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November 17, 2008

State of Nevada
Office of the Labor Commissioner
555 E. Washington Avenue - #4100
Las Vegas, Nevada 89101
Attention: Michael Tanchek, Labor Commissioner

VIA FAX AND FIRST CLASS MAIL

Re: Baldonado v. Wynn
Your Letter of November 10, 2008
Potential "Timeliness of Claims" Issue

Dear Commissioner Tanchek:

I am in receipt of your above referenced correspondence, copy attached. After conferring with all other counsel in this matter, and Ms. Hegeduis, there remains an unclear, but very important, "timeliness of claims" issue that was not resolved by your correspondence.

You have made clear that your office is not interested in receiving 500 individual claims in this matter. You have also made clear that in the event relief is granted to the Complainants the standard policy of your office would be to conduct a companywide audit. That audit would seek to collect the compensation owed to all of Respondent's involved employees.

What is not resolved by your correspondence is whether some future companywide audit would afford relief (restitution of the tips taken by the Respondent) for the entire time period at issue. This is not an academic consideration but one of pressing concern to the involved employees. No determination will be made in these proceedings for some months. Your office's position, as set forth in N.A.C. § 607.105, is that it will not accept a "claim or complaint" based upon "an act or omission" taking place more than

24 months prior to the filing of the same with your office¹.

The Respondent's conduct that is at issue has been ongoing since September 1, 2006. It does not appear that your office will conclude its hearings and make a determination in this matter until sometime in 2009. If that determination is favorable to the Complainants the question remains from what date will the Respondent's other employees be granted relief as a result of a companywide audit.

Respondent will argue that any future companywide audit is limited by N.A.C. § 607.105 and cannot cover more than the 24 months prior to its initiation. Yet no such audit would be initiated by your office until sometime in 2009 and after a ruling in these proceedings. If you were to apply N.A.C. § 607.105 in the manner urged by Respondent, employees who had not previously filed individual claims would be unable to collect the tips owed to them from 2006 and a part of 2007.

The conflict and concerns presented by this situation are readily apparent. Quite sensibly, your office should not be burdened with 500 individual claim filings. Nor should Respondent retain a portion of its ill-gotten gains in the event the policy at issue is found to violate Nevada's labor laws.

I submit it is imperative that your office clarify this issue at soon as possible. If your office will not seek to collect tips owed to Respondent's employees for more than a 24 month period running back from a yet to be initiated future audit date it should confirm the same. Such a ruling will put the involved employees on notice that they can protect their rights by filing individual claims. If no such audit time limitation will be adopted by your office it is also imperative that such a ruling be

¹ I submit that the provisions of N.A.C. § 607.105 are void in respect to the Administrative Complaint filed by this office. The Nevada Supreme Court in the recent Baldonado v. Wynn case, 124 Nev. Adv. Opn. 81, held that your office has a mandatory duty to hear and determine all claims arising under the Nevada labor statutes at issue. Nevada, under N.R.S. § 11.190(3)(a), provides for a three year statute of limitations to bring claims arising under any statute that does not prescribe a shorter period of limitations. None of the involved statutes provide for a shorter statute of limitations. The N.A.C. cannot limit the rights provided by Nevada's Legislature under the N.R.S. In any event, the timeliness of claims issue is still of grave concern to the involved employees even under the longer three year statute of limitations.

made as soon as possible. Failing to promptly advise the Respondent of the same will open to attack on due process grounds any companywide audit that is not so limited.²

I believe there are at least two grounds upon which you can issue an Order deeming all claims of Respondent's employees affected by these proceedings to be before your office for timely consideration for any compensation owed to them after September 1, 2006:

(1) Under N.R.S. § 607.160(2) your office is empowered to take "any appropriate action" to enforce Nevada's labor laws. Pursuant to that authority you can issue an Order confirming the claims of Respondent's employees unpaid tips arising after September 1, 2006 are tolled for statute of limitations purposes pending the resolution of these proceedings. It is apparent that your office is not constrained by N.A.C. § 607.100 from issuing such an Order.³ Such an Order would be most appropriate given the prior District Court class action proceedings in Baldonado v. Wynn and your office's decision to defer action in this matter until those proceedings were resolved.⁴

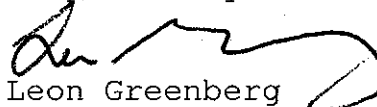
² Presumably Respondent could colorably claim that its due process rights were violated when it had no notice that such non-time limited relief was possible as a result of these proceedings. That argument might find support in the statement in the October 27, 2008, Order that the claims in the Baldonado Administrative Complaint as to "the unnamed members of the class" were being dismissed.

³ N.A.C. § 607.100 limits the time period for your office to take jurisdiction over complaints it has received. It does not limit the period of time your office has to bring an action against an employer violating Nevada's labor laws. See, City Plan Development Inc. v. Office of the Labor Commissioner, 117 P.3d 182, 187-88 (2005)

⁴ When a class action litigation is commenced the statute of limitations for all members of the putative class is tolled pending the entry of final judgment and the resolution of all appeals. See, Crown Cork and Seal Co. v. Parker, 462 U.S. 345 (1983) and the unanimous adoption of the Crown Cork doctrine by all State jurisdictions that have reached the issue. The prior Baldonado District Court action was commenced as a putative class action in September of 2006, certified as a class action in January of 2007, and resolved by appeal in October of 2008. As a result the statute of limitations on any claims in this matter have been tolled almost continuously since September of 2006.

(2) You can clarify your prior Order of October 27, 2008 by holding that upon the date of the filing of this office's Administrative Complaint a request for restitution of improperly taken compensation for all of Respondent's involved employees was properly placed before your office.⁵ Such clarification would not modify that branch of your prior Order declining to certify a Complainant (plaintiff) class in this matter. Such clarification would be consistent with N.A.C. § 607.200's requirement that a person filing an Administrative Complaint need only set forth the relief sought and the persons and circumstances involved. There is no requirement that a Complainant seek any individual, personal, damages from an employer or that they have legal authority, on a class action basis or otherwise, to represent the persons allegedly owed compensation as a result of a breach of Nevada's labor laws.⁶ For example, a business that believes a competitor has engaged in unfair competition by securing lower labor costs in violation of Nevada's labor statutes could seek the same relief being sought by this office's clients. Such a business would be owed nothing by the offending respondent-employer, but numerous employees of such respondent could be owed unpaid compensation pursuant to Nevada's labor laws.⁷

Respectfully submitted,



Leon Greenberg

cc.: Gregory Kamer, Esq.
Lawrence Jay Litman, Esq.
Diana Hegedius, Esq.

⁵ See paragraph 16(b) of the Administrative Complaint.

⁶ N.A.C. § 607.200 provides that "any person" may file an Administrative Complaint.

⁷ I provide the example of a business seeking enforcement of Nevada's Labor Laws against an unfair competitor to stress that the Baldonado complainants' request for broad restitutionary relief is *not* inexorably tied to the "class certification" of their claims. The Baldonado complainants have every right to demand the relief sought in paragraph 16(b) of the Administrative Complaint. I am not addressing whether you *must* hear such a claim for broad restitutionary relief, although I believe you must under the Nevada Supreme Court's recent holding. I merely seek to emphasize that you *can*, consistent with the N.R.S. and the N.A.C., hear such a claim even though you have declined to grant class action status to these proceedings.



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MICHAEL TANCHEK
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November 10, 2008

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Re: Letter of Clarification
Megan Smith and Daniel Baldonado, et al v. Wynn Las Vegas LLC

Dear Sirs,

I have reviewed your correspondence over the past few weeks concerning the status of the unnamed workers in the "class action" complaint filed by Mr. Greenberg.

It appears to me that the issues involving the workers at the Wynn are substantially similar with a few minor differences, such as Ms. Smith being a former employee while Mr. Baldonado is still employed at the Wynn. As such, I issued an order consolidating the claims as to the named workers who amended their claims.

Assume, for the sake of argument, that the decision is favorable to Ms. Smith and Mr. Baldonado. While *stare decisis* is generally inapplicable to administrative decisions, that doesn't mean that prior decisions are inconsequential. If the result were favorable to the workers, then any worker who found himself in substantially the same position would be able to file a claim seeking the same relief.

We handle individual claims on a regular basis, but, as a practical matter, this office is not interested in receiving 500 individual wage claims on a single issue related to the same employer. When the claim or complaint of a single individual worker indicates the existence of a more systemic problem with an employer's practices, it has been our standard procedure to pursue the additional compensation due by initiating a company

wide audit and dealing with the problem all at once. Consequently, if compensation is due to other employees who, at this point may not have been specifically identified, there is an avenue available to me for protecting their interests should it become necessary.

Another issue that will need to be addressed is attorney fees. Mr. Greenberg has requested fees as part of the relief being requested. I have seen only two statutes in either NRS Chapter 607 or 608 that address the matter. NRS 607.190 prohibits the assessment of attorney fees against the Labor Commissioner. That is clearly inapplicable in this case. NRS 608.140 allows attorney fees to be awarded pursuant to either a court decision or jury award resulting from a wage claim. I am unable to find any statutory authority that allows the Labor Commissioner to award attorney fees.

A conference call between the parties and Dianna Hegeduis, my Deputy Attorney General, has been scheduled for November 14, 2008 at 1:30 p.m. Please feel free to discuss these matters with her and among yourselves at that time.

Sincerely,



MICHAEL TANCHEK
Labor Commissioner

Cc: Dianna Hegeduis, DAG