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10 **BEFORE THE NEVADA STATE LABOR COMMISSIONER**  
11 **CARSON CITY, NEVADA**

13 IN THE MATTER OF: )

14 MEGAN SMITH, )

15 Claimant, )

16 vs. )

17 THE WYNN, )

18 Respondent. )

19 \_\_\_\_\_ )  
20 DANIEL BALDONADO, JOSEPH CESARZ, )  
and QUYNGOC TANG, )

21 Complainants, )

22 vs. )

23 WYNN LAS VEGAS, LLC., )

24 Respondent. )  
25 \_\_\_\_\_ )

Labor Commissioner File Number: 5651

**RESPONDENT'S POST-HEARING**  
**BRIEF**

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1 were “at-will employees and do not have written contracts of employment,” and thus Wynn  
2 could modify their terms of employment. Id. Finally, the court found that Wynn’s new tip  
3 pooling procedure “does not violate Nevada statutory provisions or public policy.” Id. The  
4 plaintiffs appealed the decision to the Nevada Supreme Court.

5 On October 9, 2008, the Nevada Supreme Court issued its opinion affirming the District  
6 Court’s decision. See Baldonado, 196 P.3d at 107. Notably, the Nevada Supreme Court found  
7 that plaintiffs did not have a private cause of action to bring their claims in state court.  
8 Furthermore, the Court reiterated its position that “employers may unilaterally modify the terms  
9 of an at-will employment arrangement in prospective fashion; the employee’s continued  
10 employment constitutes sufficient consideration for the modification.” Id. at 105. The Court  
11 specifically addressed Wynn’s modified tip pooling policy and the voting provision contained in  
12 its original policy:

13 [T]o the extent that the March 28 [, 2005] policy provisions constituted terms of  
14 employment, the Wynn was free to alter those terms with respect to future  
15 employment periods. Second, the Wynn’s employee handbook expressly stated  
16 that “any” policies were subject to unilateral modification, and that statement was  
17 not contradicted by the March 28 policy provisions. Although appellants contend  
18 that the March 28 policy’s voting provision granted the dealers the sole right to  
19 change the tip-pooling and distribution policy, nothing therein suggested that the  
20 Wynn was relinquishing its right to change the terms of the voting provision  
21 itself. Accordingly, the March 28 policy provisions did not, as a matter of law,  
22 rise to the level of an enforceable contract with respect to future periods of  
23 employment, and the district court properly granted summary judgment on  
24 appellants’ breach of contract claim.

25 Id. at 106.

26 During the pendency of the Nevada Supreme Court matter, on or about September 12,  
27 2007, Claimant Megan Smith filed a claim for wages with the Nevada Labor Commissioner. On  
28 or about February 29, 2008, the Nevada Labor Commissioner granted intervenor status to  
Claimants Baldonado, Cesarz and Tang. Such Claimants thereafter filed their Administrative  
Complaint on or about October 17, 2008. The Administrative Complaint alleged violations of  
NRS 608.100, 608.160, and 613.120. By Order dated February 20, 2009, the Labor  
Commissioner dismissed the allegations under NRS 608.100 and 613.120 as “not applicable” to  
the matter at issue. However, at the commencement of the hearing, the Labor Commissioner

1 indicated that he would allow Claimants to submit evidence as to those previously dismissed  
2 alleged unlawful employment practices.

3 The matter was initially scheduled to be heard on July 7, 2009 through July 10, 2009,  
4 with additional dates held in reserve from August 18, 2009 through August 21, 2009.  
5 Ultimately, the hearing lasted ten (10) days, from July 7, 2009 through July 9, 2009, from  
6 August 18, 2009 through August 20, 2009, and from October 5, 2009 through October 8, 2009.

7 Prior to the commencement of the hearing, Claimant Smith was represented by Jay  
8 Litman, Esq. and Travis Shetler, Esq. Claimants Baldonado, Cesarz and Tang were represented  
9 by Mark Thierman, Esq. and Leon Greenberg, Esq. During the hearing, however, Claimants  
10 added additional counsel. Claimant Smith was additionally represented by Cecil Hollins, Esq.  
11 Claimants Baldonado, Cesarz and Tang were additionally represented by J.P. Kemp, Esq. and  
12 Robin Potter, Esq. Throughout the proceeding, Claimants' numerous counsel alternated in both  
13 their presence at the hearing and their examination of the witnesses.

14 Wynn has been consistently represented in all aspects of this matter by Kevin J. Tourek,  
15 Esq., General Counsel for Wynn Las Vegas, LLC, and Gregory J. Kamer, Esq. and Bryan J.  
16 Cohen, Esq. of the law firm of Kamer Zucker Abbott.

## 17 STATEMENT OF THE FACTS

### 18 **I. WYNN'S CASINO STRUCTURE PRIOR TO SEPTEMBER 1, 2006.**

19 The fundamental underlying material facts of this matter are not in dispute. Although the  
20 policies and practices of Wynn prior to September 1, 2006 are not legally relevant to the issue at  
21 hand, a discussion of these initial practices will provide a useful understanding of the job duties  
22 of the various table games positions, an understanding of the toke pooling practice that the  
23 employees deemed acceptable and lawful upon their hire, and an understanding that a CSTL is  
24 *not* "an employer" for purposes of Nevada law.

#### 25 **A. The Initial Casino Hierarchy.**

26 Wynn opened to the public on April 28, 2005. (Stipulated Fact No. 14) At that time,  
27 Wynn's Table Games Department had an established hierarchy in overseeing those casino games  
28 that were under the Department's responsibility. These games include: Big 6. Blackjack,

1 Caribbean Stud Poker, Craps, Let it Ride Poker, Pai Gow, Roulette, Three Card Poker, Crazy 4  
2 Poker, Casino War, and Baccarat. (Ex. 10 at 73-74) The Table Games Department does not  
3 oversee Wynn's Poker Room, the Sports Book, or the Slots. At the top of the Table Games  
4 hierarchy was the Vice President of Table Games Operations, then the Shift Managers, Assistant  
5 Shift Managers, Pit Managers, Floor Supervisors, Box Supervisors and Dealers. (TR 6: 22, ll. 5-  
6 10; Ex. 10 at 66-72) As noted in the job descriptions, each of these positions had unique duties  
7 for overseeing the operations of the games.

8 Focusing first on the duties of the Pit Managers, they were responsible for the  
9 administrative aspect of operating the games in one or more "pit areas." (Ex. 10 at 69) Namely,  
10 the Pit Managers were responsible for tracking the chip inventory on the games, ensuring that  
11 gaming regulations were followed, ensuring the games had the proper equipment and supplies,  
12 monitoring the level of play on the games, and overseeing all of the administrative tasks that  
13 arise on a given shift. *Id.* In addition to their administrative functions, the Pit Managers were  
14 also responsible for disciplinary actions of employees in their assigned areas. (TR 2: 296, ll. 6-  
15 11) As Neala Banton, a former Pit Manager now Dealer, testified, the Pit Managers "pretty  
16 much managed the pits." (TR 2:215, ll. 22-23) William Ehrenberg, a former Pit Manager,  
17 testified that Pit Managers did "disciplinaries." (TR 7: 118, ll. 21-22)

18 The Floor Supervisors were directly below the Pit Managers and had a more direct  
19 involvement with the activity on the table games. Floor Supervisors were assigned to a specific  
20 number of tables within a single pit area. (Ex. 10 at 70) Among the duties of the Floor  
21 Supervisor were issuing markers, which are credit documents that allow customers to gamble on  
22 a line of credit, resolving minor disputes when mistakes occurred on a game, rating players so  
23 that they could qualify for complimentary, protecting the integrity of the game, ensuring the  
24 games have enough chips for play to continue, ensuring that gaming regulations are followed,  
25 and directing the Dealers to ensure conformity with established policies and procedures. *Id.* at  
26 70-71. Unlike the Pit Managers, the Floor Supervisors were always assigned to a single pit and a  
27 limited number of tables to oversee. (Ex. 10 at 70) The Floor Supervisors had limited  
28 disciplinary authority. As Scot Campbell testified, Floor Supervisors would "write note[s] to

1 files, disciplinary things” when a Dealer’s actions or behavior warranted some initial level of  
2 discipline. (TR 7: 194, ll. 11-12) Bill Westbrook similarly testified that Floor Supervisors could  
3 “actually counsel dealers.” (TR 1: 124, ll. 3-4)

4 **B. Wynn’s Initial Table Games Department Tip Pooling Policy.**

5 Prior to its April 2005 opening, Wynn unilaterally established a tip or “toke” pooling  
6 policy that mandated that the Table Games Dealers pool the tips throughout the casino that were  
7 received at their individual tables over a twenty-four (24) hour period with all the other Dealers  
8 working that same twenty-four (24) hour period. (Stipulated Fact Nos. 15-22; Ex. 10 at 255)  
9 Under the policy, Dealers were not permitted to keep any tokens received directly by them from  
10 customers. Rather, the policy dictated that Dealers were required to “immediately drop[] [the  
11 tokens] into one of the toke boxes located on each table game.” (Ex. 10 at 255) This initial  
12 policy, created entirely by Wynn management without the participation of the Dealers, provided  
13 that only the Table Games Dealers would share in the distribution of the tokens after they were  
14 collected over the twenty-four hour period. (Stipulated Fact No. 18; Ex. 10 at 255-256) The  
15 tokens were distributed to the Dealers on their bi-weekly paychecks.

16 Under this policy, the tokens were collected daily by the Dealers and counted in their  
17 break room. (Ex. 10 at 258-259) As Claimant Smith pointed out, it was not uncommon for other  
18 Dealers in the break room to assist in the counting process. (TR 2: 79, ll. 2-19) There was no  
19 mechanism in place to ensure with any level of certainty that the tokens were accurately counted  
20 and completely accounted for. Ms. Smith even stated about that process, “If you’re going to  
21 steal, you can steal anytime.” (TR 2: 79, ll. 18-19) Additionally, those dealers on the count  
22 committee paid themselves a daily rate out of the toke pool for performing that function. (Ex. 10  
23 at 263) This amounted to thousands of dollars per year being paid to the toke committee out of  
24 the toke pool.

25 Although Wynn’s written policies prohibited its non-Dealer Table Games’ employees  
26 from receiving cash gratuities, it was not uncommon for customers to still attempt to give cash  
27  
28

1 gratuities to Floor Supervisors or Pit Managers.<sup>2</sup> (TR 2: 250, l. 24 – 251, l. 5) As both Andrew  
2 Pascal, Wynn's President, and Bill Westbrook, Wynn's Director of Casino Administration,  
3 testified, the policy of prohibiting non-Dealers from accepting gratuities was in their opinion  
4 antiquated by the new payroll procedures and heightened surveillance, and was not based on any  
5 known justification or legal grounds.<sup>3</sup> (TR 6: 41, l. 12 – 42, l. 17) Mr. Westbrook noted that  
6 with the sophistication of the surveillance equipment, it was highly unlikely that a Floor  
7 Supervisor, or a Dealer for that matter, would risk losing his or her job by colluding with a  
8 customer to obtain tokens. (Ex. ZZ, Depo of B. Westbrook at 54-55) As the testimony revealed,  
9 when customers offered them cash gratuities, because Wynn policy prohibits them from  
10 receiving any, Floor Supervisors would often direct customers to just give the gratuity to the  
11 dealers. (TR 8: 112, ll. 18-19; TR 7: 15, ll. 16-18)

## 12 **II. WYNN'S CASINO STRUCTURE AFTER SEPTEMBER 1, 2006.**

13 On or about August 21, 2006, Wynn announced to its Table Games employees that it  
14 planned to modify its internal company procedure regarding tip pooling. (Ex. 4) The following  
15 day, Wynn issued a second memorandum further elaborating on its proposed changes to the  
16 Table Games Department. (Ex. 5) As a result of Wynn's ability to attract high level gaming, the  
17 amount of total compensation earned by the Dealers, as a result of their high tip income, was  
18 greater than the compensation of the Floor Supervisors, thus discouraging the best Floor  
19 Supervisor candidates from the Dealer pool from becoming Floor Supervisors. (Ex. 5)  
20 Additionally, the ultimate decision-making with regard to the procedures on the games was too  
21

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22 <sup>2</sup> Regardless of the policy, historically speaking, Floor Supervisors and even management level  
23 employees received a share of the gratuities. William Ehrenberg testified that at the Sands and  
24 the Dunes in the 1970s and 1980s, the gratuities were shared with the Floor Supervisors. (TR 7:  
25 162, l. 6, 163, l. 10) Steve Garan testified that when he was at the Imperial Palace in the 1980s,  
26 the craps Dealers would meet up with the Box Persons after work to give them a share of the  
27 gratuities. (TR 7: 286, l. 24 – 287, l. 1) Since that time, the Internal Revenue Service ("IRS")  
28 has cracked down on gratuities in the casino industry. Dean Lawrence, Wynn's Vice President  
of Finance, testified that Wynn participates in a tip compliance program with the IRS, so the  
exact amount of tokens received by each employee is reported to the IRS. (TR 6: 264-265)

<sup>3</sup> As Bill Westbrook testified in deposition, Wynn has approximately 5,000 cameras on the  
casino floor. (Ex. ZZ at 54-55) Wynn's Surveillance Department maintains digital video of the  
casino floor that is sophisticated enough to pick up the slightest mark on a card.

1 far removed from the guests, resulting in few people taking responsibility for the guest  
2 experience and thus the level of customer service being provided suffered. (Ex. 5)

3 Andrew Pascal testified as to the justification and thought that went into the decision to  
4 change the casino structure:

5 Well, there were a number of factors ultimately related in our change in practice.  
6 I think the whole, the whole program really focused on, first and foremost, the  
7 quality of service that we were delivering at the game. It also focused on the, the  
8 consistency and the overall integrity of the games, so the quality of oversight of  
9 the games. And generally it, it was focused on, in trying to, trying to promote a  
10 natural progression in terms of a career ladder for the people that were in the table  
11 games division.

12 So, the, the former structure was very hierarchical where dealers and floor  
13 supervisors and pit managers and assistant shift managers and shift managers and  
14 directors of casino operations and ultimately vice president, they had oversight for  
15 everything. And so the whole program was structured in a way where a lot of  
16 decision making and the authority was centralized. And so in really looking at the  
17 quality of service that we were extending, the overall integrity of the games, and  
18 the fact that it was challenging for us to really encourage and get the employees  
19 that we had that were dealers to become floor supervisors or to attract other  
20 people from outside of the company to fill that classification, to help us address  
21 both those things, impact the quality of the experience for the guest and ensure the  
22 integrity of the games, we started looking at the overall structure, the overall  
23 compensation structure, the overall focus and definition of the roles within the  
24 casino division. And we came up with what is now the structure that we have,  
25 which was to eliminate a lot of hierarchy, which we felt would promote  
26 accountability and people taking responsibility at the point of game for the  
27 experience that our guests were having.

28 (TR 6: 21-23)

**A. Wynn's New Casino Personnel Model.**

The most significant change to Wynn's Table Games Department on September 1, 2006  
was the change in its casino hierarchy. The positions of Vice President of Table Games  
Operations, Shift Manager, Assistant Shift Manager, Pit Manager and Floor Supervisor were all  
eliminated. The new casino hierarchy provided that Casino Managers would be the highest level  
Table Games employees who would report directly to the President of Wynn. (Ex. 11 at 446)  
Below the Casino Managers are the Assistant Casino Managers, Casino Service Team Leads,  
Box Persons and Dealers. (Ex. 11 at 446-451) As Andrew Pascal explained, the purpose was  
"to eliminate a lot of hierarchy," which "would promote accountability and people taking

1 responsibility at the point of the game for the experience that [the] guests were having.” (TR 6:  
2 23, l. 2-5)

3 One of the many misconceptions that Claimants have asserted is that the Pit Manager  
4 position and the Floor Supervisor position were combined into the Casino Service Team Lead  
5 Position. This is simply not true. The Pit Manager position was eliminated. As Tyrone  
6 Lancaster testified, a small portion of the Pit Manager’s duties fell to the Casino Service Team  
7 Leads, such as changing out the cards on the games, raising and lowering table game limits, and  
8 verifying the amount of chips in the rack at the end of the shift. (TR 8: 106, ll. 7-17) Each of  
9 these duties take place on the casino floor at the tables. (TR 8: 106, ll. 18-24) The  
10 overwhelming majority of any of the administrative and managerial functions of the Pit  
11 Managers were assumed by the Assistant Casino Managers and Casino Managers, such as  
12 resolving disputes of a high monetary value, counseling and disciplining Table Games  
13 employees, conducting evaluations of employees, and determining which games to open or  
14 close. (TR 8: 107, ll. 2-23) Additionally, the position of Pit Administrator, which also *does not*  
15 share in the token pool, took on the tasks of monitoring cash transactions for IRS purposes on the  
16 computer system. (TR 8: 108, ll.1-13) The inventory controllers, who are also not included in  
17 the token pool, are responsible for physically bringing the cards and dice to the pits to be used on  
18 the games. (TR 8: 108, ll. 16-22) As a result of this distribution of the administrative duties, the  
19 CSTLs are able to focus all of their attention to the action on the table games.

20 Like the prior Floor Supervisors, the Casino Service Team Leads are assigned to a group  
21 of tables within a single pit. (Ex. 11 at 448) They do not move between pits. Unlike the Floor  
22 Supervisors, however, the Casino Service Team Leads were tasked with focusing their attention  
23 on guest service:

24 And, and then the primary change, which is why we’re here, is that we changed  
25 really the focus of the floor personnel, and we expanded their role to really  
26 emphasize more ownership of the experience that our guests were having at the  
27 game, and so to really take responsibility for everything, welcoming them,  
28 educating them about what’s going on on the property, obviously the things that,  
in terms of ratings, extended some members complementary service. We gave  
them greater flexibility in terms of addressing, resolving customer conflicts at the  
point of game. So, there was just a much greater emphasis on the service that we  
were extending. We, we trained them and had them focus on other things that

1 may not have, in the past where they may not have been as sensitive to. So, thing  
2 as simple as just as cleanliness of the area and the quality of cocktail service and  
3 the volume levels of the music and page and the temperature and, I mean, all the  
things that ultimately make up the experience and the impression that we're  
making on our customers.

4 (TR 6: 23, l. 9 – 24, l. 7)

5 The Box Supervisor position was essentially unchanged, albeit the title was modified to  
6 Box Person. As noted in the job description, the Box Person actually sits at the craps table and is  
7 responsible for maintaining the “pace” of the game, much like a Dealer on a card game. (Ex. 11  
8 at 450) The Box Person also verifies payoffs and makes change for currency. *Id.* at 450-451.  
9 Like a Dealer on a card game, the Box Person on a craps game is responsible for dropping  
10 money in the drop box, as well as dropping tokens in the token box. *Id.*; (TR 7: 121, ll. 1-9)

11 **B. Wynn’s Current Table Games Department Tip Pooling Practice.**

12 In addition to restructuring the casino hierarchy, on September 1, 2006, Wynn chose to  
13 modify its internal tip pooling procedure that had been unilaterally created and implemented by  
14 Wynn prior to its opening. (Stipulated Fact No. 25) Under the new tip pooling policy, the  
15 Tables Games positions of Casino Service Team Lead, Box Person and Dealer would all share in  
16 the gratuities pooled in the Table Games Department over a twenty-four (24) hour period.  
17 (Stipulated Fact No. 28; Ex. 11 at 819-825) All three of these positions are now permitted to  
18 accept tokens from customers. The Casino Managers and Assistant Casino Managers do not share  
19 in the token pool. (Stipulated Fact No. 28; TR 2: 231, ll. 20-25)

20 The token policy provided that each participant in the token pool receive a designated share:  
21 Dealers receive a full share, Casino Service Team Leads receive a two-fifths, or four-tenths (0.4),  
22 share, and Box Persons receive a one-fifth, or two-tenths (0.2), share. (Stipulated Fact No.  
23 27(g)) To better explain this concept, let us look at a basic example of one Dealer, one CSTL,  
24 and one Box Person sharing \$100 in tokens. Because only the Dealer gets a full share, the \$100  
25 would be divided by the total number of fractional shares, which in this case would be 1.6 (1.0  
26 share for the Dealer, 0.4 share for the CSTL, and 0.2 share for the Box Person). \$100 divided by  
27 1.6 shares equals \$62.50 per share. Thus, the Dealer would receive \$62.50, the CSTL would  
28 receive \$25.00 (\$62.50 x 0.4), and the Box Person would receive \$12.50 (\$62.50 x 0.2). Under

1 the formula, each Dealer will always receive 2.5 times the amount of tokes a CSTL receives and  
2 5 times the amount of tokes a Box Person receives regardless of the number of employees in the  
3 pool or the amount of the toke drop. No matter how the tokes fluctuate, the ratio remains the  
4 same. (Ex. 4; Ex. 5)

5 The new toke procedure also eliminated the toke committee and the counting of the tokes  
6 in the break room without any accountability. Instead, the tokes are counted in the same fashion  
7 in which Wynn counts its table games revenue. Security transports the tokes to the Count Room,  
8 which is a secure vault under constant surveillance. The tokes are counted by Wynn's count  
9 team employees, who do not receive any share of the tokes, and have no pecuniary interest in the  
10 tokes. (Ex. 11 at 823) These employees wear special uniforms that prohibit them from being  
11 able to hide any chips, and must be let into and out of the vault through security clearance. (Ex.  
12 ZZ at 83)

13 Again, Mr. Pascal explained the basis for including the CSTLs in the toke pooling  
14 procedure in conjunction with the change in the casino hierarchy:

15 And so we felt that by emphasizing the guest experience and also acknowledging  
16 that they are, in fact, in the line of service, that they do impact the experience that  
17 the guest is having in partnership with the dealers, we elected to give them a share  
18 of the tokes, albeit a lesser share than what the dealers receive, but some share of  
19 the tokes, recognizing that they are in that line of service. . . . Because the whole  
20 focus of the program was to improve the quality of the service that we were  
21 extending to our guests. And there is really no better structure than the guest  
22 acknowledging and rewarding an employee for extending that great service. It's  
23 no different, for the same reason that we don't pay our, our waitresses and  
24 waiters, wait people just a salary and not allow them to accept gratuities. That  
25 direct exchange between a guest and the people that are servicing them, their  
26 performance and the quality of the service they deliver to ultimately the tips they  
27 receive, it's the purest form of performance-based compensation and the primary  
28 motivator for a really great service.

(TR 6: 24-30)

24 As the irrefutable testimony revealed, the Casino Service Team Leads and Box Persons  
25 receive tokes directly from customers. As noted above, even before the change in policy, the  
26 Floor Supervisors and Box Persons would receive tokes directly from customers. (TR 8: 112, ll.  
27 18-19) Since the change in policy, the frequency in which CSTLs and Box Persons receive tokes  
28 directly from customers has increased. Reem Mikhail, Alex Mattes, William Ehrenberg, Scot

1 Campbell, and Kimberly Bigelow all testified to the frequency in which they receive tokens  
2 directly from customers. (TR 5: 190, ll. 18-21 (“every day”); TR 7: 15, ll. 19-25; TR 7: 121, l.  
3 15 – 122, l. 12; TR 7: 197-199 (“Quite often”); TR 7: 230, ll. 19-23 (“regularly”)) Claimants  
4 own witnesses admitted as such. Eric Malchow and Roger Xiong observed Reem Mikhail  
5 receive tokens from customers. (TR 9: 193, ll. 19-24; TR 10: 7, ll. 3-12) Sreymom Vong testified  
6 that she observed Kimberly Bigelow receive tokens from customers. (TR 10: 20, ll. 17-19) Billy  
7 Manning testified that he observed William Ehrenberg receive tokens. (TR 10: 75, ll. 11-15)  
8 When CSTLs receive a token from a customer, they immediately thank the customer, inform them  
9 that they share the tokens with the Dealers, and advise him or her to give the token to a Dealer to  
10 put into the token box. (TR 7: 16, ll. 1-5; TR 7: 198, ll. 19-24) The tokens that the CSTLs and Box  
11 Persons receive are collected in the same token boxes as are the tokens received by Dealers during  
12 the play of the game. (Ex. 11 at 820) Thus, the three Table Games positions that pool the tokens,  
13 the Casino Service Team Leads, Box Persons, and Dealers, are the same three positions that  
14 receive tips directly from customers and thus contribute to the token pool.

### ARGUMENT

#### **I. WYNN’S INTERNAL COMPANY PROCEDURE ON TIP POOLING IS NOT A VIOLATION OF NEVADA LAW.**

Wynn’s tip pooling procedures are absolutely lawful. Nevada has a single statute discussing the subject of tip pooling, NRS 608.160, which states as follows:

1. It is unlawful for any person to:

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

(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon his employees.

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

NRS 608.160 is not a “dense” statute that requires significant unpacking to understand its straightforward limitations. NRS 608.160 provides two restrictions on employers in Paragraph 1: a) employers cannot take the tips; and b) employers cannot use the tips as a credit toward

1 minimum wage. Only subparagraph (a) is applicable in this matter as Wynn does not take a  
2 credit against the minimum wage. Paragraph 2 of the statute provides express clarification that  
3 the restriction of Paragraph 1 will not prohibit tip pooling. Tip pooling by its very nature is a  
4 taking. Fundamentally, tip pooling allows the employer to take some of the tips from one  
5 employee and give them to another employee. As discussed in more detail below, the  
6 prohibition in NRS 608.160 is against taking the tips from the *employees*, plural, not from an  
7 individual *employee*, singular. In other words, as long as the employer does not take the tips  
8 from its collective employees, the statute has not been violated. The employer may lawfully take  
9 the tips from a single employee and give them to another employee. By including Paragraph 2 of  
10 NRS 608.160, the Nevada legislature expressly clarified that tip pooling will not be considered  
11 an unlawful practice under Paragraph 1.

12 The Nevada Supreme Court had its first opportunity to address the issue of tip pooling  
13 under NRS 608.160 in Alford v. Harolds Club, 99 Nev. 670, 669 P.2d 721 (1983). In Alford, the  
14 casino instituted an employment policy requiring dealers to “pool” their tips and divide them  
15 evenly with other dealers working on the same shift. Alford, 99 Nev. at 672, 669 P.2d at 722.  
16 Several dealers refused to comply with the policy and were terminated. The dealers then brought  
17 an action for wrongful termination. The district court dismissed the claim on a Motion to  
18 Dismiss brought under NRCP 41(b). On appeal, the Nevada Supreme Court reviewed whether  
19 the casino could impose a tip pooling policy as a condition of employment. In its analysis of the  
20 issue, the Court relied heavily upon the federal court’s review of NRS 608.160 in Moen v. Las  
21 Vegas Int’l Hotel, Inc., 402 F. Supp. 157 (D. Nev. 1975), noting that the U.S. District Court had  
22 “conducted an extensive review of the legislative history of NRS 608.160 and prior related  
23 legislation.” Id. at 673, 669 P.2d at 723. The Court found no violation of the statute,  
24 concluding:

25 Although this court is not bound by a federal district court’s interpretation of a  
26 Nevada statute, we believe that *the interpretation advanced in Moen is, in light of*  
27 *the legislative history and well established and commonly known Nevada*  
28 *employment practices, the correct one.*

1 Id., 669 P.2d at 724 [emphasis added]. Alford unequivocally confirms Wynn’s statutory right to  
2 impose a mandatory tip pooling procedure upon its employees.

3 The issues presented in Moen are nearly identical to those at issue here. In Moen, the  
4 court reviewed whether a dealer could be forced to pool tips he received with dealers and “other  
5 employees, including *boxmen*, casino cashiers and *floormen*.” Id. at 158 [emphasis added]. As  
6 noted in Alford, the Moen court conducted an extensive analysis of the legislative history of  
7 NRS 608.160 and concluded that:

8 [W]e note that subsection 1(a) makes it unlawful for an employer to “take” all or  
9 part of any tips or gratuities bestowed upon his “employees.” The plural and not  
10 the singular is used. The statute does not say that [the employer] cannot take tips  
11 bestowed on an employee. This, in connection with the section validating pooling  
12 agreements, indicates that *so long as only employees share in the tips, the statute*  
13 *is not violated*. It indicates that a tip or gratuity need not be considered a personal  
14 donation to the employee receiving it. . . . There is no reason to suppose that the  
15 last person in a service line is the only one entitled to share in the customer’s  
16 bounty. For example, a busboy as well as a waitress contributes to the good  
17 service and well-being of a customer in a restaurant. Similarly, *in a casino, the*  
18 *floormen, boxmen and cashiers all contribute to the service rendered to the*  
19 *player*.

20 Id. at 160 [emphasis added]. Thus, as recognized in Moen, floormen and boxmen are employees  
21 entitled to share in tip pooling. At Wynn, those similarly situated employees are called Casino  
22 Service Team Leads and Box Persons, and they too are legally eligible to share in tip pooling.  
23 Wynn management is not sharing or taking any of the tips. As discussed *supra*, the Floor  
24 Supervisors at Wynn, and that position historically in the industry, possessed more supervisory  
25 control over the Dealers, such as implementing discipline. Yet, Moen did not find this  
26 supervisory role to prohibit employees in that position from participating in the tip pool. The  
27 CSTLs and Box Persons in contrast, possess no managerial authority. Thus, if a Floor  
28 Supervisor was legally eligible to participate in the tip pool, certainly the CSTLs and Box  
Persons are eligible. Wynn’s Casino Managers and Assistant Casino Managers are expressly  
excluded from the pool. Accordingly, there is no violation of NRS 608.160.

29 **A. Casino Service Team Leads and Box Persons are Not the Employer Pursuant**  
30 **to Boucher v. Shaw.**

31 Under NRS 608.160, the only restriction placed upon an employer with regard to tip  
32 pooling is that the pool be limited to “employees.” Accordingly, the sole issue to be decided is

1 whether the Casino Service Team Leads and Box Persons are employees entitled to share in the  
2 tip pool, or are they the “employer” and therefore prohibited from sharing in the toke pool?  
3 Claimants will likely argue that the Casino Service Team Leads and Box Persons are  
4 “employers” under NRS 608.011. Such a notion is entirely contrary to Nevada law, and the  
5 Nevada Supreme Court’s recent decision in Boucher v. Shaw, 124 Nev. 96, 196 P.3d 959 (2008).

6 NRS 608.011, which provides the definition of an “employer” for purposes of Nevada’s  
7 wage and hour laws, states: “‘Employer’ includes every person having control or custody of any  
8 employment, place of employment or any employee.”

9 The Nevada Supreme Court recently issued a decision discussing the statutory definition  
10 of “employer” under NRS 608.011. See Boucher, 124 Nev. 96. The Court noted that NRS  
11 608.011 “offers no guidance as to who qualifies as a ‘person’ or what constitutes ‘control or  
12 custody’ in the ‘employment context.’” Id. at 961. Because of this ambiguity, the Court  
13 analyzed the legislative intent of the statute. In this analysis, the Court referenced the language  
14 of the statute prior to the 1985 amendment. Specifically, the Court pointed out that before 1985,  
15 the definition of “employer” included the word “manager.” “Notably, the term ‘manager’ was  
16 not carried through to either of the new definitions.” Id. at 962. The Court concluded that “had  
17 the Nevada Legislature intended to qualify individual managers as employers and thus expose  
18 them to personal liability, it would have done so explicitly.” Id. at 963.

19 Although the Boucher case discussed managers in terms of liability for unpaid wages, the  
20 analysis of the definition of “employer” is equally applicable here. The definition of “employer”  
21 under NRS 608.011 does not include managers. As such, even if Casino Service Team Leads  
22 and Box Persons could be considered managers or supervisors under the loosest of definitions,  
23 they are not the “employer” and therefore not prohibited from sharing in a tip pool.

24 This analysis is unnecessary, however, because as the testimony revealed the Casino  
25 Service Team Leads and Box Persons are not the supervisors or managers of the Dealers. The  
26 Casino Service Team Leads are not the source of the Dealers’ wages, they do not possess the  
27 right to hire and fire the Dealers, and they do not control the hours and location of employment.  
28 (Ex. 11 at 448-450) Furthermore, not one of Claimants’ witnesses could testify to an example of

1 any form of discipline issued by a Casino Service Team Lead. Rather, Casino Service Team  
2 Leads merely report their observations to the Assistant Casino Manager or Casino Manager, who  
3 then determines if any discipline is warranted. (TR 7: 11-13) Casino Service Team Leads  
4 provide direction as to the procedures of the games. They supervise the games, not the  
5 employees.

6 **B. The Benefit Wynn Receives from the Tip Pooling Procedure Does Not Make**  
7 **it Unlawful.**

8 Claimants will likely argue, as they did during the hearing before the Labor  
9 Commissioner, that Wynn “directly benefits” from the revised tip pooling procedure, and  
10 therefore its procedure is unlawful. Wynn does not dispute that it receives some “benefit” from  
11 the tip pooling procedure. As a matter of common sense, no employer would impose any policy  
12 or procedure that did not benefit the employer in some fashion.

13 For example, the fact that Wynn allows its employees to receive tips in general benefits  
14 Wynn by reducing the amount in wages it would have to pay its employees. If Wynn did not  
15 permit any tipping in the Table Games Department, it would likely have to increase the hourly  
16 wages of all the Dealers to maintain its staffing levels with qualified employees. Similarly, if  
17 Wynn did not allow for tip pooling, even among just the Dealers, it would likely have to pay  
18 certain Dealers higher wages to staff the certain games and shifts that provided lower tip income.

19 However, the only direct beneficiaries of the revised tip pooling procedure are the front  
20 line Casino Service Team Leads and the Box Persons. Wynn receives a collateral benefit  
21 inasmuch as it will be able to meet its staffing needs, and its employees have greater motivation  
22 to enhance their customer service. The fact that Wynn receives such collateral benefits does not  
23 invalidate the tip pooling procedure.

24 In Alford, the Nevada Supreme Court specifically noted that “as a result of the change [in  
25 procedure, the employer] reaped collateral benefits of higher employee morale and lower  
26 employee turnovers.” 99 Nev. at 672, 669 P.2d at 722-23. The fact that the employer had lower  
27 turnover is clearly an economic benefit to the employer. However, in upholding the imposition  
28 of the employer’s tip pooling procedure, such a benefit was not construed by the Court as a

1 “direct” benefit. It is clear from the holding in Alford that the Court viewed a “direct benefit” as  
2 the employing entity’s taking of the tips for the company’s use. Wynn’s decision to pool and  
3 divide tips among its employees is not considered taking those tips for “its own use.”

4 The Court noted in Alford that the employer had lower turnover as a result of the policy  
5 change. If the employer had increased the wages of those employees who were not receiving as  
6 much in tips as the other employees, then the employer would not have had the turnover. It  
7 follows that the employer in Alford implemented a tip pooling procedure to avoid having to  
8 increase wages to prevent turnover. The Court found the benefit obtained by the employer  
9 through this change was not a direct benefit that would make the policy a violation of the law.  
10 Id. In the instant matter, the change in procedure was made to provide an incentive to all front-  
11 line employees who perform customer service to enhance that level of service, and to equalize a  
12 discrepancy in the income levels. The result is the same as that in Alford. Specifically, Wynn  
13 has reduced employee turnover and has provided an incentive for enhanced customer service and  
14 promotional opportunity. This is not a prohibited direct benefit to Wynn, as addressed in Alford,  
15 as Wynn is not “taking” the tips for its own benefit. Rather it is a “collateral” benefit to which  
16 the Alford Court has lent its imprimatur.

17 Claimants’ argument that Wynn benefits because it did not have to increase the salaries  
18 of the front line Casino Service Team Leads completely ignores the judicial wisdom of Alford  
19 and Moen. Wynn has no obligation to raise the salaries of its employees. Nevertheless, the  
20 evidence established that Wynn increased the hourly wages of the Casino Service Team Leads  
21 by \$5,000 and created a bonus program for the casino dealers when it created the new tip pooling  
22 procedures. (Ex. 5; TR 6: 24, ll. 16-19)

23 This further establishes that Wynn does not receive any legally-impermissible direct  
24 economic benefit from the tip pooling procedure, any more than it does in allowing acceptance  
25 of tips or requiring tip pooling in general. The tips received in the Table Games Department  
26 continue to be distributed to employees of the Table Games Department. Wynn Las Vegas,  
27 LLC, its officers, directors, and managers do not receive any of the tip revenue as a result of the  
28 change in procedure. The only beneficiaries of the tip pooling procedure are the employees of

1 the Table Games Department with direct customer interaction, who directly receive tips from  
2 customers, namely the Casino Service Team Leads, Box Persons and Dealers.

3 Contrary to Claimants' assertions, as a result of the change in tip pooling procedure,  
4 Wynn has increased its payroll burden by several million dollars. (Ex. 5; TR 6: 32, l. 6 – 33, l.  
5 14) The tip pooling procedure is not a salary substitute, as Claimants contend. Rather, it  
6 correctly rewards all Table Games employees that perform customer service while further  
7 providing a proper compensation structure for its employees.

8 **C. Wynn's Tip Pooling Procedure is Not a Rebate to the Employer.**

9 Claimants argue that Wynn's tip pooling procedure is some form of "rebate" from the  
10 Dealers' compensation back to the employer, which constitutes a violation of NRS 608.100(2).  
11 This argument is not supported by any case authority.

12 NRS 608.100(2) states: "It is unlawful for any employer to require an employee to rebate,  
13 refund or return any part of the wage, salary or compensation earned by and paid to the  
14 employee."

15 As noted above, the Casino Service Team Leads are not the employers of the Dealers.  
16 Accordingly, there is no "rebate" of the Dealers' compensation being "refunded" to the  
17 employer. Because the tips are not being "rebated," "refunded," or "returned" to the employer,  
18 NRS 608.100(2) is not violated by the tip pooling procedure. The tip pooling procedure is  
19 permissible as it divides the tips solely amongst employees.

20 Claimants would argue that tips received by an individual Dealer "are compensation  
21 earned at the time the customer gives the tip to the dealer." Under that argument, the "tip" given  
22 to an individual dealer is part of the compensation for that individual dealer. It is interesting to  
23 note that Claimants do not take issue with the original tip pooling practices imposed by Wynn at  
24 the time of its opening. Under the original procedures, all Dealers pooled their tips with other  
25 Dealers who worked during that 24-hour period. Essentially, the policy enabled the employer to  
26 take the tips from one dealer, the dealer directly receiving the tip from the customer, and give  
27 them to other employees, those dealers designated by management as being in the tip pool. This  
28 employer-mandated form of tip pooling was specifically validated in Alford. The Claimants'

1 allegation that they are not receiving their full tips and compensation as required by NRS  
2 608.100(2) is critically flawed, incorrect, and has been rejected by the Court for the last 27 years.  
3 Because the Dealers argue they are not receiving their full compensation, the original tip pooling  
4 procedure would have also been unlawful under that rationale as it took tips from some dealers  
5 and gave it to others, who did not receive them directly from the player. The Nevada Supreme  
6 Court has already determined that such a policy is lawful under NRS 608.160. If the tip pooling  
7 procedure was construed as a rebate to the employer, then all tip pooling arrangements would be  
8 a violation of the statute under the theory that employees would not retain the full tips they  
9 individually receive. As noted above, this argument was resoundly rejected in Alford.

10 As the Labor Commissioner correctly noted in his Order dated February 20, 2009,  
11 “Before the wage, salary or compensation can be rebated, refunded or returned by the employee,  
12 the employee must have been paid. The conduct at issue in this case occurs before the employee  
13 is paid.” This very concept was recently addressed in a Ninth Circuit Court of Appeals decision:

14 According to Cumbie, her forced participation in the “invalid” tip pool constituted  
15 an indirect kick-back to the kitchen staff for Woo’s benefit, in violation of the  
16 free-and-clear regulation. As she sees it, the money she turned over to the tip  
17 pool brought her cash wage below the federal minimum in the same way as the  
18 tools in the regulation’s example. The Secretary of Labor agrees, asserting that  
19 “if the tipped employees did not receive the full federal minimum wage plus all  
20 tips received, they cannot be deemed under federal law to have received the  
21 minimum wage ‘free and clear,’ and the money diverted into the invalid tip pool  
22 is an improper deduction from wages that violates section [20]6 of the Act.”

23 Cumbie acknowledges that the applicability of the “free and clear” regulation  
24 hinges on “whether or not the tips belong to the servers to whom they are given.”  
25 This question brings us back to section 203(m), which we have already  
26 determined does not alter the default rule in Williams that tips belong to the  
27 servers to whom they are given only “in the absence of an explicit contrary  
28 understanding” that is not otherwise prohibited. 315 U.S. at 397. Hence, whether  
a server owns her tips depends on whether there existed an agreement to  
redistribute her tips that was not barred by the FLSA.

Here, such an agreement existed by virtue of the tip-pooling arrangement. The  
FLSA does not restrict tip pooling when no tip credit is taken. Therefore, only the  
tips redistributed to Cumbie from the pool ever belonged to her, and her  
contributions to the pool did not, and could not, reduce her wages below the  
statutory minimum. We reject Cumbie and the Secretary’s interpretation of the  
regulation as plainly erroneous and unworthy of any deference, see Auer v.  
Robbins, 519 U.S. 452, 461 (1997), and conclude that Woo did not violate section  
206 by way of the “free and clear” regulation.

Cumbie v. Woody Woo, Inc., No. 08-35718, 2010 WL 610603, at \*3-4 (9<sup>th</sup> Cir. Feb. 23, 2010).

1           **D.     Wynn’s Tip Pooling Procedure Does Not Require The Dealers to Pay a Fee to**  
2           **Their Supervisors.**

3           Claimants next argue that Wynn’s tip pooling procedure violates NRS 613.120. The  
4           front line Casino Service Team Leads, discussed *supra*, are not charged with the employment of  
5           the Dealers. They do not have “control” over the dealers’ pay or their hours of employment, nor  
6           do they have the authority to hire or fire the dealers. (Ex. 11 at 448-450) Accordingly, they are  
7           not the subject of NRS 613.120.

8           NRS 613.120 states:

9           1. It shall be unlawful for any manager, superintendent, officer, agent, servant,  
10          foreman, shift boss or other employee of any person or corporation, charged or  
11          entrusted with the employment of any workmen or laborers, or with the  
12          continuance of workmen or laborers in employment, to demand or receive, either  
13          directly or indirectly, from any workman or laborer, employed through his agency  
14          or worked or continued in employment under his direction or control, any fee,  
15          commission or gratuity of any kind or nature as the price or condition of the  
16          employment of any such workman or laborer, or as the price or condition of his  
17          continuance in such employment.

18          2. Any such manager, superintendent, officer, agent, servant, foreman, shift boss  
19          or other employee of any person or corporation, charged or entrusted with the  
20          employment of laborers or workmen for his principal, or under whose direction or  
21          control such workmen and laborers are engaged in work and labor for such  
22          principal, who shall demand or receive, either directly or indirectly, any fee,  
23          commission or gratuity of any kind or nature from any workman or laborer  
24          employed by him or through his agency or worked under his direction and  
25          control, either as the price and condition of the employment of such workman or  
26          laborer or as the price and condition of the continuance of such workman or  
27          laborer in such employment, shall be guilty of a misdemeanor.

28          The tips received in the Table Games Department are not the personal property of the  
individual who receives the tip. As the district court noted in Moen, “Plaintiff’s argument, which  
has to be predicated upon the contention that the tip handed to him becomes his personal  
property under NRS 608.160 is ridiculous . . . . It is ridiculous to assume that a satisfied player  
who hands over a tip intends it only for the particular person to whom the tip is given.” Moen,  
402 F. Supp. at 160. Thus, when the tips are shared with the front line Casino Service Team  
Leads, it is not the taking of property of any individual employee, and cannot be construed as a  
“commission” for “continued employment.”

This statute was clearly enacted to prevent a supervisor from requiring an individual  
employee to pay that supervisor a fee so the employee could keep his or her job. In the instant

1 case, there are no individual employees that are being forced to pay a fee to maintain their  
2 employment. Rather, the current matter involves an employer-imposed permissible tip pooling  
3 arrangement, under which the gratuities received by individuals are pooled and divided among  
4 fellow employees. Such an arrangement has been affirmed in Alford.

5 The Labor Commissioner has already come to the same conclusion in his February 20,  
6 2009 Order:

7 This statute is typically referred to as the “kick back” statute, e.g., a foreman  
8 would hire undocumented workers and charge them a kick back for the privilege  
9 of obtaining employment. In such a situation, the kick back was not ordered by  
10 the employer nor was it a term or condition of the employment placed on the  
11 employee by the actual employer. Therefore, this statute is not relevant to the tip  
12 pooling matter now before the Labor Commissioner.

13 February 20, 2009 Order at 2.

## 14 **II. THE “SERVICE LINE” STANDARD ADOPTED IN MOEN IS CORRECT.**

15 Recognizing the fact that the Moen decision is completely contrary to their argument,  
16 Claimants will attempt to argue that the Moen decision was incorrectly decided. They will likely  
17 assert that the Alford decision limited the holding in Moen. This assertion is unfounded as the  
18 Nevada Supreme Court affirmed Moen’s interpretation of NRS 608.160 without limitation.

19 Claimants will argue that Moen’s “service line” analysis would allow tips to be shared  
20 with every employee. This conclusion is not supported by Moen, nor are those the facts in the  
21 matter at hand. In its discussion of the “service line,” the Moen court specifically noted that the  
22 service line includes those that “contribute[] to the good service and well-being of a customer.”  
23 Moen, 402 F. Supp. at 160. The busboy and waitress example used in Moen is directly on par  
24 with the situation between the Dealers, the Casino Service Team Leads and Box Persons in the  
25 instant matter. Contrary to Claimants’ assertions, the front line Casino Service Team Leads and  
26 Box Persons provide a direct service to the customers. (TR 5: 186-190; TR 7: 195, 1. 5 – 197, 1.  
27 7) All three positions provide customer service to the customer while he or she is playing on the  
28 game. Specifically, the Dealers deal the cards and make the payouts, while the Casino Service  
Team Leads rate the customer’s play and provide any amenities requested by the customer  
during the game. (Ex. 11 at 448-451) These amenities, of course, lead to greater guest

1 satisfaction and, therefore, the potential for greater tips to be contributed on the game. Similarly,  
2 providing markers to players to allow them to play on credit, which is performed by the Casino  
3 Service Team Leads, results in continued play for the customer and a greater opportunity for the  
4 customer to tip on the game. All three positions, Dealer, CSTL and Box Person, directly interact  
5 with the customer and contribute to the tips received on the game.

6 As Reem Mikhail testified when describing her interaction with guests:

7 Well, first thing, I greet the player, which is, most often I know them by name. I  
8 know exactly what they want. They ask for marker, room, anything. And I, I talk  
9 to them. And I ask them about how, how they love the stay and how they, how  
10 they like the place, is it first time, do you have any complaint about anything. I  
11 talk to them all the time. . . . First thing I ask, are you staying here? How do you  
12 like it? Do you like the room? Do you have any problem? How you like the  
13 staff, anything. . . . I ask him first if he has a host. If he doesn't have a host, I try  
14 to get the host. I ask the host, he needs this. I cannot make reservations for the  
15 player, but I can get him to know a host and meet a host, and then the host take  
16 over from there. . . . I'm watching the game while the player is playing. So, I'm,  
17 I'm interacting with him while I'm watching the game. . . . I'm commenting his  
18 play, very good, this is right, ah, yeah, too bad, sorry, things like that, make him  
19 feel good. . . . And I even always make a joke about [receiving tips from  
20 customers], and I give to the dealer, and I say, put my name on this chip, because  
21 that's mine. And we laugh about it. . . . Players like to give me tips.

22 (TR 5: 186-190) Similarly, Scot Campbell provided testimony regarding his interaction with  
23 guests:

24 Well, our part in the customer service chain is a complementary part to the  
25 dealers. The dealer, unfortunately, is locked on that game, and they have  
26 customer service with their customers that are on the game. We have customer  
27 service interaction with everybody that's in our section on all the different games.  
28 But it's also to do things that the dealer can't do.

For example, someone comes up to the table. You know, I work at 3:30, 4:00  
o'clock in the morning. They come up to the table, and they feel like a cup of  
coffee. Well, you just seen the cocktail waitress go into the station. So, instead of  
sitting there, I pick up the phone, call the cocktail waitress to bring a cup of  
coffee to the pit 10. I've even seen customers go, hey, look, they have actually  
called for that. It's little differences like that that make our job a little different  
description than what's next door.

In the morning we're talking, and in Pai Gow it's a very social game. It's a very  
slow game, lot of time for talk, unlike a lot of other games. So, we're talking in  
the morning. One of the things that may come up with our customers, well, what  
are you guys doing today? And, you know, all, we're going to head out to the  
mall out at Primm. We're going to check that out. Well, then she turns to her  
husband, go, remember to find out what time that shuttle leaves next door to go to  
the mall. So, I just pick up the phone, call the concierge, say, hey at Fashion  
Show what time does that shuttle leave for the mall? 9:30, okay. So, you let the  
customer know it's 9:30. Oh, great. I don't have to do that. So, they can sit and

1 play a little bit longer. So, we try to complement each other in what we can do for  
2 the customer.

3 And now our main focus has to be, how can we be of service to this customer,  
4 which need to be thinking how we can make their experience a memorable one,  
5 one that they want to come back to. And that's part of the whole point in forging  
6 relationships with customers. I can't tell you how many times since we opened  
7 the Encore, some of our better customers, the host will put them at the Encore  
8 instead of at the Wynn. Here they come, 5:00 o'clock in the morning, come in to  
9 see us. Scot, how you doing? What's going on? Oh, you staying at the Encore?  
10 Yeah. But, you know, we would like to come play here. So, they come over.  
11 They play here. And that's all part of forging relationships.

12 (TR 7: 195, l. 5 – 197, l. 7)

13 The specific holding in Moen found that NRS 608.160 could be read as follows:  
14 “Nothing contained in this section shall be construed to prevent such employees from entering  
15 into an agreement with the employer or with other employees to divide such tips or gratuities  
16 among the employees.” Moen, 402 F. Supp. at 160. The only limitation provided in the statute  
17 is that the employer may not “take” the tips. As long as only employees share in the tip pooling,  
18 there is no violation. Under the initial tip pooling procedure, Wynn would “take” the tips from  
19 one dealer and give them to another dealer. Fundamentally, the revised procedure does the same  
20 thing, takes from one employee and gives it to another. Yet, Claimants only have a dispute with  
21 this revised procedure.

22 The new internal company procedure for tip pooling only includes employees in those  
23 job classifications that have direct interaction with the customers playing at the gaming tables.  
24 Clearly, if Wynn included officers, directors or managers of the corporation in the tip pooling,  
25 then a violation of NRS 608.160 may be present. That is not what is transpiring here.

26 NRS 608.160 specifically allows tip pooling. As such, Nevada allows the tips given to  
27 one person to be distributed to another. Arguably, a customer who gives a tip to one dealer may  
28 not want that dealer to share the tip with the dealer at the next table. However, there are more  
people involved in providing the high level of gaming experience to the customer than just the  
individual dealer on that particular game. The new tip pooling procedure recognizes this fact and  
accordingly rewards those Table Games employees with direct customer service, namely the  
CSTLs, Box Persons and dealers. The law allows the tips to be shared among employees.

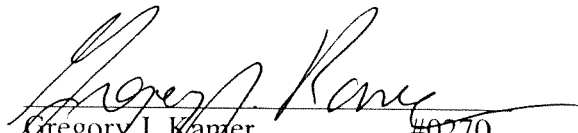
1 CONCLUSION

2 Wynn has established a valid tip pool under Nevada law. The overwhelming evidence  
3 demonstrates that tips received in Wynn's Table Games Department are pooled and distributed  
4 among those employees in the Department. In fact, all of the employees participating in the pool  
5 contribute directly to its contents. The Casino Service Team Leads, Box Persons and Dealers all  
6 contribute to a valid tip pool and are entitled to share in its bounty. Claimants' assertions that  
7 Wynn's tip pooling procedure violates Nevada law is entirely without merit. Accordingly, this  
8 matter should be dismissed in its entirety.

9 DATED this 22<sup>nd</sup> day of March, 2010.

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