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15

16 **BEFORE THE OFFICE OF THE NEVADA LABOR COMMISSIONER**

17

18 DANIEL BALDONADO, et al,)
19 Complainants,)
20 vs.)
21 WYNN LAS VEGAS, LLC.)
22 Respondent.)
_____)

POST HEARING BRIEF OF THE
BALDONADO COMPLAINANTS

23

24

25

26 Submitted on behalf of all Complainants
represented by the above listed counsel

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1 to the employee." There are no reported cases interpreting NRS
2 608.100(2). The statute does not just restrict an employer's
3 ability to require the payment to the employer of the employee's
4 actual "wages" and "salary" but also prohibits such conduct broadly
5 in respect to "compensation earned" by the employee.

6 **Relevant Undisputed Facts**

7 Since September of 2006 the Respondent has compelled casino
8 dealers to participate in a tip pool that includes the casino floor
9 supervisors.¹ The casino dealers and the floor supervisors each
10 have significant unique duties not performed by the other. The
11 customer service functions performed by the floor supervisors, such
12 as issuing complimentary meals or other items of value to the
13 players, and processing markers for players (gaming chips issued on
14 casino credit) are never performed by the dealers. R. 7/9/09, p. 9,
15 59.² The primary duty of the dealers, dealing the various casino
16 games, is never performed by the floor supervisors.

17 The compensation scheme of the dealers and the floor
18 supervisors, and their histories, are undisputed. The dealers, as
19 is the custom in the casino industry in Nevada, are paid by the
20 Respondent the minimum wage or no more than \$1.00 or so above the
21 minimum wage. R. 8/18/09, p. 161-2. The floor supervisors, as is

22
23 ¹ The Respondent as of September 1, 2006 has given floor
24 supervisors the title of "Customer Service Team Lead" or "CSTL."
25 That title is used in no other casino facility and such persons are
26 traditionally referred to as "floors" or "floor supervisors" or
27 "floor men" in the casino industry, as they were by the Respondent
prior to September of 2006. Complainants submit that use of the
term "CSTL" is a subterfuge and refers to such persons, whether
before September of 2006 or afterwards, as floor supervisors.

28 ² R. references are to date and page number of hearing records,
some references also include witness name.

1 also the custom in the casino industry in Nevada, are paid
2 substantially more by the Respondent, \$60,000 to \$65,000 a year, or
3 about 4 to 5 times as much as the Respondent pays the dealers. R.
4 7/7/09, p. 141.

5 It is undisputed that the tip pool instituted by the Respondent
6 in September of 2006 mandated that floor supervisors receive a tip
7 pool share equal to 40% of the share received by a dealer. R.
8 7/7/09, p. 146. By way of example, if the hourly tip pool share for
9 dealers for the day was \$10.00 an hour the floor supervisors would
10 receive \$4.00 an hour.

11 It is undisputed that prior to September 1, 2006, Respondent
12 prohibited its floor supervisors from accepting customer tips. R.
13 7/7/09, p. 111; 8/19/09, p. 40.

14 It is undisputed that prior to September 1, 2006 the
15 compensation received by dealers was, owing to their receipt of
16 customers' tips, significantly greater than the compensation
17 Respondent paid to floor supervisors. Complaints' Ex. BB, p. 4. It
18 is undisputed that such differences in compensation levels made it
19 more difficult for Respondent to recruit what it felt were well
20 qualified floor supervisors.

21 It is undisputed that the September 1, 2006 policy allowed the
22 Respondent to have its floor supervisors compensated at a level that
23 was close to and possibly above the level of compensation received
24 by the dealers. *Id.*, p. 6. It is undisputed that Respondent did
25 not, itself, incur the expense of securing that increase. Instead
26 Respondent only funded \$5,000 of that almost \$31,000 increase with
27 the rest of that increase to the floor supervisors' compensation
28 coming from the dealers' tip pool. *Id.* It is undisputed that such

1 increase of compensation to the floor supervisors has allowed the
2 Respondent to more easily recruit floor supervisors.

3 **Precise Questions Presented**

4 **A. N.R.S. § 608.160**

5 The exact language of N.R.S. § 608.160(2), states that
6 "Nothing contained in this section shall be construed to prevent
7 such employees from entering into an agreement to divide such tips
8 or gratuities among themselves" and raises the following questions
9 of law:

10 **1. Scope of Limitation Imposed by N.R.S. § 608.160**

11 Does the language of N.R.S. § 608.160(2) referring to an
12 agreement by "such employees" to "divide such tips or gratuities
13 among themselves" and not just an agreement by "employees" to divide
14 "tips or gratuities" limit the scope of the mandatory tip pools
15 authorized by *Alford* ? Complainants submit the answer to that
16 question is yes and an employer cannot compel employees to divide
17 tips with any or all other employees at the employer's complete
18 discretion.

19 If the answer to the foregoing question is yes, the following
20 additional questions are posed:

21 **2. Who Bears the Burden of Showing Compliance With**
22 **N.R.S. § 608.160 When a Mandatory Tip Pool**
23 **Includes Employees Performing Different Jobs**

24 Does the employer bear the burden of proving that a mandatory
25 tip pool among employees performing different jobs is permissible
26 under Nevada law?
27
28

1 **3. What Factors are Considered When Determining Whether**
2 **An Employer Mandated Tip Pool Involving Employees**
3 **Performing Different Jobs Complies with N.R.S § 608.160**

4 What factors are considered in determining the appropriate
5 group of employees among whom mandatory tip pooling is allowable
6 when those employees do not perform the same jobs?

7 Do those factors include requiring proof that all of the
8 participants in the tip pool work in jobs where employees regularly
9 and customarily receive tips?

10 Do those factors include requiring the participants in the tip
11 pool to perform completely or almost completely interchangeable
12 tasks and the same primary duty, such as those of a bus boy and
13 waitress in serving a customer their meal, and who work in
14 capacities where tip sharing has existed by long standing custom and
15 practice?

16 Do those factors include requiring the participants in the tip
17 pool to be compensated by the employer in a similar fashion and at a
18 similar level as is the case among service personnel who customarily
19 receive tips and are paid low level wages, often the minimum wage or
20 the lower "tip credit" minimum wage?

21 Does the tip pool instituted by the Respondent in September of
22 2006 violate *Alford's* requirement that an employer imposed tip pool
23 not "use" employee tips for the "direct benefit" of the employer?

24 **B. NRS 613.120**

25 The exact language of NRS 613.120 (1) states as follows:

26 It shall be unlawful for any manager, superintendent,
27 officer, agent, servant, foreman, shift boss or other
28 employee of any person or corporation, charged or entrusted
with the employment of any workmen or laborers, or with the
continuance of workmen or laborers in employment, to demand
or receive, either directly or indirectly, from any workman
or laborer, employed through his agency or worked or

1 continued in employment under his direction or control, any
2 fee, commission or gratuity of any kind or nature as the
3 price or condition of the employment of any such workman or
laborer, or as the price or condition of his continuance in
such employment.

4 **1. Scope of Limitation Imposed by NRS 613.120**

5 Are Respondent's floor supervisors employees of Respondent that
6 are "charged or entrusted" with the employment of the dealers and
7 barred from receiving the tips Respondent has directed be taken from
8 the dealers' tip pool and given to them?

9 **C. N.R.S. § 608.100(2)**

10 The exact language of N.R.S. § 608.100(2) states:

11 It is unlawful for any employer to require an employee to
12 rebate, refund or return any part of the wage, salary or
compensation earned by and paid to the employee.

13 **1. Scope of Limitation Imposed by NRS 608.100(2)**

14 Is Respondent requiring its casino dealers to rebate, refund or
15 return a portion of their compensation to the Respondent by
16 requiring the dealers to give a portion of the tips they receive to
17 the Respondent's floors supervisors?

18 **SUMMARY OF ARGUMENT**

19 Nevada law, N.R.S. § 608.160(2), allows mandatory tip pooling
20 among "such employees" upon whom "such tips" are "bestowed" and only
21 among such employees "themselves." The use of the terms "such
22 employees" and "such tips" and "themselves" must be given their
23 ordinary and logical meaning. The statute does *not* provide for
24 agreements to share "all tips" with "all employees" or with any
25 employees who have not "themselves" had "bestowed" upon them in the
26 first instance "such tips" being divided. The Respondent's dealers
27 had, as is the custom and practice in the casino industry, a pre-
28 existing tip pool for the tips customers "bestowed" upon them. The

1 Respondent's floor supervisors never had a tip pool and prior to
2 September of 2006 customers were prohibited from giving them any
3 tips. Respondent could not, in compliance with the restrictions of
4 N.R.S. § 608.160, make its floor supervisors participants in the
5 dealer's tip pool.³ This is because the floor supervisors were not,
6 and are not, "such employees" upon whom "such tips" were "bestowed"
7 and who may be compelled to enter into an agreement to share "such
8 tips" among "themselves."

9 Respondent's September 2006 policy also violates NRS 613.120 by
10 requiring the dealers to give a portion of their tips to a class of
11 other employees, the floor supervisors, who are prohibited by such
12 statute from accepting any gratuities earned by the dealers.

13 Respondent's September 2006 policy also violates NRS 608.100(2)
14 by requiring the dealers to in effect rebate, return, or refund a
15 portion of their compensation, the tips they earn, to their
16 employer, the Respondent, who in turn directs those tips to its
17 floor supervisors. The Respondent's decision to not directly retain
18 those tips itself, but give them to the floor supervisors, in no way
19 ameliorates its violation of NRS 608.100(2).

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25 ³ Respondent was free to allow tipping to its floor supervisors
26 and force those floor supervisors to share such tips among
27 themselves. As discussed, *infra*, it did not attempt to institute
28 such a policy because floor supervisors do not receive tips or only
receive a nominal amount of tips and the whole purpose of the
Respondent's September 2006 policy was to take the dealers' tips and
give them to the floor supervisors.

1 ARGUMENT

2 I. RESPONDENT SHOULD HAVE THE BURDEN OF PROVING ITS TIP
3 POOL POLICY COMPLIES WITH NEVADA LAW AS ANY TIP
4 POOL REPRESENTS AN EXCEPTION TO THE LEGAL REQUIREMENT
5 THAT AN EMPLOYER NOT TAKE ANY OF THEIR EMPLOYEES' TIPS

6 A. NRS 608.160(2) Provides for an Exception to a
7 Broad Standard of Conduct Imposed on Employers

8 The language of NRS 608.160(1) is broad and unconditional:

9 1. It is unlawful for any person to:

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

12 Nevada Revised Statutes 608.160(2) constitutes an exception to
13 the prohibition on tip taking set forth in NRS 608.160(1):

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

17 Under NRS 608.160(1) an employer cannot require an employee to
18 do anything with his tips, even if the employer is not requiring
19 such tips to be handed over to the employer. Any such coerced
20 action by the employee would be a "taking" by the employer
21 prohibited by the statute. Yet as ruled upon in *Alford*, under NRS
22 608.160(2) a group of casino dealers can be required to enter into
23 an agreement to share their tips among themselves. As discussed at
24 length, *infra*, such a requirement does not constitute a "taking" of
25 tips in violation of NRS 608.160(1). It is apparent from the
26 statutory language itself, and *Alford*, that NRS 608.160(2)
27 represents an exception to a broadly imposed rule of conduct for
28 Nevada employers.

1 **B. Because NRS 608.160(2) is an Exception to a Broad**
2 **Standard of Conduct Imposed on Employers Such Exception**
3 **Should be Narrowly Construed and the Burden is Upon an**
4 **Employer to Show the Exception's Requirements are Met**

5 The NRS Chapters at issue in this case are all aimed at
6 employee protection and impose duties upon employers to safeguard
7 the health, welfare and livelihood of workers. See, NRS 608.005.
8 It has long been held by the Supreme Court of Nevada that employee
9 protection statutes should be liberally construed in favor of the
10 employees for whom they were enacted. See *.International Game Tech.*
11 *v. Dist. Ct.*, 124 Nev. Adv. Opn 18 at 7 (2008) (Construing employee
12 whistleblower protection statute); *Copeland v. Desert Inn Hotel*, 99
13 Nev. 823, 826, 673 P.2d 490 (1983) (Discrimination statutes under
14 Chapter 613); *Banegas v. SIIS*, 117 Nev. 222, 231, 19 P.3d 245 (2001)
15 (Historical liberal construction of workers' compensation statutes,
16 but recognizing 1993 legislative abrogation of liberal construction
17 doctrine as to workers' compensation); and *State, Emp. Sec. v.*
18 *Reliable Health Care*, 115 Nev. 253, 257, 983 P.2d 414 (1999)
19 (Unemployment compensation statutes in Chapter 612 liberally
20 construed in favor of involuntarily displaced employees).

21 Nevada Revised Statutes Chapter 608 covers wage, hour and
22 employee compensation standards, issues also covered by the federal
23 Fair Labor Standards Act (FLSA). It is well established that
24 exceptions to the FLSA are narrowly construed and the employer bears
25 the burden of "plainly and unmistakably" establishing an FLSA
26 exemption. See, *Corning Glass Works v. Brennan*, 417 U.S. 188
27 (1974); *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211
28 (1959); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960) and
 Donovan v. Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir.1983) and

1 numerous other cases. That burden also applies under the FLSA when
2 the employer seeks to institute a tip pool that complies with the
3 FLSA's minimum wage tip credit provisions.⁴ See, *Reich v. Priba*
4 *Corp.*, 890 F. Supp. 586, 595-96 (N.D. Tex. 1995) and *Bursell v.*
5 *Tommy's Seafood Steakhouse*, No. H-06-0386, 2006 U.S. Dist. LEXIS
6 80526, 2006 WL 3227334, at *1 (S.D. Tex. Nov. 3, 2006).

7 Other employment regulation statutes also impose the burden
8 upon the employer to justify any exception from the standards of
9 conduct that they impose. See, *Western Airlines v. Cristal*,, 427
10 U.S. 400 (1985)(Employer bears burden of establishing the bona fide
11 occupational qualification exception to the Age Discrimination in
12 Employment Act, such exception being narrowly construed); *Keziah v.*
13 *W.M. Brown & Son*, 888 F.2d 322 (4th Cir. 1989)(Statutory exceptions
14 to the Equal Pay Act are narrowly construed and the employer bears a
15 "heavy" burden to establish them); and *Local Union 7107, UMW v.*
16 *Clinchfield Coal Co.*, 124 F.3d 639 (4th Cir. 1997) (Because the WARN
17 or plant closing act is remedial legislation, its exceptions are
18 construed narrowly and the employer bears the burden of proof to
19 show an exception).

20 Based upon the remedial and protective nature and intent of NRS
21 608.160 (as well as NRS 613.120 and NRS 608.100 to which the above
22 standards should likewise apply), and the analogous relationship
23 between NRS Chapter 608, the FLSA, and other labor law statutes, the
24 Labor Commissioner must construe the statutes at issue in this case
25 liberally in favor of the dealers. He must also narrowly construe

26
27 ⁴ Complainants do not assert this case presents a "tip credit"
28 issue but submit the same rationale for requiring an employer under
the FLSA to justify their tip pool applies with equal force to the
NRS provisions at issue in this case.

1 any exceptions to those statutes and place upon the Respondent the
2 burden of establishing that its September 2006 policy complies with
3 the requirements of Nevada law. As discussed, *infra*, the
4 Respondent has failed to meet that burden.

5 **II. MANDATORY SHARING OF TIPS UNDER NRS 608.160 IS ONLY**
6 **PERMISSIBLE AMONG EMPLOYEES WHO CUSTOMARILY AND REGULARLY**
7 **RECEIVE TIPS, WHO PERFORM THE SAME SERVICE FUNCTIONS, AND**
8 **WHO ARE COMPENSATED AT A SIMILAR LEVEL BY THE EMPLOYER**

9 **A. Tip Pooling under N.R.S. § 608.160 Can be Compelled Only**
10 **Among Employees Who Regularly and Customarily Receive Tips**

11 Under N.R.S. § 608.160(2) "such employees" who have received
12 "such tips" can agree to "divide such tips among themselves."
13 *Alford* does not question or narrow the application of this language
14 and holds the employer can make such agreements mandatory as long as
15 it retains no portion of the tips for its "own use" and "reaps no
16 direct benefit" from the agreement. The purpose underlying NRS
17 608.160, the language of such statute, and *Alford*, compel a
18 conclusion that mandatory tip pooling must be limited to employees
19 who, themselves, actually, customarily, and regularly receive tips.
20 Absent such a requirement NRS 608.160 would be rendered meaningless
21 and would allow employers to compel employees to share tips with any
22 and all other employees without limitation, something not
23 contemplated by *Alford*.

24 As *Alford* observes, NRS 608.160 prevents an employer from
25 taking tips from employees for the benefit of the employer. In
26 *Alford* there was no "taking" in violation of NRS 608.160 because the
27 tips remained with the dealers who received such tips. It was
28 unnecessary in *Alford* to state the obvious: Tips were being divided
among, and in compliance with NRS 608.160 could only be divided
among, employees who received such tips in the first instance.

1 Under NRS 608.160 an employer cannot require tipped employees to
2 pool tips with non-tipped employees. Tip pools can only be
3 compelled among the employees who regularly and traditionally
4 receive tips.

5 **B. An Employer Can Only Impose Mandatory Tip Pooling Among**
6 **Employees Who Have the Same Primary Duty and Perform**
7 **Completely or Almost Completely Interchangeable Tasks,**
8 **Mandatory Tip Pools Among Other Employees Constitute an**
9 **Impermissible "Use" of Employee Tips for the "Direct**
10 **Benefit" of the Employer**

11 The purpose of NRS 608.160 is to prevent an employer from
12 retaining "...any part of the tips for his own use or reap[ing] any
13 direct benefit from the [tip] pooling." *Alford*, 669 P.2d at 724.
14 That "own use" or "taking" or "direct benefit" language indicates
15 the protections afforded by NRS 608.160 are broad. The statute's
16 reach is not limited to the literal "taking" through personal
17 appropriation by an employer of his employee's tips. Indeed, *Alford*
18 characterized NRS 608.160 as a statute "restricting an employer's
19 access to employees' tips and gratuities" and not just one
20 preventing employers from narrowly *taking* employee tips. 669 P.2d
21 at 722.

22 The tip pool approved of in *Alford* involved only casino
23 dealers. Even though *Alford* was a short and circumscribed decision
24 the Court felt it necessary to state *twice* it was only approving of
25 the tip pooling policy in the case before it. 669 P.2d at 722, 724.
26 That repeated statement, coupled with *Alford's* holding NRS 608.160
27 restricts an employer's "use" of and "access to," and its receipt of
28 a "direct benefit" from, employee tips, requires the conclusion
mandatory tip pools must be limited to employees performing
identical or very close to identical tasks.

1 *Alford*, by holding that NRS 608.160 imposes more than just a
2 "taking" prohibition, and repeatedly insisting it was only approving
3 of the "dealers only" tip pool before it, is most reasonably
4 interpreted as rejecting the Respondent's "service line"⁵ tip
5 pooling approach. Such "service line" approach has its origins in
6 *Moen v. Las Vegas International Hotel, Inc.*, 402 F. Supp 157 (D.
7 Nev. 1975), *aff'd mem.*, 554 F.2d 1069 (9th Cir. 1977). *Alford's*
8 rejection of the "service line" theory is supported by *Alford's*
9 acknowledgment it had considered *Moen*; its holding that *Moen* was
10 correct in finding NRS 608.160 was intended to prevent the taking of
11 tips by employers and its silence on the other findings made in
12 *Moen*; its statement that *Moen* was not controlling; and its refusal
13 to otherwise endorse *Moen's* "service line" approach. 669 P.2d at
14 723-24. That interpretation is also the only one consistent with
15 *Alford's* conclusion the prohibitions imposed by NRS 608.160 go
16 beyond the mere "taking" of tips noted by *Moen* and *Alford's* repeated
17 limitation of its holding to the "dealers only" tip pool it was
18 considering.

19 *Moen's* "service line" approach is inherently incompatible with
20 the broad prohibitions imposed on employers under NRS 608.160, as
21 interpreted by *Alford*. The employer in *Alford*, by requiring dealers
22 who had received "such tips" to share "such tips among themselves",
23 was not "accessing" or "using" the dealers' tips for any purpose
24 that conferred a direct benefit upon the employer. It was the
25 *dealers* who were using or accessing such tips to share them "among
26

27 ⁵ The "service line" theory, even if it was not rejected by
28 *Alford*, must also be rejected as irrational, unworkable and
unsubstantiated, as discussed, *infra*.

1 themselves."

2 Moen only held that an employer may not "take" employee tips
3 for its own benefit. 402 F. Supp. at 160. It did not discuss
4 whether 608.160 prevented an employer from using tips for its own
5 benefit. The tip pool approved of in *Moen* required dealers to share
6 their tips with floor supervisors and other personnel performing
7 very different jobs. Based upon its finding that all employees in
8 the "service line" were properly entitled to share in customer tips,
9 *Moen* held there was no "taking" of tips by the employer and no
10 violation of NRS 608.160. That holding was premised upon *Moen's* "no
11 taking" analysis but completely ignored the later, and controlling,
12 prohibition NRS 608.160 imposes under *Alford* upon an employer's "use
13 of" or "access to" employee tips.

14 Not only was *Moen* unable to consider *Alford's* future holding,
15 it engaged in a fundamental misreading of NRS 608.160 and took it
16 upon itself to, quite literally, rewrite the statute:⁶

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

25 ⁶ As discussed, *infra*, a Court must, whenever possible, apply
26 a statute pursuant to its express language as long as doing so does
27 not yield an absurd result. Because NRS 608.160 can be easily
28 applied in a sensible manner pursuant to its express language there
is no reason to go beyond that language. *Moen* ignored this bedrock
principle of statutory construction when creating its "service line"
standard.

1 practices, is as follows: "Nothing contained in this
2 section shall be construed to prevent such employees from
3 entering into an agreement with the employer or with other
employees to divide such tips or gratuities among the
employees." 402 F. Supp. at 160.

4 *Moen's* conclusion that NRS 608.160 "does not specify with whom such
5 an agreement [to divide tips] may be made" is unsupported and
6 unexplained. In fact, the "whom" specification of NRS 608.160 is
7 actually made even more apparent through *Moen's* supposedly
8 "reasonable interpretation" and *de facto* modification of the
9 statute's language.

10 The actual language of NRS 608.160 provides that nothing in
11 such statute "shall be construed to prevent such employees from
12 entering into an agreement to divide such tips or gratuities among
13 themselves." The terms "such employees" and "such tips" and
14 "themselves" when read together clearly designates the "whom" at
15 issue: The "such employees" who have been bestowed "such tips" can
16 agree to divide the same among the critically limiting "themselves."

17 Neither of the two alternative readings of NRS 608.160 recited
18 by *Moen* consider the controlling terms of the statute as it is
19 actually written. The statute does not authorize employees to enter
20 "into an agreement with other employees," without limitation, to
21 divide tips, as proposed in one of *Moen's* readings. The statute
22 expressly states it is providing for "such employees" to divide
23 "such tips." Nor does it, as *Moen* ultimately concludes, authorize a
24 division of tips "among the employees" but only among "themselves,"
25 referring back to the "such employees" who received "such tips"
26 referenced in the first part of the sentence.

27 The conclusion NRS 608.160 limits mandatory tip pooling to
28 "such employees" who perform the same sort of tasks and have the

1 same "primary duty" is supported by two decisions from
2 Massachusetts. See, *Williamson v. DT Management Co.*, 17 Mass. L.
3 Rep. 606 (2004) and *Fernandez v. Four Seasons Hotels, Ltd.*, 23 Mass.
4 L. Rep. 77 (2007). Those decisions construed the application of
5 Massachusetts G.L.c. 149, § 152A, which in relevant part states:

6 "No employer or other person shall solicit, demand,
7 request or accept from any employee engaged in the serving
8 of food or beverage any payment of any nature from tips or
9 gratuities received by such employee..."

10 In both *Fernandez* and *Williamson* the employer maintained the
11 participation of other employees in the servers tip pool was proper
12 either because such employees performed some form of customer
13 service or also, to some small extent, actually were engaged in
14 serving food or beverages to customers. Those contentions were
15 rejected in both cases. As stated in *Williamson*:

16 It would be illogical to interpret the Massachusetts
17 Tips Statute so as to provide protection to employees who
18 serve food and beverages with regards to tip pooling and
19 then to simultaneously say that service charges imposed by
20 the employer can be distributed to virtually any employee,
21 so long as it can be said that they furthered the positive
22 experience of the customer, without any regard to the
23 services actually provided by that employee. Here, the
24 Servers are the only employees whose primary duty is to
25 engage in the service of food and beverages. As such, they
26 are entitled to the full benefit of any tips, gratuities,
27 or service charges paid to them directly or to their
28 employer on their behalf. Any payments from these monies
to management, the house, or others not engaged in the
service of food or beverages as their primary duty for the
particular event is a violation of the Massachusetts Tips
Statute.

As stated in *Fernandez*:

The fact that Four Seasons' philosophy and practice
is that its managers should be able to perform all the
functions and duties of a banquet server and that managers
are "required" to participate in "plating" of food does
not change the Court's decision. Four Seasons contends
that these activities entitle them to summary judgment,
and then contends that they create genuine issues of fact
because plaintiffs assert that managers serve food and

1 beverages to customers at most a "couple of times per
2 year." (Clifford Dep. at 87). However, the issue is not
3 whether managers assist in the service of food or how
4 often, but rather what their primary duty is during
5 banquet events. The primary duty of the managers at Four
6 Seasons is to supervise, not to serve food and beverages
7 to patrons. As a result, the plaintiffs are entitled to
8 the full benefit of the service charges.

9 Nevada, like Massachusetts, has, through legislation, protected
10 its workers from having their tips used or taken by their employer.
11 Unlike Massachusetts, it has extended that protection to all "such
12 workers" upon whom "such tips" are "bestowed." As recognized in
13 *Williamson* and *Fernandez*, it would be illogical, irrational, and
14 defeat the entire purpose of protecting workers' tips, as set forth
15 in NRS 608.160, to hold that tips given to one group of workers can
16 be shared with another group of workers who do not have the same
17 primary duty.

18 **C. Only Employees Who Are Compensated at a Similar
19 Level by the Employer Can be Compelled to Share Tips**

20 Mandatory tip pools are only permissible among employees
21 receiving similar levels of compensation from the employer. Such
22 restriction is mandated both by the language of NRS 608.160 and the
23 holding of *Alford*. Failing to impose such a restriction would
24 result in the diversion of tips from such employees to whom they are
25 actually given and allow the use of such tips for the direct benefit
26 of the employer.

27 Empirical study indicates that tips are "bestowed" upon
28 employees who are paid low wages by their employer. See, "*Who Do We
Tip and Why: An Empirical Investigation*, Azar, Ofer, published in
the journal *Applied Economics*, Vol. 37, Issue 16, Sept. 2006 (Copy
at Ex. "A"). Azar's conclusion, based upon his review of the

1 findings of other scholars, and his own detailed study, is that
2 tipping is strongly correlated to the low income level of the worker
3 being tipped.

4 The motivation to bestow a tip, and the resulting social norm
5 to tip, substantially arises from the customer's desire to tip the
6 service worker paid too little by their employer. Studies of the
7 issue, cited by Azar, also support the conclusion the low wages paid
8 by employers to tipped workers is the reason customers give tips.
9 Azar cites two studies supporting that conclusion: Crespi, Leo P.
10 (1947), "The Implications of Tipping in America," Public Opinion
11 Quarterly, 11 (Fall), 424-435 and Economic Development Committee for
12 the Hotel and Catering Industry (1970), "Why Tipping?," London:
13 National Economic Development Office. The first finds that most
14 Americans approve of tipping "only because wages are inadequate for
15 certain service workers", the second finds that 19% of survey
16 responders indicated that the employee's need for the tip income was
17 a motivator in giving a tip.

18 Tips are bestowed to an employee based upon, at least in very
19 substantial part, the employee's relatively lower level of
20 compensation from the employer. Such tips, having been bestowed
21 upon such workers, must be divided, in compliance with NRS 608.160,
22 among such workers "themselves," not other workers paid
23 substantially higher wages and upon whom such tips were not
24 bestowed. Compelling workers paid low wages to share tips "bestowed"
25 upon them with workers paid much higher wages is a "use" of employee
26 tips for the "direct benefit" of the employer prohibited by *Alford*.
27 Such an arrangement directly benefits the employer who would use
28 tips given to employees because of their low wages for a completely

1 different purpose and benefit: Increasing the compensation of
2 employees paid much more substantial wages by the employer and upon
3 whom the customer did not, and presumably would not, bestow any tip.

4 **III. RESPONDENT HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING**
5 **ITS TIP POOL POLICY COMPLIES WITH N.R.S. § 608.160**

6 **A. The Respondent's September 2006 Tip Policy Violates**
7 **N.R.S. § 608.160 Because its Purpose is to Use**
8 **The Dealers' Tips for its Own Benefit: To Fund a**
9 **Pay Increase For its Floor Supervisors Without the**
10 **Respondent Having to Pay for Such Increase**

11 **1. Respondent Admits it Decided to Use the Dealers'**
12 **Tips to Meet its Business Objective of Increasing**
13 **Floor Supervisor Compensation Without Having**
14 **To Pay for Such Increase**

15 As *Alford* recognized, by restricting its holding to the
16 "dealers only" tip pool it was considering, no improper "use" by an
17 employer of tips occurs when a group of employees having the same
18 primary duty are compelled to share the tips they have received.
19 The reason no improper "use" has occurred in that situation is
20 presumably too obvious for *Alford* to have detailed at length: Such
21 tips remain with the employees who received them. There is no "use"
22 by the employer of the tips for any other purpose or "direct
23 benefit" to the employer. The "benefit" of the tips remains with
24 the persons who received them in the first instance. Some may
25 receive more tips in such a pooling situation, and others less, but
26 collectively, as a group, the pool does not disadvantage the
27 employees who received the tips in the first instance.

28 Respondent does not deny it is "accessing" and "using" the
dealers' tips. Its "access" of the dealers' tips includes
physically seizing the tips, preventing the dealers themselves from
counting them, and dictating the terms under which such tips shall
be divided. R. 7/7/09, p. 136, 143-4, 149-52, 251-3. Those terms

1 do not involve a "pooling" or "equal sharing" of the tips among the
2 dealers who received them and who all have the same primary duty, as
3 was approved of in *Alford*, but the requirement a specified share of
4 those tips be paid to other workers performing completely different
5 jobs and having different primary duties.

6 The September 2006 policy has but one purpose: To increase the
7 compensation of Respondent's floor supervisors⁷ without the
8 Respondent having to pay for that increase. R. 7/7/09, p. 133-6.
9 Dealers, through their receipt of generous customer tips, were
10 earning more than floor supervisors. *Id.* Respondent made a business
11 determination that such a situation was unacceptable and was making
12 it impossible for Respondent to recruit employees, including
13 dealers, into needed positions as floor supervisors. *Id.* This was
14 repeatedly and publicly acknowledged by the Respondent's President,
15 Andrew Pascal, who stated:

16 "...[A] widening disparity between the wages earned by dealers
17 and casino floor supervisors caused [the September 1st
18 policy]... ..Wynn Las Vegas dealers are the highest paid
19 dealers in the city, averaging about \$100,000 per year in
20 salary and tip earnings. But the employees supervising dealers
21 average about \$60,000 a year... .."Because of our property,
22 that disparity has gotten wider," Pascal said, citing Wynn's
23 emphasis on high end play as one reason its dealers' tokens are
24 larger than most Strip properties. "There was no incentive in
25 the division to advance and grow. Everybody wanted to become
26 dealers," he added. [The September 1st policy] will have
27 dealers earning an average of \$90,000 a year while supervisors
28 will be paid \$95,000... ..[and it] "rebalances the structure
of our table games division and gives a person an incentive to
take on more responsibility." Las Vegas Review Journal, p. 1A,
August 23, 2006, "Wynn Alters Rules on Tips." Complainants'
Ex. MM

25 Steven Wynn similarly confirmed the purpose of the September

27 ⁷ The September 2006 policy also required a much smaller
28 payment of a tip share to a small number of box persons. When the
term "floor supervisor" is used herein it includes box persons.

1 2006 system was to increase the compensation of floor supervisors.
2 Commenting on dealers, after tips, earning more than the managers
3 who supervise them, Steven Wynn stated:

4 "This is upside down. It's inverted. It's just outrageous...
5 ...The current system makes the (200 supervisors and 38 craps
6 boxmen) feel cheated." He is also paraphrased as attributing a
7 reduction in the quality of the front line managers occurring
8 as a result of the pay disparity. Las Vegas Sun, August 23,
9 2006. Complainants' Ex. LL

10 The Respondent can secure higher compensation for its floor
11 supervisors by paying them higher salaries. The diversion of tips
12 from casino dealers benefits no one except the Respondent⁸ which
13 secures higher compensation for its floor supervisors *without having*
14 *to pay for it*. This use of the dealers' tips by the Respondent for
15 its own direct benefit, namely as a substitute for salaries that the
16 Respondent itself would otherwise have to pay to the floor
17 supervisors who traditionally receive few, if any, tips, is
18 prohibited by NRS 608.160.

19 **2. Respondent's Claim the Tip Policy was Instituted to**
20 **Improve Customer Service is Untrue and Unsupported**

21 Respondent was repeatedly asked why it increased floor
22 supervisor compensation by giving such employees a share of the
23 dealers' tips rather than paying them higher salaries. In response
24 Respondent insisted the increase in compensation was achieved
25 through a share of the dealers' existing tip pool because the
26 Respondent's goal was to improve customer service. Pascal, August
27 8, 2010, p. 129-130. Having the floor supervisors receive their
28 compensation increase from tips was a "performance based

29 ⁸ Any claim that the September 2006 policy only benefits the
30 floors supervisors receiving a tip pool share is specious. Their
31 receipt of higher compensation is just a byproduct of the
32 Respondent's decision to use dealers' tokens to fund their raises.

1 compensation" system that would improve customer service.⁹ Id.

2 Respondent's claim a "performance based compensation" system
3 for floor supervisors could only be achieved through the use of
4 the dealers' tip pool is devoid of any factual basis. Pascal, when
5 asked, was unable to explain why a *floor supervisors' only tip pool*
6 would not provide a *better* "performance based compensation"
7 incentive for floor supervisors. Pascal, August 8, 2010, p. 150.
8 Respondent's refusal to acknowledge such a system would actually
9 advance its customer service goals more effectively demonstrates its
10 inherently, and irreconcilably, contradictory positions. On the one
11 hand, Respondent insists the purest measure of customer service
12 performance by its employees is the level of tips customers give in
13 exchange for such service. Pascal, p. 130. On the other hand,
14 Respondent refuses to actually use that system to motivate and
15 improve the customer service provided by the floor supervisors by
16 having them alone share in tips given to them by customers.

17 Presumably Respondent, in its reply, will now proffer an
18 explanation, based upon its "line of service" argument, of why a
19 "pure" floor supervisor tip pool would not achieve its improved
20 customer service goals. It is anticipated Respondent will claim the
21 improved customer service rendered by floor supervisors manifests
22 itself in increased tips *to the dealers* who are at the "end" of the
23 floor supervisors' "line of service." The lack of foundation of
24 such an argument is manifest. Floor supervisors, prior to September
25 of 2006, were not allowed to receive tips. R. 7/7/09, p. 111.

27 ⁹ Respondent's assertions that an improvement in customer
28 service was achieved from the policy is also false, as discussed,
infra.

1 There is no prior history upon which to measure the *increase* in tips
2 generated by any supposedly improved performance by them. It is
3 also impossible to determine if the floor supervisors allegedly
4 improved efforts at customer service actually increase customer tips
5 if those tips are not segregated in a "floor supervisors" only pool.

6 Under the Respondent's reasoning, because the "line of service"
7 includes both dealers and floor supervisors, the customer's tip,
8 handed to the dealer or placed on the dealer's table during the
9 course of the game, is properly shared with the floor supervisor.
10 According to the Respondent, in some indefinite and undefined way,
11 which cannot be measured by changes in a tip pool limited to floor
12 supervisors, improvements in customer service by floor supervisors
13 will result in increased customer tips given to dealers. Yet the
14 Respondent provides no evidence, just its supposition, that an
15 increase in tips to the dealers can be attributable to its floor
16 supervisors' actions. The dealers' tips could increase for any
17 number of reasons. Those could include better drink service by
18 cocktail servers or better quality beverages being provided by the
19 casino making customers more eager to gamble and the casino's
20 initiation of games where players win, and correspondingly tip, more
21 frequently.

22 Respondent's insistence the "line of service" must include the
23 floor supervisors, and it cannot measure the floor supervisors'
24 customer service efforts through a floor supervisors only tip pool,
25 is not just illogical and unsupported, it is completely one-sided
26 and hypocritical. Assuming, *arguendo*, that Respondent's floor
27 supervisors' customer service efforts are reflected in the amount of
28 tips received by dealers, what is the result of a *decrease* in those

1 tips? As documented, *infra*, customer tips given to dealers, as
2 measured against the level of activity in the Respondent's casino,
3 have consistently *decreased* since September of 2006. Yet Respondent
4 has not *decreased* the share of the dealers' tips it bestows upon the
5 floor supervisors. Under Respondent's approach floor supervisors
6 receive all of the credit for any increase in tips given to dealers
7 and none of the responsibility for any decrease. This circumstance
8 merely highlights, again, the true purpose of the September 2006
9 policy: To take tips from dealers to increase the compensation
10 earned by floor supervisors at no cost to the Respondent. Such
11 increase in compensation was deemed necessary by the Respondent
12 because it found it to be "inequitable" for customers to be so
13 generous with their tips that minimum wage compensated dealers were
14 earning more than their floor supervisor superiors. William
15 Westbrook, 7/7/10, p. 133

16 **3. Respondent Could Have Instituted the Exact Same**
17 **"Performance Based" Compensation System to Improve**
18 **Customer Service by Floor Supervisors Without Using**
The Dealers' Tips

19 Respondent maintains the only way it could properly achieve its
20 goal of improving customer service by floor supervisors was to have
21 them rewarded based upon customer tips. Such compensation system
22 was described by Pascal as "...the purest, most effective way of
23 performance based compensation." August 20, 2009, p. 135, l. 19-20.

24 What is never explained by Pascal, or by any other witness on
25 behalf of Respondent, is why such a system must also involve
26 actually using the dealers' tips to pay the floor supervisors such
27 "performance based" compensation. The Respondent itself could
28 simply match those tip amounts from the Respondent's own funds

1 rather than use the dealer's tip pool to make such "performance
2 based" payments to the floor supervisors.

3 Respondent could have implemented the exact same "performance
4 based" compensation standards of the September 2006 policy for the
5 floor supervisors *but paid for that compensation itself*. It could
6 have allowed the dealers to continue to share their tips, as before,
7 and the Respondent itself could have paid the 40% "floor supervisor"
8 share it instituted in September of 2006. Such a system would have
9 achieved the *exact same customer service improvement* and pure
10 "performance based compensation" the Respondent claims it was
11 securing under the September 2006 policy. The floor supervisors
12 would be just as motivated to improve customer service, and customer
13 tips, and their resulting compensation, as they were under the
14 system actually implemented by the Respondent. Of course such a
15 system would have denied the Respondent the use of the dealers' tips
16 to pay such compensation and the direct financial benefit Respondent
17 enjoys by increasing floor supervisor compensation at no cost to
18 itself.

19 **B. The Respondent's September 2006 Tip Policy Violates**
20 **N.R.S. § 608.160 Because its Shifts Respondent's**
21 **Existing Payroll Costs to the Dealers' Tip Pool,**
The Sort of "Direct Benefit" Prohibited by Alford

22 As a result of the September 2006 tip pool policy the
23 Respondent eliminated 17 pit manager positions for which it was
24 paying a salary of \$80,000 per year, plus a possible 10% bonus.
25 Fifteen of those persons became floor supervisors. Neala Banton,
26 7/8/09, p. 252, 257-259. Floor supervisors under the September
27 2006 policy were paid \$65,000 a year by Respondent, that amount
28 represented an increase from the \$60,000 per year it paid to them

1 prior to September of 2006. Baldonado Ex. BB, p. 6., Westbrook
2 7/7/09, p. 141. Respondent, as set forth in its Ex. 12, increased¹⁰
3 its total of floor supervisors from 209 to 220 as a result of the
4 September 2006 policy. The foregoing documents a direct benefit to
5 the Respondent under the September 2006 policy, in the form of a
6 direct shift of at least \$330,000 of its payroll, what were
7 management labor costs, from itself to its dealers' tip pool.

8 The foregoing shift of payroll costs from the Respondent to the
9 dealers' tip pool took place as follows:

10 (i) Respondent eliminated 17 pit manager positions at a
11 minimum compensation of \$80,000 per year. That is a minimum savings
12 of \$1,360,000 per year;

13 (ii) Fifteen of those pit managers became floor supervisors at
14 a salary of \$65,000, but with their total compensation still being
15 in excess of \$80,000 per year because they each now receive \$25,000
16 a year or more in tips from the dealers' tip pool. Baldonado Ex.
17 BB, p. 6.;

18 (iii) Respondent expanded its total number of floor supervisors
19 by 11, at an additional cost to itself of \$715,000 per year;

20 (iv) Respondent hired three additional assistant casino
21 managers, formerly known as assistant shift managers, at a cost to
22 itself of \$315,000.¹¹

23 Minimum net savings to Respondent: \$330,000 per year
24

25 ¹⁰ As discussed, *infra*, Respondent's Ex. 12 is incompetent and
26 must be excluded from consideration except for its recital of the
27 number of employees in the indicated time periods or as a factual
admission against the Respondent's interests.

28 ¹¹ Salary amounts for assistant casino managers is taken from
Respondent's Ex. 12.

1 (\$1,360,000 - \$715,000 - \$315,000) with all of its former pit
2 managers receiving the same total compensation. This savings arises
3 solely from Respondent shifting its pit manager labor costs to an
4 increased number of floor supervisors who, unlike the pit managers,
5 are now compensated in part by the dealers' tips and in a lower
6 amount by the Respondent. Respondent's shift of pit manager labor
7 costs to the dealer's tip pool is not negated by Respondent's need
8 to shift a portion of those pit manager labor costs back onto itself
9 by hiring three additional assistant managers.

10 Presumably Respondent, in reply to the foregoing, will claim
11 such analysis is inaccurate because it actually increased the
12 compensation it paid to its existing 209 floor supervisors by \$5,000
13 per year for a total cost to itself of over \$1,000,000 per year.
14 Respondent's decision to simultaneously grant its floor supervisors
15 a salary increase, in conjunction with instituting the September
16 2006 policy, is irrelevant. The labor cost savings to Respondent
17 under the September 2006 policy, and its impermissible direct
18 benefit to Respondent, must be measured against the actual facts
19 existing prior to the policy, not Respondent's incidental decision
20 to give floor supervisors a raise in September and not July of 2006.
21 That raise (to \$65,000 a year) is properly taken into account in the
22 foregoing calculations. Those calculations acknowledge Respondent's
23 increased pool of 11 floor supervisors have, each, cost it \$65,000
24 per year of its gross savings of \$1,360,000 per year through the
25 elimination of the pit managers.

26 Respondent's claim Ex. 12 establishes it did not shift labor
27 costs from itself to the dealer's tip pool is specious.
28 Respondent's witness, William Westbrook, along with a close

1 examination of Ex. 12, establishes Ex. 12 is incompetent and does
2 not support Respondent's claims. As Westbrook acknowledges, the
3 figures in that document do not set forth the *actual labor cost* of
4 the Respondent for the two months illustrated. Rather, it sets
5 forth *the amounts paid by its payroll* which may have been for labor
6 incurred during a prior period. Westbrook, 7/7/09, p. 192. In
7 addition, the Respondent issues payroll payments every two weeks and
8 there were three payroll payment periods in September of 2006 and
9 only two in August. *Id.*, p. 183.

10 The components of Ex. 12 are clearly inconsistent with
11 Respondent's other representations and testimony. Floor supervisors
12 in August of 2006 are listed as receiving \$4,615 per month in
13 compensation, which is \$55,380 per annum, not the \$60,000 per year
14 acknowledged by Respondent. In September of 2006 they (now listed
15 as "Casino Service Team Leads") receive \$4,493 for the month,
16 meaning *less* compensation even though their yearly compensation from
17 the Respondent was increased to \$65,000. Yet dealers, who
18 experienced no change in their pay from the Respondent, are shown to
19 have been paid \$903 per month in August of 2006 increasing to \$1,158
20 per month in September.

21 In actuality, the Ex. 12 document, combined with Respondent's
22 other admissions, compel a conclusion that Respondent did shift its
23 payroll costs to the dealers' tip pool. On its face, Respondent
24 claims its monthly payroll costs increased to \$1,967,595 in
25 September of 2006 from \$1,852,691.08 in August of 2006 for a net
26 increase of \$114,903.92. Yet the September of 2006 payroll includes
27 far more than \$114,903.92 that must be attributed to Respondent's
28 decision to pay its floors supervisors \$5,000 a year more and work

1 its dealers more hours (or pay them for more hours in September than
2 in August). There was no actual increase in Respondent's payroll
3 costs but a decrease once the amount of employee hours worked by, or
4 more properly paid to, dealers in each month is considered.

5 The \$5,000 per year increase for the 209 original floor
6 supervisors increased Respondent's September 2006 payroll by
7 \$87,083.33 (\$416.66 per month x 209). Respondent also increased
8 payments to its dealers from \$600,420 in August of 2006 to \$757,100
9 in September of 2006, a net increase of \$156,680. That increase is
10 only attributable to increased work hours by the dealers as their
11 compensation from the Respondent was unchanged. Once the September
12 2006 numbers are adjusted to reflect the Respondent's decision to
13 give its floor supervisors a raise, and work the dealers longer
14 hours, its payroll costs for September of 2006, as reflected in Ex.
15 12, actually decreased by \$128,860. Even if the Ex. 12 figures were
16 not adjusted for the floor supervisor raise but only for the
17 increased hours worked by the dealers, the Respondent's September
18 2006 payroll costs still decreased by \$13,956 from August of 2006.

19 **C. Respondent's Claims its September 2006 Tip Pool
20 Policy Improved Customer Service, Increased Customer
21 Tips, and Floor Supervisors Contribute More than
22 Nominally to the Tip Pool, are Demonstrably False**

23 **1. The Tip Pool Records and Respondent's Financial
24 Records Establish that Customer Tips Have Decreased
25 Substantially as a Result of Respondent's Policy**

26 In instituting its September 2006 policy the Respondent has
27 repeatedly asserted that the purpose of such policy was to improve
28 customer service and by doing so increase the amount of tips
customers will give to the employees participating in the tip pool.
Pascal, 8/20/09, p. 158. Respondent asserts it had the floor

1 supervisors take on new and significant customer service
2 responsibilities¹² that increased customer tips. R. 10/5/09, p. 9,
3 14-15, 137, 195-9. Respondent's witnesses claim floor supervisors
4 receive substantial amounts of tips from customers and by doing so
5 have acted to increase tip earnings for all employees participating
6 in the tip pool. R. 8/19/09, p. 239-244. Respondent further
7 claims to the extent dealers are receiving a smaller amount of tips
8 it is due to the poor economic conditions, and a general decline in
9 Respondent's business, and not the September 2006 policy. R.
10 10/5/09, p. 137. All of these assertions are demonstrably, and
11 conclusively, false.

12 Annexed as Ex. "B" is a chart showing the quarterly "drop" of
13 the Respondent's casino, the quarterly tip pool, and that tip pool
14 as a percentage of the "drop." These figures were obtained from
15 the Respondent's public disclosures (Exhibit "C") and the monthly
16 tip pool amounts furnished by Respondent in these proceedings (Ex.
17 "D"). The casino drop is the amount of table game chips purchased
18 by customers and is presumptively the amount of money in play at
19 the table games. It is the most reliable indicator of table games
20 activity by customers.

21 As Ex. "B" demonstrates, the amount of tips given by casino
22 customers, when measured against the volume of activity (the drop)
23 in the Respondent's casino, has been less every single quarter
24 since the September 2006 policy was instituted. That decrease has
25 not been limited to quarters taking place after the economic
26

27 ¹² As discussed, *infra*, Respondent's witnesses can identify no
28 additional or new customer service duty besides spending more time
talking with customers.

1 decline began in 2008 nor has such decrease been marginal or
2 sporadic. It is consistent and dramatic.

3 The current recession is commonly thought to have begun in
4 December of 2007.¹³ As set forth in Exhibit "B" the baseline amount
5 of tips placed in the table games tip pool prior to September of
6 2006, as a percentage of the Respondent's drop, was 2.78%, varying
7 from 2.7% to 2.84%.¹⁴ In no subsequent quarter has the tip pool
8 reached this 2.78% baseline or even the 2.7% minimum achieved
9 during this period. Every quarter starting in September of 2006
10 and through the third quarter of 2007 shows a decline of between
11 5.4% and 13.3% in the amount of tips given by customers as a
12 proportion of the table games drop. Such substantial declines
13 cannot be explained by the recession as they pre-date the beginning
14 of the recession.

15 The irrefutable decline in customer tips belie the
16 Respondent's claim it has improved customer service, and as a
17 result increased customer tips, through the September 2006 policy.
18 In fact, just the opposite has occurred: The September 2006 policy
19 has resulted in customers leaving smaller tips or no tips at all.
20 That circumstance, under the Respondent's reasoning, must be
21 because customer service has declined under the September 2006

22

23 ¹³ National Bureau of Economic Research indicates nationwide
24 employment peaked in December of 2007.

25 ¹⁴ Respondent has frustrated and limited this analysis by not
26 providing all the monthly tip pool amounts. As a result no analysis
27 can be performed for the period after the second quarter of 2009 or
28 prior to the fourth quarter of 2005. Respondent's publicly filed
drop figures from December 22, 2008 forward also include the
operations of the Encore casino, Respondent declining to provide
figures just for the Wynn casino operations.

1 policy. The only clearly articulated change in customer service
2 instituted by the September 2006 policy was requiring an increased
3 level of talking by floor supervisors to customers.¹⁵ That change
4 was instituted to further the Respondent's goal of more actively
5 engaging its floor supervisors in their customer service and
6 contact functions. Under Respondent's own reasoning, the
7 irrefutable conclusion to be drawn from the decline in customer
8 tips is such increased talking by floor supervisors to customers is
9 unwelcome and has resulted in customers leaving smaller tips.

10 Respondent, in its reply, may seek to argue the decline in
11 customer service, and resulting decline in customer tips, maybe or
12 is the result of the dealers' conduct. Any such argument must be
13 disregarded as contrary to the assertions Respondent has already
14 committed itself to in this proceeding. According to the
15 Respondent, customer service by dealers improved as a result of the
16 September 1, 2006 policy as verified by its "secret shopper"
17 studies, such studies not being conducted of floor supervisors.
18 Pascal, p. 120-126; Westbrook, p. 211-12. *Ipsa facto* the only
19 possible reason for the decline in tips, under Respondent's own
20 reasoning, must be due to a decline in customer service by the
21 floor supervisors, which according to the Respondent is the only

22

23

24 ¹⁵ See, testimony of floor supervisor Alex Mattes, 10/5/09, p.
25 14-15, stating his job now involves a "much higher level" of guest
26 interaction because he now spends more time talking to guests. When
27 asked what was different about his job under the September 2006
28 policy the only thing was that he now spends more time talking to
guests. *Id.* p. 30. William Ehrenberg similarly testified there was
no change in the specific customer service duties of floor
supervisors under the September 2006 policy, they just acted to
"increase" customer service, presumably as Mattes testified by
spending more time talking with guests. 10/5/09, p. 123-130.

1 other component of the dealers' "line of service."

2 Nor is there any credible basis to conclude an improvement in
3 customer service is demonstrated by the casino's increased "hold"
4 since September of 2006. Hold should not be confused with "drop."
5 The drop is the amount of money being gambled, the hold is the
6 percentage of money won ("held") by the casino from the drop.
7 Pascal, 8/20/09, p. 29. Pascal, in asserting improved customer
8 service is demonstrated by the increased hold, claims the casino's
9 hold increased in excess of 15% as a result of the September 2006
10 policy. *Id.*, p. 26, 29. That statement is not true. Respondent's
11 public disclosures, Ex. "C," indicate the average hold for the five
12 quarters before the September 2006 policy was 20.78%. Of the
13 thirteen subsequent quarters (ending third quarter 2009) the hold
14 was greater than this amount in eight quarters, less in four
15 quarters, and essentially the same in one quarter.

16 More importantly, Pascal offers no explanation for his
17 assertion customer service has a primary, or even substantial,
18 affect on the casino's hold. The casino sets the odds on its games
19 through the various rules it imposes. Changing those rules to give
20 more favorable odds to the players has a depressant effect on the
21 drop. When those rules are changed to more strongly favor the
22 casino the drop should also increase.

23 If players extended their playing sessions in the casino, and
24 gambled more money, the Respondent's drop would also increase.
25 Presumably Respondent is claiming its wholly undocumented
26 improvements in customer service did encourage precisely such
27 longer and increased gambling by its customers and a commensurate
28 increase in the drop. Such assertion is completely speculative and

1 Respondent has failed to introduce the most compelling evidence
2 that would support the same: The actual average length of time and
3 amounts per hour its table games customers' gamble under the
4 September 2006 policy and before that policy was instituted. That
5 information is readily available through the Respondent's player
6 card tracking (player rating) records. Respondent, having declined
7 to provide such authoritative proof of increased player gambling
8 time, must be estopped from asserting its improved "hold" is the
9 result of its efforts to improve customer service under the
10 September 2006 policy.¹⁶

11 **2. Respondent's Financial and Tip Pool**
12 **Records Establish That Floor Supervisors Do**
13 **Not Actually Receive Tips From Customers or Are**
14 **Given Only a Nominal Amount of Tips by Customers**

15 Floor supervisors were prohibited from accepting customer tips
16 prior to September of 2006. R. 7/7/09, p. 111; 8/19/09, p. 40.
17 If tips were handed to them by customers they were either declined
18 or directed to the dealers' token box. The parties disagree about
19 the frequency of such "attempted" tip incidents prior to September
20 of 2006. Complainants have testified that such "attempted" tip
21 incidents were non-existent or close to non-existent. R. 7/8/09,
22 p. 177, 251-2; 7/9/09, p. 175. Respondent's witnesses claim to
23 the contrary. Complainants have also testified that there has been
24 no change since the floor supervisor tip taking ban was lifted in
25 September 2006 and floor supervisors still never or almost never
26 are given tips by customers. *Id.* Respondent's witnesses again

27 ¹⁶ Even if such player information was produced, such
28 information, in isolation, is not determinative of why the hold has
changed. Respondent would also need to provide information on the
shifting of the odds on its table games.

1 claim otherwise. No records exist of such incidents, either before
2 or after September of 2006. Respondent has declined to make
3 available surveillance videotapes that would allow for an analysis
4 of such alleged incidents and this Tribunal has declined to order
5 the production of such videotapes.

6 The testimony of Respondent's witnesses on this issue are
7 incredulous and even when not incredulous describe circumstances
8 that can only be anomalous, isolated, and unrepresentative.¹⁷ That
9 is exemplified in the testimony of Respondent's witness Mikhail
10 Rheems, who claims:

11 (i) Dealers were receiving more tips since September of 2006.
12 8/19/09 p. 239. As discussed, *supra*, Respondent's own records
13 establish this is untrue;

14
15 (ii) Dealers and floor supervisors receive, on average,
16 the same amount of tips from customers. 8/19/09 p. 243.

17
18 (iii) That the other floor supervisors (referred to as "team
19 leads" in her testimony) are receiving tips as frequently as
20 she is. 8/19/09 p. 236-37

21 That Rheems lacks any credibility is demonstrated by the
22 testimony of Respondent's President, Pascal. Rheems claims she did
23 not apply for a floor supervisor job before they started receiving
24 a share of the dealers' tips because no such job openings were
25 available. 8/19/09 p. 232-233. Presumably she felt it was better
26 for her to deny that she was only interested in becoming a floor

27
28 ¹⁷ Respondent's claim on this issue, as discussed *infra*, also
defies logic and established customs and norms.

1 supervisor after September of 2006 when it would not result in a
2 decrease from the compensation she received as a dealer. Her
3 testimony on this issue is false. Pascal says floor supervisor
4 positions were available prior to September of 2006, meaning Rheems
5 could have elected to become a floor supervisor at that time and
6 incur a substantial decrease in her compensation. 8/9/09 p. 69

7 If, as Rheems claims, floor supervisors were receiving tips in
8 an amount equal to the dealers, and the dealers were receiving an
9 increased amount of tips since September of 2006, the dealers' tip
10 shares would have increased, not decreased, since the floor
11 supervisors only receive a share equal to 40% of the dealers'
12 share. Respondent admits the dealers' net share of the tip pool
13 has declined as a result of the September 2006 policy, meaning
14 Rheems's testimony is incontrovertibly wrong. Nor can Respondent
15 rehabilitate such testimony by claiming tips increased to floor
16 supervisors but decreased to dealers because the dealers' level of
17 customer service declined.¹⁸ Respondent has already stated its
18 secret shoppers established that dealers improved their customer
19 service after September 1, 2006 and it is bound by that assertion.
20 Pascal, p. 120-126.

21 This Tribunal need not make a determination about the
22 credibility of the parties' witnesses on this point. Respondent's
23 tip pool and financial records objectively establish the falsity of
24 Respondent's claims on this issue. The amount of tips given by
25 customers, taking into account the level of table games play in the
26 casino, has markedly declined since the September 2006 policy was

27
28 ¹⁸ That claim would also, of course, contradict Rheems's
testimony that there was no decrease in tips to the dealers.

1 instituted. If floor supervisors were receiving the sort of tips
2 Respondent claims, and customer service also improved by dealers as
3 Respondent likewise claims, no such decline would have occurred.¹⁹

4 **3. Respondent's Policy Was Intended to and**
5 **Does Take Tips Given to Dealers and Gives**
6 **Them to Respondent's Floor Supervisors**

7 Respondent's September 2006 policy takes a share of the tips
8 given to dealers and hands them over to Respondent's floor
9 supervisors. The floor supervisors are not "sharing" from a pool
10 of tips to which they meaningfully contribute, they are just taking
11 a portion of the tips given to the dealers. This is documented by
12 the decrease, not increase, in tips that customers choose to give
13 even though floor supervisors are now allowed to receive tips and
14 their tips, such that they are, are placed in the same token box as
15 the dealers' tips.

16 Respondent admits that an increase in the compensation
17 received by floor supervisors, and a decrease in the amount of
18 compensation received by dealers in comparison to floor supervisor,
19 is both the intended purpose and effect of the September 2006
20 policy. As its casino manager, William Westbrook, acknowledged,
21 the purpose of the September 2006 policy was to correct the
22 "inequity" of the dealers, with tips, receiving substantially
23 larger amounts of compensation than their floor supervisor
24 superiors. Westbrook, p. 133. Respondent most effectively, and at
25 no cost to itself, decided to correct such perceived, and wholly

26 ¹⁹ This conclusion is required by Respondent's assertion that
27 the amount of tips left by customers are directly dependent upon the
28 quality of the customer service provided. Having made that
assertion in these proceedings the Respondent, even if it now proves
contrary to its interests, should be bound by the same.

1 fictitious, "inequity"²⁰ by taking a portion of the dealers' tips
2 and giving them to the floor supervisors.

3 **D. Respondent's Claim NRS 608.160 Allows an**
4 **Employer to Compel Tip Sharing Among a "Service**
5 **Line" of Employees is Unsupported and Untenable**

6 **1. The "Service Line" Holding of Moen is the Result**
7 **Of a Fundamental Failure to Abide by Established**
8 **Rules of Statutory Construction**

9 If a Nevada statute is capable of application pursuant to its
10 plain language it is construed and applied solely by reference to
11 that language. The only reason to go beyond the language of a
12 statute to divine its meaning is if the statute "is ambiguous or
13 silent on the issue in question." See, *Salas v. Allstate Rent-A-*
14 *Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000) and
15 *Allstate Ins. Co. v. Fackett*, 206 P.3d 572, 577 (2009). In
16 addition, as long as applying the plain language of the statute
17 does not yield an "unreasonable or absurd result" such language
18 will be respected and applied. *Allstate Ins. Co., Id., citing*
19 *Torrealba v. Kesmetis*, 178 P.3d 716, 721 (2008).

20 As discussed, *supra*, NRS 608.160 is properly, and sensibly,
21 applied pursuant to its plain and unambiguous language. Its
22 interpretation does not require any external references, and
23 certainly not to a "line of service" or what *Moen* labels, without
24 further specification, "well known employment practices." Nor does

25 ²⁰ Respondent's claim that it is inequitable for front line
26 managers to earn less than their minimum wage paid and heavily
27 tipped subordinates is ludicrous and ignores established practices
28 in the casino industry. See, Ex. MM, p. 58, quoting Alan Feldman,
spokesman for MGM Mirage, stating gaming industry entry level
managers sometimes earn far less than the line workers they oversee,
an acceptable circumstance because "The management positions are on
a completely different career path than the line employees."

1 a strict construction of the statute, limited to its actual
2 language, yield an "absurd or unreasonable result". There is also
3 every reason to believe that the legislature, in NRS 608.160(2) was
4 specifying that such employees upon whom such tips were "bestowed,"
5 as referenced in NRS 608.160(1), were the "such employees"
6 authorized to divide "such tips" among "themselves," as provided
7 for in NRS 608.160(2).

8 **2. Respondent's "Service Line" Argument is Nonsensical**
9 **And Just a Contrived Excuse to Seize the Dealers'**
10 **Tips and Use Them to Fund an Increase in the Floor**
11 **Supervisors' Compensation**

12 In reaching its "service line" holding, *Moen* cites to no
13 precedent or principle of law and holds its interpretation of NRS
14 608.160 is the proper one "in the light of well-known employment
15 practices." 402 F. Supp. at 160. *Moen* provides no illumination as
16 to what those "well-known" employment practices are. To the extent
17 it was referring to the common practice, as later approved of in
18 *Alford*, of dealers, and dealers alone, pooling their tips, such a
19 practice has no bearing upon the tip pool at issue in *Moen*, or this
20 case. There is nothing in the record in *Moen*, nor in the record in
21 this case, establishing a "well-known" practice of floor
22 supervisors sharing tips received by dealers.

23 The only "well known" employment practice *Moen* does discuss
24 that involves tip sharing is its reference to the tips typically
25 shared by a busboy and waitress. It cites that custom as the basis
26 for its "service line" holding upon which Respondent relies:

27 There is no reason to suppose that the last person in a
28 service line in an establishment serving the public is the
only one entitled to share in the customer's bounty. For
example, a busboy as well as a waitress contributes to the
good service and well-being of a customer in a restaurant.
Similarly, in a casino, the floormen, boxmen and cashiers all

1 contribute to the service rendered to the player. 402 F.
2 Supp. at 161.

3 The custom of a busboy and a waitress sharing tips does not
4 support, in any fashion, the existence of a tipping "service line"
5 that Moen holds is the appropriate mandatory tip pooling limitation
6 under NRS 608.160. A busboy and a waitress are not, between
7 themselves, part of a linear or hierarchical "service line." They
8 are co-workers who have the same *service function* and primary duty
9 of giving the customer his meal and they perform completely or
10 almost completely identical and interchangeable tasks. They both
11 bring food and beverages, set and clear the table, take directions
12 from the customer, and serve the meal. They both provide the *same*
13 *services* and *perform the same tasks* with the exception that the
14 waitress is typically the person who solely takes the customer's
15 food order and the busboy typically concentrates on the more menial
16 tasks of setting and clearing the table.

17 The custom of tip sharing among restaurant wait staff
18 performing predominately the same *service functions* does not
19 justify Moen's conclusion that tips can properly be taken from
20 minimum wage casino service employees and given to their much
21 higher salaried superiors who are up the "service line." See,
22 *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1069, 1067
23 (Cal. Ct. App. 1990) (Approving of mandatory tip pooling in the
24 restaurant industry based upon its long and established custom).
25 There is no established tradition and custom in the casino industry
26 of dealers and floor supervisors sharing tips (the Wynn, prior to
27 September 1, 2006, banning the floor supervisors from receiving any
28 customer tips). No sensible analogy can be drawn between the

1 dealers and the floor supervisors, who have totally different
2 service functions and primary duties, and the customs of restaurant
3 table service workers who share many or most service functions and
4 the same primary duty and who are also compensated at a similar
5 level, typically the minimum wage, by their employer.

6 Even within the dining "line of service" *Moen's* conclusions
7 are unsupported. There are other restaurant employees, besides the
8 waitress and busboy, who are also involved in seeing that proper
9 dining service is provided to the customer. Those employees, who
10 may even interact directly with the customer, include such persons
11 as the shift or assistant manager and maitre d'. They do not
12 perform the same *service functions* or tasks²¹ of the waitress and
13 busboy and do not have the same primary duty and are typically
14 compensated by the employer with a substantial salary. Even though
15 such employees could, arguably, be considered part of the same
16 "service line" as the waitress and busboy there is no "well known
17 employment practice" of such dining employees also sharing in the
18 customer tips shared by the busboy and waitress.

19 Neither in the dining industry nor the casino industry nor in
20 any other industry is there a custom or practice of employees who
21 perform completely different service functions sharing tips. No
22 such practice exists because such a practice would be contrary to
23 the whole purpose and reason that tips are given, which is for a
24 particular identified and concrete service that is performed.

25
26 ²¹ To the extent such personnel may occasionally get a basket
27 of bread or bottle of wine for a dining customer, the same tasks
28 performed by a waitress or busboy, those circumstances have no
bearing on the tip pool at issue in this case. It is undisputed
floor supervisors perform none of the same tasks as the dealers.

1 Respondent does not, and cannot, cite a single example of such a
2 circumstance where tips are shared among employees performing
3 substantially or completely different services and functions.²²

4 In this case the dealers and the floor supervisors perform no
5 common functions. The dealers run the casino's games. They
6 exchange the customer's money for casino chips, initiate the game
7 (deal the cards, spin the roulette wheel, etc.) and advise the
8 customer if they have won or lost. The floor supervisors never
9 deal casino games. They handle customer markers; rate players for
10 complimentary treatment and issue complementaries; assist customers
11 with dining reservations, show tickets and utilizing other casino
12 amenities; protect the integrity of the casino's games; and rule on
13 disputes between players and dealers. R. 7/9/09, p. 9, 59.

14 Unlike a waitress and a busboy, the dealers and the floor
15 supervisors perform no common service functions and do not serve
16 the customers in the same fashion or even in respect to the same
17 subject matter.²³ The completely different primary duties of floor

18
19 ²² Respondent in reply may cite to the provisions of certain
20 collective bargaining agreements ("CBAs") involving unionized
21 employees of Las Vegas casinos. Those provisions provide that a
22 portion of "service charges," which are also referred to as
23 "gratuities" or "tips" in those CBAs, be distributed to management
24 employees, such as banquet managers. Such provisions are irrelevant
25 to the issue in this case. The involved "service charges" are not
26 tips or gratuities although those terms may be used interchangeably
with the "service charge" term in the CBAs. A "service charge" is
mandatory, it is a commission percentage in a fixed amount charged
to and imposed upon the customer, it is not a tip or gratuity given
freely, in the discretion and in an amount, determined by the
customer.

27 ²³ The only arguably similar functions performed by dealers and
28 their supervisors are "game protection" but that duty (to prevent
theft of their employer) is shared by all casino employees and all
employees in all industries generally. Dealers, being pre-occupied

1 supervisors and dealers, if not already clearly appreciated by this
2 Tribunal, are documented in the United States Bureau of Labor
3 Statistics occupational descriptions, Ex. "E". As discussed *infra*
4 there is no reason to find dealers and floor supervisors are even
5 part of the same "service line" as Respondent conclusorily claims.

6 Respondent argues that the tips given to the dealers are just
7 a manifestation of the customer's gratitude to all of the persons
8 in a "line of service" that includes the floor supervisors.
9 According to the Respondent, those tips are only extended to the
10 dealers because they are "the last person in the line of service or
11 the person that interacts with them [the customer] most directly or
12 most frequently." Pascal, August 20, 2009, p. 31-32. Neither Mr.
13 Pascal nor any other Respondent witness has explained how or why it
14 is presumed a customer is *not* giving their tip just to the dealer
15 who, as Pascal acknowledges, has interacted with them "most
16 directly or most frequently."

17 Respondent's "service line" is just a contrived
18 rationalization for its seizure of the dealers' tips so it can
19 increase, at no cost to itself, the compensation received by its
20 floor supervisors. It is the dealer who deals the game for the
21 customer and calls the winning and losing hands. It is undisputed
22 that the floor supervisors do nothing directly for the customer in
23 respect to the actual play of the game. To the extent they provide
24 ancillary support services to the dealers so the game can be

25 _____
26 with dealing their games, are also unable to solely observe players
27 and root out cheats, the function of the floor supervisors. Clearly
28 "game protection" cannot be the primary duty of the dealers who must
proficiently deal the casino games, although it is the primary duty
of the floor supervisors.

1 conducted, those services consist of the *de minimis* functions of
2 providing dice or cards to the dealer. As discussed, *infra*, most
3 of those are also functions that as a matter of regulation only a
4 supervisor, and not the dealer, can perform.

5 **3. The "Service Line" Tip Pooling Limitation is**
6 **Indefinite, Undefined and Unworkable Without**
7 **Specific Legislative Guidance Which Does Not Exist**

8 The "service line" tip pooling limitation recognized by *Moen*,
9 and urged by the Respondent, is an ethereal chimera, a pure work of
10 fiction. In the broadest, and really quite literal sense, every
11 person involved in the Respondent's resort is in the "line of
12 service" that ultimately reaches the customer. Steve Wynn himself,
13 through his vision and risk taking, formulated the plan for the
14 Respondent's resort and made countless decisions that determine how
15 each customer is served. Numerous other managers further down that
16 line of service to the floor supervisor are also responsible for
17 the enjoyment, or displeasure, a guest experiences at the
18 Respondent's casino. A myriad of other line workers, who keep the
19 casino and its gaming tables clean, who bring cigarettes to the
20 casino's players, who serve drinks to those players, who maintain
21 the hotel rooms of the players, who maintain the physical plant of
22 the resort, and so on *ad infinitum*, are all part of the "service
23 line" that in the words of *Moen* contribute "to the service rendered
24 to the player."

25 The service line approach urged by Respondent is exactly like
26 the fairy tale bowl of porridge enjoyed by Goldilocks that was
27 neither too hot nor too cold. Respondent's service line is neither
28 too long nor too short, it is, like Goldilocks's porridge, "just
right." It allows Respondent to take tips received by one group of

1 workers performing one service and having one primary duty and set
2 of tasks and give them to a different group of workers performing
3 very different services and tasks and having a completely different
4 primary duty. This is supposedly proper because the former group,
5 by virtue of their position at the "end" of the "line of service,"
6 receives tips denied to the later group which is "higher up" that
7 same "line of service." Yet Respondent insists this "line of
8 service" is not a completely pure, unfettered and limitless
9 creature. It both allows Respondent's policy but also denies the
10 Respondent what it concedes would be the patently absurd freedom to
11 have tips received by dealers at the "end" of the service line
12 travel all the way up that same service line to Mr. Wynn himself.
13 Rather, the term "service line" means, with apologies to another
14 fairy tale character,²⁴ just what Respondent chooses it to mean -
15 neither more nor less.

16 Fairy tales aside, there is no basis in law or fact for the
17 "service line" formulation adopted by *Moen* and urged by Respondent.
18 The language of NRS 608.160(2) does not refer to tip pooling among
19 a "service line" of employees or even "employees" generically. It
20 permits "such employees" upon whom tips are "bestowed" to divide
21 "such tips" among "themselves." *Alford* did not endorse the service
22 line approach and is properly read to have rejected *Moen's* holding
23 on that issue. Neither the court in *Moen*, nor this Tribunal, was
24 or is empowered to broaden or alter NRS 608.160 by grafting onto it
25 a completely undefined "service line" standard.

27 ²⁴ "When I use a word," Humpty Dumpty said in a rather scornful
28 tone, "it means just what I choose it to mean - neither more nor
less." Lewis Carroll, *Through the Looking Glass*.

1 There was no legislative intent to administer NRS 608.160(2)
2 under a "service line" standard. Absent some enunciation by the
3 Legislature as to what constitutes a "service line" there is also
4 no way to properly apply such a standard. Until such time, if
5 ever, that the Legislature chooses to amend NRS 608.160(2) to
6 explicitly provide for "service line" tip sharing, and defines what
7 constitutes a "service line," Respondent's mandatory "service line"
8 tip pool is impermissible, if only because it is undefinable and
9 incapable of administration.

10 **4. Even if a "Service Line" Tip Pool Was Proper**
11 **The Tip Pool Created by Respondent Violates**
12 **NRS 608.160 Because Floor Supervisors are Not**
 In the Same "Line of Service" as the Dealers

13 When a customer gives a tip to a waitress, who shares it with
14 her busboy, the customer is tipping for the service they jointly
15 provided, which was serving the customer their meal. When a
16 customer tips a dealer it is for the *service provided by the dealer*
17 *to the customer*, which is dealing the game. When another employee
18 of Respondent, the floor supervisor, provides a *different service*
19 *to the customer*, for example obtaining a marker, securing dining
20 reservations or show tickets, the customer is free to extend a tip
21 to the floor supervisor in appreciation of those services.
22 Similarly, when the cocktail server brings the customer a drink she
23 too is performing yet a *different service* for the customer and may
24 also receive the customer's tip in recognition of that service.
25 Neither the dealer nor the cocktail server nor the floor supervisor
26 is being tipped for the same service, neither is in the other's
27 "line of service" in respect to the customer.

28 To the extent that the floor supervisors can be said to be in

1 a customer "line of service" it is a *different* line of service than
2 the dealers. That line of service involves the customer functions
3 of the floors supervisors. Those functions are handling customer
4 credit (casino markers) and authorizing complimentary treatment for
5 players, including such things as making reservations, obtaining
6 show tickets, and the like, for customers. Dealers perform none of
7 those functions.

8 All of the customer service functions performed by floor
9 supervisors are also performed by casino hosts. William Ehrenberg,
10 10/5/09, p. 119, 125, 130. It is the duty of casino hosts to
11 accommodate players, arrange amenities for them, get them
12 complimentary treatment, arrange for casino credit (markers) and so
13 forth, all for the purpose of enhancing the player's experience in
14 the Respondent's casino. Those are also the precise customer
15 service duties performed by the floor supervisors. *Id.* Making the
16 casino's customers happy by providing them with access to amenities
17 and other services so the customer will play the casino's games, is
18 the joint, and identical, customer service mission of both the
19 floor supervisors and the casino hosts. *Id.* Notwithstanding this
20 complete identity of purpose and function, casino hosts are
21 forbidden from accepting tips. Pascal, 8/20/09, p. 213-14. That
22 prohibition exists even though about half of the hosts earn less
23 than floor supervisors. Pascal, 8/20/09, p. 228.

24 The proper "service line," if such a thing exists, for the
25 floor supervisors is the one for employees providing the same
26 customer services. That would place them, along with the casino
27 hosts, in the "customer amenities" or "customer complementaries"
28 service line. The floor supervisors do not belong in the casino

1 table games service line with the dealers in the same way they do
2 not belong in the beverage service line with the casino cocktail
3 servers. They neither deal the casino games to the customer nor
4 serve the customer their drink. Nor does directing a cocktail
5 server to a player, or getting fresh cards for the dealer, make a
6 floor supervisor part of the those employees' line of customer
7 service.

8 **E. Respondent's Claim That Floor Supervisors Are Merely**
9 **Receiving Their Proper Portion of the Tips Actually**
10 **Left for Them by Customers Has No Basis in Fact**

11 Intertwined with, and closely related to, Respondent's "line
12 of service" argument is their argument the tips given by customers
13 to dealers are really intended, in part, for the floor supervisors.
14 That assertion defies logic and established customs and norms. In
15 casinos it is customary to tip dealers who are paid nominal
16 compensation from the employer.²⁵ The pronounced custom of tipping
17 dealers, but not floor supervisors, is recognized by the United
18 States Bureau of Labor Statistics which notes dealers generally
19 receive a large portion of their earnings from tips²⁶ and makes no
20 mention of floor supervisors receiving player tips. The custom is
21 not to tip casino management employees, such as floor supervisors.²⁷

22 ²⁵ The United States Bureau of Labor Statistics reports that the
23 average annual wages of casino dealers are \$14,340 and gaming
24 supervisors earn an average of \$40,840 per year in wages. See,
<http://www.bls.gov/oes/current/oes391011.htm> (Gaming Supervisors)
<http://www.bls.gov/oes/current/oes391011.htm> (Gaming Dealers)

25 ²⁶ <http://www.bls.gov/oco/ocos275.htm>

26 ²⁷ Respondent, schizophrenically, attempts to claim the floor
27 supervisors simultaneously are, and are not, managers. It
28 repeatedly asserts it has placed its floor supervisors in the role
of "front line customer service" while simultaneously acknowledging
that the floor supervisor position is the "entry level" step for

1 Tipping guides either admonish against tipping casino pit managers
2 (unless special services are provided) or exclude casino managers
3 as employees who should be tipped by not mentioning them and noting
4 that winning players should tip the casino dealer. See, S.
5 Krajchia, *The Itty Bitty Guide to Tipping*, p. 83 (2004) and Fodor's
6 *How to Tip* (K. Cure ed.) p. 70-75 (2002), N. Star, *The*
7 *International Guide to Tipping*, p. 23 (1988). Respondent has
8 introduced not a scintilla of evidence establishing any custom in
9 the casino industry of tipping floor supervisors and concedes no
10 such custom existed at the Wynn because floor supervisors were
11 prohibited from receiving tips prior to September of 2006.

12 It is well established that the custom of tipping, as a rule,
13 does not extend to well paid employees who typically occupy more
14 supervisory roles and is reserved for lower level, and lower
15 compensated, service workers. Etiquette books uniformly advise
16 that one should tip low paid service workers and not managers or
17 similar personnel such as cruise ship officers. See, N. Tuckerman,
18 *The Amy Vanderbilt Complete Book of Etiquette Entirely Rewritten*
19 *and Updated*, p. 106, 114 (1995); P. Post, *Emily Post's Etiquette*,
20 17th Ed., p. 801, 807 (2004); C. Ford, *Etiquette Guide to Modern*
21 *Manners*, p. 23 (1988); J. Martin, *Miss Manners Guide for the Turn-*
22 *of-the-Millennium*, p. 379 (1989). Although tips are given, in
23 part, to recognize good service, the occupations for which tips are
24 typically given are uniformly those involving lower paid service
25 workers, such as taxi drivers, waiters, and casino dealers. Ex.

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27 advancement through the managerial ranks of its casino operation.
28 The later assertion is clearly the correct one, as the very custom
of calling such personnel "supervisors" makes clear.

1 "A".

2 Respondent's claim that tips given to dealers should be
3 presumed, as a matter of law, to also be intended for the floor
4 supervisors has its genesis in *Moen*: "It is ridiculous to assume
5 that a satisfied player who hands over a tip intends it only for
6 the particular person to whom the tip is given." *Moen*, 402 F.
7 Supp. at 160. Despite *Moen's* labeling of such a proposition as
8 "ridiculous," at least one appellate Court has adopted a
9 presumption that tips belong solely to the tipped employee. See,
10 *Richard v. Marriott Corp.*, 549 F.2d 303, 305 (4th Cir. 1977)("tips
11 belong to the employee to whom they are left").

12 By granting employers the power to dictate a broad "service
13 line" distribution of tips, *Moen* rejects, or at least ignores, the
14 presumption that a customer is not giving a tip to the employer to
15 use or distribute however it pleases. See, *Herbert's Laurel-*
16 *Ventura, Inc. v. Laurel Ventura Holding Corp.*, 58 Cal. App. 2d 684,
17 694, 138 P.2d 43, 48 (1943)("A tip is not intended for the
18 proprietor of a restaurant"); *Leighton*, 219 Cal. App. 3d at 1069 (A
19 restaurant customer does not intend a tip to go to the employer but
20 to the employee(s) who directly service the customer's table); and
21 *Winans v. W.A.S. Inc.*, 772 P.2d 1001, 1004 (Sup. Ct. Wa. 1989)
22 ("Whether a tip is to be given, and its amount, are matters
23 determined solely by the customer, and generally he has the right
24 to determine who shall be the recipient of the gratuity" [emphasis
25 in original]). Yet *Moen* strips the customer of the right to give a
26 tip for a particular service by allowing the employer to dictate
27 not just *who* should receive the customer's tip, in terms of whether
28 the tip is pooled or kept only by the employee to whom it was

1 handed, but *what service* the customer's tip compensates for as
2 well.

3 Respondent has chosen to allow its customers to tip floor
4 supervisors, something it prohibited prior to September of 2006.
5 If Respondent believes customers are confused about where their
6 tips are going, *i.e.* some customers may believe the tip they give
7 to a dealer will be shared with the floor supervisor, or vice
8 versa, when it will not, Respondent can post signs explaining the
9 casino's tip rules and/or require dealers, before accepting any
10 tip, to advise the customer exactly where the tip goes. A cardinal
11 rule of tipping is that one does not tip the establishment but the
12 employee providing the service for which the tip is extended.²⁸
13 Respondent offers no explanation of why that established custom
14 should be superceded by requiring customer tips given to dealers be
15 shared with floor supervisors who provide completely different
16 services.

17 Neither logic nor the law requires, or even provides any
18 basis, for finding that the customer's "intent" when a tip is given
19 to a dealer was to bestow the tip for anything besides the services
20 provided by the dealer. That service was dealing the game. The
21 dealer was not tipped for getting the customer his marker, issuing
22 him his complimentary tickets, fetching him his preferred drink,
23 bringing him cigarettes, or any other service provided by floor
24 supervisors, casino hosts, cocktail waitresses, cigarette runners,
25 or other persons for which the customer may chose to give a tip for
26 as well.

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²⁸ J. Schein, *The Art of Tipping*, p. 6-7 (1984)

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IV. RESPONDENT'S SEPTEMBER 2006 POLICY
 VIOLATES NRS 613.120 AND NRS 608.100

A. Respondent Has Violated NRS 613.120

 The prohibitions imposed by NRS 613.120(1) are broad, as is readily apparent from its language. It applies not just to managers or business owners but all "agents" of an employer. Nor is its application limited to those who act in a decision making or hiring and firing capacity, as it expressly covers all agents who are "charged or entrusted with the employment" of others in addition to agents entrusted with the "continuance in employment" (the hiring and firing) of others. The language of NRS 613.120(2)²⁹ goes even further by specifying such statute applies to those "charged or entrusted" with the employment of others or "under whose direction or control" such other persons work. Similarly, the conduct enjoined by NRS 613.120 is not just a direct or overt demand for a kickback by an employer's agent but the "acceptance," even if compelled by the employer, of any "fee, commission or gratuity of any kind or nature" whether received "directly or indirectly" by the agent.

²⁹ "Any such manager, superintendent, officer, agent, servant, foreman, shift boss or other employee of any person or corporation, **charged or entrusted with the employment of laborers or workmen for his principal, or under whose direction or control such workmen and laborers are engaged in work and labor for such principal**, who shall demand or receive, either directly or indirectly, any fee, commission or gratuity of any kind or nature from any workman or laborer employed by him or through his agency or worked under his direction and control, either as the price and condition of the employment of such workman or laborer or as the price and condition of the continuance of such workman or laborer in such employment, shall be guilty of a misdemeanor." (emphasis provided).

1 As § 613.120(2) makes clear, employees who are "charged or
2 entrusted" with the employment of others, or who "direct or
3 control" such persons' employment, on behalf of their "principal,"
4 cannot "directly or indirectly" receive any "fee, commission or
5 gratuity" from such workers. The Respondent's floor supervisors
6 squarely fit within this definition. They are "entrusted" or
7 "charged" by the Respondent with the dealers' employment and
8 overseeing the dealers' conduct. This primary job function is
9 admitted by the Respondent, whose recruiting literature states that
10 the primary functions of a casino service team lead is "ensuring
11 proper procedures are followed by dealers in games within their
12 team" Complainants' Ex. RR, p. 71.

13 Respondent's delegation to the floor supervisors of the
14 responsibility of "ensuring" dealers are properly following
15 procedures is just the sort of "entrustment" covered by § 613.120.
16 Indeed, the definition of "entrust" has its essence in placing
17 responsibility upon the person entrusted for a specific duty or
18 matter. As used in NRS 613.120 the word "entrust" means an agent
19 placed in a position of responsibility or oversight as to another
20 employee.

21 Respondent insists floor supervisors do not "discipline"
22 dealers, much less actually make decisions regarding their
23 employment termination or retention and do not exercise
24 "supervisory" control over the dealers. Even assuming, *arguendo*,
25 that is true,³⁰ it is irrelevant. The floor supervisors under

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27 ³⁰ The only evidence on the issue indicates that assertion is
28 untrue. Steve Garan, a box person, testified that a dealer, Kenny
Blackman, was fired because he was insubordinate to a manager or
supervisor and that the manager or supervisor was Mr. Garan.

1 Respondent's own job description are entrusted with overseeing the
2 proper conduct of the dealers. Even if they did not command the
3 dealers in a supervisory role, which as discussed *infra* is not the
4 case, they serve as Respondent's eyes and ears. They are entrusted
5 with reporting to the Respondent any misconduct or failure by the
6 dealers in following proper procedures.

7 Respondent's entrustment to the floor supervisors of the
8 responsibility to report the dealer's performance and misconduct
9 triggers the protections of NRS 613.120 even if the floor
10 supervisors make no disciplinary decisions. The broad wording of
11 the statute compels that conclusion and also makes perfect sense.
12 The purpose of the statute is to prevent agents of an employer from
13 financially profiting from those entrusted to their care or
14 oversight, irrespective of whether those agents actually
15 discipline, hire, fire or make any decisions about the terms and
16 conditions of their charges' employment. It is the abuse of that
17 trust granted by the employer to the agent, the power it confers on
18 the agent, and the associated danger of exploitation of the
19 employee, that NRS 613.120 addresses.

20 Under NRS 613.120 an employer's agent who is entrusted to
21 report other employees' failures cannot accept any financial
22 payment, commission or gratuity from those employees, directly or
23 indirectly, even under compulsion from the employer. Such
24 prohibition protects employees not just from overt demands for

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26 10/5/09 at p. 316. Respondent, having declined to actually produce
27 its disciplinary records for dealers, makes it impossible to
28 objectively ascertain what role floor supervisors play in
disciplinary matters. As a result, its assertions on this issue
must be disregarded.

1 "kickbacks" but any form of mandatory financial payment to their
2 overseers, whether demanded by their overseers or their employer.
3 That prohibition ensures employees are free to perform their labors
4 without being coerced into making payments to overseers who can use
5 their employer's trust to, truthfully or falsely, accuse the
6 employee of misconduct, accusations likely to bring disapproval on
7 the employee from the employer. Through its enactment of NRS
8 613.120 Nevada has guaranteed to its workers a fair and harmonious
9 employment environment, free from possible financial extortion by
10 employee overseers, and bars the Respondent's September 2006
11 policy.

12 Even though NRS 613.120 is not confined to such persons who
13 are classified as "supervisors," the evidence also establishes that
14 Respondent has not met its burden of showing the floor supervisors
15 are outside the scope of NRS 613.120 by virtue of not being
16 "supervisors." The Nevada Gaming Control Board has issued minimum
17 internal control standards that can be viewed at
18 http://gaming.nv.gov/audit_mics.htm#newmics and these regulations
19 require that many of the tasks performed by floor supervisors must
20 be performed by casino supervisory personnel. For example these
21 include the following (paragraph numbers as in the original
22 regulations):

23 9. All credit issuances are initially evidenced by lammer buttons
24 that are displayed on the table in public view and placed there
by supervisory personnel.

25
26 11. Only the dealer moves lammer buttons from the table into the
27 table tray, or moves lammer buttons to a neutral area for
subsequent removal by pit supervisory personnel. This procedure
is performed when the marker issue slip is placed in the table
game drop box.

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1 14. The payment slip includes the same marker number as the
2 original. When the marker is paid in full in the pit, it will
3 also include the table number where paid, date and time of
4 payment, nature of payment (cash, chips, etc.) and amount of
5 payment. The payment slip also includes the signature of a pit
6 supervisor acknowledging payment, and the signature of the dealer
7 receiving payment, unless this information is included on another
8 document.

9 15. Voided markers contain the following:

- 10 a. "Void" written across the original marker, issue slip (if
11 available at the time of the void) and payment slip.
- 12 b. The reason a marker is voided is documented on one part of the
13 marker, or other document (e.g., a log) sufficiently
14 identifying the marker.
- 15 c. Date and time of void on at least one part of the marker.
- 16 d. Signatures on at least one part of the marker (adjacent to the
17 void indication) of two pit personnel performing the void, at
18 least one of whom is a pit supervisor. A pit clerk may be a
19 nonsupervisory signer.

20 Note: In the event a pit marker is voided later by
21 accounting/audit personnel, the signature of two pit
22 personnel authorizing the void is required.

23 31. Foreign currency exchange forms include the country of origin,
24 total face value, amount of chips/tokens extended (i.e.,
25 conversion amount), signature of supervisor, and the dealer
26 completing the transaction.

27 34. The placement of the lammer button, chips, or other
28 identifiable designation is performed by supervisory personnel.
The placement may be performed by a dealer only if the supervisor
physically observes and gives specific authorization.

31 37. Only the dealer moves lammer buttons from the table into the
32 table tray, or moves lammer buttons to a neutral area for
33 subsequent removal by pit supervisory personnel. This procedure
34 is performed upon completion of the call bet transaction.

35 39. If a patron transfers his outstanding rim credit balance from
36 one table to another table and chips are transferred from one
37 table inventory to another table inventory, the following
38 procedures are performed:

39 . . .

40 c. The lammer buttons remain on the original table with the
41 outstanding rim credit until the chips have been received from
42 the new table to replenish the original table's inventory.
43 When the chips are received, the dealer and supervisor will

1 verify the dollar amount of chips to the outstanding rim
2 credit indicated on the rim card. The dealer will remove the
3 lammer buttons after the chips have been verified and placed
4 into the table inventory.

5 53. Fill transactions are authorized by a pit supervisor prior to
6 the issuance of fill slips and transfer of chips, tokens, and/or
7 monetary equivalentents.

8 72. The accuracy of inventory forms prepared at shift end is
9 verified by either two pit supervisors or one pit supervisor and
10 one supervisor from another gaming department.

11 128. Pit supervisory personnel (with authority equal to or greater
12 than those being supervised) provide supervision of all table
13 games.

14 The Respondent analogizes the relationship between the dealers
15 and the floor supervisors as of the same nature or quality as a
16 food server and a bus person. The proper analogy is that the
17 dealer is in the position of a waitress or waiter and the floor
18 supervisor is in the same position as an assistant restaurant
19 manager or similar front line manager. In *Jameson v. Five Feet*
20 *Restaurant, Inc.*, 107 Cal.App.4th 138, 131 Cal.Rptr.2d 77103
21 (2003) a waitress was required to give ten percent (10%) of her
22 tips each night to the restaurant's floor manager. The California
23 Court of Appeal held that this was a violation of the California
24 Labor Code because the floor managers had authority to supervise,
25 direct, or control the work of the waitress, making them an "agent"
26 of the employer within the meaning of the California Labor Code and
27 they were therefore prohibited from receiving any part of the
28 waitress's tips.

In this case, the floor supervisors are more akin to the floor
managers in *Jameson* than they are to dining servers like waiters
and busboys. They are supervisors and agents of the casino having
supervisory authority over the table games and the dealers who are

1 dealing the games. Pursuant to the Nevada Gaming Control Board's
2 minimum internal control standards they are supervisors and agents
3 of the Respondent as a matter of law. As such their acceptance or
4 receipt of any part of the dealers' tips is barred by NRS 613.120.

5 **B. Respondent's September 2006 Policy Violates**
6 **NRS § 608.100(2) by Requiring the Dealers to Rebate**
7 **A Portion of their Compensation to their Employers**

8 Nevada Revised Statutes 608.100(2) prohibits "any employer"
9 from requiring that an employee "rebate refund or return" not only
10 his wages or salary but any *compensation* that he earns. The tips
11 received by dealers are compensation earned at the time the
12 customer gives the tip to the dealer. The customer is not giving
13 the tip to the Respondent, but to the dealer who provides the
14 service to the customer. The tips are recognized by the Internal
15 Revenue Service as taxable employee income ("compensation"). The
16 legislature's extension of 608.100 to all employee "compensation,"
17 and not just "wages," evidences an intent to also include tips
18 within its coverage. The definition of "wages" set forth in
19 Chapter 608, at 608.012, does not include tips but only amounts
20 paid by an employer to an employee. If 608.100 was intended to
21 exclude employee tips from its coverage it would have limited its
22 applicability to "wages" and not all employee "compensation."

23 Rebate is defined as an act "to reduce the force, effect,
24 intensity, or activity of; DIMINISH, LESSEN"³¹ The Respondent's
25 September 2006 policy requires that the dealers "rebate", or
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28 ³¹ Webster's Third New International Dictionary, Unabridged.
Merriam-Webster, 2002. <http://unabridged.merriam-webster.com>

1 reduce, their earned, and paid³², compensation in violation of
2 608.100. Such is the not only the inevitable result of the
3 Respondent's policy, but is its acknowledged intent as well.

4 **V. APPROVING OF RESPONDENT'S SEPTEMBER 2006 POLICY WOULD**
5 **HAVE THE PERNICIOUS EFFECT OF DEPRESSING EMPLOYEE**
6 **WAGES AND EARNINGS SOLELY SO EMPLOYERS CAN INCREASE**
7 **THEIR PROFITS, ALL IN VIOLATION OF THE PURPOSES**
8 **UNDERLYING THE NEVADA LABOR STATUTES AT ISSUE**

9 There are two overriding purposes of the Nevada labor statutes
10 at issue and similar statutes such as the FLSA. The first is to
11 ensure workers receive a certain minimum level of compensation and
12 the other compensation that is properly due to them. The second is
13 to foster a competitive market for labor that simultaneously
14 protects the well-being of employees, prevents unfair business
15 practices, and creates a level playing field for business
16 competition all while encouraging economic dynamism and the free
17 flow of commerce. *See, Tony & Susan Alamo Foundation v. Secretary*
18 *of Labor*, 471 U.S. 290, 299-301 (1985) *citing* 29 U.S.C. § 202
19 (Purpose of FLSA is to create standards that apply to all
20 businesses to effectuate the goal of free and fair commerce, such
21 goal requiring the application of the FLSA's protections to even
22 those who would decline its benefits).

23 The foregoing purposes are advanced by ensuring tips are
24 received by the workers for whom they are intended and who have

25 ³² Respondent's claim that NRS 608.100(2) is inapplicable
26 because no such compensation (customer tip) has yet been "paid" to
27 the dealers is ridiculous. The customer's tip, when given, is
28 clearly being paid to someone, it does not exist in limbo. It is
paid to the dealers' collectively, through their agreed upon tip
pool, and not just the single dealer it is given to. It certainly
is not being paid to the Respondent. That the dealers still need to
account for and divide such tip does not strip such compensation of
its "received" and "paid" status.

1 earned them. As *Alford* succinctly stated, such tips are not to be
2 "accessed" for "use by" the employer for its "direct benefit." A
3 fair and free market for labor is advanced when employees receive
4 the minimum compensation guaranteed to them under law and such
5 other compensation as the marketplace has determined is due them
6 for their labors, in this case such other compensation being
7 determined by the amount of tips bestowed upon the dealers by their
8 customers.

9 The prohibition on an employer "taking" tips set forth in NRS
10 608.160 cannot be construed to only prevent a literal seizure of a
11 worker's tip and its placement in the employer's pocket. Or in
12 this case the Respondent's general corporate funds for distribution
13 in whatever fashion the Respondent chooses. Not even Respondent
14 asserts such a narrow application is appropriate.

15 If an employer were to not "pocket" an employee's tip, but
16 merely require the employee use that tip to purchase the employer's
17 products, desired or not, certainly there would be a "taking" in
18 violation of NRS 608.160. Respondent agrees its dealers cannot be
19 compelled to "donate" or "deposit" a portion of their tips in a
20 fund that would pay a bonus to Steve Wynn or Respondent's other
21 high ranking managers. It concedes that point even though such
22 persons, being legally separate and distinct from the Respondent as
23 a matter of law, are not "employers." Indeed, the Nevada Supreme
24 Court has recently ruled that such persons are not employers within
25 the meaning of NRS Chapter 608. See, *Boucher v. Shaw*, 196 P.3d 959
26 (2008). Nonetheless, the parties agree compelling the dealers to
27 pay their tips to Mr. Wynn, who is legally *not* their employer,
28 constitutes a violation of NRS 608.160.

1 Money is fungible. Employee tips are not a revenue source for
2 an employer to dispense to any employee, whether senior executives
3 or front line supervisors, as they see fit. Respondent concedes as
4 much. An employer "takes" tips from an employee whenever he forces
5 an employee to use their tips for an impermissible purpose. Such
6 activity frees the employer to use another portion of its fungible
7 monies for other purposes. An employer, by directing tips in such
8 a prohibited manner, engages in a "taking" of them just as surely
9 as it if had effected an outright and overt seizure of the same.³³

10 The Respondent's September 2006 policy has resulted in
11 decreased management labor costs to the Respondent, a commensurate
12 increase in the Respondent's profits, and a reduction in the
13 earnings of its dealers and the depression of worker's wages
14 generally. The broader and pernicious effect of the Respondent's
15 policy is demonstrated by the testimony of Respondent's witness,
16 Jim Booze, who testified that those were the results of the exact
17 same sort of policy at the Riverside Casino in Laughlin, Nevada.

18 At the Riverside Casino floor supervisors and shift managers
19 receive a share of the dealers' tips. Except for the Respondent,
20 such a system is unique and exists in no other Nevada casino. When
21 asked how much floor supervisors or shift managers at the Riverside
22 Laughlin were paid by their employer, Booze stated it was 50% or
23 less than the going rate paid by other Laughlin casinos. Booze,
24 7/8/09, p. 164-165. As Booze of course conceded, such a
25 circumstance simply increases the profits of the Riverside.

26
27 ³³ As amply documented, and as admitted by the Respondent, the
28 Respondent is actually engaging in such a seizure and treating the
dealers' tips exactly like a form of revenue it can dispense as it
sees fit.

1 In the face of these irrefutable facts, Respondent will
2 presumably assert that the broader economic implications of its
3 policy are irrelevant, and in any event employers always benefit by
4 being able to pay tipped employees lower wages. That argument
5 ignores the critical issue: The shifting of tips earned by one
6 group of workers, who by longstanding history and custom, are
7 poorly paid by their employer and rely upon tips, to another group
8 of workers who are traditionally paid much higher wages by their
9 employer and who do not receive tips.

10 What Respondent is doing is using the custom and practice of
11 tipping dealers as a compensation substitute for its own failure to
12 pay its floor supervisors the compensation Respondent believes they
13 should receive. Not only is such action by Respondent unfair, it
14 violates a central tenant of our free market economy. It takes
15 compensation from the dealers, who have earned it in the
16 competitive marketplace, and gives it to another group of workers
17 who have not earned it, the floor supervisors. Ignoring the
18 dictates of the marketplace, and the choices made by its customers,
19 Respondent commands the payment of the dealers' compensation to the
20 floor supervisors to correct what it has determined to be the
21 "inequity" caused by the dealers' receipt of such compensation.

22 If Respondent wishes to pay its floor supervisors lower wages,
23 or the minimum wage, and force them to rely upon customer tips for
24 a portion of their livelihood, it is free to do so. If it
25 undertakes such a policy it must allow for the development of an
26 organic custom and practice of customers actually giving tips to
27 such persons since no such custom exists. It can take steps to
28 encourage that custom if it wants, by posting signs or otherwise

1 allowing or directing communications to customers that tipping of
2 floor supervisors is permitted and encouraged. If customers accept
3 that custom its policy will be successful. On the other hand, if
4 customers decline to tip floor supervisors it may not be able to
5 retain their services and they will seek employment elsewhere or as
6 dealers. Such is the virtue of the free market for labor and the
7 free enterprise system.

8 What Respondent must be enjoined from doing is appropriating
9 the custom of dealers receiving tips to lower its wage costs for
10 another group of employees, its floor supervisors. The custom and
11 practice of dealers receiving tips developed for the benefit of the
12 dealers, not other employees of the Respondent. Their pre-existing
13 tip pool is not a revenue source for Respondent to direct to other
14 employees who have not actually earned such tips. The Respondent
15 must not be allowed to "short circuit" the process of the floor
16 supervisors developing their own culture and custom of receiving
17 customer tips by forcing the dealers to share their pre-existing
18 and historic tip pool with them.

19 Allowing Respondent to proceed with its misappropriation of
20 the dealers' tips not only violates the language and intent of
21 Nevada's labor statutes, it is contrary to the central purpose of
22 our free enterprise system. A worker's earnings, whether paid for
23 through tips or an employer's wages, is supposed to reflect the
24 value of *their labor*, not the labor of others, in the competitive
25 marketplace. Indeed, Respondent's President Pascal praises the
26 customer tip system as the most pure example of a "compensation for
27 performance" system.

28

1 In true Orwellian fashion Respondent, while praising the
2 custom of tipping as exemplifying the virtuous competitive
3 compensation system in its purest form, acts to corrupt such purity
4 and impose a collectivist regimen. It is taking the tips received
5 by dealers, who were freely given such tips by customers in the
6 competitive marketplace, and re-distributing them to floor
7 supervisors who have done nothing to earn them. Such a
8 redistributionist system is perhaps the norm in another country
9 where Respondent does business, but is anathema to how business,
10 and employer/employee relations, should be, and are, conducted in
11 this country. Neither Respondent, nor any other employer, should
12 be allowed to corrupt the intent of its customers and depress the
13 rightful and fairly earned compensation of its employees by seizing
14 tips earned by those employees and re-directing them to other
15 employees who never earned them.

16 **CONCLUSION**

17 For all of the foregoing reasons, appropriate relief should
18 issue to the complainants and all of those similarly situated
19 including the putative class of such persons as alleged by the
20 complainants, such relief to include monetary compensation,
21 interest, costs, attorney's fees, and all other appropriate relief
22 available at law and equity.

23 Dated this 22nd day of March, 2010

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