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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 REPLY BRIEF
OF THE BALDONADO
COMPLAINANTS

23

24

25

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

27

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1 defies logic. Such personnel were banned from accepting
2 tips from customers. Once a customer was aware of such
3 prohibition they are not going to attempt to do something
4 that is against casino policy. Under Respondent's
5 historic ban on tipping floor supervisors customers would
6 presumably only "attempt" to proffer such tips a single
7 time. There would be no "repeat" tippers of floor
8 supervisors and the pool of "uninformed" and potential
9 floor supervisor tipping customers would be quite small.
10 Under these facts it is absurd to find attempts to tip
11 floor supervisors were historically more than sporadic
12 and rare.

13
14 ● **Floor Supervisors Currently Receive Few Tips**

15 Respondent's claim that floor supervisors now receive
16 more tips from customers than under its prior policy
17 banning them from receiving any tips states an
18 irrelevancy: Any number is greater than zero, which was
19 the amount of tips floors supervisors were previously
20 allowed to receive. As discussed at length in
21 Complainant's Post Hearing Brief the only available
22 objective evidence, the Respondent's tip pool and casino
23 drop records, establishes floor supervisors receive very
24 few tips and the contrary testimony of Respondent's
25 witnesses is untrue. Respondent has refused to provide
26 objective evidence, such as videotape surveillance
27 footage, that would allow for a proper examination of
28 this issue. Respondent having no actual records

1 documenting its claim on this point, and refusing to
2 provide other objective evidence on the issue, must be
3 barred from relying on the false, and self-serving,
4 testimony of its witnesses.

5
6 ● **Customer Service by Floor Supervisors Did Not Improve**

7 Respondent asserts it has enhanced the customer service
8 functions of its floor supervisors. It provides no
9 corroboration of that claim and admits it has no "secret
10 shopper" studies showing customer service by floor
11 supervisors has improved (although it does have such
12 studies showing customer service by dealers has
13 improved). It claims it provided additional "training"
14 to its floor supervisors to improve customer service but
15 it has provided no details of that training. It
16 identifies no additional or different customer service
17 powers granted to such persons. At best, Respondent has
18 simply pushed the floor supervisors to make more of an
19 effort to personally engage with and communicate to its
20 customers. Indeed, as discussed in Complainants' Post
21 Hearing Brief, the only different "customer service"
22 function actually identified by the floor supervisors
23 themselves is that they now "spend more time talking with
24 customers." As also documented in the Complainants' Post
25 Hearing Brief, the decrease in customer tips, as a
26 percentage of the Respondent's casino business activity,
27 indicates such increased talking by floor supervisors to
28 customers is unwelcome and has caused a decrease, not an

1 increase, in customer tips.
2
3

4 **B. Respondent's Explicit Admissions**

5 Respondent's Brief makes the following explicit admissions:
6

7 ● **Respondent Believes the Dealers Made Too Much In Tips**

8 Respondent would not have started taking tips away from
9 the dealers if the dealers had not received such a large
10 amount of tips. That substantial volume of tips rendered
11 the compensation paid by the Respondent to its floor
12 supervisors, the dealers' superiors, inadequate. The
13 dealers, with tips, were making more than what the
14 Respondent chose to pay the floor supervisors. As a
15 result the floor supervisors wanted to be dealers and
16 dealers did not want to become floor supervisors. This
17 "problem" of dealers receiving such generous tips would
18 not have been a problem if Respondent had elected to pay,
19 from its own resources, appropriately competitive
20 compensation to the floor supervisors.
21

22 ● **Respondent Has Mendaciously Dropped the "Supervisor" Title**

23 Respondent admits there has been no change whatsoever in
24 the duties or functions of its Box "Supervisor" personnel
25 who it now just calls Box "Persons." The change in name,
26 and the omission of the "Supervisor" title from Box
27 Supervisors is the same sort of deceptive removal of the
28 term "Floor Supervisor" (now supposedly "Casino Service

1 Team Leads") from Respondent's floor supervisors. Such
2 change in name has been wholly unaccompanied by any
3 actual or substantive change in the floor supervisors'
4 duties.

5 **C. Respondent's Implicit Admissions**

6 Respondent's Brief makes the following implicit admissions:
7

8 ● **A Floor Supervisor Only Tip Pool Would Distribute Few Tips**

9 Implicit in Respondent's submission is a recognition that
10 although it lifted the ban on floor supervisors receiving
11 tips, there would very few tips to distribute among only
12 the floor supervisors. Respondent seeks to increase the
13 compensation received by floor supervisors to an amount
14 at or above that received by dealers, such increase to be
15 secured at no cost or the smallest possible cost to
16 itself. Merely allowing the floor supervisors to receive
17 tips from customers, and requiring the floor supervisors
18 to share such tips, would obviously not achieve that goal
19 and only nominally increase the floor supervisors'
20 compensation. Respondent can only achieve its objective
21 by taking the tips received by dealers and using those
22 funds to pay for the increased compensation of its floor
23 supervisors.

24
25 ● **Respondent Now Completely Controls the Dealers' Tips**

26 Respondent now exercises complete control over the
27 dealers' tips just like any other form of revenue it
28 receives. It has replaced the dealers' toke committee

1 and assumed the additional costs of counting and handling
2 the tips, costs that it previously avoided. It has done
3 so to establish its complete control over the tips and
4 cement its ability to distribute them however it sees
5 fit. Respondent attempts to counter this conclusion by
6 claiming it has acted to ensure there is "accountability"
7 in the handling of tips. Yet there is nothing in the
8 record indicating any dealers ever had an issue with the
9 "accountability" of the prior dealer controlled tip
10 counting process. The "accountability" Respondent lauds
11 could have been achieved by leaving the tip counting
12 under the control of the dealers, albeit with different,
13 more "accountable" procedures. The additional cost
14 assumed by Respondent for such tip counting is not for
15 the purpose of increasing "accountability" but to secure
16 Respondent's control over a new revenue stream it can now
17 distribute as it sees fit.

18
19 ● **Floor Supervisors Are Involved in Dealer Discipline**

20 There has been no change in the functions of floor
21 supervisors vis-a-vis dealer discipline. Floor
22 supervisors do not, and did not, have authority to, on
23 their own, hire or fire dealers. Nor has Respondent
24 introduced a scintilla of evidence that floor supervisors
25 either at Respondent's casino or in Nevada casinos
26 generally exercise different powers than its current
27 "CSTL" floor supervisors. Floor supervisors always have
28 had, and still have, the responsibility of overseeing the

1 dealers and reporting misconduct by dealers to
2 management. Such reporting is the bedrock first step of
3 the disciplinary process, as managers vested with actual
4 authority to mete out discipline must be advised by the
5 floor supervisors about the failings of the dealers.
6 Respondent's assertions the floor supervisors only
7 provide "direction as to the procedures of the game" and
8 they "supervise the games, not the employees" is
9 preposterous. The games are conducted by the dealers.
10 "Directing" the "procedures" of the games requires that
11 floor supervisors observe, and report on, the activities
12 of the persons conducting such "procedures," meaning the
13 dealers.

14
15 **D. Respondent's Irrelevant Assertions**

16 Respondent's Brief makes the following irrelevant assertions:
17

18 ● **The Transfer of Pit Manager Duties are Irrelevant**

19 Respondent asserts that only some, but not all, of the
20 former pit managers' responsibilities have been
21 transferred to the floor supervisors. This is irrelevant
22 and Respondent provides no explanation how or why the
23 transfer of such duties have any bearing on the tip
24 pooling system.

25
26 ● **The Change in Management Structure is Irrelevant**

27 Respondent's decision to change its management structure,
28 unlike its decision to shift management compensation from

1 is also free to take tips from any group of employees as long as it
2 is giving those tips to *other employees* because such tips still
3 remain with some employees and have not been "taken" from "all
4 employees." Such assertion is patently absurd and is also contrary
5 to Nevada's rules of statutory construction.

6 Nevada Revised Statutes § 0.030 governs the interpretation of
7 statutes and states:

8 Except as otherwise expressly provided in a particular statute
9 or required by the context:

10 1. The masculine gender includes the feminine and neuter
11 genders.

12 2. The singular number includes the plural number, and the
13 plural includes the singular.

14 Respondent's argument ignores the dictates of N.R.S. § 0.030
15 and its reasoning would also countenance the most absurd results.
16 Under Respondent's logic the limitations imposed by § 608.160(1)(a)
17 are also only applicable to male employers because the statute only
18 restricts employers from taking the tips of *his* and not *her*
19 employees. Fortunately, N.R.S. § 0.030 disposes of such an absurd
20 argument and the equally absurd argument actually made by
21 Respondent.

22 The term "employees" in N.R.S. § 608.160(1)(a) must be applied
23 in both the singular and plural sense under N.R.S. § 0.030. The
24 only exception to such an application is if N.R.S. § 608.160(1)(a)
25 "expressly provides" for the term "employees" to be given its
26 limited "plural only" meaning or the actual context of such statute
27 compels the "plural only" application. No such "express provision"
28 is made in N.R.S. § 608.160(1)(a) and the actual context of the
statute compels the conclusion the term "employees" is meant to be

1 applied in both the singular and plural sense.

2 The terms of N.R.S. § 608.160(1)(a) are subject to §
3 608.160(2) that provides: "Nothing contained in this section shall
4 be construed to prevent such employees from entering into an
5 agreement to divide such tips or gratuities among themselves." As
6 ruled upon in *Alford v. Harold's Club*, 99 Nev. 670, 669 P.2d 721
7 (1983) such an "agreement" can be required as a condition of
8 employment. Yet under Respondent's reasoning, § 608.160(2) is
9 completely superfluous and unnecessary as the employer never
10 violates § 608.160(1)(a) when he merely "takes" tips from one
11 employee and "gives" them to another employee. This context, e.g.,
12 the need for § 608.160(2) to have meaning and not be interpreted as
13 just excess verbiage, also renders Respondent's "plural application
14 only" of the word "employees" clearly erroneous. "When
15 interpreting a statute, this court will give the statute its plain
16 meaning and will examine the statute as a whole without rendering
17 words or phrases superfluous or rendering a provision nugatory."
18 *Haney v. State*, 124 Nev. Adv. Rep. 40, 185 P.3d 350, 353 (2008).

19 The sole support cited by Respondent for this "plural only"
20 application of "employees" is in *Moen v. Las Vegas International*
21 *Hotel, Inc.*, 402 F. Supp 157, 160 (D. Nev. 1975), *aff'd mem.*, 554
22 F.2d 1069 (9th Cir. 1977):

23 In interpreting the 1971 statute, we note that
24 subsection 1(a) makes it unlawful for an employer to
25 "take" all or part of any tips or gratuities bestowed
26 upon his "employees." The plural and not the singular is
used. The statute does not say that he cannot take tips
bestowed on an employee.

27 Moen does not bother to discuss N.R.S. § 0.030 and its holding
28 conflicts with N.R.S. § 0.030. It was improper for *Moen* to draw

1 the foregoing conclusion when N.R.S. § 0.030 compels the
2 application of NRS 608.160(1)(a) as if it is written in both the
3 plural and singular tense.

4 **B. Respondent's Assertion that *Alford v. Harolds Club*,
5 *99 Nev. 670, 669 P. 2d 721 (1983)* Approved of the Sort
6 of Tip Pooling Policy Adopted By the Respondent is False**

6 Respondent misleads by taking an incomplete excerpt from
7 *Alford v. Harolds Club*, 99 Nev. 670, 669 P. 2d 721 (1983) and
8 representing that *Alford*, in such excerpt, adopted the holding of
9 *Moen* and approved of the sort of tip pool instituted by Respondent.
10 After observing that the Nevada Supreme Court had never examined
11 whether any mandatory tip pool was proper under N.R.S. § 608.160,
12 *Alford* discussed *Moen* and stated:

13 The court [*Moen*] conducted an extensive review of
14 the legislative history of NRS 608.160 and prior related
15 legislation, and concluded: "The evident purpose and
16 proper interpretation of the statute is that it was
17 enacted to prevent the taking of tips by an employer for
18 the benefit of the employer." Based on this construction
19 of the statute, the district court [*Moen*] concluded that
20 608.160 did not bar the employer from imposing a
21 tip-pooling agreement among employees as a condition of
22 employment. *Id.*

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

23 "The interpretation" advanced by *Moen* and endorsed by *Alford*
24 is that "The evident purpose and proper interpretation of the
25 statute [N.R.S. § 608.160] is that it was enacted to prevent the
26 taking of tips by an employer for the benefit of the employer." It
27 is only this broad general "purpose" of N.R.S. § 608.160 upon which
28 *Alford* and *Moen* agree.

1 Alford did not approve of the sort of mandatory tip pool used
2 in Moen and by Respondent. Alford held only that the "tip-pooling
3 policy in the instant case" it was considering, a tip pool limited
4 to casino dealers, complied with N.R.S. § 608.160. Although
5 clearly presented with the opportunity to do so, and possessing
6 full knowledge of Moen's "line of service" holding, Alford declined
7 to embrace the same. Alford can only be viewed as rejecting, and
8 not validating, the sort of tip pool policy instituted by
9 Respondent through its *sub silentio* refusal to approve of the tip
10 pool endorsed by Moen.

11 **C. Respondent's Assertion that Under *Boucher v. Shaw*, 124
12 Nev. 96, 196 P.3d 959 (2008) its Floor Supervisors are
13 Not "Employers" Within the Meaning of N.R.S. § 608.160
14 Is in Error and Even if Correct is Irrelevant**
15 **1. Whether the Floor Supervisors are "Employers" Under
16 N.R.S. § 608.160 is Irrelevant as it is the Respondent
17 And Not the Floor Supervisors Who is Taking the
18 Dealers' Tips**

19 The policy in dispute between the parties was formulated and
20 imposed by the Respondent. It is the Respondent that is compelling
21 the placement of all tips received by dealers in token boxes. It is
22 the Respondent who, through its security staff and other non-dealer
23 employees it designates, takes those token boxes, empties them,
24 counts the tips and deposits the tips in its general operating
25 account. It later gives an amount equal to a portion of those tips
26 to the dealers and a separate amount equal to the other portion of
27 those tips to the floor supervisors. It is the Respondent, not the
28 floor supervisors, who is taking the dealers' tips. The floor
supervisors are merely receiving from the Respondent an amount of
money that represents a portion of the tips Respondent has taken
from the dealers.

1 Under N.R.S. § 608.160 an employer cannot take any of the tips
2 of their employees. Respondent does not dispute it is the employer
3 of the dealers. Respondent also concedes that the dealers, as a
4 condition of their employment, must allow the Respondent to take,
5 count, and dispose of as the Respondent pleases, the dealers' tips.
6 Whatever "taking" that has occurred within the meaning of N.R.S. §
7 608.160 is by the Respondent.

8 **2. Whether the Floor Supervisors are "Employers"**
9 **Under N.R.S. § 608.160 is Irrelevant as they**
10 **Are Prohibited From Accepting any Portion of**
11 **The Dealers' Tips Under N.R.S. § 613.120**

12 As discussed in Complainants' opening brief, the floor
13 supervisors, being "charged" and "entrusted" with the employment of
14 the dealers, are prohibited from "directly or indirectly" receiving
15 any portion of the dealers' gratuities under N.R.S. § 613.120.
16 Even if N.R.S. § 608.160 somehow did not bar the floor supervisors
17 from taking the dealers' tips they would be barred from taking, or
18 even accepting a portion of, such tips by N.R.S. § 613.120.

19 **3. Respondent's Claim That Anyone Who is Not an**
20 **"Employer" Under *Boucher* May Take Employee Tips**
21 **Without Violating N.R.S. § 608.160 is Absurd**
22 **And Would Render the Protections of Such**
23 **Statute Meaningless**

24 Under Respondent's reasoning no one can be an "employer" for
25 the purposes of N.R.S. § 608.160 except for the actual wage paying
26 corporate entity listed on a payroll record because that is the
27 only "employer" under N.R.S. § 608.011 as applied in *Boucher*. Such
28 a rule would mean the owners of an employing corporate entity would
be perfectly free to seize and keep all of the tips received by
such corporation's employees. According to the Respondent, under
Boucher and N.R.S. § 608.011 such persons are not actually

1 "employers" subject to N.R.S. § 608.160. That is the only logical,
2 and also absurd, result of Respondent's reasoning.

3 **4. Respondent's Floor Supervisors are "Employers"**
4 **Within the Meaning of N.R.S. § 608.160 and**
5 **N.R.S. § 608.011 Because this is an**
6 **Administrative Matter**

7 Respondent misleads by claiming *Boucher* somehow recast the
8 meaning of N.R.S. § 608.011 and how the term "employer" applies in
9 this case. It did not. The relevant holding of *Boucher* is:

10 We therefore reject the proposition that an
11 individual manager's potential criminal and
12 administrative liability necessarily means that the
13 individual manager can be held personally liable for the
14 unpaid wages under Nevada's wage and hour laws. 196 P.3d
15 at 964.

16 Complaints do not seek wages¹ but their tips taken in
17 violation of N.R.S. § 608.160. Claims for tips under N.R.S. §
18 608.160 are administrative, not civil, in nature. *Baldonado v.*
19 *Wynn Las Vegas LLC*, 194 P.3d 93, 103-104 (2008). The holding of
20 *Boucher* is irrelevant and has no bearing on the meaning of
21 "employer" as defined by N.R.S. § 608.011 and applied by N.R.S. §
22 608.160 to this administrative proceeding.

23 To the extent relevant or necessary to the resolution of these
24 proceedings, the definition of "employer" set forth in N.R.S. §
25 608.011 is applicable to the floor supervisors who have "control or
26 custody" of the dealers and their place of employment. Such
27 "control or custody" is not disputed and exists irrespective of the
28 floor supervisors' alleged lack of disciplinary authority over the

29 ¹ Only amounts payable by an employer itself or "commissions"
30 are defined as "wages" within the meaning of Chapter 608. See,
31 N.R.S. § 608.012. That definition excludes tips which are given and
32 paid by customers voluntarily.

1 dealers. The floor supervisors direct the dealers in their work,
2 advise dealers when they may take breaks, and otherwise act in a
3 position of "control" in that they "supervise" the dealers'
4 activities. They also have "custody" of the dealers in that they
5 are charged with reporting any misbehavior or infractions by the
6 dealers to higher management.

7 **II. RESPONDENT HAS VIOLATED N.R.S. § 608.160 BY TAKING**
8 **TIPS GIVEN TO AND INTENDED FOR THE DEALERS AND USING**
9 **THOSE TIPS TO REDUCE THE AMOUNT OF COMPENSATION IT PAYS**
10 **TO THE FLOOR SUPERVISORS WHO DO NOT RECEIVE SUCH TIPS**

11 Respondent, relying on *Alford's* holding that a mandatory tip
12 pool can properly benefit an employer by reducing employee turnover
13 and increasing employee morale, insists its tip pool confers a
14 "permissible" benefit upon the Respondent. In making that
15 assertion Respondent ignores the critical distinction between its
16 tip pooling policy and the one in *Alford*: Respondent is not forcing
17 dealers, upon whom tips were "bestowed" by customers, to share
18 their tips among "themselves," as was the situation in *Alford*.
19 That policy was approved of in *Alford* and is consistent with the
20 language of N.R.S. § 608.160. Respondent is "accessing" and
21 "using" the dealers' tips, in precisely the manner prohibited by
22 *Alford*, to pay its floor supervisors an increased amount of
23 compensation rather than pay such increased compensation out of its
24 own funds.

25 The benefit of the Respondent's tip pooling policy does not
26 inure to the dealers, to whom such tips were given in the first
27 instance. In *Alford* the policy may have disadvantaged some
28 dealers, and advantaged others, but as a group the dealers' enjoyed
the same collective income from the tips bestowed upon them by

1 customers. As a group they lost, and gained, nothing under such
2 policy. Because the dealers experienced no collective loss under
3 that policy, they were merely sharing among "themselves" the tips
4 "bestowed" upon them by customers, the "benefit" their employer
5 secured under such policy did not violate N.R.S. § 608.160.

6 Unlike in *Alford*, all of the Respondent's dealers, as a
7 collective group, are experiencing a "taking" of a portion of their
8 collective tips and a collective decrease in their incomes. They
9 are all economically harmed by the Respondent's tip pooling policy.
10 The benefit secured by that policy is to the Respondent, alone, who
11 now distributes a portion of those tips to persons upon whom they
12 were never "bestowed." Respondent is not benefitting, as in
13 *Alford*, from a lower turnover rate among its dealers upon whom the
14 tips at issue were actually bestowed. Instead it is using the
15 dealers' tips to increase the compensation of its floor supervisors
16 to whom such tips were never given in the first instance. By doing
17 so it reduces turnover among floor supervisors, increases their
18 morale,² and increases its ability to more easily hire such
19 persons. It concedes as much.

20 Nor does Respondent's policy, as it asserts, equitably reward
21 all employees, including floor supervisors, who receive tips from
22 customers. The competent evidence conclusively establishes such is
23 not the case. Indeed, if that assertion was true Respondent would
24 have no reason to require a tip pool including both the dealers and
25 the floor supervisors. It could just require the floor supervisors

27 ² Such policy has the opposite effect upon the dealers, as
28 evidenced by the very substantial number that have filed complaints
seeking to void the policy.

1 to pool the tips they receive among themselves, in proper
2 compliance with *Alford* and N.R.S. § 608.160.

3 Respondent has, of course, failed to institute a separate
4 floor supervisor tip pool because there are no such tips or almost
5 no such tips to actually pool and distribute. The purpose of
6 Respondent's tip pooling policy is not to have employees who
7 receive customer tips share those tips among "themselves." It is
8 the exact opposite, which is to take tips from the dealers, to whom
9 such tips were bestowed in the first instance by customers, and
10 give those tips to the floor supervisors, who did not receive them.
11 The floor supervisors may properly be compelled by the Respondent
12 to share in the tips that are *bestowed upon themselves* in
13 compliance with N.R.S. § 608.160 and *Alford*. They have no right
14 share in the dealers' tips.

15 **III. RESPONDENT HAS VIOLATED N.R.S. § 608.100**
16 **AND N.R.S. § 613.120**

17 The *Cumbie v. Woody Woo* decision, No. 08-35718, 2010 WL 610603
18 (9th Cir. Feb. 23, 2010), claimed by Respondent to support a
19 finding that no violation of NRS 608.100 has occurred, is
20 irrelevant. *Cumbie*, dealt with the Federal Fair Labor Standards Act
21 (the "FLSA") It held the FLSA does not limit the "understanding"
22 that employees may enter into with employers in respect to the
23 disposition of their tips, as long as the employee is ultimately
24 paid the hourly minimum wage. That ruling has no bearing on this
25 case. Nevada, unlike the FLSA, explicitly restricts the sort of
26 "understandings" that employers can enter into with employees in
27 respect to tips.

28 Respondent also claims that no N.R.S. § 608.100 or N.R.S. §

1 613.120 violation, or improper rebate or payment to Respondent or
2 the floor supervisors, has occurred because the dealers' tips were
3 never "received" or "paid" to the dealers prior to such rebate or
4 improper payment taking place. It bases that claim on the fact
5 that the tip, when given to the dealer, did not become the
6 individual personal property of such dealer because the dealer was
7 pooling the tip with other dealers. That argument is simplistic
8 and misleading. It also begs the question: To whom does the tip
9 belong to when given by the customer to a dealer who pools his tips
10 with other dealers?

11 A tip, when given to an individual dealer participating in a
12 proper dealer tip pool, belongs to all of the dealers,
13 collectively. It certainly does not belong to the Respondent or
14 anyone else. The dealers, collectively, have a legally recognized
15 property interest, conferred by N.R.S. § 608.160, in such monies.
16 Respondent, as the employer, cannot command them, as a group, to
17 pay any portion of those funds to the Respondent (a "rebate") for
18 use by the Respondent or to the floor supervisors.

19 Respondent also argues that N.R.S. § 613.120 "was clearly
20 enacted to prevent a supervisor from requiring an individual
21 employee to pay the supervisor a fee so the employee could keep his
22 or her job." Such argument, that N.R.S. § 613.120 is merely an
23 "anti-kickback" statute, fails to properly recognize the broad
24 language of the statute. It does not just prevent a supervisor
25 from "requiring" a payment, or extorting a kickback from an
26 employee, it bars such supervisor (a position very broadly defined)
27 from even "receiving" such a payment "directly or indirectly."
28 There is no reason for such broad language *unless* N.R.S. § 613.120

1 was intended to prevent more than just "overt" kickback demands.
2 Only by applying such language, and actually preventing the sort of
3 payments Respondent, and not its floor supervisors, are compelling,
4 can the language of N.R.S. § 613.120 be given its proper meaning.
5 *See, Haney.* Respondent makes no attempt to explain how this broad
6 language of N.R.S. § 613.120 should be applied or why such language
7 should be ignored.

8 **IV. RESPONDENT HAS ACTED IMPROPERLY BY FAILING TO**
9 **SET FORTH IN ITS INITIAL BRIEF CALIFORNIA**
10 **PRECEDENTS THAT IT WILL NOW SEEK TO RELY UPON**

11 Respondent is well aware of certain cases from California that
12 it believes support a finding its tip pooling policy complies with
13 Nevada law. Respondent did not discuss those precedents in its
14 initial post-hearing brief in an attempt to deny complainants the
15 opportunity to respond to arguments based on such precedents. This
16 is unfair and improper. Complainants have not acted in such a
17 fashion and have cited, in their initial post-hearing brief, all
18 precedents, from all jurisdictions, upon which they seek to rely.
19 In response to such conduct by the Respondent this tribunal should
20 refuse to consider any arguments based upon such California
21 precedents.

22 Despite their inability to properly, and fully, respond to
23 Respondent's arguments that will incorporate such California cases,
24 Complainants, briefly, explain why such precedents do not support
25 Respondent's claims.

26 The relevant statute in California is Labor Code § 351, which
27 provides, in relevant part, that:

28 No employer or agent shall collect, take, or receive
any gratuity or a part thereof that is paid, given to, or
left for an employee by a patron, or deduct any amount

1 from wages due an employee on account of a gratuity, or
2 require an employee to credit the amount, or any part
3 thereof, of a gratuity against and as a part of the wages
4 due the employee from the employer. Every gratuity is
hereby declared to be the sole property of the employee
or employees to whom it was paid, given, or left for.

5 This statute, in certain respects, duplicates the provisions
6 of N.R.S. § 608.160. California Labor Code § 351 prevents an
7 employer or "agent" from taking employee tips and bans any minimum
8 wage "tip credit." Unlike N.R.S. § 608.160, it is silent on the
9 issue of tip pooling. Despite that silence, California's Courts
10 have held that mandatory tip pools are permissible under Labor Code
11 § 351. See, *Leighton v. Old Heidelberg, Ltd.*, 219 Cal App 3d 1062,
12 268 Cal Rptr 647 (Cal. App. 2d Dist. 1990).

13 It is unknown if Respondent will argue Labor Code § 351 is
14 fundamentally different from N.R.S. § 608.160 because the former,
15 unlike the later, speaks of preventing tip taking by both employers
16 and "agents." That argument is lacking in merit and looks to form
17 and not substance. Nevada, although only mentioning employers in
18 N.R.S. § 608.160, incorporates the definition of employer at N.R.S.
19 § 608.011 into such statute. That Nevada definition of "employer"
20 (including anyone who exercises "control or custody" over an
21 employee or their employment) is almost the same as California's
22 combined definitions of "employer" and "agent" set forth at
23 California Labor Code § 350 and applicable to California Labor Code
24 § 351.

25 There are four recent notable cases examining California Labor
26 Code § 351 upon which Respondent may seek to rely. These are:
27 *Grodensky v. Artichoke Joe's Casino*, 171 Cal. App. 4th 1399, 91
28 Cal. Rptr. 3d 732 (Cal. App. 1st Dist. 2009) *depublished* 97 Cal.

1 Rptr. 3d 273, 211 P.3d 1061, 2009 Cal. LEXIS 5962 (Cal. 2009);
2 *Etheridge v. Reins International California, Inc.*, 172 Cal. App.
3 4th 908, 91 Cal. Rptr. 3d 816 (Cal. App. 2d Dist. 2009); *Chau v.*
4 *Starbucks Corp.*, 174 Cal. App. 4th 688, 94 Cal. Rptr. 3d 593) (Cal.
5 App. 4th Dist. 2009) and *Lu v. Hawaiian Gardens Casino, Inc.* (2009)
6 170 Cal.App.4th 466, 88 Cal. Rptr. 3d 345 (Cal. App. 2d Dist.
7 2009), not to be cited, review granted by California Supreme Court,
8 April 29, 2009, No. S171442. No support can be properly drawn for
9 Respondent's claims from any of these cases.

10 *Chau* found that a mandatory tip pool among Starbucks baristas
11 and their shift supervisors, involving tips left in a "tip jar" at
12 a store's counter, did not violate Labor Code § 351. The critical
13 findings in *Chau* were that the shift supervisors spent 90% to 95%
14 of their time performing the exact same functions as the baristas;
15 they were indistinguishable to the customers from the baristas; and
16 the baristas and the shift supervisors worked as an integrated team
17 taking and filling customer orders. Based upon these facts, and
18 the customers' placement of tips in "undesignated" tip jars for the
19 employees, the tip pool was found to be proper. The facts of this
20 dispute are radically different. Floor supervisors and dealers
21 perform none of the same tasks, their functions are clearly
22 different and visible to the customers, and tips are given directly
23 to the dealers, they are not placed in some "undesignated" employee
24 tip jar at a retail service counter. Any attempt by Respondent to
25 analogize its tip pool to the one approved of in *Chau* is completely
26 without merit.

27 *Grodensky* and *Lu* both involved employer mandated tip pools at
28 two different poker card rooms. Each card room required dealers to

1 share tips with floor supervisors. *Grodensky* found such a tip pool
2 to be proper under California law because the floor supervisors
3 were not "agents" of the employer. *Lu* held summary judgment on
4 that issue was improper because the functions performed by the
5 floor supervisors, such as having to "counsel" dealers and advise
6 them to be more "careful" when mistakes occurred, and their one
7 time power to grant dealers the ability to leave early, among other
8 things, may have placed them in a position of "control" making them
9 "agents."³ Those decisions are depublished and cannot be cited as
10 precedent in California as the California Supreme Court has granted
11 leave to appeal in both cases. As a result, neither decision can
12 be viewed as having any precedential value.

13 Presumably Respondent will argue the analysis in *Grodensky* is
14 compelling and should be adopted by this tribunal, notwithstanding
15 its depublished, and potentially overturned, status. *Grodensky*
16 held that: "The statute [Cal. Labor Code § 351] permits an employer
17 to require an employee to share the tips with all of the employees
18 serving or attending to the customers." 171 Cal. App. 4th at 1446.
19 In the view of *Grodensky*, the only other limitation on such a tip
20 pool was that the tip pool participants not include "agents" of the
21 employer.

22 *Grodensky* ignored a critical issue that this tribunal must
23 consider. It steadfastly refused to concern itself with the
24 benefit, if any, received by an employer from a tip pooling policy.

26 ³ The employer in *Lu*, just like the Respondent, changed the
27 name of its floor supervisors from "relief supervisor" to "customer
28 agents into employees who could receive a portion of its dealers'
tip pool.

1 In response to the *Grodensky* dealers' argument that the tip pooling
2 policy at issue was just a means for the employer to reduce the
3 amount of wages it had to pay to its floor supervisors, *Grodensky*
4 stated:

5 We, however, are not concerned with whether the
6 casino benefitted from its tip pooling policy. The
7 question before us is whether the mandated-tipping-pool
policy violated Labor Code section 351. 171 Cal. App.
4th at 1448.

8 This refusal by *Grodensky* to concern itself with the "benefit"
9 secured by an employer under a tip pooling policy renders its
10 holding irrelevant. Nevada's highest Court, in *Alford*, has clearly
11 spoken on that issue and held that the "direct benefit" received by
12 the employer must be evaluated when considering if a mandatory tip
13 pool complies with N.R.S. § 608.160. Whether *Grodensky* was
14 correct, as a matter of California law, in ignoring the employer
15 "benefit" issue, may be answered by the California Supreme Court.
16 This tribunal, as a matter of Nevada law, cannot ignore that issue.

17 *Grodensky* concluded the floor supervisors, because they lacked
18 ultimate disciplinary decision making authority, and did not
19 control the wages, benefits, or scheduling of the dealers, were not
20 "agents" under Cal. Labor Code § 351 because they did not exercise
21 a sufficient measure of control of the dealers. It found the
22 "principal responsibility" of the floor supervisors "was to ensure
23 the games ran smoothly." That conclusion improperly ignores the
24 essential task they undertook in making the "games run smoothly,"
25 which was being sure the dealers were doing their jobs. Despite
26 *Grodensky's* prevarication, casino floor supervisors are in
27 "control" of the dealers they oversee. It is their responsibility
28 to insure the dealers are doing their jobs and report the dealers'

1 transgressions to higher management. If they fail to do so they,
2 themselves, will face termination of their employment. Floor
3 supervisors are "agents" of the employer in respect to their
4 relationship with the casino's dealers, it is the essential
5 function of their job.

6 *Grodensky* also is unworthy of consideration because it did not
7 evaluate the status of the floor supervisors under any California
8 statute analogous to N.R.S. § 613.120. That Nevada statute, as
9 previously discussed, prevents the mandatory sharing of employee
10 tips with employer agents merely "charged" or "entrusted" with,
11 e.g., overseeing, other employees. A violation of N.R.S. § 613.120
12 does not require proof of "control" over other employees, whether
13 under the improper standard used by *Grodensky* or some other
14 standard. It only requires that the agent be *responsible* for
15 reporting and overseeing the conduct of the employer's other
16 employees.

17 Nor can Respondent credibly argue that the decision in
18 *Etheridge* provides any proper guidance. Presumably Respondent will
19 argue that the approach used by *Etheridge*, what that case termed a
20 "chain of service" analysis analogous to *Moen's* "line of service,"
21 should be utilized by this tribunal. But the decision in *Etheridge*
22 was not unanimous. Perhaps more importantly, the "chain of
23 service" analysis used in *Etheridge* also included a requirement
24 that tip pool distributions be fair and equitable and reflect the
25 relative contribution of the participants in the service they
26 provide to the customer. It did not, as *Moen* implied was proper,
27 and as *Grodensky* vacuously held, and as Respondent will surely
28 argue, allow tip pooling in any manner among all members of the

1 "chain of service."

2 Two judges agreed to the decision in *Etheridge* and one
3 vigorously dissented. One of the two judges agreeing in the
4 decision also filed a separate concurrence. In that concurrence he
5 found that a "chain of service" distribution must be equitable and
6 fair and reflect each group of employees' contribution to the
7 customer tip that was earned. In making that finding the
8 concurrence explicitly recognized that tip pooling cannot be used
9 by an employer to reduce the wages it would otherwise have to pay
10 to a group of employee:

11 Thus a mandatory tip pool should only be sustained
12 under Labor Code, section 351 when it works a fair and
13 equitable distribution among the employees who
14 participate in the tip pool. If that distribution is
15 unfair or inequitable, it is effectively no different
16 from the case where the employer takes a portion of the
17 tips received by one employee and gives them to another
18 in order to lessen the employer's own obligation to pay
19 the second employee. As explained in the majority
20 opinion, such conduct constitutes a violation of Labor
21 Code section 351. 72 Cal. App. 4th at 927.

22 In a footnote at the end of the foregoing passage, the
23 concurrence in *Etheridge* explicitly rejects *Grodensky's* holding
24 tips could be distributed to all employees, without limitation, who
25 serve customers. As the concurrence also observed, the Court in
26 *Etheridge* had no opportunity to consider whether the actual tip
27 pool division at issue in that case was fair and proper as the
28 plaintiff declined to make that argument.⁴ Both the concurring
and dissenting judges in *Etheridge* urged the California Supreme

26 ⁴ Plaintiff in *Etheridge* declined to make that argument and
27 instead argued that any dining establishment tip pool must be
28 limited to those who provide "direct table service" to the dining
customers, 72 Cal. App. 4th at 925-926, a standard rejected by the
Etheridge majority.

1 Court to grant review, which was declined. As a result, no unified
2 holding is presented by *Etheridge* and it cannot be viewed as a
3 precedent relevant to this case.

4 If the "fairness" standard enunciated in *Etheridge* was applied
5 to this case, the floor supervisors, for the reasons already
6 discussed, would receive no tips or a very nominal amount of tips
7 from the tip pool. Under Respondent's tip pooling policy, floor
8 supervisors receive a share of tips equal to 40% of a dealer's
9 share.⁵ It is readily apparent they do not contribute an amount of
10 "customer service" value to the casino players that is equal to 40%
11 of what the dealers contribute.

12 The dealer is present and with the customer, dealing a single
13 game, 100% of the time the customer is playing. The dealer also
14 interacts with a very limited number of customers at a time.
15 Dealing the game is the dealer's function and the floor supervisor
16 does not deal the game. To the extent the floor supervisor
17 interacts with the customer it is highly peripheral, limited, and
18 involves other things. The floor supervisor has numerous other
19 responsibilities besides interacting with the customer and often is
20 responsible for a much larger number of customers and is usually
21 overseeing more than one game. He is certainly not at the
22 continuous, face to face, beck and call of the customer in the way
23 the dealer is. He is not rendering a direct service to the
24 customer every few minutes with every deal of the game. The
25 nominal contribution of the floor supervisors to the customers is

26
27 ⁵ A small number of box persons are receiving a tip pool amount
28 equal to 20% of a dealer's share. Although that share is
considerably less than the floor supervisors, it is still
unjustified.

1 born out by the nominal amount of tips, if any, they are actually
2 given by customers. To the extent that the approach formulated in
3 *Etheridge* is considered by this Tribunal even under that approach
4 the Respondent's tip pool is grossly unfair, inequitable, invalid
5 and void.

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CONCLUSION

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

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Dated this 3rd day of May, 2010

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