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**DISTRICT COURT
CLARK COUNTY, NEVADA**

DANIEL BALDONADO; JOSEPH CESARZ; and
QUYNGOC TANG, Individually and on behalf of all
others similarly situated,

Petitioners,

vs.

MICHAEL TANCHEK, in his capacity as the
NEVADA STATE LABOR COMMISSIONER an
agency of the State of Nevada; and WYNN LAS
VEGAS, LLC also known as the WYNN CASINO
LAS VEGAS,

Respondents.

Case No. A-10-622879-J
Dept No. I

DECISION AND ORDER

1 This matter having come before the Court on the petitioners' Petition for
2 Judicial Review pursuant to N.R.S. § 233B.130 and N.R.S. § 607.215 of the determination of
3 July 12, 2010 of the Respondent, Michael Tanchek, in his capacity as the Nevada State
4 Labor Commissioner, such Petition having come before the Court for oral argument on
5 August 4, 2011, with Leon Greenberg, Esq., arguing on behalf of all petitioners except
6 Megan Smith, and Richard Segerblom, Esq., arguing separately on behalf of petitioner
7 Megan Smith, and with Gregory Kamer, Esq., arguing on behalf of real party in interest
8 Wynn Las Vegas LLC, also known as the Wynn Casino Las Vegas, and after due
9 consideration of the arguments, briefs and papers submitted by counsel for the parties, and
10 the record of these proceedings;
11

12 **THE COURT FINDS:**

13 **Summary**

14
15 Petitioners (the "Dealers") are seeking review of the determination of the Nevada Labor
16 Commissioner (the "Labor Commissioner") that the mandatory tip pool instituted by the
17 Respondent Wynn Casino Las Vegas (the "Wynn") for the Dealers in September of 2006 (the
18 "September 2006 tip pool") complies with N.R.S. § 608.160, N.R.S. § 608.100(2) and N.R.S. §
19 613.120. The Court holds that the Labor Commissioner erred as a matter of law in his reading
20 and application of N.R.S. § 608.160. Because such error is completely dispositive of the
21 parties' dispute, the Court declines to consider whether the Labor Commissioner was also in
22 error in respect to his application of the requirements of N.R.S. § 608.100(2) and N.R.S. §
23 613.120 to the September 2006 tip pool.

24 The Court also holds that the Labor Commissioner erred as a matter of law in denying
25 class action treatment to the Dealers' claims.

26 **Discussion**

1 The Court's decision is guided by the Nevada Supreme Court's application and
2 discussion of N.R.S. § 608.160 in *Alford v. Harold's Club*, 669 P.2d 721 (1983). That statute
3 states:

4 It is unlawful for any person to:

5 (a) Take all or part of any tips or gratuities bestowed upon the employees of that person.

6 The issue presented is whether the September 2006 tip pool instituted by the Wynn
7 involves a "taking" of tips prohibited by N.R.S. § 608.160 or whether it complies with
8 subsection 2 thereof which authorizes certain employee tip sharing pools and provides that:

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

11 *Alford* is the only Nevada Supreme Court case that has ruled upon how to apply N.R.S.
12 § 608.160 to a particular employee tip pool. *Alford* discussed *Moen v. Las Vegas International*
13 *Hotel*, 402 F. Supp 157 (D. Nev. 1975) and acknowledged some general approval of *Moen's*
14 interpretation of N.R.S. § 608.160. Accordingly, the Court agrees with the Labor
15 Commissioner's decision to give *Moen* serious consideration. The Court disagrees with the
16 Labor Commissioner's decision upholding the September 2006 tip pool because such decision
17 goes further than what the Nevada Supreme Court in *Alford* anticipated when it approved of the
18 employer mandated tip pool in that case.

19 The issue raised in *Alford* was whether an employer could compel employees to enter
20 into a tip pool that otherwise complied with N.R.S. § 608.160(2). In *Alford* the casino
21 employer had decreed that dealers would pool and share their tips among themselves. Certain
22 dealers declined to do so, were terminated, and alleged, among other things, that such
23 terminations violated N.R.S. § 608.160. 669 P.2d at 722-23. *Alford* held that an employer
24 could compel its dealers to share their tips under the sort of tip pool utilized in that case and
25 still comply with N.R.S. § 608.160. 669 P.2d at 724.

26 *Alford* observed that *Moen*, a federal district court case, has no binding precedential
27 value as to the proper interpretation of a Nevada statute not yet ruled upon by the Nevada
28 Supreme Court, 669 P.2d at 724, and relied upon *Moen* for its holding as to the purpose of
N.R.S. § 608.160.:

1 “The evident purpose and proper interpretation of the statute [N.R.S. §608.160]
2 is that it was enacted to prevent the taking of tips by an employer for the benefit
3 of the employer.” *Alford*, 669 P.2d at 723 quoting *Moen*, 402 F.Supp. at 160.

4 Beyond agreeing with this finding by *Moen* that N.R.S § 608.160 was adopted “to prevent the
5 taking of tips by an employer for the benefit of the employer,” and that employer mandated tip
6 pools were not *per se* violative of N.R.S. § 608.160, there is no suggestion in *Alford* that it was
7 approving of the tip pool at issue in *Moen*. The sort of tip pool imposed in *Moen*, and imposed
8 in this case, was not at issue in *Alford*. Indeed, *Alford* was careful to expressly state, twice,
9 that it was limiting its approval to the dealers only tip pool that was before it:

10 We hold that the district court correctly concluded that NRS 608.160 does not
11 prohibit an employer from requiring employees to enter into a tip-pooling
12 arrangement *such as that imposed in the instant case*. 669 P.2d at 722.
13 (emphasis provided).

14 Accordingly, the district court did not err when it found that NRS 608.160 did
15 not prohibit Harolds Club from imposing a tip-pooling policy *in the instant*
16 *case*. 669 P.2d at 724. (emphasis provided).

17
18 *Alford* categorizes N.R.S. § 608.160 as a statute that restricts an employer’s “access to
19 employees' tips and gratuities,” 669 P.2d at 722, and holds that an employer mandated tip pool
20 complies with N.R.S. § 608.160 when “the employer does not retain any part of the tips for his
21 own use or reap any direct benefit from the pooling.” 669 P.2d at 723. Accordingly, the
22 relevant inquiry under *Alford* is whether the September 2006 tip pool involves an “access” or
23 “use” of the Dealers’ tips by the Wynn for the “direct benefit” of the Wynn.

24 The Court finds the September 2006 tip pool fails *Alford's* direct benefit test. At oral
25 argument counsel for the Wynn implied that the purpose of the tip pool was to improve the
26 management of the casino by ensuring that front line supervisors, the Wynn’s CSTL and
27 boxmen employees, were compensated at a level above that of the Dealers. The record
28 contains public statements by Wynn representatives that it was “upside down,” “outrageous,”
and “inverted” that the amount of tips given by customers to the Dealers was so large that they

1 were earning more than their immediate supervisors, the CSTL's (floor supervisors) and
2 boxmen.¹ The Wynn's official written announcement of August 21, 2006 to the Dealers on the
3 implementation of the September 2006 tip pool began by stating:

4 Over the years, the casino industry has allowed an anomaly to occur with regard to the
5 compensation earned by dealers and floor supervisors. As a result of tip income, it has
6 become common for floor supervisors to earn less money than the dealers they
7 supervise. This results in an inverted system whereby the best dealers do not want to be
8 promoted, as should be the case in any employment situation.

9
10 We have therefore decided to modify our Table Games Department and tip pooling
11 procedure to eliminate this discrepancy.²

12
13 It appears that an essential purpose of the September 2006 tip pool policy was to ensure
14 that the Wynn floor supervisors, re-categorized as customer service team leads ("CSTLs"), and
15 boxmen, would receive a substantial increase in their compensation and earn more than the
16 Dealers. That policy provided a direct benefit to the Wynn, which did not have to pay for the
17 cost of correcting what it viewed as an "inverted" compensation system caused by the Dealers'
18 largess of tips and the much lesser wages paid to the floor supervisors and boxmen.³ The
19 Court believes *Alford's* direct benefit limitation would be eviscerated if it were to ignore this
20 very substantial, direct economic benefit to the Wynn of shifting a part of the Dealers' tips to
21 its CSTL's and boxmen. Accordingly the Court finds the Labor Commissioner's reasoning
22 unpersuasive.

23 ¹ Record On Appeal 04852.

24 ² Record On Appeal 04817.

25
26 ³ The Dealers also introduced evidence, which was not disputed by the Wynn,
27 indicating the September 2006 policy allowed the Wynn to transfer to the Dealers' tip
28 pool approximately \$330,000 in casino table games management salary expenses the
Wynn was previously paying from its own funds. Such evidence provides an additional
basis to hold the tip pool provided an impermissible direct benefit to the Wynn. Record
On Appeal, 00267-00271.

1 Nor is the Labor Commissioner's characterization of the benefit to the Wynn from the
2 tip pool as "collateral" and not "direct"⁵ supported by *Alford*, the only case discussing what
3 constitutes a permissible collateral benefit to the employer under its holding. *Alford* found that
4 the benefit received by the casino in that case from its dealers only tip pool, consisting of lower
5 turnover and higher morale among the casino's dealers, was merely a collateral, and not a
6 direct, benefit. The Court disagrees with the Labor Commissioner's finding that the Wynn
7 merely received a collateral benefit from the September 2006 tip pool, through a lower turnover
8 among its CSTL and boxmen employees and an ability to more easily attract high quality
9 applicants for such positions.

10 The Court also finds the Labor Commissioner's Order of October 27, 2008, denying
11 class action treatment to the Baldonado petitioners cannot be sustained, as such Order fails to
12 set forth any meaningful reasons for its decision. The Court believes the broad remedial
13 powers granted to the Labor Commissioner under N.R.S. Chapter 607, and the Nevada
14 Supreme Court's prior holding in *Baldonado v. Wynn (Baldonado I)*, 194 P.3d 96 (Nev. Sup.
15 2008), support the availability of the class action device in these proceedings. *Baldonado I*
16 held that the Labor Commissioner must hear and determine all claims alleging violations of
17 N.R.S. 608.160. 194 P.3d at 104. Under N.R.S. § 607.160(1) the Labor Commissioner is also
18 charged with the duty to enforce all of Nevada's Labor Laws. He is further granted the power
19 under N.R.S. § 607.160(2) to "take any appropriate action" against persons who have violated
20 Nevada's Labor Laws "whether or not a claim or complaint has been made" to him about such
21 violation. Under N.R.S. § 607.160(6) he has the power to bring civil and administrative
22 actions, presumably including those seeking broad class action type relief. It would be
23 anomalous for the Labor Commissioner to be empowered to seek, and secure, on his own
24 initiative, broad class wide relief, but simultaneously be prohibited from granting such relief
25 when he adjudicates, as required by *Baldonado I*, the claims brought by others.

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⁴ Record on Appeal 00015-16.

1 Other jurisdictions that have not expressly provided by statute for class actions in
2 administrative proceedings have recognized that they should be allowed in appropriate cases.
3 See, *Brandon v. Arkansas Public Service Commission*, 67 Ark. App. 140; 150-153, 992 S.W.2d
4 834, 839-840 (Arkansas Court of Appeals, 1999) and *State Employees Assoc. of New*
5 *Hampshire*, 127 N.H. 89, 90-91; 497 A.2d 860, 861 (New Hampshire Supreme Court, 1985).
6 See, also, Bernard Schwartz, *Administrative Law* § 8.21 at 480-81 (2d ed. 1984)(cited in
7 *Brandon*). No Nevada statute expressly prohibits an administrative proceeding class action. It
8 follows that the Nevada Revised Statutes' silence on the issue of class actions in an
9 administrative proceeding should not be construed to bar the same. Absent a clear and
10 meaningful showing as to why class action treatment was denied, the Court finds the Labor
11 Commissioner's Order denying such treatment to be in error.

12 **CONCLUSION**

13 It is hereby Ordered that the decision of the Labor Commissioner is reversed as it
14 violates the substantial rights of the Petitioners because, for the reasons stated herein, it is in
15 violation of statute and based upon errors of law, and this matter is Remanded to the Labor
16 Commissioner for further proceedings consistent with this Decision and Order.

17 IT IS SO ORDERED this 31 day of Jan, 2012

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19 HONORABLE JUDGE KENNETH CORY
20 DISTRICT COURT, CLARK COUNTY
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1 Submitted by:

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17 NOT APPROVED AS TO FORM AND
18 A DIFFERENT PROPOSED DECISION
19 AND ORDER WILL BE SUBMITTED BY:

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