1997 through December 31, 1997, for tax of $2,138.00, additions to tax of $-0-, and interest of $126.00, for a total assessed liability of $2,264.00

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers use tax assessments against FJT Enterprises, Inc., dba Big Berthas ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

***4** The consumers sales and service tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $7,177.00, additions to tax of $-0-, and interest of $1,038.00, for a total assessed liability of $8,215.00.

The purchasers' use tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $5,613.00, additions to tax of $-0-, and interest of $733.00, for a total assessed liability of $6,346.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers use tax assessments against Fort Knocks, Inc., dba Lady Godivas ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $7,112.00, additions to tax of $-0-, and interest of $793.00, for a total assessed liability of $7,905.00.

The purchasers' use tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $5,985.00, additions to tax of $-0-, and interest of $638.00, for a total assessed liability of $6,623.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers use tax assessments against LJB Enterprises, Inc., dba Lady Godivas ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $18,596.00, additions to tax of $-0-, and interest of $2,563.00, for a total assessed liability of $21,159.00.

The purchasers' use tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $13,807.00, additions to tax of $-0-, and interest of $1,755.00, for a total assessed liability of $15,562.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers use tax assessments against Club Management Corp., dba Lady Godivas ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $4,614.00, additions to tax of $-0-, and interest of $643.00, for a total assessed liability of $5,257.00.

The purchasers' use tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $3,516.00, additions to tax of $-0-, and interest of $452.00, for a total assessed liability of $3,968.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers use tax assessments against Friar Tucks Inc. The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

***5** The consumers sales and service tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $7,664.00, additions to tax of $-0-, and interest of $899.00, for a total assessed liability of $8,563.00.

The purchasers' use tax assessment was for the period of July 1, 1995 through December 31, 1997, for tax of $6,177.00, additions to tax of $-0-, and interest of $652.00, for a total assessed liability of $6,829.99

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers use tax assessments against Riverview Inn, Inc., dba Lady Godivas ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of March 1, 1996 through December 31, 1997, for tax of $19,311.00, additions to tax of $-0-, and interest of $1,705.00, for a total assessed liability of $21,016.00.

The purchasers' use tax assessment was for the period March 1, 1996 through December 31, 1997, for tax of $17,427.00, additions to tax of $-0-, and interest of $1,470.00, for a total assessed liability of $18,897.00.

On March 13, 1998, the Auditing Division issued consumers sales and service tax and purchasers use tax assessments against The Academy, Inc., dba Lady Godivas ("Petitioner"). The assessments were issued pursuant to the lawful authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15, and 15A of the West Virginia Code.

The consumers sales and service tax assessment was for the period of July 1, 1996 through December 31, 1997, for tax of $2,915.00, additions to tax of $-0-, and interest of $240.00, for a total assessed liability of $3,155.00.

The purchasers' use tax assessment was for the period of July 1, 1996 through December 31, 1997, for tax of $2,776.00, additions to tax of $-0-, and interest of $205.00, for a total assessed liability of $2,981.00. The Petitioners timely filed petitions for reassessment. The matters were consolidated for hearing purposes. Subsequently, a notice of hearing on the petitions was furnished to the Petitioners. Thereafter, the hearing was held in accordance with W. Va. Code § 11-10-9.

FACTS

The Petitioners are comprised of eleven (11) corporations which are engaged in the adult entertainment business. Petitioners operate using various corporate names and employing strippers/exotic dancers to entertain their clientele.

Prior to going on the record, both parties stipulated that the dancers at the clubs are independent contractors.

The only problem area found by the tax auditor is what he designated as "beverage service fees," which was a term that originated with an accountant previously employed by the Petitioners.

That category was broken down into two (2) types. The first type is when a customer purchases a drink for a particular dancer. The second element is when a customer purchases a private dance, massage, etc., from a particular dancer.

***6** If a customer purchases a drink for a dancer, she collects the price, which is set by the Petitioners either in cash or takes the customer's credit card and puts same into an envelope and gives it to the club or bar manager with her name on it. The amount of time that the dancer spends talking to a customer depends on the number of drinks that he purchases for her.

If a customer purchases a private dance, a private massage, time together in a hot tub, or has a dancer trim his beard or give him a shave, the amount which is again set by the Petitioner is given to the dancer in the form of cash or a credit card and said amount is placed in an envelope with her name on it and given to the bar club manager.

Once a week all of the proceeds are turned over to an outside accounting firm to make sure that all the collections either in the form of cash or from credit cards are properly accounted. The total is then divided in half with half going to the Petitioner and half going to the dancer. The dancer's portion is placed back into the original envelope and sent back to the dancer who signs as having received that amount.

Petitioners' witness testified that private dances, massages, and the like, all take place in rooms which have no doors and with windows along one side so that the customer and the dancer are visible by the public at all times.

Petitioners' witness further testified that the clubs' rules as well as state law prohibit personal touching of any kind during private dances or during any other kind of activity and that the law is enforced by the Petitioner.

More specific facts will be included in the issues discussed below.

ISSUES AND DETERMINATIONS

The first issue to be determined is Petitioner's continuing objection to the admission into evidence of the tax assessments and audit memorandum without the tax auditor being present.

At the time, the administrative law judge overruled the objection stating that the case would proceed in order to decide whether the issues being contested actually require the presence of the tax auditor before any determination could be made.

Although the Petitioner did not agree with the substance of the assessments nor the conclusions reached by the tax auditor in the audit memorandum, the fact of the matter is that no objections were ever raised concerning the technical aspects of the audit, including the accuracy of any of the entries recorded.

Accordingly, it is **DETERMINED** that the absence of the tax auditor at the hearing had no effect upon the issues raised by the Petitioner for determination.

A second issue presented for consideration concerns the alcoholic beverages that a customer purchases when requested to do so by a particular dancer(s).

Petitioner argues that what the customer is really buying for the independent contractors (dancers) is just colored water or tea, not a real alcoholic beverage, and thus not a real sale item but that the same is simply a way of purchasing the contractor's companionship.

***7** This tribunal does not challenge the scenario proffered by the Petitioner; however the tax implications are decidedly different for the following reasons: First, it is undisputed that the sale price of the "alcoholic beverage" being purchased for the dancer is set by the Petitioner and no one else and that no interaction takes place between the two until the cash or credit card is taken to the bar manager. Secondly, the price of her drink, whatever the cost may be, is included as income in the Petitioners" books which are kept by its accountants. The fact that the contents of the drink is colored water or tea or that the major item being sold is companionship is totally irrelevant for tax purposes. Thirdly, the Petitioner and not the dancer is in the business of selling "alcoholic beverages" from its bars. Proof of that is that Petitioner's clubs are the entities licensed by the State of West Virginia to serve alcoholic beverages.

W. Va. Code § 11-15-2(i) defines gross proceeds as the amount received by the vendor (in this case the Petitioners) without any deduction for the cost of goods sold or any other expenses.

Therefore, it is **DETERMINED** that the full amount of the price of the beverage(s) being purchased by customers for the dancers is subject to sales or use tax for which the Petitioner remains solely liable.

The third issue raised for consideration is what is the proper tax treatment for the private lap dances, private massages, hot tub sessions with dancers, as well as the beard trimming and other grooming services which are also provided by the dancers to Petitioners' clientele.

Again, as was the case with the beverages purchased for the dancers, each of these activities is priced in advance by the Petitioner and none takes place until all the financial arrangements are completed to the satisfaction of the bar manager.

In their brief Petitioners' counsel sets forth what the Petitioners consider to be a number of cases supporting their theory that their dancers are independent contractors to the extent that the Petitioners may deduct from Petitioners' gross proceeds the moneys remitted by the Petitioners to the dancers. The case of Deja Vu Entertainment Enterprises of Minnesota, Inc. v. United States, District Ct., Civil Action No. 3-96-1078, is cited to reinforce the finding that such dancers are not employees but independent contractors and that that is a common practice in the adult entertainment business. Deja Vu Entertainment Enterprises kept track of the number of dances performed, but that fact alone did not alter the court's ruling that the dancers were not subject to withholding by the taxpayer because no showing was made that Deja Vu controlled its performers' income.

In citing the cases of Marlar v. United States, 151 F.3d 962, 964 (3d Cir. 19__), and Taylor Blvd. Theater, Inc. v. United States, Civil Action No. 3:97-CV-63H (W.D. Ky. 1997), Petitioners here argue that their situation is analogous, because the money in the Petitioners' clubs also flowed from the dancer to the club owner and not vice versa.

***8** It is undisputed that exotic dancers are generally recognized as independent contractors by the courts and that dancers pay their own income taxes as evidenced by a series of federal employment tax decisions to that effect.

The problem with the Petitioners' analogy is, in this case, two fold. First, the assessments issued against the Petitioners are not income, withholding, or employment tax for which the cited cases have direct precedential value. Second, as noted by opposing counsel, there are significant factual differences between the cited cases and the Petitioners' case, to-wit: (1) In Deja Vu, the club owner never touched any of the money paid by customers or sent same to its outside accountant to verify what had been received and (2) in Marlar, the dancers did not report their earnings to Marlar nor did Marlar claim to know what its dancers earned.

Simply put, the Petitioners, by setting the price of the various activities, making sure that the various activities do not commence before payment is made, and then handling all of the proceeds, including having the same tabulated by its outside accountant, have established sufficient dominion and control over the proceeds so that returning a portion of same to the dancers is clearly a cost of doing business which is again prohibited by West Virginia Code § 11-15-2(i).

The fourth issue raised by the Petitioners for determination is their claim that Publication TSD-300, which is circulated by the State Tax Department, specifically exempts from sales or use tax the rental of real estate.

Petitioners argue that the Marlar case previously cited herein stands for the proposition that independent contractors in the adult entertainment business are considered “lessees” who pay rent to the club owner for their scheduled shifts and other activities performed on the club owner's premises and, therefore, do not receive wages.

As noted before, Marlar and the other cited federal cases deal exclusively with employment and withholding tax matters and consequently do not have direct applicability to the present case.

In Marlar each erotic dancer was required to execute a “Dancer Performance Lease” which set forth an amount to be paid to the club owner for rent and a specific surcharge for couch or private dancers.

In Deja Vu each dancer was again required to sign a “Dancer Performance Lease” and was to pay the club a stage rental fee for dance sets.

In JJR, Inc. v. United States, 950 F. Supp. 1037 (1997), another federal employment tax case, the dancers were required to execute a contract which set forth a lease relationship and to pay a daily rent regardless of what the dancer made that day.

At the hearing, Petitioners testified that such a lessor (club owner) - lessee (dancer) relationship existed here; however, no written corroboration of any kind was offered into evidence to support same. The fact that a fifty (50)-fifty(50) split takes place without any particulars as to how that is computed (hourly, daily, or square foot) is suspicious at best and does not rise to the level of proof required of a taxpayer to prove that the assessment is incorrect and contrary to law, in whole or in part. W. Va. Code § 11-10-9.

***9** Consequently, it is **DETERMINED** that the monies retained by the Petitioners as a result of the activities performed by their dancers is not exempt from sales and use tax as a lease or rental of real property.

This issue is also problematic for another reason, specifically, that the Petitioners already paid taxes on the amount of money they thus retained. To the extent that the Petitioners may be insinuating that a refund is due them, that request is denied.

The fifth issue presented by the Petitioners for determination is its claim that TSD-300 also exempts from sales or use tax personal services performed upon the person of the customers by the dancers such as barbering, hair styling, manicuring, and massaging. Petitioners also contend that the personal services exemption extends even to the companionship which the dancers provide to the “person” of the individual customer.

110 C.S.R. 15, § 2.59.2 defines personal service as that, “rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining and similar services.”

110 C.S.R. 15, § 8.1.2.1 speaks of services performed to the person of the individual and adds to the list massaging, manicuring, hair setting, hair washing, and dyeing, services of dental hygienists, and shoe-shining if the shoes remain on the customer's feet. 110 C.S.R. 15 § 8.1.2.2 goes further to say that the physical contact must be of a “continuing” nature and the touch must be direct either to the person or to the clothing worn by such a person.

It is a real stretch for the Petitioners to claim a personal service exemption for erotic dancers when the clear intent of the regulation(s) was to make it applicable to those engaged in the business of barbering, massaging, manicuring, and the like, and not to untrained persons who perform same either without a license or who do not hold themselves out to the general public as a barber, masseuse, or a manicurist.

Additionally, Petitioners' own witness testified that any such touching which takes place in a strip bar or strip club is expressly prohibited by state law and that the Petitioners enforce the law.

Because as an exemption statute is strictly construed against the one claiming same, and because exotic dancers are not within the category of persons entitled to the exemption for personal services, it is **DETERMINED** that said exemption is not applicable in this case.

The sixth issue raised by the Petitioners for consideration is their contention that what is ultimately kept by the dancer(s) is in the form of a gratuity and exempt from sales or use tax.

Petitioners rely on the case of Lakeview Inn & Country Club, Inc., 175 W. Va. 689, 338 S.E.2d 166 (1985), which involved gratuities paid to waiters and waitresses. Petitioner surmises that fees paid by patrons to dancers for companionship are akin to gratuities paid to a banquet staff, because the amount paid is based upon the perceived service received by the customer or patron. Petitioners add that the Code of Federal Regulations § 531.52-53 (1985), promulgated September 28, 1967 (hereafter CFR), provides that a tip (gratuity) paid by a customer is in recognition of some service being performed and can be distinguished from a payment for a charge made for the service. Petitioner concludes by saying that the amounts usually received by the dancers are possibly in excess of the value of the services being performed.

***10** To sustain Petitioners' argument would be to totally ignore the testimony of Petitioners' witness, who clearly stated that the amount to be paid for a lap dance, couch dance, massage, manicure, and the like, are all predetermined by the Petitioner and not the dancer. If the stated amount is not paid, the dancer does not perform.

This factual situation is entirely different from that which occurred in the Lakeview case, where payment to the banquet staff was entirely discretionary. It is also distinguishable from the CFR quoted by the Petitioners, because the fee is not a gratuity, but a stated charge for a particular service.

The seventh issue presented for determination concerns Petitioners' contention that they have been subjected to double taxation, because they have paid sales tax to vendors when purchasing T-shirts and also collected sales tax when selling those same T-shirts to their customers.

Petitioners were advised by the counsel for the Auditing Division that they had three (3) years from the time that the original tax was paid in which to file a claim for refund.

The burden of proof rests, of course, with the Petitioners, under W. Va. Code § 11-10-9, to show that the assessment is incorrect and contrary to law, in whole or in part. Therefore, because the Petitioners offered no documentation at the hearing proving that certain transactions were taxed twice, the assessment is upheld in toto.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against Cuttys Corporation, dba Lady Godivas, for the period of January 11, 1996 through December 31, 1997, for tax of $2,746.00, and interest, updated through January 31, 2000, of $718.23, totaling $3,464.23, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against Cuttys Corporation, dba Lady Godivas, for the period of January 11, 1996 through December 31, 1997, for tax of $2,381.00, and interest, updated through January 31, 2000, of $577.85, totaling $2,958.85, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against FCK Enterprises, Inc., dba Lady Godivas, for the period of October 1, 1996 through December 31, 1997, for tax of $9,264.00, and interest, updated through January 31, 2000, of $2,026.02, totaling $11,290.02, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against FCK Enterprises, Inc., dba Lady Godivas, for the period of October 1, 1996 through December 31, 1997, for tax of $8,784.00, and interest, updated through January 31, 2000, of $1,829.10, totaling $10,613.10, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against Hamm, Inc., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $10,502.00, and interest, updated through January 31, 2000, of $3,182.75, totaling $13,684.75, should be and is hereby **AFFIRMED**.

***11** It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against Hamm, Inc., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $7,698.00, and interest, updated through January 31, 2000, of $2,174.32, totaling $9,872.32, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against Capabara, Inc., dba Lady Godivas, for the period of January 1, 1997 through December 31, 1997, for tax of $2,749.00, and interest, updated through January 31, 2000, of $598.71, totaling $3,347.71, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers use tax assessment issued against Capabara, Inc., dba Lady Godivas, for the period of January 1, 1997 through December 31, 1997, for tax of $2,138.00, and interest, updated through January 31, 2000, of $456.31, totaling $2,594.31, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against FJT Enterprises, Inc., dba Big Berthas, for the period of July 1, 1995 through December 31, 1997, for tax of $7,177.00, and interest, updated through January 31, 2000, of $2,201.64, totaling $9,378.64, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against FJT Enterprises, Inc., dba Big Berthas, for the period of July 1, 1995 through December 31, 1997, for tax of $5,613.00, and interest, updated through January 31, 2000, of $1,600.19, totaling $7,213.19, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against Fort Knocks, Inc., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $7,112.00, and interest, updated through January 31, 2000, of $1,946.11, totaling $9,058.11, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against Fort Knocks, Inc., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $5,985.00, and interest, updated through January 31, 2000, of $1,562.66, totaling $7,547.66, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against LJB Enterprises, Inc., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $18,596.00, and interest, updated through January 31, 2000, of $5,578.07, totaling $24,174.07, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers use tax assessment issued against LJB Enterprises, Inc., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $13,807.00, and interest, updated through January 31, 2000, of $3,888.14, totaling $17,695.14, should be and is hereby **AFFIRMED**.

***12 WHEREFORE**, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against Club Management Corp., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $4,614.00, and interest, updated through January 31, 2000, of $1,391.09, totaling $6,005.09, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers use tax assessment issued against Club Management Corp., dba Lady Godivas, for the period of July 1, 1995 through December 31, 1997, for tax of $3,516.00, and interest, updated through January 31, 2000, of $995.21, totaling $4,511.21, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against Friar Tucks, Inc., for the period of July 1, 1995 through December 31, 1997, for tax of $7,664.00, and interest, updated through January 31, 2000, of $2,141.61, totaling $9,805.61, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against Friar Tucks, Inc., for the period of July 1, 1995 through December 31, 1997, for tax of $6,177.00, and interest, updated through January 31, 2000, of $1,606.33, totaling $7,783.33, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against Riverview Inn, Inc., dba Lady Godivas, for the period of March 1, 1996 through December 31, 1997, for tax of $19,311.00, and interest, updated through January 31, 2000, of $4,836.00, totaling $24,147.00, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against Riverview Inn, Inc., dba Lady Godivas, for the period of March 1, 1996 through December 31, 1997, for tax of $17,427.00, and interest, updated through January 31, 2000, of $4,162.41, totaling $21,589.41, should be and is hereby **AFFIRMED**.

WHEREFORE, it is the **DECISION** of the State Tax Department that the consumers sales and service tax assessment issued against The Academy, Inc., dba Lady Godivas, for the period of July 1, 1996 through December 31, 1997, for tax of $2,915.00, and interest, updated through January 31, 2000, of $712.62, totaling $3,627.62, should be and is hereby **AFFIRMED**.

It is **ALSO** the **DECISION** of the State Tax Department that the purchasers' use tax assessment issued against The Academy, Inc., dba Lady Godivas, for the period of July 1, 1996 through December 31, 1997, for tax of $2,776.00, and interest, updated through January 31, 2000, of $633.89, totaling $3,409.89, should be and is hereby **AFFIRMED**. It is **FINALLY DETERMINED** that the interest on each of these tax liabilities is **ABATED** for the period of February 1, 2000 through the date of this Administrative Decision, pursuant to the provisions of W. Va. Code § 22-20-76(a)(2).

***13** George V. Piper
Administrative Law Judge

2000 WL 33300345 (W.Va.Off.Hrg.App.)

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EXHIBIT 31

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Josephine Tijerino, Plaintiff, v. Stetson Desert Project LLC, et al., Defendants.	No. CV-15-2563-PHX-SMM (Lead) Nos. CV-15-2564-PHX-SMM, CV-16-0408-PHX-SMM (Consolidated) **ORDER**

Before the Court is Plaintiff Jane Roe Dancer's ("Plaintiff") Brief RE: Dancers' Employee Status Under the FLSA's Economic Realities Test. (Doc. 41.) Defendants Stetson Desert Project LLC, Cory Anderson, and Cary Anderson ("Defendants") filed a Response to Plaintiff's Brief. (Doc. 46.) The Court now issues the following ruling.

I. BACKGROUND

Defendants own and operate Le Girls Gentlemen's Club located in Phoenix, Arizona. (Doc. 8 at 1.) Plaintiff is a former dancer at Le Girls (Doc. 16 at 1; Doc. 19 at 3), and brings this lawsuit as an individual, as a collective action on behalf of all those similarly situated individuals under § 216(b) of the Fair Labor Standards Act ("FLSA"), and as a class action on behalf of all those similarly situated individuals under Fed. R. Civ. P. 23 to remedy violations of the Arizona Minimum Wage Act and Arizona common law (Doc. 1 at 2).

Plaintiff filed a motion requesting that the Court enter an order conditionally certifying a FLSA opt-in class in connection with Count I (Failure to Pay Minimum

Wage - FLSA) of Plaintiff's Complaint, and authorizing notice to putative class members regarding their opt-in rights. (Doc. 16.)

On December 6, 2016, the Court denied Plaintiff's motion, finding it premature. (Doc. 21.) The Court explained that "[b]efore the Court will rule on a motion for conditional class certification, Plaintiff must satisfy her initial burden of alleging specific facts that permit an inference that she is an "employee" (and the Defendants her "employer") within the meaning of the FLSA." (Id. at 3-4.) The Court then ordered Plaintiff to brief the issue of whether Plaintiff and her putative class are employees within the meaning of FLSA under the economic realities test set forth in Real v. Driscoll Strawberries Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979). (Id. at 4-5.)

In response to the Court's Order, Plaintiff filed the instant brief,[1] to which Defendants filed a Response (Doc. 46).

II. THE FAIR LABOR STANDARDS ACT (FLSA)

The FLSA mandates that employers pay employees certain minimum and overtime wages, and employ employees for no more than a certain amount of hours each week. 29 U.S.C. § 206-207 (2016). The FLSA penalizes employers for violations of its provisions. Id. § 216.

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" Id. § 203(d). Courts have adopted "an expansive interpretation of 'employer' and 'employee' under the FLSA, in order to effectuate the broad remedial purposes of the Act." Real, 603 F.2d at 754. Consequently, employees are those "who as a matter of economic reality are dependent upon the business to which they render service." Id. (quoting Bartels v. Birmigham, 332 U.S. 126, 130 (1947)). Whether an individual is an employee or an independent contractor for purposes of the FLSA is a question of law. See Bonnette v. Ca. Health &

[1] On the same day Plaintiff filed the instant brief, she also filed a Renewed Motion for Conditional Certification and to Authorize Notice to Putative Class Members. (Doc. 40.)

Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983).

Courts consider a number of factors to assess the economic reality between the putative employee and putative employer for purposes of the FLSA. Real, 603 F.2d at 754. The factors include:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
> (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
> (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
> (4) whether the service rendered requires a special skill;
> (5) the degree of permanence of the working relationship; and
> (6) whether the service rendered is an integral part of the alleged employer's business.

Id. The presence of any one of the above factors is not dispositive of whether an employee/employer relationship exists; rather, whether such a relationship exists depends "upon the circumstances of the whole activity." Id. (quoting Rutherford, 331 U.S. at 730). Importantly, a contractual label does not determine employment status, nor does the subjective intent of the parties to a labor contract override the economic realities reflected in the factors described above. Id. at 755 (internal citations omitted).

Although this District and the Ninth Circuit appear not to have examined the relationship between exotic dancers and the clubs where they perform under the factors set forth in Real, numerous courts outside of this District and Circuit have examined the relationship under factors similar to those set forth in Real. See e.g. Shaw v. Set Enterprises, Inc., No. CV-15-65152, 2017 WL 1380774, at *3 (S.D. Fla. Mar. 17, 2017) (analyzing relationship between exotic dancers and clubs under Scantland v. Jeffry Knight, Inc., 721 F.3d 1308 (11th Cir. 2013)); Lester v. Agment LLC, No. CV 1:15-886, 2016 WL 1588654, at *4 (N.D. Ohio April 20, 2016) (analyzing relationship between exotic dancers and clubs under Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984)); Hanson v. Trop, Inc., 167 F. Supp. 3d 1324 (N.D. Ga. 2016) (analyzing relationship between exotic dancers and clubs under Scantland); Foster v. Gold & Silver Private Club, Inc., No. CV 7:14-00698, 2015 WL 8489998, at *3 (W.D. Va. Dec. 9, 2015) (analyzing relationship between exotic dancers and clubs under Schultz v. Capital Int'l Sec., Inc.,

466 F.3d 298, 304 (4th Cir. 2006)); Mason v. Fantasy, LLC, No. CV-13-02020-RM, 2015 WL 4512327, at *8 (D. Colo. July 27, 2015) (analyzing relationship between exotic dancers and clubs under Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1346 (10th Cir. 1998)); Verma v. 3001 Castor, Inc., No. CV-13-3034, 2014 WL 2957453, at *5 (E.D. Pa. June 30, 2014) (analyzing relationship between exotic dancers and clubs under Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985)); McFeeley v. Jackson Street Entertainment, LLC, 47 F. Supp. 3d 260 (D.Md. 2014) (analyzing relationship between exotic dancers and clubs under Schultz); Hart v. Rick's Cabaret Intern., Inc., 967 F. Supp. 2d 901 (S.D.N.Y. 2013) (analyzing relationship between exotic dancers and clubs under Brock v. Superior Care, 840 F.2d 1054 (2d Cir. 1988)); Doe v. Cin-Lan, Inc., No. CV-08-12719, 2008 WL 4960170, at *6 (E.D. Mich. Nov. 20, 2008) (analyzing relationship between exotic dancers and clubs under Donovan)).

In each of the foregoing cases, the courts found an employee-employer relationship to exist. Notably, in all but one of these cases,[2] the clubs were found to exert "substantial," "significant," "high," or a "tight" amount of control over their dancers.[3]

These cases are persuasive but non-binding upon this Court. Nevertheless, an important question will be what difference, if any, exists between the economic realities in the foregoing cases and the economic reality in this case.

III. DISCUSSION

Before resolving the issue before it, the Court will first address an argument raised by Plaintiff prior to his arguing the status of Plaintiff as an employee under the FLSA.

Plaintiff argues that it is improper for the Court to determine whether Plaintiff is

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[2] In Doe, the District Court found that the evidence on the control factor was "mixed." The District Court ultimately concluded that, on balance, the control factor weighed in favor of the dancer's likelihood of proving that she was an employee, because "[h]er autonomy in performing her work [was] undermined too much by [the Club's] entirely discretionary control over what she [could] charge third-party customers." Doe, 2008 WL 4960170, at *17.

[3] Cf. Home Insur. Co. v. Industrial Commission, 599 P.2d 801, 803 (Ariz. 1979) (explaining that the distinction between an employee and an independent contractor turns on the employer's right to control the employee).

an employee at the conditional certification stage because "it goes to the heart of the merits of this case and is not properly considered as part of the initial 'notice stage' determination of whether Plaintiffs are 'similarly situated' for purposes of conditionally certifying an FLSA collective action." (Doc. 41 at 2 (citing Colson v. Avnet, Inc., 687 F. Supp. 2d 914, 925-26 (D. Ariz. 2010).) The Court disagrees.

First, whether Plaintiff is an employee does not go "to the heart of the merits of this case"; rather, it is an antecedent issue. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947) (explaining that whether the acts charged in a complaint violate the FLSA depends on whether Plaintiff is an employee and Defendant her employer); accord Dellinger v. Science Applications Intern. Corp., 649 F.3d 226, 228 (4th Cir. 2011) ("Consistent with the FLSA's purpose to regulate the employer-employee relationship and the relevant text of the Act...only employees can sue their current or former employers[.]"). If Plaintiff is not an employee under the FLSA, then there can be no alleged violation of the FLSA, and therefore no conditional certification of a FLSA collective action.

Second, the rule set forth in Colson – that it is not the court's role to resolve factual disputes or decide substantive issues going to the ultimate merits of the case at the conditional certification stage – applies to the court's "similarly situated" determination, not to the court's employee determination. See Colson, 687 F. Supp. 2d at 924-26. Plaintiff fails to recognize that the question of whether Plaintiff and her putative class are "similarly situated" for purposes of conditionally certifying an FLSA collective action is not the same question as whether Plaintiff is an employee within the meaning of the FLSA. Indeed, they are separate inquiries analyzed under different legal standards. Compare Colson, 687 F.Supp.2d at 924-26 (explaining that Plaintiff and her proposed class members are "similarly situated" within the meaning of § 216(b) if the evidence shows "some factual nexus which brings the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice") with Real, 603 F.2d at 754 (explaining that Plaintiff is an employee if she "as a matter of economic

reality [is] dependent upon the business to which [she] renders service") (quoting Bartels v. Birmigham, 332 U.S. 126, 130 (1947).) The rule set forth in Colson therefore does not apply to the Court's employee determination.

Third, as stated by the Court in a prior Order (Doc. 21), it is apparent from Plaintiff's Motion for Conditional Certification and to Authorize Notice to Putative Class Members (Doc. 16), Defendant's Response (Doc. 19), and Plaintiff's Reply (Doc. 31), that Plaintiff's status as an employee or independent contractor of the Club is unsettled. Accordingly, it was incumbent upon the Court to order briefing on the issue prior to considering Plaintiff's motion for conditional class certification.

The Court now turns to the issue of whether Plaintiff and her putative class are employees within the meaning of FLSA under the economic realities test set forth in Real.

Factor 1: The degree of the alleged employer's right to control the manner in which the work is to be performed

The first factor of the economic realities test is the "degree of the alleged employer's right to control the manner in which the work is to be performed." Real, 603 F.2d at 754. An example of a club exerting significant control over dancers includes a Club requiring dancers: to follow "Entertainer Rules" regulating appearance and behavior, and terminating dancers for violations thereof; to pay escalating house fees based on time of arrival; to sign in for shifts; to follow procedures for stage rotations; and to charge minimum fees as set by the club. Shaw, 2017 WL 1380774, at *4. Another example includes a club requiring dancers: to consent to random drug testing; to check-in upon arrival; to pay a house fee based on arrival time; to work at least three shifts per week; to attend annual parties and other mandatory meetings; to not leave the Club once they have arrived; to pay tip-outs and to submit to breathalyzer tests prior to leaving; and to perform stage dances when called upon to do so by the DJ, pursuant to a rotation system controlled by the DJ. Hanson, 167 F.Supp. 3d at 1329-1330. A third example includes a club requiring dancers to complete shifts and pay fines for leaving early, and

subjecting dancers to behavioral rules, including rules prohibiting drugs and alcohol and restricting attendance of significant others. Foster, 2015 WL 8489998, at *4. A final example includes a club where dancers choose when they will work based upon availability set by the club; where dancers are required to work a certain amount of days each month; where dancers are required to notify the club in advance of their preferred work schedules; where dancers are required to check-in upon arriving for their shifts; where dancers are required to enter the club through a certain entrance; where dancers are assessed fines for late appearances and early departures; and where dancers' physical appearance and conduct is regulated by instructions set by the club. Verma, 2014 WL 2957453, at *5-*6.

Plaintiff argues that Defendants exert control over the dancers by setting up and controlling the physical space where the dancers perform, which includes specifying certain areas for different dances (stage dances, private "lap" or "couch" dances, VIP dances, and VIP booth dances); controlling and monitoring access to the VIP area and keeping track of the duration of VIP performances; and setting up a rotation for all dancers who appear on the stages. (Doc. 41 at 5-6, citing Doc. 41-1 Exhibit A.)

Defendants argue that they exert minimal control over the dancers. In support, they state that: the Club maintains no schedule for dancers, rather, dancers are free to appear or not appear at the Club whenever and for however long they desire; the Club does not impose rules on dancers as to how to dance or interact with patrons, rather, the only rules imposed are those imposed by the City of Phoenix; the Club has no internal set of rules or standards for dancers, and there is no evidence in the record that any dancer was ever disciplined or fined for non-compliance with any Club internal rules; the Club does not control or monitor what dancers receive in gratuities or report this information to taxing authorities; and the Club does not dictate how much a dancer may charge a patron for a dance except in the VIP area. (Doc. 46 at 4-8, citing Doc. 47 Exhibits.)

In addition, Defendants state that dancers are free to leave the premises and take a break at any time without having to provide an excuse or reason for doing so; dancers are

free to dance at other establishments, which many do or did; dancers are free to take long hiatuses from appearing at the Club, and Plaintiff testified that she went weeks and sometimes months in between appearances at Le Girls; dancers choose which side of the Club they will appear (topless side or fully nude), and Plaintiff testified that she appeared on both sides of the Club; and dancers receive no wages from Defendants and never have in the decades the establishment has been in operation. (Id.) Defendants also state that dancers are free to use, or refrain from using, any of the Club's areas for whatever purpose she chooses – whether it be to dance or to interact with patrons without performing. (Id.) Defendants further argue that dancers are free to decide where in the Club they will perform, and cites Plaintiff Toliver's testimony, wherein she stated that she preferred not to use the VIP areas because she could then collect directly from patrons, as opposed to having to go through the Club for collection of a VIP fee, even though she could earn more per dance in the VIP areas. (Id.) Finally, Defendants state that dancers are not obligated to participate in the main stage rotation, and that the purpose of the rotation is to allow equal time for all performers who wish to appear on the mainstage. (Id.)

On this record, the Court finds that the dancers at Le Girls have overwhelming autonomy, and that the Club exerts minimal control over them. Accordingly, the Court finds that this factor weighs heavily in favor of a finding that Plaintiff is an independent contractor rather than an employee. The Court adds that this factor is entitled to significant weight in the overall analysis and causes subsequent factors to have an inconsequential impact on the overall analysis, or to carry only minimal weight.

Factor 2: The alleged employee's opportunity for profit or loss depending upon his managerial skill

The second factor of the economic realities test is "the alleged employee's opportunity for profit or loss depending upon his managerial skill." Real, 603 F.2d at 754. Most courts have ruled in favor of dancers on this factor, finding that the clubs' investments, and returns on those investments, outweighed the relatively minor

investments and returns of their dancers. See Hart, 967 F.Supp.2d at 919-20 (finding that dancers had little opportunity for profit or loss despite setting their own schedules and cultivating relationships with clients as to encourage them to visit more often and tip more, compared to the club's opportunity for profit or loss based upon its ability to set business hours, choose the club's location, determining its aesthetics and decor, paying wages to other staffers, and purchasing the bar and kitchen supplies); see also Verma, 2014 WL 2957453, at *7; Foster, 2015 WL 8489998, at *4; McFeely, 47 F.Supp.3d at 270; Lester, 2016 WL 1588654, at *6.

Plaintiff argues that the dancers have "no opportunity for profit depending on managerial skill, and no opportunity for loss whatsoever (other than the fees paid to the Club)." (Doc. 41 at 6.) In support, Plaintiffs state that dancers have no control over determining the physical location of the club and are not responsible for paying any facility expenses relating to the operation of the Club; Defendants maintain exclusive control over major determinants of customer volume, such as marketing, advertising, business hours, facility maintenance, aesthetics, beverage inventory, and setting of cover charge; Defendants hired, supervised, and paid all managers, hosts, bartenders, waitresses, and other employees necessary to operate the Club; dancers do not control the prices that the Club "recommends" to customers for private or VIP dancers; patrons cannot pay dancers by credit card for private "lap" dances; patrons cannot use credit cards to pay dancers additional amounts for VIP dances; and any credit card "tip" for VIP dances goes to VIP host or manager. (Id. at 6-7, citing Doc. 41-1 Exhibits.)

Defendants counter that the dancers have a significant opportunity for profit or loss. In support, Defendants argue that dancers are free to determine how much they will accept from patrons for performing, and free to determine when, how, and where they will perform. (Doc. 46 at 8-10.) Defendants also dispute Plaintiff's statement that patrons cannot use credit cards to pay dancers in the VIP areas, arguing that customers are free to obtain a cash advance on their credit cards to pay a cash tip to the dancer. (Id. at 9.) Defendants also argue that the dancers "are free to reach any arrangement they may want

with patrons both in the VIP areas of the Club and elsewhere on the premises." (Id.) Defendants also emphasize that dancers are free to appear at other venues, and that dancers can maintain a list of regular customers in order to maximize her profit. In other words, how dancers choose to manage their time and cultivate regular clients will determine their opportunity for profit and loss at Le Girls. (Id. at 10.)

The evidence is clear that Defendants bore the greater opportunity for profits and losses since they have a greater role than the dancers do in drawing customers to Le Girls: Defendants chose the location of the Club, set its business hours, maintain the facility, oversee its aesthetics, manage the Club's marketing and advertising, and control the Club's food and beverage inventory. (Doc. 41-1 at 5-8.) Given the autonomy of the dancers (as described under the "control" factor analysis), however, it is unsurprising that this is the case. Therefore, the Court finds that this factor is inconsequential to the overall analysis.

Factor 3: The alleged employee's investment in equipment or materials required for his task, or his employment of helpers

The third factor of the economic realities test is "the alleged employee's investment in equipment or materials required for his task, or his employment of helpers." Real, 603 F.2d at 754. In analyzing this factor, courts look to the capital investments made in the club by the respective dancers and club owners. McFeeley, 47 F.Supp.3d at 217. In cases such as the one at bar, courts have concluded that a dancer's investment is minor compared to the club's investment. See Reich v. Circle C Investments, Inc., 998 F.2d 324, 324-28 (5th Cir. 1993); McFeeley, 47 F.Supp.3d at 271; Clincy v. Galardi South Enterprises, Inc., 808 F. Supp. 2d 1326, 1347 (N.D. Ga. 2011).

In support of her argument that dancers' investment is "miniscule" compared to Defendants' capital investment in the club, Plaintiff cites the fact that dancers are only required to cover the cost of their makeup and clothing. (Doc. 41 at 7; citing Doc. 41-1 at 15.) Plaintiff then states that courts in similar cases have found that this factor favors a finding that exotic dancers are employees. (Doc. 41 at 7, citing Reich, 998 F.2d at 324-

28; McFeeley, 47 F.Supp.3d at 271.)

In response, Defendants state that the club generates approximately $1.5 million annually, but Plaintiffs have not provided any record as to the amount of their investment in their performance activities at Le Girls. (Doc. 46 at 10.) Defendants also argue that given the flexible arrangement between dancers and Le Girls, "framing a comparison of relative investments between the Club and dancers is irrelevant and inapposite." (Id.) The Court agrees. If Defendants have no meaningful control over their dancers, it is not surprising that the dancers would not invest heavily in the establishment. Therefore, the Court finds that this factor is inconsequential to the overall analysis.

Factor 4: Whether the service rendered requires a special skill

The fourth factor of the economic realities test is whether the service rendered requires a special skill. Real, 603 F.2d at 754. "Other courts have held that there is no special skill required to become an exotic dancer, pointing to the lack of instruction, certification, and prior experience required to become an exotic dancer." McFeeley, 47 F.Supp.3d at 272 (further citations omitted).

In support of her argument that exotic dancing requires no special skill, Plaintiff cites two cases where courts have made such a finding: Butler v. PP&G, Inc., No. CV-13-430, 2013 WL 5964476, at *5 (D. Md. Nov. 7, 2013), and Stevenson v. Great American Dream, Inc., No. CV 1:12-3359, 2013 WL 6880921, at *5 (N.D. Ga. Dec. 31, 2013). (Doc. 41 at 7.) Plaintiff also cites the fact that Le Girls does not require its dancers to have any formal dance training or certification. (Id. at 7, citing Doc. 41-1 at 12-14.)

Defendants counter that it is an "undeniable skill set" for a dancer to excel at performing and interacting well with patrons. (Doc. 46 at 11.) Defendant urges this Court to depart from other courts which have dismissed exotic dancing as requiring little to no specialized skill. (Id.) Defendant also offers the creative argument that plumbers, handymen, and standup comedians may not have special training but could be deemed to possess "special skills." (Id.)

The Court is inclined to follow the reasoning of other courts on this matter. Other

than Defendants' own opinion, there is no evidence to show that exotic dancing requires a special skill. Defendant also fails to cite to any controlling or persuasive authority in support of his argument that exotic dancing is an "undeniable skill set." The Court also rejects the notion that performing and interacting well with patrons is a special skill. (See Lester, 2016 WL 1588654, at *5 (noting that every court to consider a "hustling" argument by a strip-club proprietor has rejected it).)

On the other hand, there is evidence showing that exotic dancing does not require a special skill. Defendants do not require that their dancers have any formal training or dance certifications, or provide references. (Doc. 41-1 at 14.) Defendants admit that dancers are free to dance how they choose, so long as they comply with the City of Phoenix's rules and regulations. (Doc. 46 at 11.) Joshua Thornton also testified that all that is required of a woman with no prior experience to try out to be an exotic dancer is that she do a "trial run." (Doc. 41-1 at 13.)

For these reasons, the Court finds that there is a minimal degree of skill required to be an exotic dancer at Le Girls. Thus, this factor weighs in favor of employee status.

Factor 5: The degree of permanence of the working relationship

The fifth factor of the economic realities test is the degree of permanence of the working relationship. Real, 603 F.2d at 754. "Generally, a long, exclusive relationship weighs in favor of finding that the individual is an employee." Lester, 2016 WL 1588654, at *5 (further citation omitted). However, since exotic dancers tend to be itinerant, many courts that have addressed whether dancers are employees have accorded this factor only modest weight. Id.

Plaintiff argues that even if Le Girls and its dancers could terminate their relationship at any time, and even if it is unknown how long dancers tended to remain at Le Girls, that this factor is entitled to only modest weight. (Doc. 41 at 8, citing cases.)

Defendant argues when dancers perform at multiple clubs, this factor weighs in favor of independent contractor status. (Doc. 46 at 12, citing Clincy v. Galardi South Enterprises, Inc., 808 F. Supp. 2d 1236 (N.D. Ga. 2011).) Defendant points to Plaintiff

Tijerno's testimony, in which she stated that she appeared at over a dozen clubs across multiple states during her performing career. (Id., citing Doc. 47-1 at 39-56.)

The Court finds that these facts weigh in favor of independent contractor status. Per the License Agreement, dancers are "free to perform at any other adult entertainment venue" while performing at Le Girls. (Doc. 47-1 at 5.) Plaintiff Tijerno testified that she performed at Le Girls and other clubs over the same period of time (Id. at 19-27), and Plaintiff Toliver likewise testified that she appeared at more than one club at a time (Id. at 60). The License Agreement also permits a dancer to go up to twelve months without appearing at Le Girls, and states that the relationship between a dancer and Le Girls can be terminated at any time. (Id. at 2.) For these reasons, the Court finds that this factor weighs in favor of independent contractor status.

Factor 6: Whether the service rendered is an integral part of the alleged employer's business

The sixth factor of the economic realities test is whether the service rendered is an integral part of the alleged employer's business. Real, 603 F.2d at 754.

Plaintiff argues that exotic dancing is an integral part of Le Girls, as the name of the Club reflects this reality, and Defendants' website markets itself as a venue where patrons can enjoy "sexy" topless and nude female dancers. (Doc. 41 at 8-9, citing Le Girls' website.) Plaintiff also cites a number of cases in support of the proposition that courts have "emphatically rejected the notion that exotic dancers are anything less than integral to a strip club." (Id., citing cases.)

Defendants admit that dancers are relevant to its operations, but also argue that musical performances are also relevant to its operations. (Doc. 46 at 12.)

The Court finds that exotic dancing is, undoubtedly, an integral part of Le Girls. This factor thus weighs in favor of employee status.

Consideration of all factors

To summarize, weighing in favor of independent contractor status is the fact that Defendants exercise virtually no control over the manner in which the dancers' work is

performed, and the fact that there is a lack of permanence of the working relationship between Defendants and the dancers. The absence of meaningful control carries substantial weight under the Real test, and decreases the weight accorded to all other factors. (See supra, page 8.)

Weighing in favor of employee status is the fact that the service rendered by the dancers does not require a special skill, and the fact that the service rendered is an integral part of Defendants' business.

The facts having no impact on the overall analysis include the dancers' opportunity for profit or loss depending upon their managerial skill and the dancers' investment in equipment or materials required for their task, or their employment of helpers.

Accordingly, the Court finds that, on balance, the factors weigh in favor of independent contractor status.

IV. CONCLUSION

Although Plaintiff urges this Court to find an employee/employer relationship on the basis that so many other courts have found so in cases involving exotic dancers and the clubs where they perform, Plaintiff's reliance on these cases is misplaced; the facts of the instant case are materially distinguishable from the facts of these other cases. Most significant is the fact that in this case, Defendants exert virtually no control over their dancers, as discussed under the first Real factor.

The Court thus finds that the service rendered by Plaintiff at Le Girls is that of an independent contractor. Having concluded that Plaintiff is not an employee of Le Girls for purposes of the FLSA, the Court need not consider her Renewed Motion for Conditional Certification and to Authorize Notice to Putative Class Members. (Doc. 40.)

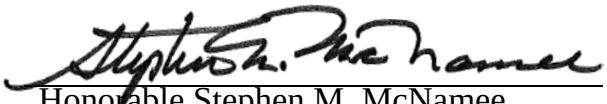
Accordingly,

IT IS HEREBY ORDERED denying Plaintiff's Renewed Motion for Conditional Certification and to Authorize Notice to Putative Class Members. (Doc. 40.)

IT IS FURTHER ORDERED requiring that Plaintiff show cause by **Friday,**

July 14, 2017, why this case should not be dismissed with prejudice for lack of subject matter jurisdiction. Defendant shall respond to Plaintiff's show cause brief by **Friday, July 28, 2017**. There shall be no reply.

Dated this 21st day of June, 2017.



Honorable Stephen M. McNamee
Senior United States District Judge

EXHIBIT 32

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

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DISTRICT COURT

CLARK COUNTY, NEVADA

KARLA BARBER, BRITTANY MORRIS, JACQUELINE FRANKLIN, STACIE ALLEN, ASHLEY HOLZMAN, AND DANIELLE LAMAR, individually, and on behalf of Class of similarly situated individuals, **Plaintiffs,** vs. D. 2801 WESTWOOD, INC., a Nevada Domestic Corporation (d/b/a TREASURES GENTLEMEN'S CLUB AND STEAKHOUSE, a/k/a TREASURES LAS VEGAS); D. WESTWOOD INC., a Nevada Domestic Corporation (d/b/a TREASURES GENTLEMEN'S CLUB AND STEAKHOUSE, a/k/a TREASURES LAS VEGAS), DOE CLUB OWNER, I-X, DOE EMPLOYEE I-X, ROE CLUB	Case No. A-14-709238-C Dept. No. XXVIII **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' COUNTER-MOTION FOR SUMMARY JUDGMENT AND MOTION FOR CLASS CERTIFICATION**

☐ Voluntary Dismissal	■ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

OWNER, I-X and ROE EMPLOYER, I-X,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' COUNTER-MOTION FOR SUMMARY JUDGMENT AND MOTION FOR CLASS CERTIFICATION

On May 30, 2017 at 9:00 am, this Court heard Plaintiffs' Motion for Class Certification, Defendants' Motion for Summary Judgment and Plaintiffs' Counter Motion for Summary Judgment. Allison L. Kheel and Whitney Selert, from Fisher Phillips, LLP, and Casey Wallace, of Feldman & Feldman, appeared on behalf of the Defendants; and Andrew Sterling, of the law firm of Rusing, Lopez & Lizardi, PLLC, appeared on behalf of the Plaintiffs. Having carefully considered the written briefs, arguments of counsel, and all other evidence of record herein, this Court grants Defendants' Motion for Summary Judgment and denies Plaintiffs' Counter-Motion for Summary Judgment and Motion for Class Certification.

I. DISCUSSION

Plaintiff Karla Barber purports to represent a class of similarly situated exotic dancers who performed at Defendants' club, Treasures (hereafter "the Club") in Las Vegas, Nevada. Plaintiffs claim they were misclassified by the Club as independent contractors, but are actually employees entitled to a minimum wage. The Club, by contrast, argues that Plaintiff Barber and all other exotic dancers who perform at Treasures are independent contractors as evidenced by the written agreements signed by those dancers acknowledging that status and by virtue of the way these parties conduct this business relationship.

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A. Procedural Posture:

Plaintiffs filed their original Complaint on November 2, 2014 alleging claims on behalf of a class seeking unpaid wages and overtime under: 1) NRS § 608.250; 2) NRS §§ 608.040-050; 3) Conversion; 4) Unjust Enrichment; and 5) Declaratory and Injunctive Relief. On February 19, 2015, Plaintiffs filed their First Amended Complaint ("FAC") asserting class claims for unpaid wages and overtime under: 1) the Minimum Wage Amendment ("MWA") to the Nevada Constitution; 2) NRS § 608.250; 3) NRS §§ 608.040-050; and 4) Unjust Enrichment. Defendants filed their Answer to the FAC on April 29, 2015.

Plaintiffs moved to certify their claims as a class action on April 27, 2016. Defendants opposed that motion on June 27, 2016. Plaintiffs then filed a Motion to Proceed Pseudonymously (i.e., without disclosing the true identities of the putative class representatives) and for a Protective Order on August 10, 2016. On August 10, 2016, Defendants filed a Motion To Dismiss Jane Doe Dancers I through VIII and on August 12, 2016 Defendants filed a Motion To Compel Arbitration. During the hearing of those motions on October 4, 2016, Plaintiffs withdrew their Motion for Class Certification. This Court denied Plaintiffs' Motion to Proceed Pseudonymously, granted Defendants Motion to Compel Arbitration of claims by those plaintiffs who signed arbitration agreements and granted Defendants' Motion to Dismiss the Doe Dancers with leave for Plaintiffs' to amend.

Plaintiffs then filed a Third Amended Complaint (the "TAC") on December 16, 2016, again asserting class action claims to recover unpaid wages and overtime under: 1) the MWA to the Nevada Constitution; 2) NRS § 608.250; 3) NRS §§ 608.040-050; and 4) Unjust Enrichment. On December 23, 2016 Defendants filed a Motion To Dismiss. On February 14, 2017 this Court granted Defendants' Motion to Dismiss the NRS 608 claims (the second and third causes of action under the TAC) and held that a two year statute of limitation applied to the first cause of action under the MWA, both of which

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issues were stipulated by Plaintiffs. Defendants then filed their Answer to the TAC on February 16, 2017

On March 28, 2017 Plaintiffs renewed their Motion for Class Certification. On April 27, 2017, Defendants moved for summary judgment on the remaining claims under the MWA (first cause of action) and unjust enrichment (fourth cause of action). On May 15, 2017 Plaintiffs opposed that motion and filed a Counter Motion for Summary Judgment on those same claims.

B. Undisputed Facts:

In their written briefs both parties provided statements of undisputed facts with citations to the record and supporting exhibits. Both parties addressed the other's statement in their briefs. During the Hearing, Defendants argued that although Plaintiffs purported to dispute certain facts, in virtually every instance the fact in question was either not actually disputed, did not involve a material fact or was based on unreliable and inadmissible evidence from which no reasonable juror could conclude that fact was actually disputed.[1] During that argument, Plaintiffs stipulated to Defendants' statement of undisputed facts, arguing they still were entitled to judgment as a matter of law as discussed, *infra*. *See* Hearing Transcript at 20:14; 23:4. Thus, the following material facts, as stipulated by both parties, are undisputed:

Karla Barber, the only remaining named Plaintiff and putative class representative, is an exotic dancer who periodically performed at Treasures and other exotic dance establishments. As a condition of working at the Club, Barber and other dancers sign a written Entertainer/Independent Contractor Agreement (the "Agreement"), some version of which has been in effect since at least 2010.[2] That

[1] *See* Defendants' Reply in Support of Motion For Summary Judgment at 4:17-7:7; *see also* Hearing Transcript at 13:9. The Court agrees that Plaintiffs failed to present evidence from which a reasonable juror could conclude that any material fact was genuinely in dispute, but need not address each and every alleged dispute in light of Plaintiffs' stipulation to those facts.

[2] The specific record references supporting these undisputed facts are set forth in Defendants' Motion for Summary Judgment, supporting Reply brief or the extant record and will not be repeated here.

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Agreement, among other things, includes the following relevant language regarding the nature of the intended relationship between the parties: "Entertainer fully understands, acknowledges and agrees that he or she is an independent contractor only, and under no circumstances is an employee or agent of Corporation. . ." Ex. I to Def.s' Reply, p. Supp. 566 at ¶ 1. While Plaintiff Barber now claims she is an "employee" instead of an independent contractor, other dancers disagree with that characterization and acknowledge their intent and preference for independent contractor status. (*See* Ex. D, p. 202 at ¶ 6 and Ex. E, p. 208 at ¶ 5).

Every Dancer who signed the Agreement may perform at Treasures, but also may perform at other clubs around the country and the world. There is no exclusivity requirement requiring those dancers to perform only for Treasures. Many Dancers who perform at Treasures regularly perform at other clubs and Dancers from other clubs, including other clubs in Las Vegas, other cities and around the world come to Las Vegas to perform at Treasures at their discretion and based on their business judgment.

The Club requires every dancer to obtain a business license as a condition of performing at Treasures. Plaintiff Karla Barber had a business license at all times relevant to this action and filed taxes reporting her income earned in that capacity. The Club also requires Dancers to obtain and hold a valid Non-Gaming Work Card ("Sherriff's Card") in accordance with LVMC § 6.35.090(A), which is required, issued and regulated by the City of Las Vegas, Nevada, where the Club is located. Plaintiff Karla Barber had a valid work card at all times relevant to this action.

The Club is open from 4:00pm to 6:00am daily (4:00pm to 8:00am on weekends). While open, the club sells food and alcohol while exotic Dancers market their performances to club patrons. The Club does not have schedules requiring any Dancer to work on any given day or during any given time. When the Club is open, Dancers who wish to market their performances at the Club pay an access fee (also known as a "house-fee") which varies depending on the time of day or night that access

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is sought. Dancers receive a flat discount on the access fee if they agree to perform in the stage rotation. Dancers can choose not to perform a stage rotation with no penalty. Every Dancer who pays to access the Club is required to "sign in" using her work card, which is a legal requirement of the City of Las Vegas. Once access is granted, the Dancer decides whether to dance, when to dance, for whom to dance, how long to dance, how many dances to perform and when to go home. The Club does not strictly track when any Dancer leaves the Club, but once they leave, they are prohibited from re-accessing the Club twice on the same night to deter prostitution.

The Club does not set any fixed fees for any dance performances. Dance fees are negotiated directly by the Dancers with the Club's patrons and vary based on what the Dancer chooses to charge. The "industry standard" for a floor dance is $20, but can vary up or down if the Dancer chooses to negotiate a different rate. Most Dancers perform more than one dance every hour, but Dancers are not required to perform any dances.

The Club does not require Dancers to report their earnings to the Club and the Club does not otherwise track how much money dancers take home on any given night. The Club does not take any portion of the fees negotiated or received by the Dancers for their performances unless both the Dancer and patron choose to use the Club's "Dance Dollars," which is a form of scrip created by the Club to facilitate credit card transactions.[3] Dancers are not required to accept Dance Dollars and can choose to conduct business only with patrons paying on a cash basis without any penalty imposed by the Club. The Club does not have a dress code for Dancers and does not interfere with the Dancers' choice of costume, makeup, perfume, or dance routines, all of which are within the discretion and control of each Dancer based on her own business judgment. The Club does not allow Dancers to violate state and local laws regarding prostitution or other legally prohibited conduct, but otherwise does not restrict or limit

[3] A transaction fee is charged to patrons buying "Dance Dollars" and Dancers redeeming those "Dance Dollars".

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Dancers in the marketing of their performances to Club patrons or the fees negotiated for their performances, which can vary depending on each Dancer's negotiating skill.

C. Standard for Summary Judgment:

Because there is no dispute as to the operative material facts as set forth above, this Court proceeds directly to the determination of whether, given those facts, either party is entitled to judgment as a matter of law.

D. Summary of the Parties' Positions:

Defendants argue that the undisputed facts compel a "conclusive presumption" under NRS § 608.0155 that these Dancers are independent contractors. Defendants argue in the alternative that even if the Court applies the "economic realities" test articulated in *Terry*, these Plaintiffs are still independent contractors as a matter of law.

Plaintiffs argue that NRS § 608.0155 cannot apply to their MWA claim as a matter of law because the statutory definition of independent contractor impermissibly conflicts with, and restricts, the MWA's definition of employee, which somehow incorporates the "economic realities" test and compels the conclusion that exotic dancers are always employees, regardless of any factual distinctions between the clubs where they perform.

II. FINDINGS AND CONCLUSIONS:

A. The Economic Realities Test Determines the Proper Classification of the Exotic Dancers In This Case

This Court finds that NRS § 608.0155, enacted in 2015, cannot apply to this case, which was filed in November of 2014.[4] There is no evidence the statute was intended to apply retroactively. Thus, even if the undisputed facts would compel a "conclusive presumption" that these exotic dancers are independent contractors after applying the factors outlined in NRS § 608.0155, that presumption is not available in

[4] All Plaintiffs who performed after July 1, 2014, signed Agreements containing Arbitration provisions and were compelled to arbitrate their claims by this Court's Order of Nov. 8, 2016.

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this case.

Likewise, this Court rejects Plaintiffs' argument that the MWA's definition of "employee" compels the conclusion that exotic dancers must always be deemed employees as a matter of law and can never be independent contractors. The Nevada Supreme Court has already correctly observed that the MWA's definition of employee is an ambiguous tautology, unhelpful in resolving the question before the court. *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 955, 130 Nev. Adv. Op. 87, *6 (Nev. 2014), reh'g denied (Jan. 22, 2015). ("Still, because of the overlap between the Minimum Wage Amendment and NRS Chapter 608, the Minimum Wage Amendment's definition of employer could be instructive, were it not equally, if not more, tautological than NRS 608.011—'[e]mployer' means any ... entity that may employ individuals.' Nev. Const. art. 15, § 16(C)").

Moreover, contrary to Plaintiffs' assertions, no court, including *Terry* or any of the other cases string cited by the Plaintiffs (or any known statute or regulation for that matter) has ever held that there can never be a valid independent contractor relationship formed between exotic dancers and exotic dance establishments as a matter of law. Indeed, *Terry* specifically rejected such overbroad industry-based arguments. *Terry*, 336 P.3d at 957, 130 Nev. Adv. Op. 87 at *6 (". . . deciding that all who render service to an industry would qualify [as employees], a result that . . . our case law specifically negate[s]."). Clearly, so too did the Nevada legislature, which enacted NRS § 608.0155 after *Terry* was decided. That statute sets forth specific criteria creating a "conclusive presumption" that any individuals satisfying them are independent contractors, including, presumably, exotic dancers. The mere fact that some cases have held that

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some exotic dancers in some clubs around the country have been deemed "employees" and not "independent contractors" does not compel that same conclusion in this case or every other case where that issue is presented. Here, because NRS § 608.0155 does not apply retroactively this Court must therefore apply the economic realities test adopted by *Terry* and consider the totality of the circumstances relative to these parties and their business relationship to decide the underlying legal issue.

B. Economic Realities Test:

The *Terry* Court adopted the "economic realities" test to distinguish between employer/employee relationships and principal/independent contractor relationships. The analysis requires consideration of several factors, including:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
> 2) the alleged employee's opportunity for profit or loss depending upon his or her managerial skill;
> 3) the alleged employee's investment in equipment or materials required for his or her task, or her employment of helpers;
> 4) whether the service rendered requires a special skill;
> 5) the degree of permanence of the working relationship; and
> 6) whether the service rendered is an integral part of the alleged employer's business.

Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 954, 130 Nev. Adv. Op. 87, *4 (Nev. 2014) (*citing Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir.1979). No single factor is determinative and other factors may be relevant in particular cases. *Real*, 603 F.2d at 754 (*citing Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)). The consideration must always be made with regard to the totality of the factual circumstances. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947); *Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 47, 910 P.2d 271, 274 (Nev. 1996). This Court begins with the six factors identified in *Terry*.

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1. The Degree of Treasures' Right to Control the Manner in Which the Work is to be Performed by Dancers is Very Limited

It is worth again observing as a predicate to this discussion the undisputed fact that before any Dancer is permitted to perform at Treasures, she signs an Agreement specifically acknowledging that she does so as an independent contractor. That status is clearly stated, in writing and there is no evidence of coercion, duress or undue influence.

While such an Agreement is not determinative, it is not irrelevant either. It is undisputed that the Club does not set any schedules requiring Dancers to work on any given day or to remain at the Club for any specific amount of time once they have sought and been granted access to the Club. Once at the Club, Treasures does not tell Dancers what to wear, how to dance, who to dance for, how many dances to perform or what fees to charge for their performances; each of those decisions is left to the individual Dancer's personal business discretion. Dancers can choose to perform stage dances and receive a discount on the access fee, or they can choose not to perform stage dances at all. Dancers can leave the Club whenever they choose. The only limitations and restrictions placed on Dancers is that they cannot access the Club to market their dance performances without paying the access fee, cannot engage in illegal activity while on the premises and cannot re-enter the premises on the same night after leaving, the latter two restrictions being legal requirements imposed by the City of Las Vegas and not the Club. Plaintiffs argue that because the Club is closed for several hours each day, it is "restricting and controlling" the manner in which Dancers can perform their work. That argument is unpersuasive. Merely having set hours of operation is not the same as exercising control over the manner in which work is performed when the Club is open. Here, the evidence is overwhelming that Dancers retain a very high degree of control regarding the manner of the work they perform, the only material limitations being imposed by law, not the Club. This factor weighs heavily in favor of these Dancers

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being considered independent contractors and the evidence is overwhelming in favor of the Club on this factor.

2. The Exotic Dancer's Managerial Skill Primarily Dictates That Individual's Opportunity for Profit or Loss

At Treasures, each Dancer decides how much energy and effort to invest in her exotic dance career. Dancers may individually choose to invest significant time and money in physical training, personal appearance, costumes, jewelry, hair and makeup, diet, dance training, negotiating and marketing skills, or choose to invest virtually no effort in that regard. Moreover, Dancers can perform several days per week, or choose to perform only a few days each week or not at all for weeks at a time. Likewise, Dancers at this Club can stay for hours at a time or leave after only a few minutes as their business judgment may dictate. While present at the Club, Dancers can choose whether to work hard to market and perform as many dances as they can in a given hour or, by contrast, choose only to perform one dance every hour, one dance every two hours or not to perform any dances at all. Again, each of those business decisions is entirely within the discretion of the individual Dancer and the Club imposes no restrictions, obligations or limitations on the exercise of that discretion. Moreover, the Club allows Dancers to negotiate for themselves the fees they charge for their services and, presumably, those who invest more effort to develop those skills are more successful than those who do not. Plaintiffs' argument that these fees are "tips" or gratuities and thus not a reflection of profit and business judgment is unpersuasive and not supported by the record. Ex. I, Supp. 482 (Barber Tr. 86:9-19). The record is clear that Dancers charge a negotiated fee for a service, and do not provide that service for free in hopes of getting a tip.[5] Finally, the Club takes no part of the fees negotiated and retained by the Dancers unless the Dancer and

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patron choose to use the Club's Dance Dollars to transact their business, which neither party is obligated to do. Again, this factor weighs heavily in favor of recognizing that these exotic Dancers work as independent businesses with their opportunity for profit or loss almost entirely within their own managerial control.

3. Dancers Investment in Equipment or Materials and the Employment of Helpers

Dancers acquire and hold business licenses and work cards as a condition of performing at The Club and those costs are born by each Dancer, not the Club. As noted, *supra.*, Dancers may make other significant financial investments in a variety of other "tools of the trade," including cosmetic surgery, expensive wigs, jewelry, perfume and costumes; physical training, stage props and dance training, much of which involves the use of assistants.[6] The Club places no restrictions on Dancers in that regard. Moreover, Dancers decide how often to work and, accordingly, how often to pay the door fees necessary to access the Club to market their services to their patrons. Dancers weigh those costs against the higher or lower costs of performing at other clubs and the potential profits to be earned at those clubs. Treasures does not limit or restrict their right to make that business decision. Some Dancers invest significantly in marketing to build and maintain loyalty with individual customers to let them know where and when they will be performing, which, as already stated, may not always be at Treasures.

Plaintiffs argue that this factor weighs in favor of finding Plaintiffs to be employees because they make no capital investment in the Club, itself. Specifically, Plaintiffs argue that "purchasing thongs and dance costumes" can never compare to what the Club spends on its business. But Plaintiffs fundamentally misunderstand this factor, which is focused on the individual's

[5] Named Plaintiff Barber testified she negotiates her fee up front, takes payment up front, and only then performs the exotic dance, admitting that only additional money beyond the performance fee would constitute a tip or gratuity. Ex. I, Supp. 482 (Barber Tr. 86:9-19).

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investment in the individual's business (exotic dancing) not on whether that individual has invested capital in the business of the principle entity (the Club). There is undisputed evidence in the record that some Dancers re-invest 30-40% of their profits in "tools of the trade," which is consistent with the conduct of any business. *See* Exs. D & E. While the degree of individual investment may vary by Dancer, such is due primarily to the business discretion exercised by that Dancer, not the Club, and weighs heavily in favor of concluding that these exotic dancers are independent contractors.

4. Whether the Services Rendered Require Special Skill

Plaintiffs imply that no special skill is required to perform as an exotic Dancer, therefore Dancers must be employees. In reviewing the body of case law addressing misclassification cases involving exotic Dancers, it appears short shrift is often given to this factor. In Las Vegas, perhaps unlike other parts of the country, the exotic dance industry is a significant part of the local community and economy. It is undisputed that successful exotic Dancers can earn significant money. *See* Hearing Tr: 21:24. The extent of those earnings is not only dictated by individualized exercises of managerial discretion regarding how often and how hard to work and how much to invest in the "tools of the trade" that facilitate that work, as discussed, *supra.*, but also by the physical and artistic expression involved in the exotic dances themselves. Seductive dancing — to create illusions and fantasies for which patrons are willing to pay significant money — is an art that can require years to develop and hone. Many exotic Dancers invest significant time and energy developing precisely those skills, which in combination with negotiation skills, can result in significant earnings. This Court rejects the invitation to conclude, without analysis, that exotic dancing requires no special skill and finds that, upon careful

[6] While dancers may employee numerous individuals to assist in preparing for their performances, there is no evidence dancers use assistants in the performance itself.

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and objective consideration, this factor, too, weights in favor of these Dancers being independent contractors.

5. Permanency of the Relationship

This factor also weighs heavily in favor of an independent contractor relationship. It is undisputed that these Dancers are not prohibited from performing at any other exotic dance establishments, including other clubs within Las Vegas which are direct competition of Treasures. It is further undisputed that these Dancers often do perform at other clubs, sometimes at several clubs in the same night. The fact that these Dancers can choose to work at Treasures so long as they maintain their work cards does not establish the type of permanency and regularity required to deem them more like employees than independent contractors.

6. Service Rendered As An Integral Part Of Employer's Business

The final factor of "whether the service rendered is an integral part of the alleged employer's business". This factor was not considered in *Terry* because the Defendant in that Case conceded the issue. *Terry v. Sapphire Gentlemen's Club*, 336 P.3d at 954, 130 Nev. Adv. Op. 52, at *6 (Nev. 2014). Plaintiffs argue that "strippers" are always integral to "strip clubs" and it appears other courts agree without much additional analysis. Here, Defendants argue that while they operate a licensed "erotic dance establishment," exotic dancing is merely form of entertainment they feature to attract customers to whom they sell food and alcohol, the bar/restaurant being its core business model. (Ex. B at ¶ 10). Defendants further argue that, if required,[7] it could feature other forms of entertainment without affecting its core business model. Although the Defendant could change the forms of entertainment, it is not currently how it operates its business. Based off of the current business model the services rendered are an integral part of the

[7] For example if exotic dancers were deemed employees, the business might conceivably be unable to reliably attract exotic dancers willing to work under set shifts and schedules, forcing it to market other forms of entertainment (e.g., live music) to attract patrons to the club. The doormen, security, bartenders, waitresses, chefs, cooks, bus-persons and other patrons would remain essentially unchanged.

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Employers business. This factor weighs in the Plaintiff's favor, but it is one of many. Taken into consideration as a whole, this factor alone does not outweigh the rest.

7. The Totality Of The Circumstances Indicates These Dancers Are Independent Contractors.

In this case it is undisputed that, at the formation of the business relationship both parties acknowledged in writing their understanding that the exotic Dancers would be independent contractors. This factor while not determinative should not be ignored, as it evidences a fundamental intent and purpose of the business relationship at the outset. There is no evidence of fraud, coercion, duress or undue influence. Moreover, it is clear that the parties conducted themselves consistent with that understanding at all times. It is undisputed that the named Plaintiff and putative class representative, Karla Barber, obtained and held the business license required by the Club consistent with that understanding and filed her taxes, reporting her income, consistent with that understanding. Moreover, it is simply implausible that Plaintiff Barber, who performed at Treasures on 128 separate occasions, did so while expecting but never receiving a paycheck for a minimum wage. Neither she, nor any Dancer, ever had a set performance schedule, were ever required to perform at the Club on any given day or for any set number of hours, performances or songs. If business was slow on any given night, she, as all Dancers, had full discretion to leave and fish other more lucrative waters and could do so without penalty or repercussion from Treasures. Considering the totality of the circumstances, this Court finds that the undisputed facts, as conceded during the Hearing, overwhelmingly support the conclusion that these Dancers are independent contractors.

Finally, as concluded above, there was no failure to pay a minimum wage because there was no obligation to pay a minimum wage. The Agreement setting forth the terms of the independent contractor relationship is not illegal and thus, there is no basis for any claim of unjust enrichment because both parties conducted themselves

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consistent with their written Agreement. Finally, Plaintiffs introduced no evidence of malice, fraud or oppression to support any claim for punitive damages.

ORDER

Based upon the foregoing analysis, findings and conclusions, Defendants' Motion for Summary Judgment is **GRANTED** on all Plaintiffs' Causes of Actions. Plaintiffs' Counter Motion for Summary Judgment is **DENIED.** Plaintiffs' Motion for Class Certification was addressed in a separate order.

IT IS SO ORDERED this 4 day of August, 2017.

DISTRICT COURT JUDGE

A-14-709238-C

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Las Vegas, Nevada 89101

EXHIBIT 33

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

JANE ROE, et al., Plaintiffs, v. SFBSC MANAGEMENT, LLC, et al., Defendants.	Case No. 14-cv-03616-LB **PRELIMINARY APPROVAL ORDER** e: ECF No. 127

INTRODUCTION

This is a dispute under federal and California labor law. It is a putative collective action under the Fair Labor Standards Act (29 U.S.C. §§ 201-19) and a putative class action under Rule 23.[1] The plaintiffs are or were exotic dancers suing the company — defendant SFBSC, LLC — that (broadly speaking) managed the nightclubs where they worked. The court previously granted their motion to proceed anonymously.[2] It denied SFBSC's motion to compel arbitration on the ground of unconscionability,[3] and SFBSC appealed. The Ninth Circuit affirmed, holding that SFBSC lacked standing because it was not a party to the performer contracts and had not established that it

[1] Am. Compl. – ECF No. 11 at 1–2, ¶ 1; Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

[2] ECF Nos. 17, 32.

[3] ECF No. 53.

was the nightclubs' principal or alter ego. *Roes v. SFBSC Mgmt., LLC*, No. 15-15437, mem. op., ECF No. 90 (9th Cir. Jul. 18, 2016). The parties then settled their case, and the plaintiffs moved for preliminary approval of the proposed class-action settlement, which includes the nightclubs (added as defendants by a proposed amended complaint).[4] The court grants the motion.

STATEMENT

1. Other Information About the Lawsuit to Date

During their appeal, the parties had three in-person mediations and multiple telephone conferences with Ninth Circuit Mediator Peter Sherwood, exchanging information about working conditions, hours worked, compensation, and the parties' relative control over their work, among other matters; ultimately the parties executed a settlement agreement.[5] The Ninth Circuit — based on the parties' stipulation — dismissed the appeal without prejudice to its reinstatement if this court did not approve the parties' settlement. *Roes v. SFBSC Mgmt.*, No. 15-15437, order, ECF No. 52 (9th Cir. Dec. 21, 2016). As part of the settlement, and for settlement purposes only, the plaintiffs submit a proposed second amended complaint that adds the following nightclubs as named defendants: SFBSC Management, LLC; Chowder House, Inc.; Déjà Vu San Francisco, LLC; Roaring 20's, LLC; SF Garden of Eden, LLC; SAW Entertainment, Ltd.; Déjà Vu Showgirls of San Francisco, LLC; Gold Club–SF, LLC; Bijou–Century, LLC; and BT California, LLC.

During this process, two new lawsuits were filed: (1) *Hughes v. S.A.W. Entm't, Ltd.*, No. 16-cv-03371-LB (filed 6/16/2016), a lawsuit by exotic dancers against S.A.W. doing business as Larry Flynt's Hustler Club sand the Gold Club; and (2) *Pera v. Entm't, Ltd.*, No. 17-cv-00138-LB (filed 1/1/2017), a lawsuit by exotic dancers against S.A.W. doing business as Condor's Gentlemen's Club. The plaintiffs in the new lawsuits are represented by Lichten & Liss-Riordan; Long & Leavitt represent all defendants in all lawsuits. The cases involve the same substantive claims for wage-and-hours violations, but the new lawsuits named the nightclubs themselves as defendants.

[4] Settlement Agreement – ECF No. 126; Motion – ECF No. 127.

[5] ECF No. 126; ECF No. 127 at 5; Tidrick Decl. – ECF No. 128, ¶¶ 2–3.

On March 24, 2017, plaintiffs' counsel in *Hughes* and *Pera* — on behalf of dancers at several of the clubs — filed objections to the settlement.[6] Three dancers submitted declarations in support of the objections: two named plaintiffs in *Hughes* and a named plaintiff in *Pera*.[7]

2. Proposed Settlement

The parties agreed to the following class definitions for settlement purposes only:

> "Settlement Class Member" means any Class Member who has not timely and properly excluded herself from the Settlement as provided in Section XIII of this Agreement.
>
> "Class" means the group of Entertainers who, during the class period, performed at one or more of the Nightclubs, but does not include those individuals who provide or have provided services as "headliner" or "feature" performers unless such individual was otherwise party to a Dancer Contract with a Nightclub during the Class Period.
>
> "Class Member" means any individual who, during the Class Period, has performed as an Entertainer at one or more of the Nightclubs, but does not include those individuals who provide or have provided services as "headliner" or "feature" performs unless such individual was otherwise party to a Dancer Contract with a Nightclub during the Class Period.
>
> "Entertainer(s)" means persons who dance, Perform, and/or entertain, or who have danced, Performed, or entertained, as exotic dance entertainers on the premises of a Nightclub and who sell personal entertainment performances or services to customers.
>
> "Perform(s)," "Performed," "Performing," and "Performances" mean(s) all acts of entertaining, dancing, and /or engaging in entertainment services, and all activities related thereto, at the Nightclubs or at any of them.
>
> "Dancer Contract" means a contract entered into between a Settlement Class Member and a Nightclub, which permits the Settlement Class Member to engage in personal dance sales for remuneration at the Nightclub's premises.
>
> "Class Period" means the period from August 8, 2010, through the Preliminary Approval Date.[8]

The Nightclubs[9] are defined in paragraph 70 of the Settlement Agreement, listed in Exhibit A, and named as the defendants in the proposed amended complaint (and listed *supra*).[10] There are

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[6] Objection to Proposed Settlement – ECF No. 133.

[7] ECF Nos. 131-21 to -23.

[8] Settlement Agreement – ECF No. 126, ¶¶ 37, 39, 41, 49, 54, 76, 98.

[9] Capitalized terms throughout this order have the definitions given them in the Settlement Agreement.

nine Nightclubs reflecting ten Nightclub Entities, which are the commercial names for the clubs themselves (sometimes the same name, but sometimes a different name, such as "the Hungry I" for the owner/defendant "Chowder House").[11]

In summary form, the settlement agreement is as follows.

The settlement consideration includes Cash Payments, Dance Fee Payments, Residual Dance Fee Payments, and changes to the defendants' business practices that will confer a direct financial benefit on class members.[12] The Gross Settlement Value is $5 million, broken into tiers: (1) First Tier Cash Pool: $2 million; (2) Second Tier Cash Pool: up to $1 million; (3) Dance Fee Payments and Residual Dance Fee Payments: $1 million; and (4) changes to the defendants' business practices (estimated to confer benefits to class members in excess of $1 million).[13]

2.1 First-Tier and Second-Tier Cash Pools: Cash Payments, Fees, Costs, and Awards

The First Tier Cash Pool of $2 million will be used first for (1) cash compensation to Settlement Class Members who elect to receive a cash payment, then for (2) attorney's fees and expenses and the enhancement payments, then for (3) the PAGA[14] payment, and finally for (4) administrative costs.[15] After subtracting enhancement payments, the PAGA payment, and administrative costs, the fund will be distributed to class members who submitted timely requests for cash payments.[16] If the sum of the claims, enhancement payments, PAGA payment, and administrative costs exceeds $2 million, the defendants will fund the Second Tier Cash Pool of up to $1 million to cover the sum of the valid claims for cash payment, the attorney's fees and expenses, the Enhancement Payments, the PAGA payment, and administrative costs.[17]

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[10] *Id.* ¶ 70 & Exs. A & B – ECF No. 126 at 71, 73.

[11] *Id.*, Ex. A.

[12] *Id.* ¶ 111.

[13] *Id.* ¶¶ 111–12.

[14] PAGA is California's Private Attorneys General Act (Cal. Labor Code §§ 2698–99.5).

[15] ECF No. 126 at 29–30, ¶ 112(a).

[16] *Id.*

[17] *Id.* ¶ 112(b).

The following is a summary of how settlement funds are distributed for Cash Payments.

To receive a Cash Payment, a Settlement Class Member must submit an FLSA claim form with her Performance Months (identified to the best of her knowledge). Cash Payments are calculated as follows, reduced *pro rata* if the First Tier Cash Pool and the Second Tier Cash Pool are depleted:

a. $800 for Cash Payment Claimants who accrued 24 or more Performance Months during the Class Period;

b. $700 for Cash Payment Claimants who accrued between 12 and 23 Performance Months during the Class Period;

c. $500 for Cash Payment Claimants who accrued between 6 and 11 Performance Months during the Class Period; and

d. $350 for Cash Payment Claimants who accrued fewer than 6 Performance Months during the Class Period.[18]

Performance Month means any month during the class period when the Settlement Class Member had at least one Date of Performance at the Nightclub.[19] If funds remain after payment of valid claims for cash payments, attorney's fees and costs, enhancement payments, and administrative costs, then the remaining funds will be paid to Cash Payment Claimants in proportion to the amount they received.[20]

The enhancement payments, payable from the First Tier Cash Pool, are: (1) $5,000 each to Jane Roes 1 and 2; (2) $3,500 each to Jane Roes 3, 10–13, and 22; (3) for a total sum of no more than $31,000, considered non-wage income and reflected on an IRS Form 1099.[21] There are General Release Enhancement Payments, payable from the First Tier Cash Pool to Jane Roe 1 or 2 or both, contingent on their execution of the general release, of an amount not to exceed $20,000 for a total sum of $40,000.[22]

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[18] *Id.* ¶ 116.

[19] *Id.* ¶ 77.

[20] *Id.* ¶ 117.

[21] *Id.* ¶ 112(e).

[22] *Id.* ¶ 112(f).

The PAGA payment is $100,000, payable from the First Tier Cash Pool, with 75% ($75,000) paid to the California Labor and Workforce Development Agency ("LWDA") and 25% ($25,000) distributed equally to Cash Payment Claimants and Dance Fee Payment Claimants.[23]

The defendants will not object to an attorney's fees-and-expense award not to exceed 25% of the Gross Settlement Value.[24] The defendants will pay the amount (not to exceed $1 million) to Class Counsel from the First Tier Cash Pool and, as appropriate, from the Second Tier Cash Pool, to pay fees and costs that the court awards in its final approval order.[25]

The Administrative Costs are $50,000, payable from the First Tier Cash Pool, for a third-party administrator to manage the class notice, website, distribution of funds, and other administration of the settlement.[26] The parties identify four potential administrators: Simpluris, Rust Consulting, Settlement Services, or CPT Group.[27] At the hearing, they identified Rust Consulting as the administrator with the most cost-effective bid.

2.2 Dance Fee and Residual Dance Fee Payments

As an alternative to a Cash Payment Claim, settlement class members may elect to receive a "Dance Fee Payment," which is the mandatory and published cost of personal entertainment performances owned by the Nightclubs under the "Dancer Contracts."[28] The "Dance Fee Payment Pool" is $1 million.[29] The ten nightclubs in Exhibit A each fund $100,000 to fund "Dance Fee Payments" to claimants who elect that payment and who designate that Nightclub on their claim form as their Primary or Secondary Nightclub.[30] The Nightclubs divide the $1-million pool *pro rata* to claimants; the payment cannot exceed $5,000 per claimant for that claimant's Primary

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[23] *Id.* ¶ 112(h).
[24] *Id.* ¶ 66.
[25] *Id.* ¶ 112(g).
[26] *Id.* ¶ 112(i).
[27] *Id.* ¶ 96.
[28] *Id.* ¶¶ 112(c), 125.
[29] *Id.* ¶ 112(c).
[30] *Id.*

Nightclub and $3,000 per claimant for the Nightclub she designates as her Secondary Nightclub.[31] The dancer must schedule a Date of Performance during the Dance Fee Redemption Period at her Primary or Secondary Nightclub at least three business days before the performance and then can retain 100% of the Dance Fees capped at these amounts.[32]

If the claims for Dance Fee Payments are less than $100,000 for any Nightclub, the Nightclub will create a Residual Dance Fee Payment Pool for the residual amounts, which are available to Settlement Class Members who do not submit an FLSA claim form but who submit a Residual Dance Fee Claim Form, available from management at the clubs, and that contains an acknowledgment that the claimant did not submit an FLSA claim.[33]

2.3 Changed Business Practices

The Nightclubs have changed their business practices, as set forth in paragraphs 136 to 144 of the Settlement Agreement. Dancers now can be employees of a Nightclub or Independent Professional Entertainers ("IPEs"); this does not waive any rights under any labor laws except as those laws specifically permit.[34] Managers will not influence dancers' choices. The Nightclubs will provide Entertainers and Entertainer Applicants enhanced employment offers that provide for an hourly rate of $15 plus 20% commissions for sales of private dances greater than $150.[35] The settlement agreement has other changed business practices about review of choices, context for making choices (*e.g.*, not while intoxicated or in a nude or semi-nude state), provisions for changing status to an employee, clothing choices, a prohibition against tip-sharing, training videos, and guaranteed average earnings for IPEs.[36]

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[31] *Id.*

[32] *Id.*¶ 126.

[33] *Id.* ¶ 112(d).

[34] *Id.* ¶ 137.

[35] *Id.* ¶ 139.

[36] *Id.* ¶¶ 137–47.

2.4 Release

In return for the settlement relief, the settlement agreement has release provisions.

If a class member does not submit an FLSA claim form and does not exclude herself from the settlement, the release generally is for all claims that are or could have been asserted in this action (as described in the Second Amended Collective and Class Action Complaint) except claims under the FLSA, and specifically including wage-and-hours claims.[37] The plaintiffs are not releasing any personal-injury claims.[38]

If a class member submits an FLSA claim form (or has consented to be an FLSA party plaintiff and does not exclude herself from the settlement), she releases claims as described in the previous section and also any claims that are or could have been asserted in the action under the FLSA.[39]

For "General Releasors" (defined as Jane Roe 1 and 2 — on certain conditions),[40] the release is of known and unknown claims under California Code § 1542 (except claims that cannot be released as a matter of law).[41]

2.5 Administration

The administrator will send class notice to class members at their last known address on their most recent contract (but will first run a National Change of Address database search on all addresses and use any current address).[42] Other administration procedures — including notice, administration, procedures for exclusion, and procedures for objections — are set forth in the settlement agreement.[43] Settlement Class Members who elect a cash payment must "opt in" under 29 U.S.C. § 216(b) by submitting a timely FLSA claim form (Exhibit C to the Settlement

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[37] *Id.* ¶¶ 62, 85, 164.

[38] *Id.* ¶ 85.

[39] *Id.* ¶¶ 62, 165, 186.

[40] *Id.* ¶ 63, 164.

[41] *Id.* ¶ 63, 168–69.

[42] *Id.* ¶ 113.

[43] *Id.* ¶¶ 172–81, 186–201.

Agreement). Settlement Class Members who do not opt in are eligible to participate in the Residual Dance Fee Payment Pool and to receive Residual Dance Fee Payments.[44] A Settlement Class Member may not elect more than one of the following forms of monetary compensation: a Cash Payment; a Dance Fee Payment; or a Residual Dance Fee Payment.[45]

ANALYSIS

1. Jurisdiction

The court has federal-question jurisdiction under 28 U.S.C. § 1331 for the FLSA claim and supplemental jurisdiction over the California state-law claims.

2. Conditional Certification of Settlement Class

The court determines whether the Settlement Class meets the requirements for class certification first under Rule 23 and then under the FLSA.

2.1 Rule 23 Requirements

The court reviews the propriety of class certification under Federal Rule of Civil Procedure 23(a) and (b). When parties enter into a settlement before the court certifies a class, the court "must pay 'undiluted, even heightened, attention' to class certification requirements" because the court will not have the opportunity to adjust the class based on information revealed at trial. *Staton v. Boeing*, 327 F.3d 938, 952–53 (9th Cir. 2003) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

Class certification requires the following: (1) the class must be so numerous that joinder of all members individually is "impracticable"; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives must be typical of the claims or

[44] *Id.*

[45] *Id.*

defenses of the class; and (4) the person representing the class must be able to fairly and adequately protect the interests of all class members. Fed. R. Civ. P. 23(a); *Staton*, 327 F.3d at 953.

The court finds preliminarily (for settlement purposes only) that the proposed settlement class meets the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy.

First, there are approximately 4,691 class members;[46] the class is so numerous that joinder of all members is impracticable.

Second, there are questions of law and fact common to the class. All class members worked for one of the defendant nightclubs as dancers. Common questions include whether they were classified properly as independent contractors and whether the defendants' practice of not paying minimum wage and not paying overtime violated federal state or local law. The claims depend on common contentions that — true or false — will resolve an issue central to the validity of the claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct 2541, 2551 (2011); *Betorina v. Ranstad US, L.P.*, No. 15-cv-03546-EMC, 2017 WL 1278758, at *4 (N.D. Cal. Apr. 6, 2017).

Third, the claims of the representative parties are typical of the claims of the class. All have worked as dancers for the defendants during the class period, and all class members allege wage-and-hours violations based on similar facts. All representatives possess the same interest and suffer from the same injury. *Betorina*, 2017 WL 1278758, at *4.

Fourth, the representative parties will fairly and adequately protect the interests of the class. There are no conflicts of interest, and the named plaintiffs and counsel will vigorously prosecute the case. *See Hanlon*, 150 F.3d at 1020.

The court also finds preliminarily (and for settlement purposes only) that questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See* Fed. R. Civ. P. 23(b)(3); *Brown v. Hain Celestial Group, Inc.*, No. 11-cv-03082-LB, 2014 WL 6483216, at *15–20 (N.D. Cal. Nov. 18, 2014). All claims arise

[46] ECF No. 127 at 17.

from the defendants' uniform practices, and thus liability can be determined on a class-wide basis. *See Betorina*, 2017 WL 1278758, at *5.

The court thus conditionally certifies the class for settlement purposes only and for the purposes of giving the class notice of the settlement and conducting a final approval hearing.

2.2 FLSA Class

The FLSA authorizes "opt-in" representative actions where the complaining parties are "similarly situated" to other employees. 29 U.S.C. § 216(b); *see generally Hoffman-LaRoche v. Sperling*, 493 U.S. 16 (1989). Here, all class members have worked as dancers for one or more defendants during the class period, and their wage-and-hours claims — and related issues such as independent-contractor status — present common fact and law questions under federal and California law. The court certifies the FLSA class for settlement purposes only.

3. Preliminary Approval of Settlement and Leave to File Amended Complaint

The approval of a class-action settlement has two stages: (1) the preliminary approval, which authorizes notice to the class; and (2) a final fairness hearing, where the court determines whether the parties should be allowed to settle the class action on the agreed-upon terms.

Settlement is a strongly favored method for resolving disputes, particularly "where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *see, e.g.*, *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). A court may approve a proposed class-action settlement only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The court need not ask whether the proposed settlement is ideal or the best possible; it determines only whether the settlement is fair, free of collusion, and consistent with the named plaintiffs' fiduciary obligations to the class. *See Hanlon*, 150 F.3d at 1026–27 (9th Cir. 1998). In *Hanlon*, the Ninth Circuit identified factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class-action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed and

the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of class members to the proposed settlement. *Id.* at 1026 (citation omitted).

"Where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable." *Garner v. State Farm Mut. Auto Ins. Co.*, 2010 WL 1687832, *13 (N.D. Cal. Apr. 22, 2010); *see, e.g., Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution . . . ."); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

The court has evaluated the proposed settlement agreement for overall fairness under the *Hanlon* factors and concludes that preliminary approval is appropriate.

First, the plaintiffs represent that the settlement is fair because the cash payments correlate with the months that a dancer worked with one or more defendants, and the dance-fee payments — as an alternative to cash payments — are a fair alternative.[47] The fees also are capped at 25%.[48]

Second, the plaintiffs provide examples of settlements in other districts that show that the settlement is in the "range of possible approval," a relevant consideration at the preliminary approval stage.[49] *See Betorina*, 2017 WL 1278758, at *6 (considerations include whether the settlement (1) is the product of serious, informed, non-collusive negotiations, (2) has no obvious deficiencies; (3) does not grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval; court also fully considered the *Hanlon* factors because the settlement was reached before class certification).

Third, the plaintiffs point out that a class action allows class members — who otherwise would not pursue their claims individually because costs would exceed recoveries — to obtain relief.[50]

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[47] Motion – ECF No. 127 at 21; Settlement Agreement – ECF No. 126, ¶¶ 116, 123–27.

[48] Motion – ECF No. 127 at 21.

[49] *Id.* at 26; Reply – ECF No. 138 at 8.

[50] Motion – ECF No. 127 at 27 (citing *Local Jnt. Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001).

Fourth, litigation poses risk. If the defendants convinced a trier of fact that the plaintiffs were not misclassified, then their recovery would be zero. If the plaintiffs prevailed, then damages could fall within a wide range, depending on issues such as days worked, the statute of limitations, and punitive damages. For example, without a finding that a violation is willful, the third year of the statute of limitations for the FLSA claims could be eliminated. The plaintiffs observe that these factors make estimating damages difficult.[51] The plaintiffs point to risk associated with the certification process and on the merits.[52] There is the risk of being compelled to arbitration.[53] Class counsel are experienced class-action litigators and anticipate years of litigation and appeal; they — well versed in wage-and-hours law — believe that they arrived at a reasonable resolution through a protracted and arm's-length mediation process with the Ninth Circuit's mediator.[54]

Fifth, the PAGA provisions seem reasonable. *See Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1145 (2012) (general rule regarding 75/25 split to LWDA and claimants).

Finally, the settlement is the product of serious, non-collusive, arm's-length negotiations and was reached after mediation with an experienced mediator at the Ninth Circuit.

The named plaintiffs in the *Hughes* and *Pera* cases — who are class members — object to preliminary approval. Preliminarily, the plaintiffs point out that class members' objections are deferred to the final fairness review; they are not intervenors and their arguments are premature.[55] Under the circumstances, the court considers the objectors' arguments, which do not change the court's decision to preliminarily approve the settlement.

The objectors' main argument is that the settlement is not fair because the recovery is inadequate.[56] They point to settlements that they have achieved in individual arbitrations.[57] More

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[51] *Id.* at 25.

[52] Reply – ECF No. 138 at 15–16.

[53] Motion – ECF No. 127 at 28.

[54] *Id.*

[55] Reply – ECF No. 138 at 18.

[56] *See* Objections – ECF No. 133 at 8–11.

[57] *Id.* at 23.

usefully, they identify settlements with average recoveries that they say exceed the recoveries here.[58]

Case	**Recovery**
Dittus v. K.E.G., Inc., No. 14-300 (D.S.C.)	$14,000 for dancers working for four years to $2,000 for dancers working for four months or less.
Alvarez v. KWLT, No. 14-7075 (E.D. Pa.)	$5,916 per class member
Hart v. RCI Hosp. Holdings, 2015 WL 5577713 at *5, *11 (S.D.N.Y. Sept. 22, 2015)	$15 million cash/66% of recovery on wage claims; average $4,225; 34 received more than $10,000.
Clincy v. Garlardi, No. 09-2082 (N.D. Ga.)	$1,550,000 million cash for 80 dancers.
Eley v. Stadium Grp., 2017 WL 663525, at * 2 (D.D.C. Feb. 17, 2017)	$1,700 to $17,200 per class member
In Re Penthouse Exec. Club Comp. Litig., No. 10-cv-1145 (S.D.N.Y.)	$3,727 for first year, $988 for years after that; average settlement $4,666.94
Jones v. JGC Dallas, 2014 WL 7332551 & 2014 WL 7336889 (N.D. Tex. Dec. 24, 2010)	$2.3 million for 194 participants with average payment of $7,900.

Based on her familiarity with the claims here and in other cases, plaintiffs' counsel estimates damages to be $40 million just for the Hustler and Condor clubs.[59] And she discounts the plaintiffs' examples of other settlements: they are "not a basis for this Court to turn a blind eye to the serious issues presented here."[60] She concludes that the claimants here would receive a maximum of $800 for releasing SFBSC and the nightclubs — an unreasonable sum.[61]

The plaintiffs respond that the gross settlement value is larger than, or similar to, other exotic-dancer class settlements.[62] They note that the objectors' own damages assessment supports this conclusion, based in part on the following: the objectors looked at two of ten nightclubs and estimated damages for possible claims; 34.5% of the settlement class worked at the two nightclubs; extrapolating to all ten clubs yields estimated class damages (which the plaintiffs calculate is approximately $116 million[63]); the Gross Settlement Value here is 4.3% of that amount

[58] *Id.*

[59] *Id.* at 24.

[60] *Id.*at 25.

[61] *Id.*

[62] Reply – ECF No. 138 at 8.

[63] *Id.* at 8–9.

—within the range that the objectors identify as reasonable settlement ranges.[64] That is better than settlements that courts have approved.[65] They identify the following settlements:

Case	Recovery
Strube v. Am. Equity Inv. Life Ins. Co., 266 F.R.D. 688, 698 (M.D. Fla. 2005)	2.5% of estimated potential recovery
In Re Toys R Us-Del., Inc., 295 F.R.D. 438, 453–54 (C.D. Cal. 2014)	3% of possible recovery
Reed v. 1-800 Contacts Inc., 2014 WL 29011, at *6 (S.D. Cal. Jan. 2, 2014)	1.7% of possible recovery
In Re Payment Card Interchange Fee & Merch. Discount Antitrust Litig., 986 F. Supp. 2d 207, 229 (E.D.N.Y. 2013)	2.5 of highest damages estimate

The plaintiffs observe that in *Cotter v. Lyft*, the objectors' counsel argued that the second and third cases in this chart (*Toys-R-Us* and *Reed*) supported the conclusion that the settlement value "was within the range of possible approval"[66] and that a settlement representing less than two percent of maximum recovery "may be justifiable" based on "defenses that increase the risk of litigation."[67] And as described above, in their motion and reply brief the plaintiffs point to settlements with recovery ranges less than the recoveries here.

The plaintiffs quarrel too with the objectors' overall damages estimate, citing an accounting analysis about average earnings of exotic dancers that — while it does not directly correspond to the wage shortfall during the settlement period — suggests that "the potential value of the classwide claims could be magnitudes less than the Objectors posit."[68] They disagree with the objectors' limiting possible claims to $800 each and $800,000 in the aggregate: if the claims are few, claimants receive more, and if the claims are many, then the Second Tier Pool is triggered, adding an extra $1 million. They conclude that the objectors do not raise obvious defects that

[64] *Id.*

[65] *Id.* at 9 (collecting settlements).

[66] *Id.* at 9–10 (quoting objectors' counsel motion in *Cotter v. Lyft, Inc.*, No. 3:13-cv-04065, ECF No. 169 at 36 (N.D. Cal. Jan. 26, 2016)).

[67] *Id.*

[68] *Id.* at 10.

should derail the settlement[69] at the preliminary approval stage.[70] The objectors counter that the plaintiffs provide no meaningful calculation about potential class recovery, and their failure to provide that analysis means that the court should deny preliminary approval.[71]

The recoveries here are adequate to justify preliminary approval. Given other comparable settlements, and the litigation risks identified above, the settlement amount at least preliminarily appears fair. The objectors point out that exotic dancers are relatively transient workers; that may affect the hit rate for claimants, and it may affect the attorney's fees. But Tier One funds are not reversionary, and if the hit rate is substantial enough, then Tier Two funds are available. The court cannot discern how to fully evaluate these issues without seeing what the claim response is. Individual and smaller-group recoveries in wage-and-hour cases also differ from the appropriate per-member relief afforded to a class. The two modes of recovery do not correlate perfectly. And the parties essentially agree that pursuing individual recoveries is difficult partly because class members are reluctant to come forward. The court again emphasizes litigation risk in wage-and-hours cases. Indeed, the issue of whether exotic dancers were misclassified was decided in favor of one of the defendant nightclubs (Chowder House, Inc., doing business as Hungry I). *Buel v. Chowder House, Inc.*, 2006 WL 1545860 (Cal. App. June 7, 2006) (affirming jury verdict).[72]

The objectors cite *Custom LED*, supra, to support the conclusion that when plaintiffs fail to provide a detailed analysis of the value of the claims, the court can deny approval.[73] The argument does not change the outcome. The *Custom LED* court denied certification based on several obvious defects: an overbroad release, a deficient notice, the parties' failure to describe why issuing credits as the default payment method was appropriate, the parties' failure to establish the appropriateness of the *cy pres* award recipient, the parties' failure to explain why the distribution

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[69] *Id.*at 12 (citing Settlement Agreement ¶ 112(a)–(b)).

[70] *Id.* at 10.

[71] Surreply, ECF No. 144-1 at 7–8 (citing *Custom LED, LLC v. eBay, Inc.*, No. 12-cv-00350-JST, 2013 WL 4552789, at *9 (N.D. Cal. Aug. 27, 2013).

[72] Reply – ECF No. 138 at 15–16 (discussing risk in more detail).

[73] *Id.* at 9–10.

of funds was bifurcated by time period, and the parties' failure to provide information about the potential range of recovery or the number of claimants (as opposed to eBay user IDs). *Custom LED*, 2013 WL 4552789, at *6–9. By contrast, the asserted deficiency here is the amount of the recovery. Given the landscape that the court has described, the objectors' disagreements do not render the settlement unfair at this stage.

The objectors say that the lawsuit releases claims not pleaded in the lawsuit.[74] By this, they clarified at the hearing, they meant that the amended complaint adds the nightclubs (an addition that the class notice reflects). As the court said at the hearing, this case always was aimed at the nightclubs (by way of the entity — defendant SFBSC — that allegedly manages them). In any event, the objectors' argument that total value is unfair already captures this objection. The court did not deem it sufficient to deny preliminary approval.

A perhaps related argument is that the plaintiffs' valuation does not account for other claims pleaded in the lawsuit, such as the gratuity and expense claims.[75] At the hearing, the objectors clarified that their objection was not to the release of the gratuity and expense claims but rather to the overall fairness of the dollar amounts.

The objectors also characterize the Dance Fee Payments as objectionable "coupon payments" that, among other drawbacks, require dancers to work at the clubs.[76] This too is no reason to deny preliminary approval. As the plaintiffs point out, courts approve similar settlements, which convey a tangible monetary benefit; also, the benefit remains available to claimants for two years and costs the employers.[77] And given that the workforce is transient, the benefit apparently maximizes recovery to the class as a whole.

The objectors minimize the non-monetary relief, characterizing it as inconsequential, generally because dancers are properly classified as either employees or independent contractors.[78] The

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[74] *Id.* at 7.

[75] *Id.* at 9.

[76] Objections – ECF No. 133 at 18.

[77] Reply – ECF No. 138 at 12.

[78] Objections – ECF No. 133 at 19–20.

plaintiffs respond that a major goal of the lawsuit was changing industry practices.[79] The Enhanced Offer of Employee Status and the Minimum Pay Guarantee for independent contractors are real benefits, as are the mandates regarding treatment and the procedures for new exotic dancers.[80] The court also finds persuasive the reasons advanced in defendants' counsel's declaration at ECF No. 139. On this record, the changed business practices — which locally are almost industry-wide (this settlement covers 10 out of the apparently 12 such nightclubs in San Francisco) — will allow an alternative business model for the industry, providing employees with a guaranteed hourly rate, commissions, and benefits, among other changed practices.[81] And preliminarily, there is an economic value that attaches to this portion of the settlement.[82]

The objectors also suggest that their exclusion from the settlement proceedings raises a red flag and that the settlement is the result of a "reverse auction."[83] The court disagrees. First, the parties sought input from the objectors' counsel, who provided only limited feedback.[84] Second, the court does not doubt the diligence and effectiveness of counsel for the plaintiffs and the defendants, for the reasons described on the record.

In sum, the court finds that viewed as a whole, the proposed settlement is sufficiently "fair, adequate, and reasonable" such that preliminary approval of the settlement is warranted. *See Officers for Justice v. Civil Serv. Comm'n of the City and Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The court thus approves the settlement agreement preliminarily and authorizes notice to the class.

The court also grants leave to file the second amended complaint (filed at ECF No. 126 at 73–123) and finds preliminarily that it relates back to the filing date of the original complaint.

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[79] Reply – ECF No. 138 at 11.

[80] *Id.* at 11–12 (citing Settlement Agreement, ¶¶ 136–47).

[81] ECF No. 139, ¶¶ 8–14.

[82] *Id.* ¶ 18.

[83] Objections – ECF No. 133 at 28–29.

[84] Tidrick Decl. – ECF No. 138-1, ¶¶ 3–6.

The court will address the issue of attorney's fees at the final fairness hearing. *See Hanlon*, 150 F.3d at 1029 (twenty-five percent is a benchmark in common fund cases); *cf. Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (twenty-five percent benchmark, though a starting point for analysis, may be inappropriate in some cases; fees must be supported by findings). The court will address the appropriateness of the incentive payments then too. The objectors' arguments about the PAGA allocation[85] do not affect the court's decision to preliminarily approve the settlement.

4. Appointment of Class Representative, Class Counsel, and Claims Administrator

The court appoints the plaintiffs Jane Roe 1 and Jane Roe 3 as the settlement class representatives. The court finds provisionally that they have claims that are typical of members of the class generally and that they are adequate representatives of the other members of the proposed classes.

The court appoints Steven G. Tidrick and Joel Young of The Tidrick Law Firm as Settlement Class Counsel. The court finds that they have sufficient qualifications, experience, and expertise in prosecuting class actions.

The court designates and approves Rust Consulting as the claims administrator. It will administer the settlement subject to the oversight of the parties and this court, as described in the settlement agreement.

5. Class Notice

The court approves the class notice and plan. The court finds that the class notice provides the best notice practicable, satisfies the notice requirements of Rule 23, adequately advises class members of their rights under the settlement agreement, and meets the requirements of due process. The forms of notice fairly, plainly, accurately, and reasonably provides class members with all required information, including (among other things): (1) a summary of the lawsuit and claims asserted; (2) a clear definition of the class; (3) a description of the material terms of the

[85] Objections – ECF No. 133 at 10 n.13.

settlement, including the estimated payment; (4) a disclosure of the release of the claims should they remain class members; (5) an explanation of class members' opt-out rights, a date by which they must opt out, and information about how to do so; (6) the date, time, and location of the final fairness hearing; and (7) the identity of class counsel and the provisions for attorney's fees, costs, and class-representative service awards.[86]

The objectors argue that the notice should inform class members that they may "either choose to accept the settlement or instead join another case through which they may seek greater relief."[87] As the plaintiffs point out, that notice sounds like marketing, not notice.[88] And the objectors do not respond in their surreply to the plaintiffs' argument. In their initial objections, they cite *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030 (N.D. Cal. 2016) to support their argument that notice is required,[89] but *Cotter* does not compel that result. There the proposed settlement released claims raised in a different lawsuit (called *Zamora v. Lyft*). *Cotter*, 193 F. Supp. 3d at 1033–34. The *Zamora* suit alleged that Lyft had deprived its drivers of certain gratuities or payments meant for them, in violation of California law. *Id.* at 1034. Specifically, when Lyft imposed a "Prime Time" surcharge during peak hours, it kept 20% (just as it takes 20% of the regular fare), allegedly in violation of California law that provides that gratuities belong solely to employees (and thereby prohibits employers from taking part of the gratuities). *Id.* The trial judge described the *Zamora* gratuity claims as "not . . . very strong," generally because the surcharge would not appear to the "reasonable rider . . . as a mandatory gratuity, as opposed to simply a price increase. . . ." *Id.* at 1038–39. The court concluded that the plaintiffs' failure to identify and include the Prime Time gratuity claims did not render the settlement unfair, unreasonable, or inadequate under Rule 23(e)(2). *Id.* at 1040. But it required the plaintiffs to revise the class notice to include a description of the *Zamora* lawsuit and the settlement agreement's release of the *Zamora* plaintiffs' gratuity claims. *Id.*

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[86] ECF No. 128 at 414–27.

[87] Objections – ECF No. 133 at 31.

[88] Reply – ECF No. 138 at 16–17.

[89] Objections – ECF No. 133 at 31.

That result makes sense: a notice ought to include a description of the claims released by the lawsuit. This notice does. But whether a notice must describe a later-filed lawsuit that potentially gives plaintiffs another avenue at recompense for the same claims is a different inquiry. Given the record before it, amending the notice is not informative. The objectors provide no explanation about the *Bokanoski* notice that compels a contrary result.[90]

6. Compliance with Class Action Fairness Act

The plaintiffs will provide notice of the settlement — which is deemed filed as of the date of this order — and other information showing compliance with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, to the appropriate federal and state officials. Any final settlement approval will be more than 90 days after service as required by 28 U.S.C. § 1715.

7. Procedures for Final Approval Hearing

7.1 Deadlines and Hearing

Event	**Date**
Defendants provide addresses to administrator	14 days after preliminary approval
Last day to opt out or object	60 days from mailing of notice
File motion for enhancement awards and fees	39 days from mailing of notice
File motion for final approval	112 days after preliminary approval
Due Diligence Declaration for Administrator	21 days before fairness hearing
Final fairness/ approval hearing	September 14, 2017, at 9:30 a.m.

7.2 Final Approval Hearing

At the hearing, the court will consider whether to: (1) grant final certification of the settlement class; (2) finally approve the settlement agreement and the releases in it; (3) finally approve the enhancement awards; and (4) award attorney's fees and costs to class counsel. The court may, for

[90] *See* ECF No. 138 at 31.

good cause, extend any of the deadlines in this order or continue the final approval hearing without further notice to the settlement-class members.

7.3 Requests for Exclusion From the Settlement

Under the terms of the settlement agreement, class members (except the named plaintiffs) may opt out of the settlement by sending a signed, written request for exclusion, postmarked no later than the date set forth above[91] after the mailing date of the notice, to the address in the class notice. The request must include: (a) the member's full name, address, and telephone number; (b) a clear and unequivocal statement that the class member wants to be excluded from the settlement but understands that she is still bound by the release of the PAGA claims upon issuance of a final approval order for the settlement; and (c) the signature of the class member or her legally authorized representative. Failure to request exclusion means that the class member will be deemed a class member and will be bound by the settlement agreement, if the court approves it, and any orders and judgment entered by the court.

7.4 Objections to the Settlement

Any person who has not requested exclusion from the class, and who is legally entitled to object to the approval of the proposed settlement or to the judgment, may object to the class settlement in writing or by appearing at the final approval hearing, with or without the presence of an attorney. Written objections must identify the case name and number and must be mailed to the claims administrator at the above address on or before the dates set forth in the chart above. They also may be filed with the court at the following address: Clerk of the Court, United States District Court, 450 Golden Gate Avenue, San Francisco, CA 94102.

[91] This gives class members sufficient time to consider their options and make a fully informed decision. *See, e.g.*, *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

7.5 Other Orders

Pending the final determination of whether the settlement should be approved, all proceedings in this action, except as may be necessary to implement the settlement or comply with the terms of the Settlement, are hereby stayed.

Pending the final determination of whether the settlement should be approved, the Named Plaintiffs and Class Members are hereby preliminarily enjoined — until they submit a timely request for exclusion from the Settlement — from filing or otherwise participating in any other suit or non-administrative proceeding based on the Released Claims, or from attempting to effect an opt-out from the settlement as a group, class, or subclass of individuals. The injunction shall remain in force until final approval or until such time as the parties notify the court that the settlement has been terminated.[92]

CONCLUSION

The court (1) conditionally certifies the class for settlement purposes only, (2) preliminarily approves the settlement and authorizes notice as set forth in this order, (3) approves the notice plan, (4) appoints the class representatives, class counsel, and claims administrator, (5) orders the procedures in this order (including all dates in the chart), and (6) orders the parties and the claims administrator to carry out their obligations in the settlement agreement.

This disposes of ECF No. 127.

IT IS SO ORDERED.

Dated: April 14, 2017

LAUREL BEELER
United States Magistrate Judge

[92] Settlement Agreement – ECF No. 126 at 24–25, ¶ 108(b).

EXHIBIT 34

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

JANE ROE, et al.,

Plaintiffs,

v.

SFBSC MANAGEMENT, LLC, et al.,

Defendants.

Case No. 14-cv-03616-LB

ORDER APPROVING CLASS-ACTION SETTLEMENT

Re: ECF No. 159 and 163

INTRODUCTION

This is a dispute under federal and California labor law. It is a putative collective action under the Fair Labor Standards Act (29 U.S.C. §§ 201-19) and a putative class action under Rule 23.[1] The plaintiffs are or were exotic dancers suing the company — defendant SFBSC, LLC — that (broadly speaking) managed the nightclubs where they worked. The court previously granted their motion to proceed anonymously.[2] It denied SFBSC's motion to compel arbitration on the ground of unconscionability,[3] and SFBSC appealed. The Ninth Circuit affirmed, holding that SFBSC

[1] Am. Compl. – ECF No. 11 at 1–2 (¶ 1); Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

[2] Mot. – ECF No. 17; Order – ECF No. 32.

[3] Order – ECF No. 53.

lacked standing because it was not a party to the performer contracts and had not established that it was the nightclubs' principal or alter ego. *Roes v. SFBSC Mgmt., LLC*, No. 15-15437, mem. op., ECF No. 90 (9th Cir. Jul. 18, 2016). The parties then settled their case, and the plaintiffs moved for preliminary approval of the proposed class-action settlement, which includes the nightclubs (added as defendants by a proposed amended complaint).[4] The court granted the motion.[5] The plaintiffs moved for final approval of the settlement.[6] The court held a fairness hearing on September 14, 2017.[7] The court finds the settlement fair, adequate, and reasonable and approves the final settlement, including fees, costs, and enhancement payments.

STATEMENT

1. Other Information About the Lawsuit to Date

During their appeal, the parties had three in-person mediations and multiple telephone conferences with Ninth Circuit Mediator Peter Sherwood, exchanging information about working conditions, hours worked, compensation, and the parties' relative control over their work, among other matters; ultimately the parties executed a settlement agreement.[8] The Ninth Circuit — based on the parties' stipulation — dismissed the appeal without prejudice to its reinstatement if this court did not approve the parties' settlement. *Roes v. SFBSC Mgmt.*, No. 15-15437, order, ECF No. 52 (9th Cir. Dec. 21, 2016). As part of the settlement, and for settlement purposes only, the plaintiffs submitted a proposed second amended complaint that added the following nightclubs as named defendants: SFBSC Management, LLC; Chowder House, Inc.; Déjà Vu San Francisco, LLC; Roaring 20's, LLC; SF Garden of Eden, LLC; SAW Entertainment, Ltd.; Déjà Vu Showgirls of San Francisco, LLC; Gold Club–SF, LLC; Bijou–Century, LLC; and BT California, LLC.

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[4] Settlement Agreement – ECF No. 126; Mot. – ECF No. 127.

[5] Order – ECF No. 151.

[6] Mot. – ECF No. 163.

[7] 9/14/2017 Minute Order – ECF No. 177.

[8] Settlement Agreement – ECF No. 126; Mot. – ECF No. 127 at 5; Tidrick Decl. – ECF No. 128, (¶¶ 2–3).

During this process, two new lawsuits were filed: (1) *Hughes v. S.A.W. Entm't, Ltd.*, No. 16-cv-03371-LB (filed 6/16/2016), a lawsuit by exotic dancers against S.A.W. doing business as Larry Flynt's Hustler Club sand the Gold Club; and (2) *Pera v. Entm't, Ltd.*, No. 17-cv-00138-LB (filed 1/1/2017), a lawsuit by exotic dancers against S.A.W. doing business as Condor's Gentlemen's Club. The plaintiffs in the new lawsuits are represented by Lichten & Liss-Riordan; Long & Leavitt represents all defendants in all lawsuits. The cases involve the same substantive claims for wage-and-hours violations, but the new lawsuits named the nightclubs themselves as defendants.

On March 24, 2017, plaintiffs' counsel in *Hughes* and *Pera* — on behalf of dancers at several of the clubs — filed objections to the settlement.[9] Three dancers submitted declarations in support of the objections: two named plaintiffs in *Hughes* and a named plaintiff in *Pera.*[10]

On April 14, 2017, the court approved the settlement preliminarily.[11] The court also granted leave to file the second amended complaint (filed at ECF No. 126 at 73–123) and found preliminarily (and now finds generally) that it relates back to the filing date of the original complaint.[12]

The plaintiffs moved for final approval of the settlement and for their attorney's fees and costs.[13] Three objectors — represented by plaintiffs' counsel in *Hughes* and *Pera* — objected, and the plaintiffs responded. [14] The court held a fairness hearing on September 14, 2017.[15]

2. Proposed Settlement

The parties agreed to the following class definitions for settlement purposes only:

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[9] Obj. to Proposed Settlement – ECF No. 133.

[10] Decls. – ECF Nos. 131-21 to -23.

[11] Order – ECF No. 151.

[12] *Id.*

[13] Mots. – ECF Nos. 159, 163.

[14] Obj. to Proposed Settlement – ECF No. 162; Response – ECF No. 164.

[15] 9/14/2017 Minute Order – ECF No. 176.

> "Settlement Class Member" means any Class Member who has not timely and properly excluded herself from the Settlement as provided in Section XIII of this Agreement.
>
> "Class" means the group of Entertainers who, during the class period, performed at one or more of the Nightclubs, but does not include those individuals who provide or have provided services as "headliner" or "feature" performers unless such individual was otherwise party to a Dancer Contract with a Nightclub during the Class Period.
>
> "Class Member" means any individual who, during the Class Period, has performed as an Entertainer at one or more of the Nightclubs, but does not include those individuals who provide or have provided services as "headliner" or "feature" performs unless such individual was otherwise party to a Dancer Contract with a Nightclub during the Class Period.
>
> "Entertainer(s)" means persons who dance, Perform, and/or entertain, or who have danced, Performed, or entertained, as exotic dance entertainers on the premises of a Nightclub and who sell personal entertainment performances or services to customers.
>
> "Perform(s)," "Performed," "Performing," and "Performances" mean(s) all acts of entertaining, dancing, and /or engaging in entertainment services, and all activities related thereto, at the Nightclubs or at any of them.
>
> "Dancer Contract" means a contract entered into between a Settlement Class Member and a Nightclub, which permits the Settlement Class Member to engage in personal dance sales for remuneration at the Nightclub's premises.
>
> "Class Period" means the period from August 8, 2010, through the Preliminary Approval Date.[16]

The Nightclubs[17] are defined in paragraph 70 of the Settlement Agreement, listed in Exhibit A, and named as the defendants in the proposed amended complaint (and listed *supra*).[18] There are nine Nightclubs reflecting ten Nightclub Entities, which are the commercial names for the clubs themselves (sometimes the same name, but sometimes a different name, such as "the Hungry I" for the owner/defendant "Chowder House").[19]

In summary form, the settlement agreement is as follows.

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[16] Settlement Agreement – ECF No. 126 at 10, 12–13, 17, 21 (¶¶ 37, 39, 41, 49, 54, 76, 98).

[17] Capitalized terms throughout this order have the definitions given them in the Settlement Agreement.

[18] *Id.* at 16 (¶ 70), 71 (Ex. A), 73 (Ex. B).

[19] *Id.* at 71 (Ex. A).

The settlement consideration includes Cash Payments, Dance Fee Payments, Residual Dance Fee Payments, and changes to the defendants' business practices that will confer a direct financial benefit on class members.[20] The Gross Settlement Value is $5 million, broken into tiers: (1) First Tier Cash Pool: $2 million; (2) Second Tier Cash Pool: up to $1 million; (3) Dance Fee Payments and Residual Dance Fee Payments: $1 million; and (4) changes to the defendants' business practices (estimated to confer benefits to class members in excess of $1 million).[21]

2.1 First-Tier and Second-Tier Cash Pools: Cash Payments, Fees, Costs, and Awards

The First Tier Cash Pool of $2 million will be used first for (1) cash compensation to Settlement Class Members who elect to receive a cash payment, then for (2) attorney's fees and expenses and the enhancement payments, then for (3) the PAGA[22] payment, and finally for (4) administrative costs.[23] After subtracting enhancement payments, the PAGA payment, and administrative costs, the fund will be distributed to class members who submitted timely requests for cash payments.[24] If the sum of the claims, enhancement payments, PAGA payment, and administrative costs exceeds $2 million, the defendants will fund the Second Tier Cash Pool of up to $1 million to cover the sum of the valid claims for cash payment, the attorney's fees and expenses, the Enhancement Payments, the PAGA payment, and administrative costs.[25]

The following is a summary of how settlement funds are distributed for Cash Payments.

To receive a Cash Payment, a Settlement Class Member must submit an FLSA claim form with her Performance Months (identified to the best of her knowledge). Cash Payments are calculated as follows, reduced *pro rata* if the First Tier Cash Pool and the Second Tier Cash Pool are depleted:

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[20] *Id.* at 29 (¶ 111).

[21] *Id.* at 29–35 (¶¶ 111–12).

[22] PAGA is California's Private Attorneys General Act (Cal. Labor Code §§ 2698–99.5).

[23] Settlement Agreement – ECF No. 126 at 29–30 (¶ 112(a)).

[24] *Id.*

[25] *Id.* at 30–31 (¶ 112(b)).

a. $800 for Cash Payment Claimants who accrued 24 or more Performance Months during the Class Period;

b. $700 for Cash Payment Claimants who accrued between 12 and 23 Performance Months during the Class Period;

c. $500 for Cash Payment Claimants who accrued between 6 and 11 Performance Months during the Class Period; and

d. $350 for Cash Payment Claimants who accrued fewer than 6 Performance Months during the Class Period.[26]

Performance Month means any month during the class period when the Settlement Class Member had at least one Date of Performance at the Nightclub.[27] If funds remain after payment of valid claims for cash payments, attorney's fees and costs, enhancement payments, and administrative costs, then the remaining funds will be paid to Cash Payment Claimants in proportion to the amount they received.[28]

The enhancement payments, payable from the First Tier Cash Pool, are: (1) $5,000 each to Jane Roes 1 and 2; (2) $3,500 each to Jane Roes 3, 10 through 13, and 22; (3) for a total sum of no more than $31,000, considered non-wage income and reflected on an IRS Form 1099.[29] There are General Release Enhancement Payments, payable from the First Tier Cash Pool to Jane Roe 1 or 2 or both, contingent on their execution of the general release, of an amount not to exceed $20,000 for a total sum of $40,000.[30]

The PAGA payment is $100,000, payable from the First Tier Cash Pool, with 75% ($75,000) paid to the California Labor and Workforce Development Agency ("LWDA") and 25% ($25,000) distributed equally to Cash Payment Claimants and Dance Fee Payment Claimants.[31]

The defendants will not object to an attorney's fees-and-expense award not to exceed 25% of the Gross Settlement Value.[32] The defendants will pay the amount (not to exceed $1 million) to

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[26] *Id.* at 36 (¶ 116).
[27] *Id.* at 17 (¶ 77).
[28] *Id.* at 36 (¶ 117).
[29] *Id.* at 33 (¶ 112(e)).
[30] *Id.* at 33 (¶ 112(f)).
[31] *Id.* at 34 (¶ 112(h)).
[32] *Id.* at 15–16 (¶ 66).

Class Counsel from the First Tier Cash Pool and, as appropriate, from the Second Tier Cash Pool, to pay fees and costs that the court awards in its final approval order.[33] (The final fee request is $950,000.)

The Administrative Costs allocated in the settlement agreement are $50,000, payable from the First Tier Cash Pool, for a third-party administrator to manage the class notice, website, distribution of funds, and other administration of the settlement.[34] The parties initially identified four potential administrators: Simpluris, Rust Consulting, Settlement Services, or CPT Group.[35] Ultimately, they chose Rust Consulting as the administrator with the most cost-effective bid. The court thus appointed Rust Consulting. The final administrative costs are $35,000.[36]

2.2 Dance Fee and Residual Dance Fee Payments

As an alternative to a Cash Payment Claim, settlement class members may elect to receive a "Dance Fee Payment," which is the mandatory and published cost of personal entertainment performances owned by the Nightclubs under the "Dancer Contracts."[37] The "Dance Fee Payment Pool" is $1 million.[38] The ten nightclubs in Exhibit A each fund $100,000 to fund "Dance Fee Payments" to claimants who elect that payment and who designate that Nightclub on their claim form as their Primary or Secondary Nightclub.[39] The Nightclubs divide the $1-million pool *pro rata* to claimants; the payment cannot exceed $5,000 per claimant for that claimant's Primary Nightclub and $3,000 per claimant for the Nightclub she designates as her Secondary Nightclub.[40] The dancer must schedule a Date of Performance during the Dance Fee Redemption Period at her

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[33] *Id.* at 33–34 (¶ 112(g)).
[34] *Id.* at 34–35 (¶ 112(i)).
[35] *Id.* at 20 (¶ 96).
[36] Myette Decl. – ECF No. 166 at 5 (¶ 17).
[37] Settlement Agreement – ECF No. 126 at 31–32, 38–39 (¶¶ 112(c), 125).
[38] *Id.* at 31–32 (¶ 112(c)).
[39] *Id.*
[40] *Id.*

Primary or Secondary Nightclub at least three business days before the performance and then can retain 100% of the Dance Fees capped at these amounts.[41]

If the claims for Dance Fee Payments are less than $100,000 for any Nightclub, the Nightclub will create a Residual Dance Fee Payment Pool for the residual amounts, which are available to Settlement Class Members who do not submit an FLSA claim form but who submit a Residual Dance Fee Claim Form, available from management at the clubs, and that contains an acknowledgment that the claimant did not submit an FLSA claim.[42]

2.3 Changed Business Practices

The Nightclubs have changed their business practices, as set forth in paragraphs 136 to 144 of the Settlement Agreement. Dancers now can be employees of a Nightclub or Independent Professional Entertainers ("IPEs"); this does not waive any rights under any labor laws except as those laws specifically permit.[43] Managers will not influence dancers' choices. The Nightclubs will provide Entertainers and Entertainer Applicants enhanced employment offers that provide for an hourly rate of $15 plus 20% commissions for sales of private dances greater than $150.[44] The settlement agreement has other changed business practices about review of choices, context for making choices (*e.g.*, not while intoxicated or in a nude or semi-nude state), provisions for changing status to an employee, clothing choices, a prohibition against tip-sharing, training videos, and guaranteed average earnings for IPEs.[45]

The defendants' counsel's declaration describes how the changed business practices represent a sweeping change in the relationship between nightclubs and exotic dancers.[46]

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[41] *Id.* at 39 (¶ 126).
[42] *Id.* at 32 (¶ 112(d)).
[43] *Id.* at 41 (¶ 137).
[44] *Id.* at 42 (¶ 139).
[45] *Id.* at 41–43 (¶¶ 137–47).
[46] Melton Decl. – ECF No 163-2.

2.4 Release

In return for the settlement relief, the settlement agreement has release provisions.

If a class member does not submit an FLSA claim form and does not exclude herself from the settlement, the release generally is for all claims that are or could have been asserted in this action (as described in the Second Amended Collective and Class Action Complaint) except claims under the FLSA, and specifically including wage-and-hours claims.[47] The plaintiffs are not releasing any personal-injury claims.[48]

If a class member submits an FLSA claim form (or has consented to be an FLSA party plaintiff and does not exclude herself from the settlement), she releases claims as described in the previous section and also any claims that are or could have been asserted in the action under the FLSA.[49]

The temporal scope of the release for the "FLSA Claimants' Released Claims" and the "Settlement Class Members' Released Claims" is the "Class Period" (*see supra*, Statement), which is "August 8, 2010, through the Preliminary Approval Date."[50]

For "General Releasors" (defined as Jane Roe 1 and 2 — on certain conditions),[51] the release is of known and unknown claims under California Code § 1542 (except claims that cannot be released as a matter of law).[52] The temporal scope of the release is the "Effective Date" of the settlement, defined as seven days after which both of the following events occur: (1) the final approval order is entered, and (2) the final approval order and judgment become final.[53]

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[47] Settlement Agreement – ECF No. 126 at 14, 19, 49 (¶¶ 62, 85, 164).

[48] *Id.* at 19 (¶ 85).

[49] *Id.* at 14, 49, 56–57 (¶¶ 62, 165, 186).

[50] *Id.* at 9, 13–14 (¶¶ 41, 62, 99); *see* Defendants' Reply – ECF No. 168 at 2–4) (addressing this point); *cf.* Objectors' Sur-Reply – ECF Nos. 172-1, 176.

[51] *Id.* at 14, 49 (¶¶ 63, 164).

[52] *Id.* at 14, 51 (¶¶ 63, 168–69).

[53] *Id.* at 12, 14 (¶¶ 52, 63).

2.5 Administration and Distribution Amounts

The notice procedures required the administrator to send class notice to class members at their last known address on their most recent contract (after first running a National Change of Address database search on all addresses and then using any current address).[54] Other administration procedures — including notice, administration, procedures for exclusion, and procedures for objections — are set forth in the settlement agreement.[55] Settlement Class Members who elect a cash payment must "opt in" under 29 U.S.C. § 216(b) by submitting a timely FLSA claim form (Exhibit C to the Settlement Agreement). Settlement Class Members who do not opt in are eligible to participate in the Residual Dance Fee Payment Pool and to receive Residual Dance Fee Payments.[56] A Settlement Class Member may not elect more than one of the following forms of monetary compensation: a Cash Payment; a Dance Fee Payment; or a Residual Dance Fee Payment.[57]

The administrator (Rust Consulting, Inc.) complied with these procedures.[58] It mailed the court-approved notice to the 4,681 class members on May 4, 2017.[59] The Postal Service returned 1,546 as undeliverable, and Rust performed address traces on all.[60] It obtained 1,167 current addresses, obtained four more addresses from the 800 hotline, and did not obtain addresses for 375 undeliverable Class Notices.[61] From the new addresses, 185 notices were returned as undeliverable, resulting in a total of 560 undeliverable class notices.[62]

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[54] *Id.* at 35 (¶ 113).

[55] *Id.* at 52–51, 56–59 (¶¶ 172–81, 186–201).

[56] *Id.*

[57] *Id.*

[58] Myette Decl. for Rust Consulting – ECF No. 166.

[59] *Id.* at 3 (¶ 10).

[60] *Id.*at 3 (¶ 11).

[61] *Id.*

[62] *Id.*

The notice informs class members that the settlement agreement and the operative complaint are posted online at http://www.tidrick.com/SFBSC-Settlement); they have been posted there since May 4.[63] The motion for fees was posted there too within a few hours of filing.[64]

As of August 22, 2017, 865 class members (or 18.5%) responded (790 for a Cash Payment and 75 for a Dance Fee Payment); 14 requested exclusion from the settlement.[65] Three putative class members filed objections through attorney Shannon Liss-Riordan.[66] The projected average payment to class members who made claims is $1,062.17 (and the more specific payments are summarized below).[67] (The First Tier Cash Pool will be fully distributed.) The Second Tier Cash Pool of $1 million was made available and was not claimed.

This results in the following distribution: (1) a fees award of $950,000 (allowed below), (2) expenses of $4,884.21, (3) service awards to eight individuals totaling $71,000, (4) PAGA payments of $100,000, (5) administrative fees to Rust Consulting of $35,000, and (6) distribution of First Tier funds as follows:

a. $1,500.77 for Cash Payment Claimants who accrued 24 or more Performance Months during the Class Period;

b. $1,313.17 for Cash Payment Claimants who accrued between 12 and 23 Performance Months during the Class Period;

c. $937.98 for Cash Payment Claimants who accrued between 6 and 11 Performance Months during the Class Period; and

d. $650.59 for Cash Payment Claimants who accrued fewer than 6 Performance Months during the Class Period.[68]

As of August 22, 2017, 75 class members claimed $370,0000 of the $1 million Dance Fee Payment Pool, resulting in a projected average dance fee of $4,933.22.[69] The remainder of

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[63] Tidrick Decl. – ECF No. 163-1 at 5 (¶ 14).

[64] *Id.*

[65] Myette Decl. – ECF No. 166 at 4–5 (¶¶ 13–15) (summarizing data as of August 2 and August 22, 2017).

[66] ECF No. 162.

[67] Myette Decl. – ECF No. 166 at 3–4 (¶ 14).

[68] Tidrick Decl. – ECF No. 163-1 at 4–5 (¶ 13); Myette Decl. – ECF No. 166 at 3–4 (¶ 14).

[69] Myette Decl. – ECF No. 166 at 3–4 (¶ 14).

$630,000 is available for class members to claim for at least two years after the judgment is final.[70]

The $25,000 PAGA additional amount is an extra $28.90 for each claimant.[71]

The plaintiffs propose, and the court allows, late claims (postmarked after the July 3, 2017 deadline).[72]

ANALYSIS

1. Jurisdiction

The court has federal-question jurisdiction under 28 U.S.C. § 1331 for the FLSA claim and supplemental jurisdiction over the California state-law claims.

2. Certification of Settlement Class

The court determines whether the Settlement Class meets the requirements for class certification first under Rule 23 and then under the FLSA.

2.1 Rule 23 Requirements

The court reviews the propriety of class certification under Federal Rule of Civil Procedure 23(a) and (b). When parties enter into a settlement before the court certifies a class, the court "must pay 'undiluted, even heightened, attention' to class certification requirements" because the court will not have the opportunity to adjust the class based on information revealed at trial. *Staton v. Boeing*, 327 F.3d 938, 952–53 (9th Cir. 2003) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

Class certification requires the following: (1) the class must be so numerous that joinder of all members individually is "impracticable"; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives must be typical of the claims or

[70] Settlement Agreement – ECF No. 126 at 11–12 (¶ 48).
[71] Myette Decl. – ECF No. 166 at 5 (¶ 15).
[72] Motion – ECF No. 163 at 5.

defenses of the class; and (4) the person representing the class must be able to fairly and adequately protect the interests of all class members. Fed. R. Civ. P. 23(a); *Staton*, 327 F.3d at 953.

Here, the factors — numerosity, commonality, typicality, and adequacy — support the certification of the class for settlement purposes only.

First, there are approximately 4,681 class members. The class is so numerous that joinder of all members is impracticable.

Second, there are questions of law and fact common to the class. All class members worked for one of the defendant nightclubs as dancers. Common questions include whether they were classified properly as independent contractors and whether the defendants' practice of not paying minimum wage and not paying overtime violated federal state or local law. The claims depend on common contentions that — true or false — will resolve an issue central to the validity of the claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct 2541, 2551 (2011); *Betorina v. Ranstad US, L.P.*, No. 15-cv-03546-EMC, 2017 WL 1278758, at *4 (N.D. Cal. Apr. 6, 2017).

Third, the claims of the representative parties are typical of the claims of the class. All have worked as dancers for the defendants during the class period, and all class members allege wage-and-hours violations based on similar facts. All representatives possess the same interest and suffer from the same injury. *Betorina*, 2017 WL 1278758, at *4.

Fourth, the representative parties fairly and adequately protect the interests of the class. The factors relevant to a determination of adequacy are (1) the absence of potential conflict between the named plaintiff and the class members, and (2) counsel chosen by the representative party who is qualified, experienced, and able to vigorously conduct the litigation. *Id*. The court is satisfied that the factors exist here: the named plaintiffs have shared claims and interests with the class (and no conflicts of interest), and they retained qualified and competent counsel who have prosecuted the case vigorously. *See Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001); *Hanlon*, 150 F.3d at 1020; *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992).

Thus, the court finds (for settlement purposes only) that the proposed settlement class meets the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy: (1) the class is

so numerous that joinder of all members is impracticable; (2) there are common questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). The court also finds (for settlement purposes only) that questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *Brown v. Hain Celestial Group, Inc.*, No. 11-CV-03082-LB, 2014 WL 6483216, at *15–20 (N.D. Cal. Nov. 18, 2014). The court certifies the class under Federal Rule of Civil Procedure 23(b)(3) for settlement purposes only.

2.2 FLSA Class

The FLSA authorizes "opt-in" representative actions where the complaining parties are "similarly situated" to other employees. 29 U.S.C. § 216(b); *see generally Hoffman-LaRoche v. Sperling*, 493 U.S. 16 (1989). Here, all class members have worked as dancers for one or more defendants during the class period, and their wage-and-hours claims — and related issues such as independent-contractor status — present common fact and law questions under federal and California law. The court certifies the FLSA class for settlement purposes only.

3. Appointment of Class Representative, Class Counsel, and Claims Administrator

The court confirms its previous appointment of the plaintiffs Jane Roe 1 and Jane Roe 3 as the settlement class representatives.[73] They have claims that are typical of members of the class generally and that they are adequate representatives of the other members of the proposed classes.

The court confirms its previous appointment of Steven G. Tidrick and Joel Young of The Tidrick Law Firm as Settlement Class Counsel.[74] The court finds that they have sufficient qualifications, experience, and expertise in prosecuting class actions.

[73] Order – ECF No. 151 at 19.

The court confirms its previous appointment of Rust Consulting as the claims administrator.[75]

4. Class Notice

As described above, the claims administrator provided notice to the members of the class in the form that the court had approved. The notice met all legal requisites: it was the best notice practicable, satisfied the notice requirements of Rule 23, adequately advised class members of their rights under the settlement agreement, met the requirements of due process, and complied with the court's order regarding notice.

The court previously addressed the objectors' challenges to the notice.[76] That analysis holds still. The court disagrees with the objectors' assertion that the notice process was halfhearted and designed to maintain a low claims rate.[77] As discussed in the Statement, Rust Consulting conducted address traces on all returned mail and reduced the number of undeliverable notices significantly. In addition to mailing, there was the website. Also, the nightclubs displayed posters in the dancers' dressing rooms to ensure that they were seen, were confident that they were seen by all entertainers at the clubs, and responded to questions by encouraging entertainers to review the settlement notice, website, and poster.[78] The poster is Exhibit A to the declarations of the nightclub managers.[79] It informs dancers of the settlement terms, tells them availability of cash payments or dance-fee payments, and tells them where to get the claim form and how to submit it.[80] It includes the class notice.[81] And it tells the entertainers that the clubs support the settlement,

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[74] *Id.*

[75] *Id.*

[76] Order – ECF No. 151 at 20–21.

[77] Opp. to Mot. For Approval – ECF No. 165 at 18.

[78] Melton Decl. – ECF No. 168-1 at 2 (¶ 3); Bourdeau Decl. – ECF No. 168-2; Cooper Decl. – ECF No. 168-3; Morataya Decl. – ECF No. 168-4; Calcagni Decl. – ECF No. 168-5; Britton Decl. – ECF No. 168-6; Johnson Decl .– ECF No. 168-7; Garrett Decl. – ECF No. 168-8; Reid Decl. – ECF No. 168-10.

[79] Ex. A – ECF No. 169.

[80] *Id.*

[81] *Id.*

hopes that eligible entertainers will get the benefit of the settlement, and will not retaliate against the dancers.[82]

5. Compliance with Class Action Fairness Act

On March 15, 2017, the plaintiffs provided notice of the settlement and other information showing compliance with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, to the appropriate federal and state officials.[83] The notice met the requirements of 28 U.S.C. § 1715, and the final settlement approval is more than 90 days after service as required by § 1715.

6. Approval of Settlement

Settlement is a strongly favored method for resolving disputes, particularly "where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *see, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). A court may approve a proposed class-action settlement only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The court need not ask whether the proposed settlement is ideal or the best possible; it determines only whether the settlement is fair, free of collusion, and consistent with the named plaintiffs' fiduciary obligations to the class. *See Hanlon*, 150 F.3d at 1026–27 (9th Cir. 1998). In *Hanlon*, the Ninth Circuit identified factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class-action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of class members to the proposed settlement. *Id.* at 1026 (citation omitted).

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[82] *Id.*

[83] Melton Decl. – ECF No. 163-2 at 11 (¶¶ 36–40).

"Where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable." *Garner v. State Farm Mut. Auto Ins. Co.*, 2010 WL 1687832, *13 (N.D. Cal. Apr. 22, 2010); *see, e.g., Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution . . . ."); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

The court has evaluated the proposed settlement agreement for overall fairness under the *Hanlon* factors and finds that the settlement is fair, reasonable, and adequate.

First, the settlement is fair because the cash payments correlate with the months that a dancer worked with one or more defendants, and the dance-fee payments — as an alternative to cash payments — are a fair alternative.

Second, a related point is that the plaintiffs are recovering a substantial amount. As the plaintiffs point out in their final approval papers, it is difficult to pinpoint a realistic potential recovery in a case such as this.[84] At the preliminary approval stage, the court engaged in a close review of other settlements in other districts.[85] The plaintiffs cite more in their motion for final approval.[86] The court also considered whether the settlement (1) is the product of serious, informed, non-collusive negotiations, (2) has no obvious deficiencies; (3) does not grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval. The court continues to see the settlement as reasonable and fair, especially given that the response rate is relatively high, and the objections and opt-outs are low. A "relatively small number" of objections is "an indication of a settlement's fairness." *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001); *cf. Staton*, 327 F.3d at 959 (court should consider "reaction of the class members to the proposed settlement"); *Ching v. Siemens Indus.*, 2014 U.S. Dist. LEXIS 89002, at *18–19 (N.D. Cal. June 27, 2014).

[84] Mot. – ECF No. 163 at 11.

[85] Order – ECF No. 151 at 12–13.

[86] Mot. – ECF No. 163 at 16–17.

Third, a class action allows class members — who otherwise would not pursue their claims individually because costs would exceed recoveries — to obtain relief.

Fourth, litigation poses risk. If the defendants convinced a trier of fact that the plaintiffs were not misclassified, then their recovery would be zero. In *Tijerino v. Stetson Desert*, No. CV-15-2563-PHY-SMM (D. Az. June 21, 2017), the district court — while recognizing other cases where courts found that exotic dancers were misclassified — held that exotic dancers failed to establish that they were employees and denied conditional certification of their FLSA claim.[87] And in *Buel v. Chowder House*, the issue of whether exotic dancers were misclassified was decided in favor of one of the defendant nightclubs (Chowder House, Inc., doing business as Hungry I). *Buel v. Chowder House, Inc.*, 2006 WL 1545860 (Cal. App. June 7, 2006) (affirming jury verdict). As the plaintiffs observe, it is difficult to pinpoint a realistic potential recovery in a case such as this.[88] The plaintiffs point to risk associated with the certification process and on the merits.[89] There are risks that attend the arbitration clauses. (The objectors disagree,[90] but the court's decision was a close one.[91]) In sum, the settlement is a reasonable resolution given the risks for wage-and-hours cases.

Fifth, the PAGA provisions are reasonable. *See Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1145 (2012) (general rule regarding 75/25 split to LWDA and claimants).[92]

Sixth, the settlement is the product of serious, non-collusive, arm's-length negotiations and was reached after mediation with an experienced mediator at the Ninth Circuit.

There are three objectors to the settlement who have not opted out of the settlement.[93] The court considered objections at the preliminary approval stage too.

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[87] Ex. A to Tidrick Decl. – ECF No. 163-1.

[88] Mot. – ECF No. 163 at 11.

[89] *Id.* at 11–15; Response to Objection – ECF No. 163 at 9 (collecting cases).

[90] Opp. to Mot. For Approval – ECF No. 165 at 19.

[91] Order – ECF No. 53 at 12.

[92] Mot. – ECF No. 163 at 18–19 (collecting cases).

[93] Obj. to Proposed Class Action Settlement – ECF No. 162 at 9 n.2.

The objectors' main argument remains that the settlement is not fair because the recovery is inadequate.[94] They point to other settlements with average recoveries that they say exceed the recoveries here.[95] Some of these are excerpted in the court's preliminary approval order (and the court incorporates its previous analysis by this reference).[96] They argue too that the settlement value is not fair compared with the plaintiffs' own damages assessment of the class-wide minimum-wage claims.[97] Essentially, they say, it is a $2 million settlement, with close to half going to fees, $100,000 to the PAGA penalty, some to costs and incentive amounts, and the balance to dancers with a low claim rate.[98]

The plaintiffs respond that the gross settlement value is larger than, or similar to, other exotic-dancer class settlements.[99] They note that the objectors' own damages assessment supports this conclusion, based in part on the following: the objectors looked at two of ten nightclubs and estimated damages for possible claims; 34.5% of the settlement class worked at the two nightclubs; extrapolating to all ten clubs yields estimated class damages (which the plaintiffs calculate is approximately $116 million); the Gross Settlement Value here is 4.3% of that amount —within the range that the objectors identify as reasonable settlement ranges.[100] (The preliminary approval order has a more detailed analysis of the settlements and the parties' competing views about them.[101])

The recoveries here are adequate to justify approval. Given other comparable settlements, and the litigation risks identified above, the settlement amount is fair. The exotic dancers are transient workers; that affects the hit rate for claimants. And the Tier One funds are not reversionary. And the hit rate was relatively substantial and did not push claims into Tier Two.

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[94] *Id.* at 16–24.

[95] *Id.* at 26–27; Opposition to Motion For Approval – ECF No. 165 at 10–11.

[96] Order – ECF No. 151 at 14.

[97] Opp. to Mot. For Approval – ECF No. 165 at 7.

[98] *Id.* at 9–10.

[99] Response to Obj. – ECF No. 164 at 3–4 (collecting examples).

[100] *Id.* at 9 (collecting settlements).

[101] Order – ECF No. 151 at 14–15.

The objectors quarrel with the dance fee payments.[102] Other courts have approved settlements that combine cash fees and dance payments.[103] It is a tangible benefit, dancers have claimed it, and it remains available for two years. Dance fee claimants will receive on average $4,933.22.[104] It is not the ordinary illusory coupon payment with a more arguable lack of value.

The objectors also challenge the changed business practices as illusory.[105] The court disagrees. The Statement sets forth the changes, which are substantial. The Enhanced Offer of Employee Status and the Minimum Pay Guarantee for independent contractors are real benefits, as are the mandates regarding treatment and the procedures for new exotic dancers. The court also finds persuasive the reasons advanced in defendants' counsel's declaration at ECF Nos. 139 and 163-2. On this record, the changed business practices — which locally are almost industry-wide (this settlement covers 10 out of the 12 such nightclubs in San Francisco) — will allow an alternative business model for the industry, providing employees with a guaranteed hourly rate, commissions, and benefits, among other changed practices. There is an economic value that attaches to this portion of the settlement. The cases that the plaintiffs cite do not change this conclusion.[106]

The court's earlier order addresses the objectors' challenges to the release and remains the court's view.[107] The lawsuit was always about SFBSC as a joint employer. Moreover, as the defendants point out, releases often extend through final approval or the "Effective Date" of the settlement.[108] The plaintiffs cite to cases that deal with prospective waiver of FLSA claims before disputes arise.[109] This settlement and its accompanying release resolve existing disputes.

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[102] Obj. – ECF No. 162 at 18.

[103] Response to Obj. – ECF No. 164 at 7–8 (collecting cases).

[104] Aff. – ECF No. 166 at 5 (¶ 14).

[105] Obj. – ECF No. 151 at 21–22.

[106] Opp. to Mot. For Approval – ECF No. 165 at 13.

[107] Order –ECF No. 151 at 17.

[108] Defendants' Reply – ECF No 168 at 2 (collecting cases).

[109] *Id.* (analyzing cases).

The objectors also quarrel with settlement based on only "minimal discovery."[110] As the court said in its previous orders and at hearings, the lawyers on both sides have done fine work.[111] Exceptional work, really. And as summarized in the Statement, the parties represented that they worked hard at settlement, exchanging relevant information, including payroll data. The court does not doubt that they worked collaboratively — as they must under the civil rules of procedure — to exchange relevant information. And again, they engaged in serious, non-collusive, arm's-length negotiations and reached settlement through mediation with an experienced mediator at the Ninth Circuit.

In sum, the court finds that viewed as a whole, the proposed settlement is sufficiently "fair, adequate, and reasonable" such that approval of the settlement is warranted. *See Officers for Justice v. Civil Serv. Comm'n of the City and Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

7. Cy Pres Award

Any remaining amount of the net settlement fund will be split equally between the two *cy pres* beneficiaries identified in the settlement agreement: The St. James Infirmary and the Impact Fund. This distribution accounts for and has a substantial nexus to the nature of the lawsuit, the objectives of the statutes, and the interests of the silent class members. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819-22 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-41 (9th Cir. 2011).

8. Attorney's Fees and Costs

Class counsel asks for $950,000 in attorney's fees and $4,884.21 in costs.[112]

Rule 23(h) of the Federal Rules of Civil Procedure provides: "In a certified class action, the

[110] Opp. to Mot. For Approval – ECF No. 165 at 21.

[111] *See* Order – ECF No. 53 at 12.

[112] Mot. for Fees and Costs – ECF No. 159.

court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fee provisions included in proposed class-action settlements must be reasonable. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The court is not bound by the parties' settlement agreement as to the amount of attorney's fees. *See id.* at 942–43. The Ninth Circuit has instructed district courts to review class fee awards with special rigor:

> Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1052 (9th Cir. 2002) (quotation omitted).

When counsel recovers a common fund that confers a "substantial benefit" on a class of beneficiaries, counsel is "entitled to recover their attorney's fees from the fund." *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). California fee-shifting statutes also authorize the award of fees. When a fee-shifting statute applies, courts may award fees on the lodestar method. *See California Practice Guide: Federal Civil Procedure Before Trial* § 10:870 (Rutter Group 2015) (collecting cases); *see PLCM Grp. v. Drexler*, 997 P.2d 511, 518 (Cal. 2000) (fee-setting inquiry under California law ordinarily begins with the lodestar); *Serrano v. Priest*, 569 P.2d 1303, 1316 n.23 (Cal. 1977). In common-fund cases, courts may calculate a fee award under either the "lodestar" or "percentage of the fund" method. *Id.*; *Hanlon*, 150 F.3d at 1029.

Where the settlement involves a common fund, courts typically award attorney's fees based on a percentage of the total settlement. The Ninth Circuit has established a "benchmark" that fees should equal 25% of the settlement, although courts diverge from the benchmark based on a variety of factors, including "the results obtained, risk undertaken by counsel, complexity of the issues, length of the professional relationship, the market rate, and awards in similar cases." *Morales v. Stevco, Inc.*, 2013 WL 1222058, *2 (E.D. Cal. Mar. 25, 2013); *see also Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming 33% fee award); *Pacific*

Enterprises, 47 F.3d at 379 (same); *State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

When determining the value of a settlement, courts consider the monetary and non-monetary benefits that the settlement confers. *See, e.g.*, *Staton*, 327 F.3d at 972–74; *Pokorny v. Quixtar, Inc.*, 2013 WL 3790896, *1 (N.D. Cal. July 18, 2013) ("The court may properly consider the value of injunctive relief obtained as a result of settlement in determining the appropriate fee."); *In re Netflix Privacy Litig.*, 2013 WL 1120801, *7 (N.D. Cal. Mar. 18, 2013) (settlement value "includes the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief").

Finally, Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available to class members rather than the actual amount that is ultimately claimed. *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269, *23 (N.D. Cal. Mar. 28, 2007) (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) ("district court abused its discretion in basing attorney fee award on actual distribution to class" instead of amount being made available) (quoted language from *Young*)).

If the court applies the percentage method, it then typically roughly calculates the lodestar as a "cross-check to assess the reasonableness of the percentage award." *See*, *e.g.*, *Weeks v. Kellogg Co.*, 2013 WL 6531177, *25 (C.D. Cal. Nov. 23, 2013); *see also Serrano v. Priest*, 20 Cal. 3d 25, 48–49 (1977); *Fed-Mart Corp. v. Pell Enters.*, 111 Cal. App. 3d 215, 226–27 (1980); *Melnyk v. Robledo*, 64 Cal. App. 3d 618, 624 (1976); *Clejan v. Reisman*, 5 Cal. App. 3d 224, 241 (1970). "The lodestar . . . is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000). Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Id*.

Class counsel also are entitled to reimbursement of reasonable out-of-pocket expenses. Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (attorneys may recover

reasonable expenses that would typically be billed to paying clients in non-contingency matters.; *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (approving reasonable costs in class action settlement). Costs compensable under Rule 23(h) include "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

Based on the declarations submitted by the plaintiff's counsel establishing a lodestar amount $1,078,324,[113] the court finds that fee award is supported by a lodestar cross-check. The billing rates are within normal and customary ranges for timekeepers with similar qualifications and experience in the San Francisco market. The rates counsel used are appropriate given the deferred and contingent nature of counsel's compensation. *See LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2nd Cir. 1998) ("[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment . . . .") (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)); *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) ("The district court has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys' current rates to all hours billed during the course of litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement."). Counsel also submitted a sufficient breakdown of the attorneys' billing efforts for the court to reach its conclusion about the lodestar.

The court concludes that a fee award at the requested amount is justified. *See Hanlon*, 150 F.3d at 1029. It is appropriate based on counsel's efforts and the substantial benefits to the class. It is similar to awards in other cases. It is supported by the lodestar cross-check, the efficiency of the litigation, the quality of the representation, and the contingent risk. There are different ways of looking at the fees award as a percentage of the recovery, depending on how one values the settlement. The court previously calculated the gross settlement amount as $5 million. $950,000 is 19%. Subtracting the Second Tier Cash Pool results in a settlement value of $4 million, which is 23.75% allocated to fees.

The court awards costs of $4,884.81 and $35,000 for the claims administration.

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[113] ECF No. 159 at 13.

9. Service Awards

District courts must evaluate proposed incentive awards individually, using relevant factors that include "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton*, 327 F.3d at 977. "Such awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958–59 (citation omitted). The Ninth Circuit has "noted that in some cases incentive awards may be proper but [has] cautioned that awarding them should not become routine practice." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1163 (9th Cir. 2013) (discussing *Staton*, 327 F.3d at 975–78). The Ninth Circuit also has emphasized that district courts "must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Id.* at 1164.

Counsel described sufficiently the efforts of the named plaintiff, including consulting with counsel, assisting in discovery, participating in the settlement process, and otherwise participating in the litigation.[114] The court approves the awards of to Jane Roe 1 and Jane Roe 2 of $25,000 each ($5,000 each for their service and $20,000 each for their broader general releases) and $3,500 each to Jane Role 3, Jane Roes 10 through 13 and Jane Roe 22.

CONCLUSION

The court certifies the class set forth in the Statement for settlement purposes only and approves the class-action settlement, which is allocated as follows from the First Tier Cash Pool: (1) $950,000 for attorney's fees; (2) $4,884.21 for costs; (3) $35,000 to Rust Consulting for administration fees; (4) $25,000 in service awards each to Jane Roe 1 and Jane Roe 2 ($5,000 each for their service and $20,000 each for their broader general releases) and $3,500 each to Jane Role

[114] Mot. – ECF No. 51 at 14; Nguyen Decl. – ECF No. 51-6 ; Grover Decl. – ECF No. 51-1, ¶¶ 35–39.

3, Jane Roes 10 through 13 and Jane Roe 22; (5) a PAGA payment of $100,000 ($75,000 to LWDA and $25,000 distributed to the Cash Payment Claimants and Dance Fee Payment Claimants, as specified in Settlement Agreement ¶ 112(g); and (6) the remainder of $839,115.79 to be paid on a *pro rata* basis to the Cash Payment Claimants. The court approves the request to accept late but otherwise valid claims that are postmarked on or before the date of this final approval order. The Dance Fee Payment Pool must remain available to be claimed for at least two years after the judgment becomes final, as specified in Settlement Agreement ¶ 48.

The court approves the disbursement of unused funds equally to the two *cy pres* beneficiaries: The St. James Infirmary and the Impact Fund. The claims administrator must make all payments required by this order in accordance with the terms of the settlement agreement.

Without further approval from the court, the parties are authorized to agree to and adopt such amendments, modifications, and expansions of the Settlement Agreement, including all Exhibits thereto, as (i) is consistent in all material respects with this order and final Judgment and (ii) do not limit the rights of Settlement Class Members. By way of example only, the Parties are authorized to agree to treat late-submitted claims for Cash Payments as valid.

Except as otherwise provided by this order, the parties and objectors will bear their own costs and attorney's fees.

The court dismisses the case with prejudice. Based on this final approval of the settlement, all settlement class members who did not opt out have released the defendants from the released claims as set forth in the Settlement Agreement (and as summarized in the Statement). They are enjoined from pursuing the released claims as set forth in the Settlement Agreement. Pursuant to Federal Rule of Civil Procedure 23(c)(3), all class members who satisfy the class definition except for those class members who properly requested exclusion are class members bound by this judgment and by the terms of the settlement agreement.

Without affecting the finality of this final order and judgment in any way, the court retains jurisdiction over: (a) effectuating and implementing the Settlement Agreement and its terms; (b) supervising all aspects of the administration of the Settlement Agreement; (c) determining whether, in the event that an appeal is taken from any aspect of this final order and judgment,

whether to require the appellant to post a bond or provide other security, and such other matters as the court may order; (d) enforcing and administering the Settlement Agreement, including any releases executed in connection therewith, and the provisions of this final order and judgment; (e) adjudicating any disputes that arise under the Settlement Agreement; and (f) any other matters related or ancillary to the foregoing.

The court hereby enters judgment, which is a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. The court finds that no reason exists for delay in ordering final judgment pursuant to Federal Rule of Civil Procedure 54(b) and thus directs the Clerk of Court to enter the judgment forthwith. The court also directs the Clerk to close the file.

This disposes of ECF Nos. 159 and 163.

IT IS SO ORDERED.

Dated: September 14, 2017

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California

EXHIBIT 35

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JANE DOE 1–2, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DEJA VU SERVICES, INC., et al.,

Defendants.
_____/

Case No. 2:16-cv-10877

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER OVERRULING OBJECTIONS [39], [47], [50], [51], [56], GRANTING MOTION FOR FINAL APPROVAL OF SETTLEMENT [41], GRANTING AMENDED MOTION FOR ATTORNEY FEES AND COSTS [43], FINDING MOTION TO DISMISS [12] MOOT, AND FINDING MOTION FOR ATTORNEY FEES AND COSTS [42] MOOT

In a collective and class action complaint, Plaintiffs Jane Doe 1 and 2 alleged that Defendants Deja Vu Services, Inc., DV Saginaw, LLC, Harry Mohney, and Deja Vu affiliated nightclubs violated of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, state wage and hour laws, and the California Business and Professions Code. ECF 33. The Court granted preliminary approval of the parties' proposed class settlement, to which six class members objected. The Court held a Fairness Hearing and heard arguments from the parties and two of the objectors. For the reasons stated below, the Court will overrule the objections, grant the Motion for Final Approval of Settlement, and grant the Amended Motion for Attorney Fees and Costs.

BACKGROUND

The dispute between Plaintiffs and Defendants dates back nine years. *See Jane Doe v. Cin-Lan, Inc.*, 2:08-cv-12719 (E.D. Mich. July 15, 2011). *Cin-Lan* involved nearly the

same defendants, claims, and proposed settlement, and many of the same class members. After three years of highly contested litigation, the *Cin-Lan* parties proposed a class settlement. The Court in *Cin-Lan* held a fairness hearing, *id.* at ECF 402, granted final approval, and retained jurisdiction to enforce the settlement, *id.* at ECF 430.

Five years later, Plaintiffs filed this class and collective action suit alleging violations of the FLSA and state wage and hour laws. *See* Compl., ECF 1; Am. Compl., ECF 33. Specifically, Plaintiffs alleged that Defendants intentionally misclassified class members as independent contractors, refused to pay minimum wage, unlawfully required employees to split gratuities, and unlawfully deducted employee wages through rents, fines, and penalties. Defendants filed a motion to dismiss or stay. ECF 12. They argued that the named Plaintiff's contract mandated binding arbitration. *Id.* Six months ago, the parties reached a settlement and filed a motion to transfer the case to this Court, because the proposed settlement affected the parties' rights and obligations under the *Cin-Lan* settlement. ECF 22.

DISCUSSION

Federal Rule of Civil Procedure 23(e) requires parties to obtain court approval of class-action settlements. Approval is a three-step process: "(1) the court must preliminarily approve the proposed settlement, i.e., the court should determine whether the compromise embodied in the decree is illegal or tainted with collusion; (2) members of the class must be given notice of the proposed settlement; and (3) a hearing must be held to determine whether the decree is fair to those affected, adequate and reasonable." *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 565–66 (6th Cir. 2001).

On February 7, 2017, the Court granted preliminary approval to the proposed settlement, ECF 31, because it suffered from no obvious deficiencies and appeared to fall within "the range of possible approval." *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 3070161, at *4 (E.D. Mich. Aug. 2, 2010) (quoting Manual for Complex Litigation s 1.46, at 53–55 (West 1981)).The Court's order instructed the parties to send out notice to inform the class of the proposed settlement no later than February 28, 2017. ECF 31. Also, the notices advised class members that the Court would hold a the fairness hearing on June 6, 2017 at 2:00 p.m. ECF 34-5.

After the Plaintiffs filed a Motion for Final Approval of Settlement, ECF 41, and an Amended Motion for Attorney Fees and Costs, ECF 43, the Court received five objections: from C.T. (represented by W. Allen McDonald), B.D (represented by Daniel Arciniegas), Eva Cabrera and Brittney Halverson (represented by Guy Conti and Harold Lichten), Stephanie Sage (not represented by counsel), and Merry Clark (also not represented by counsel). On June 6, 2017, the Court held a fairness hearing and heard arguments from the parties and from attorneys Lichten and Arciniegas.

I. Certification of the Settlement Class is Appropriate

As noted in the order granting preliminary approval, the parties seek certification of a settlement class that includes "[a]ll current and former entertainers who worked for Defendants at any time during the Class Period and today's date at any of the Déjà Vu affiliated clubs[.]" ECF 31, PgID 718; *see also* ECF 34-2 (listing 64 "Deja Vu affiliated clubs"). The "class period" begins on the date when each class member's state wage and hour claim statute of limitations period began to run prior to March 10, 2016. ECF 34-1.

The proposed class meets the requirements of Federal Rule of Civil Procedure 23(a): numerosity ("the class [must be] so numerous that joinder of all members is impracticable"), commonality ("there [must be] questions of law or fact common to the class"), typicality ("the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class"), and adequacy of representation ("the representative parties [must] fairly and adequately protect the interests of the class"). *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 569 (6th Cir. 2004)

First, the class consists of 28,177 members; that fact makes joinder of all class members impracticable. *See id.* at 570 (holding that the "sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy" the numerosity requirement). Second, a common legal question applies to each of the class members' claims: whether Defendants misclassified class members as independent contractors. That question is "central to the validity of each one of the claims" of the class members under any of the applicable state wage and hour laws. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Third, the class representatives' claims satisfy the typicality requirement because they "stem from a single event or a unitary course of conduct, or . . . are based on the same legal or remedial theory"—namely, the Defendants' business practices of classifying workers as independent contractors. *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 509 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1493 (2016).

Fourth, to determine adequacy of representation, "[t]he representative must have common interests with unnamed members of the class, and . . . it must appear that the

representatives will vigorously prosecute the interests of the class through qualified counsel." *Vassalle v. Midland Funding, LLC*, 708 F.3d 747, 757 (6th Cir. 2013). Both requirements are met here: class representatives raise FLSA and wage and hour claims common to the class, and they have pursued their claims with the assistance of experienced and qualified counsel.

Finally, the Court looks to Federal Rule of Civil Procedure 23(b)(3). That rule permits a class action if "the court finds that the questions of law or fact common to class members predominate over any questions affecting individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The requirement is met here because "the issues subject to generalized proof"—whether Defendants correctly classified class members performing similar work in similar circumstances as independent contractors—"predominate over those issues that are subject to only individualized proof." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir. 2012).

II. The Settlement Class Received Adequate Notice

Federal Rule of Civil Procedure 23(e)(1) and (2) require that class members receive reasonable and adequate notice of a proposed class settlement. The class consists of 28,177 members. At the fairness hearing, the parties stated that 24,575 notices were delivered, 4,623 class members have opted in to the proposed settlement, and 66 class members opted out of the proposed settlement. Also, the Plaintiffs certified that notice had been provided in accordance with the Court's preliminary approval order. The notices stated—in clear and easily understandable terms—the key information class members needed to make an informed decision: the nature of the action, the class claims, the

definition of the class, the general outline of the settlement, how to to elect for a cash payment, how to opt out of the class, how to object to the settlement, the right of class members to secure counsel, and the binding nature of the settlement on class members who do not to opt out. ECF 34-5.

In another notice-related provision, Federal Rule of Civil Procedure 23(e)(5) provides that "[a]ny class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval." Accordingly, the notices advised that class members who filed timely objections to the settlement could voice their objections at the June 6 fairness hearing. ECF 34-5. Also, the notices stated that class members had 95 days from the Court's preliminary approval order—until May 13th—to object or opt out of the class. *See* ECF 31, PgID 720. In addition, the parties took additional steps to provide notice to class members, including through targeted advertisements on social media. ECF 66, PgID 2061.The Court finds that the parties have provided the "best notice that is practicable under the circumstances," Fed. R. Civ. P. 23(c)(2)(B), and complied with the requirements of the Federal Rules of Civil Procedure, the Class Action Fairness Act of 2005, and due process.

III. The Proposed Class Settlement is Fair, Reasonable, and Adequate

Under Federal Rule of Civil Procedure 23(e)(2), "the court may approve [a settlement that would bind class members] only after a hearing and on finding that it is fair, reasonable, and adequate." To determine whether the proposed settlement meets the requirements of Rule 23, the Court considers seven factors: "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount

of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *Int'l Union, UAW v. Gen*. *Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007).

"[I]n class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013). As a result, the Court must "carefully scrutinize" a class settlement to ensure that class counsel and representatives meet their "fiduciary obligations" to the class. *Id.* As proponents of the settlement agreement, the parties bear the burden to prove that the proposed settlement agreement is fair. *Id.* at 719.

A. Likelihood of Success on the Merits

A district court "cannot judge the fairness of a proposed compromise without weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *UAW*, 497 F.3d at 631 (quotations omitted). Thus, "the district court must specifically examine what the unnamed class members would give up in the proposed settlement, and then explain why—given their likelihood of success on the merits—the tradeoff embodied in the settlement is fair to unnamed members of the class." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 309 (6th Cir. 2016).

The major point of contention between the parties and the objectors is whether the settlement adequately compensates class members for release of their claims. Under the terms of the settlement, all the opt-in class members release their FLSA claims, and all class members—except those who opted out—release their state-wage-and-hour claims.

ECF 34-1, PgID 861. To estimate the value of those claims, the parties provided a damages model for a typical class member. ECF 66-7. The model shows a rough approximation of the hours worked over a three-year period based on data from a named class representative. Although far from ideal, the Court finds the damage model useful to determine class members' range of possible recovery. According to the model, the possible damages for a frequent worker in the class range from $443.08 to $6,006.70 per year of employment, depending on whether full minimum wage, reduced minimum wage, or a damages offset applied. *See* ECF 66-7, PgID 2221. The parties note that the absence of records creates a major obstacle to estimating damages. *See* ECF 66 PgID 2095–96.

In exchange for releasing their claims, the class will receive injunctive relief and either a payment from the cash pool or remuneration from the secondary pool in the form of a rent-credit or dance-fee payment. According to the parties, the combined value of the settlement is $6.55 million. The injunctive relief applies to all class members. The settlement requires Defendants to provide dancers with an "Entertainment Assessment Form" which appears to be a questionnaire designed to ensure that Defendants accurately categorize each dancer as an independent contractor or employee based on the economic realities test. ECF 34-3. Also, the injunctive relief requires Defendants to offer each class member the opportunity to cancel their current independent contractor status and accept a position as an employee. ECF 34-7 ("Enhanced Offer of Employment" form). Also, Plaintiffs argue the injunctive relief benefits class members who prefer to continue as independent contractors: Defendants may not impose work schedules, may not require tip-outs, must limit fines, and must give contractors a vote on some club policies. ECF 34-1,

PgID 851–54. Defendants value the injunctive relief at $3.4 million, based in part on $173 in wages paid per employee per shift, if 7.5% of the class were to accept the employment offer. ECF 70, PgID 2426.

Next, the proposed settlement creates a cash pool of $1 million and a secondary pool of $4.5 million. Class members can choose between one or the other. First, the cash pool provides cash compensation to class members in the form of a single monetary payment, distributed based on a point system that gives more money to class members who have worked for Defendants more recently, and for longer periods of time. The money will be distributed completely, with no reversion to Defendants. Also, the cash pool will fund a $30,000 incentive payment for the two named class representatives, and half of the settlement administration costs—$50,000. The Defendants will bear the costs of the remaining $50,000 in administration costs. In sum, the settlement requires Defendants to distribute $920,000 in cash to class members. Class members may elect payment from the cash pool until June 22, 2017. ECF 66, PgID 2061.

The secondary pool is the default form of relief, meaning any class members who have not opted out, or have not opted for cash settlement, will be eligible for a rent-credit or dance-fee payment for one year from the settlement date. The rent-credit pool pays 60% of a class member's rent on a given day. For clubs that do not operate on a rent system, class members may receive a dance-fee payment, up to a maximum of $100 per day. Class counsel will retain 33% of the secondary payment as an attorney fee. Any unclaimed secondary-pool benefits revert to the Defendants. The settlement creates three tiers; the more months a class member has worked, the more rent credits or dance fees she is eligible to receive.

Also, the settlement mandates that Defendants pay $100,000 to resolve issues surrounding the California PAGA (Private Attorney General Act) of which $75,000 will be paid to the California Labor Workforce Development Agency, and $25,000 to the California class members.

Lastly, the settlement provides $1.2 million in attorney fees to class counsel—$900,000 in direct attorney fees, and up to $300,000 indirect attorney fees contingent on the amount of rent credits or dance fees claimed by class members.

At the fairness hearing, Plaintiffs stated that a worker similar to the named class representative—whose damage model forms the estimate for the class—will receive $2,000 from the cash pool; the average payment from the cash pool will be around $200. The Court notes that $2,000 compensates the named Plaintiff for more than 50% of her $3,878.88 damages, based on three years of back pay for full minimum wage with an offset applied. ECF 66-7, PgID 2221. The secondary pool would apparently also provide between $200 to $2,000 in rent-credit or dance-fee payments to class members. ECF 41-2, PgID 1180.

The objectors cry foul. They make two primary arguments. First, the objectors claim that the parties have failed to precisely calculate the value of the released claims. *See* ECF 47, PgID 1561–64 (objecting that Plaintiffs have failed to show "the range of possible recoveries class members might obtain" through successful litigation); *see also* ECF 50, PgID 1812–17 (arguing that the parties failed to "perform[] any sort of damage calculations for class members"). And second, the objectors contend that, given the value of the claims released, the settlement vastly under-compensates class members. ECF 39, PgID 1071

(objecting to amount of cash settlement); ECF 47, PgID 1565 (estimating that class damages "exceed $141 million"); ECF 51, PgID 1952 (arguing that Plaintiffs "settled much too cheaply"); ECF 56, PgID 1986 ("The settlement is nowhere near enough."). In support, the objectors cite to a variety of dancer-misclassification cases in which both individuals and classes received cash payments of thousands or tens of thousands of dollars. *See, e.g.*, ECF 73-1 (preliminary approval of class settlement providing an average payment of $8,817.36 to 106 class members).

As an initial matter, the Court greatly appreciates the arguments offered by the objectors. In particular, Mr. Lichten impressed the Court with his knowledge of the law and familiarity with class-action litigation. As to the objectors' first argument, however, the Court disagrees. Class damage "[c]alculations need not be exact[.]" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Although the Plaintiffs' damage model may not achieve the precision sought by objectors, it provides a sufficient basis for the Court to evaluate the value of the claims released. Since "[t]he approximate value of such claims is discernable based on the record before the Court, . . . an evaluation of the fairness and reasonableness of a release of those claims is possible." *Grissam v. Ranraj Singh Dhanju I, Inc.*, No. 6:16-CV-1368-ORL-41-KRS, 2016 WL 7210946, at *1 (M.D. Fla. Dec. 13, 2016).

As to the second objection, the Court respectfully submits that the objectors have underestimated the risks of litigation and overestimated the likelihood of success on the merits. The Supreme Court will address the enforceability of mandatory arbitration clauses in its 2017 term, *see, e.g.*, *Epic Systemes Corp. v. Lewis*, 137 S. Ct. 809 (mem) (2017), and that fact adds a large measure of uncertainty to continued litigation. More importantly, however, Plaintiffs' damages may very well be limited to a reduced minimum wage, as

tipped employees, or offset by other payments made to class members and recorded by IRS Form 1099s. *See* ECF 66-7. Moreover, the objectors did not take into account the risk of a counterclaim from Defendants for repayment of mandatory dance fees in the event class members were improperly classified as employees. *See Cin-Lan*, Case No. 2:08-cv-12719, ECF 70. The key question is not Plaintiffs' likelihood of success against the defendants in the cases cited by the objectors, *see, e.g.*, ECF 47-4, but their likelihood of success against Defendants here. *See generally Buel v. Chowder House, Inc.*, No. A108951, 2006 WL 1545860 (Cal. Ct. App. June 7, 2006) (holding substantial evidence supported jury verdict that Deja Vu affiliated club properly classified dancer as independent contractor). If the class were to continue to litigate, it would face serious risks: mandatory and binding arbitration, an unfavorable verdict, or a substantial reduction in damages.

Next, the objectors attack the injunctive relief as a "sham," *see, e.g.*, ECF 47, PgID 1579, characterize the rent credits as perfunctory "coupons," *see, e.g.*, *id.* at 1576, and chastize the parties for failing to inform the Court how much of the $9 million rent-credit pool from *Cin-Lan* was actually disbursed to class members, *see, e.g.*, *id.* at 1578.

The Court finds the objections unavailing. At the outset, the Defendants claim—and the objectors failed to rebut—that the injunctive relief provides $3.4 million in value to the class, based in part on additional wages. ECF 70, PgID 2426. More importantly, however, the injunctive relief mandates long-term, structural changes to Defendants' business practices: an improved screening system to accurately classify workers, an enhanced offer of employment, and increased benefits and protections for employees and independent contractors alike. Unlike the vague health warnings issued in *In re Dry Max Pampers Litig.*,

724 F.3d 713, 719 (6th Cir. 2013), or the illusory and short-term injunction in *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013), the injunctive relief here provides real benefits to the class.

The objectors' coupon arguments are likewise made in good faith, but unpersuasive. Unlike a coupon that offers "perfunctory" relief, *see Dry Max*, 724 F.3d at 719, the secondary pool here will offer many class members a direct payment of $100 in dance fees each day they work. Also unlike a coupon that requires a consumer to buy the defendant's product, the rent credit increases a worker's net gain in compensation. The rent credits are not available only to "very few" class members who uttered the correct "magic words." *Date v. Sony Elecs. Inc.*, No. 07-15474, 2009 WL 435289, at *4–5 (E.D. Mich. Feb. 20, 2009). Rather, rent credits are available to the entire class. And since the cash pool is available as an alternative to the secondary pool, the settlement cannot be said to unfairly prejudice class members who no longer work for Defendants.

As the objectors note, the *Cin-Lan* settlement required Plaintiffs to track disbursement of the $9 million rent-credit pool, and they failed to do so. ECF 74-1. At the fairness hearing, Plaintiffs' counsel acknowledged the mistake in *Cin-Lan*, agreed to remedy the issue, and noted that the settlement (like the *Cin-Lan* settlement) provides for third-party "Modern Bookkeeping, Inc." to track payment of rent credits, and audit rights to ensure rent credits are paid to class members. Although the Court fully agrees with objectors that Plaintiffs failed to appropriately track and record rent-credit payments in *Cin-Lan*, that omission alone does not render the settlement unfair.

The Court's role in this dispute is not to determine whether the proposed settlement is ideal. Rather the Court's role is "properly limited to the minimum necessary to protect the

interests of the class and the public." *Robinson v. Shelby Cty. Bd. of Educ.*, 566 F.3d 642, 649 (6th Cir. 2009). The Court may not—and will not—"substitute [its] own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Id.* (quotations omitted). The proposed settlement offers value to the class in the form of cash, rent-credit or dance-fee payments, and long-term structural changes to Defendants' business practices, all of which directly benefit class members. Plaintiffs' likelihood of success on the merits is not guaranteed; if class members were to continue to litigate, they could receive nothing. Therefore, the high risk of continued litigation and the uncertain likelihood of success on the merits weigh heavily in favor of approval.

C. The Risk of Collusion

The other factors established by *UAW* also favor approval of the settlement. The Court begins with a "presumption that the class representatives and counsel handled their responsibilities with the independent vigor that the adversarial process demands." *UAW*, 497 F.3d at 628. The parties submit, and the Court agrees, that the settlement resulted from extensive, arm's-length negotiations made in good faith. The risk of fraud of collusion is minimal.

The objectors disagree. They point out that the Defendants agreed not to object to Plaintiffs' request for attorney fees in a "clear sailing provision." ECF 50, PgID 1802–03, ECF 51, PgID 1967–68. But "not every 'clear sailing' provision demonstrates collusion." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012). "The clauses 'are sometimes included in class action settlements so that defendants have a more definite idea of their total exposure,'" which the parties submit is the case here. *Id.* (quoting *Waters*

v. Int'l Precious Metals Corp., 190 F.3d 1291, 1293 n.3 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000)). Moreover, the parties have a "history that evidences adversity," and dates back to three years of highly contested litigation in the *Cin-Lan* case. *Id.*

Objectors also argue that the Plaintiffs' requested incentive payments are unreasonable and create the risk of fraud. ECF 51, PgID 1969. "[W]hen a class-action litigation has created a communal pool of funds to be distributed to the class members, courts have approved incentive awards to be drawn out of that common pool" to "reward[] individual efforts taken on behalf of the class." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). The Court must carefully scrutinize incentive awards, however, to ensure that named plaintiffs don't "compromise the interest of the class for personal gain." *Id.* Here, the parties have made a sufficient showing that the class representatives devoted additional time, effort, expense, and risk to prosecute the case. *See* ECF 41-6, 41-7, 66-5. The Court therefore finds the requested incentive payments reasonable and in accordance with common practice in the Sixth Circuit. *See, e.g.*, *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001).

Objectors point to the settlement of four related cases as evidence of fraud. ECF 50, PgID 1805–06. But "[t]he timing of a settlement by itself does not establish collusion." *UAW*, 497 F.3d at 633. "[A] tentative settlement can precede or be concurrent with class certification; something more is required to indicate collusion[.]" *Id.* (internal citation and quotations omitted).

The Court prefers, as a general practice, for parties to negotiate attorney fees separate from a class settlement. But the parties here did not make the settlement agreement contingent on the Court's award of the requested attorney fees. ECF 41-2, PgID

1171 ("The disposition of Class Counsels' application for an Attorney Fee and Expense Award, and for Enhancement Payments, is within the sound discretion of the Court and is not a material term of the Settlement or of this Agreement[.]"). In sum, objectors have not shown sufficient "evidence of improper incentives" to dislodge the presumption that the parties conducted negotiations independently and at arm's-length. *Id.* at 628.

D. The Complexity, Expense and Likely Duration of the Litigation, and the Amount of Discovery

This case presents complex legal issues because it combines a Rule 23 class action with a FLSA collective action. Continued litigation would require great expense and a long duration because the Defendants possess meritorious defenses, *see* ECF 12, *Cin-Lin*, Case No. 08-12719, ECF 70, and there are unique challenges to obtaining sufficient records to prove class damages. Although objectors point to the lack of discovery as an indicator of unfairness, *see, e.g.*, ECF 47, PgID 1587, "[t]he relevant inquiry with respect to this factor is whether the plaintiff has obtained a sufficient understanding of the case to gauge the strengths and weaknesses of the claims and the adequacy of the settlement." *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 236 (E.D. Mich. 2016).

To determine whether sufficient discovery has taken place, "the court should take into account the formal and informal discovery in which the parties engaged during the litigation." *Date*, 2009 WL 435289, at *7. The parties here have made a sufficient showing of informal discovery based on their efforts in *Cin-Lan*, when Plaintiffs served 13 interrogatories and 87 requests for production on each of the three defendants, took 13 depositions of Defendants' officers and managers, and filed numerous subpoenas on third parties. In total, the parties in *Cin-Lan* exchanged 13,000 pages of material related to the

details of Defendants' business practices. Although some of the material was likely out-of-date and not useful, the vast bulk of the prior discovery remained relevant to this case as it dealt with Defendants' general business practices. Accordingly, the parties were in a position "to make an informed evaluation of the merits of a possible settlement" despite the absence of formal discovery. *Id.*

E. The Opinions of Class Counsel

Class counsel have extensive experience litigating class and collective action cases, including FLSA dancer claims. ECF 41-5. Defense counsel likewise is an experienced class and collective action litigator and has successfully defended similar suits in the past. ECF 70-8. In their reasoned, professional judgment, the benefits of settlement outweigh the risks of continued litigation. Although by no means dispositive, their opinions weigh in favor of settlement approval.

F. The Reaction of Absent Class Members

The positive reaction of absent class members weighs in favor of approval. Sixteen percent of all class members have opted in. That number will likely continue to grow because absent class members can continue to opt in to receive cash payments for another week, and opt in to receive secondary rent-credit or dance-fee payments for up to one year after final approval. Opt-in rates are high: 16% of all class members and 19% of notified class members have requested to receive a cash payment. Conversely, the 66 opt outs account for 0.2% of the class. As noted above, the Court received five objections from six objectors, or 0.02% of the class. The Court considers the overwhelmingly positive response a strong indication of support for the proposed settlement.

G. The Public Interest

And finally, the settlement serves the public interest. It resolves the parties' disputes and puts an end to "potentially long and protracted litigation." *Kritzer v. Safelite Sols., LLC*, No. 2:10-CV-0729, 2012 WL 1945144, at *8 (S.D. Ohio May 30, 2012). The settlement mandates long-term structural changes to Defendants' business practices designed to ensure workers are accurately classified, and employees receive appropriate wages and legal protections. The factor also weighs in favor or approval.

In conclusion, the parties have carried their burden. The Court finds the settlement is the result of a bona-fide dispute, and the terms established in the settlement are a fair, reasonable, and adequate resolution of the claims.

IV. The Settlement is a Fair Resolution of the Class Member's FLSA Claims

Objectors contend the settlement is illegal because the FLSA prohibits payment in scrip or coupons. ECF 50, PgID 1794–96. In support, the objectors cite to federal regulations interpreting the FLSA that mandate wages paid in currency, not scrip or coupons. *Id.* But Department of Labor regulations govern an employer's payment of wages to an employee, they do not govern a negotiated settlement for the release of claims. "When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness." *Lynn's Food Stores, Inc. v. U.S. By & Through U.S. Dep't of Labor, Employment Standards Admin., Wage & Hour Div.*, 679 F.2d 1350, 1353 (11th Cir. 1982). Here, for the reasons stated above, the Court finds that the settlement embodies "a fair and reasonable [resolution] of a bona fide dispute over FLSA provisions." *Id.*

V. Motion for Attorney Fees

Plaintiffs' counsel requested, and Defendants agreed to pay, $900,000 direct attorney fees, and $300,000 indirect attorney fees contingent on payment of the secondary fund. ECF 43. Although Plaintiffs' Amended Motion for Fees includes a request for $100,000 in litigation expenses, ECF 43, PgID 1468, during the fairness hearing, the Plaintiffs explained that they seek $37,000 in out-of-pocket litigation expenses as part of their fee, and ask permission to deduct $45,000 from any fee award for incentive and general-release payments to four late-added class representatives who pursued class claims against Defendants that were stayed by the Court's injunction.

Federal Rule of Civil Procedure 23(h) allows the Court to "award reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement." "When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). To assess the reasonableness of fees, the Court may employ either the percentage-of-the-fund or the lodestar method. *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016).

A. Percentage of the Fund

"When conducting a percentage of the fund analysis, courts must calculate the ratio between attorney's fees and benefit to the class." *Id.* at 282. Attorney fee awards "of close to 30% appear[] to be a fairly well-accepted ratio in cases of this type and generally in complex class actions." *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, *19 (E.D. Mich. Dec. 13, 2011). Here, Plaintiffs assert that the settlement creates

a common fund worth at least $6.55 million. ECF 43, PgID 1482. Their request for $1.2 million in attorney fees accounts for approximately 18% of the common fund, which is well below the typical ratio of 30% fee awards.

The objectors disagree; they argue that the common fund value is overinflated by illusory relief (rent credits) and contend that the actual value of the common fund is closer to $2 million ($920,000 cash fund and $1.2 million in attorney fees). *See, e.g.*, ECF 47, PgID 1590. As an initial matter, the value of the common fund depends on the entire "benefit to the class" created by the settlement, including "all components that the parties found necessary for settlement." *Gascho*, 822 F.3d at 282. As noted above, the parties have made a sufficient showing that the secondary pool of rent-credit and dance-fee payments will give actual value to the class. And the parties have offered unrebutted data to show that—if 7.5% of class members accept Defendants' enhanced offer of employment—the class will receive around $3.4 million in benefits from the injunctive relief negotiated by Plaintiffs and included in the settlement. The Court concludes that the benefit to the class of the common fund is worth at least $6.55 million.

Since the parties failed to offer data from their previous settlement to show the benefits of rent credits to the class, the Court would be justified to reduce the value of the secondary pool. But if, hypothetically, the Court were to consider the secondary pool as worth only $2.25 million, the Plaintiffs' fee request would still fall below 30% of the common fund of $4.25 million. In any event, and contrary to objector's assertions, the value of the settlement depends on the size of the entire fund created and the class members' "right to share the harvest of the suit upon proof of their identity, whether or not they exercise it[.]"

Gascho, 822 F.3d at 282 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) (emphasis omitted)). Therefore, Plaintiffs' fee request for 18% of the common fund appears reasonable on its face.

B. Lodestar Cross-Check

The Court also finds the fee request reasonable based on the lodestar cross-check. "To determine the lodestar figure, the court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Gascho*, 822 F.3d at 279 (quotations omitted). The Court reviewed the details of Plaintiffs' attorney fee records in-camera, at their request, and found no irregularities. Since "[t]he public has an interest in ascertaining what evidence and records the District Court relied upon in reaching [its] decisions," however, the Court will make the Plaintiffs' billing rates, hours, and expenses part of the public record. *Shane*, 825 F.3d at 305.

Sommers Schwartz, P.C. recorded $381,383.05 in attorney fees and $20,618.42 in expenses based on hourly rates of $685 for Mr. Thompson, $475 for Mr. Young, $315 to $325 for other attorneys, $125 to $175 for paralegals, and 718.33 total hours. Pitt McGehee Palmer & Rivers PC recorded $349,190.00 in attorney fees and $400 in expenses based on hourly rates of $600 for Ms. Bonanni, $400 for other attorneys, and 624.55 total hours. In addition, Plaintiffs provided attorney fee records from related cases against the Defendants that joined in Plaintiffs' class action: Cullins O'Brien Law, $11,670 in attorney fees based on an hourly rate of $600, and 19.45 total hours, plus $50 in expenses; Rusing Lopez & Lizardi, $128,208.50 in attorney fees based on hourly rates of $225 to $425, and 434.30 total hours, plus $7,445.01 in expenses; Federman & Sherwood, $101,146.25 in attorney fees based on hourly rates of $250 to $850 and 193.30 hours in total, plus

$7,737.30 in expenses; and a spreadsheet entitled "Hustler Club" without identifying attorney information, $75,565 in attorney and paralegal fees based on 198.4 attorney hours and 35 paralegal hours.

To calculate the lodestar, the Court will not include fees documented by the unnamed spreadsheet, or Rusing Lopez, because neither of those fees were included in the Plaintiffs' Amended Motion For Attorney Fees. *See* ECF 43-2, PgID 1502. Similarly, the Court will not include the fees claimed by Andrew Sterling because the parties did not provide any information regarding hours worked and rates charged, or a detailed fee record for in-camera review.

After subtracting the unsupported fee submissions, Plaintiffs claim $843,389.03 in attorney fees for 1555.63 hours. The lodestar multiplier of 1.4, and the blended hourly rate of $542 are reasonable given the complexity of the case, the results achieved, and considering that Plaintiffs' counsel will continue to accumulate fees while they represent the class during the administration of the settlement. Thus, the lodestar cross-check confirms that the requested fees fall within a reasonable range accepted in the Sixth Circuit. *See, e.g.*, *N.Y. State Teachers'*, 315 F.R.D. at 243 ("Most courts agree that the typical lodestar multiplier in a large class action ranges from 1.3 to 4.5.") (quotations omitted).

C. Reasonableness Factors

The Court must determine whether Plaintiffs' fee request is "reasonable under the circumstances." *Rawlings*, 9 F.3d at 516. Six factors guide the Court's inquiry: "(1) the value of the benefit rendered to the plaintiff class []; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4)

society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

An analysis of the factors shows that the fees requested are reasonable. First, the settlement confers real value on the class who will receive access to a common fund worth $6.55 million, and non-monetary relief in the form of long-term changes to Defendants' business practices. Second, the value of legal services provided by Plaintiffs' counsel on an hourly basis are at least $843,389.03, which is within a reasonable lodestar multiplier of the amount of attorney fees requested. Third, Plaintiffs' counsel operated on a contingency fee basis, which "often justifies an increase in the award of attorney's fees." *Stanley v. U.S. Steel Co.*, No. 04-74654, 2009 WL 4646647, at *3 (E.D. Mich. Dec. 8, 2009) (quotations omitted).

Fourth, Plaintiffs' attorneys should be rewarded for recovering damages for 28,177 class members. Without the settlement negotiated by Plaintiffs, the vast majority of class members would recover nothing. "Society has a stake in rewarding attorneys who achieve a result that the individual class members probably could not obtain on their own." *Kritzer v. Safelite Sols., LLC*, No. 2:10-CV-0729, 2012 WL 1945144, at *9 (S.D. Ohio May 30, 2012). Fifth, the litigation was quite complex: a combination collective action under the FLSA and a class action under state wage and hour laws. The litigation presented difficult questions of law and fact, which should be reflected in a fee award. Sixth, both Plaintiffs' counsel and Defendants' counsel have significant expertise litigating FLSA and class actions, and have both successfully litigated similar individual and class actions.

In sum, the requested fees fall within the range of reasonableness commonly accepted in the Sixth Circuit. The percentage of the fund analysis shows that class counsel requests 18% attorney fees. And the lodestar cross-check confirms that this request is within the boundaries of acceptable fees. The request satisfies the reasonableness factors set forth by *Boyle*. As a result, the Court finds the requested fees are fair, reasonable under the circumstances, and supported by the record.

ORDER

WHEREFORE, it is hereby **ORDERED** that Objections [39], [47], [50], [51], [56] are **OVERRULED.**

IT IS FURTHER ORDERED that the settlement agreement is **APPROVED** as fair, reasonable and adequate.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Final Approval of Settlement [41] is **GRANTED**.

IT IS FURTHER ORDERED that class counsel and the class representatives adequately represent the class.

IT IS FURTHER ORDERED that Plaintiffs' Amended Motion for Attorney Fees and Costs [43] is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Attorney Fees and Costs [42] is **MOOT.**

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss or Stay Proceedings in Favor of Arbitration and For Attorney Fees and Costs [12] is **MOOT**.

IT IS FURTHER ORDERED that this case is **DISMISSED WITH PREJUDICE** and without costs, except those provided by the settlement agreement; the Court retains jurisdiction over the administration of the settlement agreement and distribution of the settlement fund.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: June 19, 2017

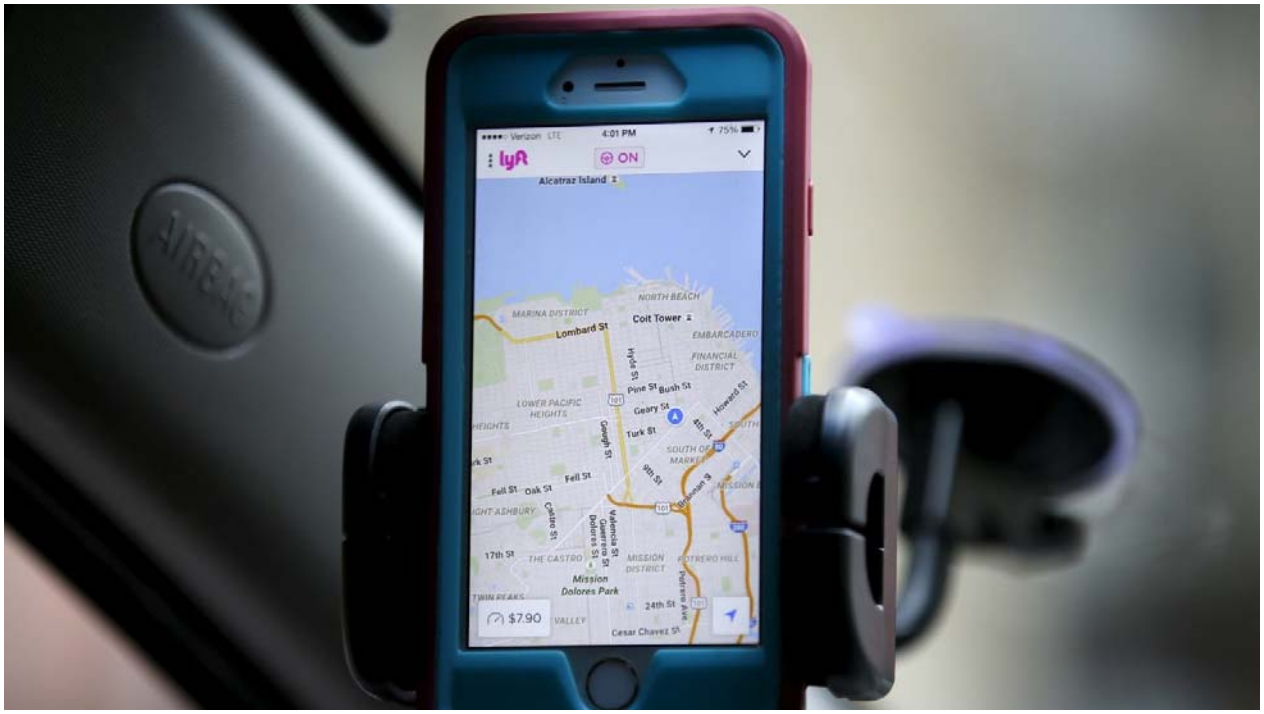
I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on June 19, 2017, by electronic and/or ordinary mail.

s/David P. Parker
Case Manager

EXHIBIT 36

DECLARATION OF BRADLEY J. SHAFER IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY APPROVAL

Judge Approves $27M Settlement in Lyft Class-Action Suit



STEPHEN LAM/REUTERS

A smartphone app for Lyft drivers is seen during a photo opportunity in San Francisco, California February 3, 2016.

A judge in San Francisco on Thursday approved a $27 million settlement in a class-action lawsuit against Lyft Inc., ending a years-long battle over the company's independent-contractor status for drivers. U.S. District Judge Vince Chhabria had previously rejected a $12.25 million settlement offer from the company, saying it "shortchanged" the drivers. Lyft drivers had filed a class-action suit against the company in 2013 in a bid to drop their independent-contractor status and become official employees, a move that would ensure they didn't have to cover work expenses out of pocket. The settlement deal keeps the drivers as independent contractors, and Chhabria conceded that the agreement was far from ideal. "The agreement is not perfect. And the status of Lyft drivers under California law remains uncertain going forward," he said. Lyft has more than 700,000 drivers in the U.S., and they have to pay for gasoline and vehicle maintenance themselves due to their status. Attorney Shannon Liss-Riordan, who represented the drivers in the class-action suit, said she was satisfied with the agreement, adding that the drivers' fight to be classified as employees "will just have to wait for another day."