IN THE SUPREME COURT OF THE STATE OF NEVADA

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JANE DOE DANCER, I; JANE DOE DANCER, II; JANE DOE DANCER, III; and JANE DOE DANCER, V, Individually, and on behalf of Class of Similarly situated individuals,

Dancers,

vs.

LA FUENTE, INC., an active Nevada Corporation,

Respondent.

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the Justices of this Court may evaluate possible disqualifications or recusal.

La Fuente is a Nevada corporation. This company does not have any parent corporations to identify and no publicly held company owns 10 percent or more of its stock. Dean R. Fuchs, Esq., with the Law Offices of Schulten Ward Turner & Weiss, LLP and Doreen Spears Hartwell, Esq. of Hartwell Thalacker, Ltd. have appeared for La Fuente in the district court. La Fuente is not using a pseudonym.

DATED: this 9th day of April, 2020.

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I. STATEMENT OF FACTS

Appellants (hereafter, "Dancers") are exotic dancers who formerly performed at a topless gentlemen's club owned by La Fuente, Inc. d/b/a Cheetahs Las Vegas ("Cheetahs"). APPX. at II, 226-239, 357, 362, 374-375. At all relevant times, Cheetahs dancers were required by law to have a business license issued by the Nevada Secretary of State to perform as an exotic dancer. APPX. at II, 231-233, 358-359, 382-383 and at III, 470, 500. The Dancers had state-issued business licenses as sole proprietors when they performed at Cheetahs. *Id.; see also,* APPX. at III, 619, 635, 641-643. Dancers personally obtained and paid $200 for their own business licenses. APPX. at II, 232, 316-317, 334, 382-383 and at III, 642-643. Appellant Jane Doe Dancer III understood that for the purpose of her business license, she was considered (and considered herself) an independent contractor. APPX. at II, 233, 297-298. In order to perform at Cheetahs (or at any other gentlemen's club), Dancers must have a "Sheriff's card." APPX. at II, 230, 354, 369, 382 and at III, 498, 500. The Dancers each have Social Security Numbers. APPX. at II, 331, 431-432 and at III, 469.

Dancers are required to sign a Dancer Performance Lease when they begin performing at the Club. APPX. at II, 281-283, 309, 328-333 and at III, 513, 524, 610-614. The purpose of the Dancer Performance Lease is to establish a

contractual relationship between Cheetahs and its entertainers, and to grant the entertainer a license to perform on the club's premises. APPX. at III, 513-514, 517. The Dancer Performance Lease specially denied the existence of an employer-employee relationship between the parties. APPX. at III, 610-614, ¶7A. The Dancer Performance Lease expressly provides that Cheetahs "shall have no right to direct and/or control the nature, content, character, manner or means of PERFORMER's performances. PERFORMER acknowledges and agrees, however, to perform live nude and/or semi-nude entertainment consistent with the type of entertainment regularly performed on the PREMISES." APPX. at II, 329. Cheetahs has never treated its entertainers as employees. APPX. at III, 523.

Prior to performing at Cheetahs, most Dancers have considerable experience performing at other gentlemen's clubs. APPX. at II, 223-226. Dancers typically had considerable experience performing as exotic dancers before performing at Cheetahs. APPX. at II, 235-236, 356-358, 362-364. Dancers at Cheetahs are not assigned to work any particular shift. APPX. at II, 240. Cheetahs dancers are not required to work any specific days and can determine for themselves what dates and shifts they wish to perform. APPX. at II, 241, 382, and at III, 498-500. At Cheetahs, entertainers can work as long as they wish. APPX. at II, 240-241. Entertainers have the discretion to arrive and

leave the club when they wished. APPX. at II, 241, 249, 376, and at III, 498. Cheetahs dancers are not required to perform exclusively at Cheetahs, and they are free to perform at other gentlemen's clubs if they wish to do so. APPX. at II, 242, 365. Cheetahs dancers may attend school or hold other jobs while performing at Cheetahs. APPX. at II, 267, 367, 408. Cheetahs dancers are free to take time off from performing at Cheetahs at their discretion. APPX. at II, 243. Dancers at Cheetahs are free to perform on stage, on the floor of the club, or in its VIP area. APPX. at II, 251. Dancers are not required to perform on stage or in the VIP area if they do not wish to do so. APPX. at II, 254, 271, 378, 381, 384.

Cheetahs dancers are not asked or required to disclose to Cheetahs their earnings from performing at Cheetahs. APPX. at II, 248, 434. Cheetahs dancers can determine how much to charge Cheetahs' customers for private dances. APPX. at II, 251 and at III, 533. Cheetahs dancers are free to perform as many dancers as they can convince customers to purchase from them. APPX. at II, 253. On the floor of the club, Cheetahs dancers are free to pick and choose the customers for whom they want to perform. APPX. at II, 271. Cheetahs dancers can perform as they please. *Id.* ("[On stage, you] can pretty much do whatever you want."), at 409-411 (could dance as she pleased, the only restriction imposed by Cheetahs was no prostitution). Cheetahs dancers are free to opt-out

of the club's stage rotation. APPX. at II, 271, 373, 381. Cheetahs dancers are free to sit and mingle with the club's customers. *Id.* at 271. Cheetahs dancers are free to take breaks during their shifts, as needed. *Id.*

Cheetahs dancers select and pay for their own costumes. APPX. at II, 262-263, 403. They select and pay for their own shoes. APPX. at II, 265, 405-406. Cheetahs dancers select and pay for their own cosmetics. APPX. at II, 266, 406-407. Cheetahs dancers pay for their own hairstyling. APPX. at II, 266, 407. Each time dancers perform at Cheetahs, it is customary for them to tip the house mom, DJ and security/floor men. APPX. at II, 274-278, 321. However, tipping the house mom, DJ and security/floor men is voluntary. APPX. at III, 555-556.

II. SUMMARY OF ARGUMENT

The District Court correctly granted summary judgment to Respondent Cheetahs below, finding there was no genuinely disputed issue of material fact that Dancers satisfied the criteria of NRS 608.0155 to be conclusively presumed to be independent contractors as a matter of law. In enacting NRS 608.0155 in the wake this Court's decision in *Terry v. Sapphire Gentlemen's Club,* 130 Nev. 879 (2014), the Nevada Legislature plainly intended to clarify who was an independent contractor under Nevada law, and desired NRS 608.0155 to apply retroactively.

Application of NRS 608.0155 to the facts of record plainly demonstrate

that Dancers are conclusively presumed independent contractors, and such a conclusion does not run afoul of the Minimum Wage Amendment, nor is NRS 608.0155 preempted by the Fair Labor Standards Act. Even assuming the "economic realities" test applies to determine whether Dancers were Cheetah's employees, the undisputed facts still result in the conclusion that, as a matter of law, Dancers were not the club's employees.

III. ARGUMENT

A. The Nevada Legislature Intended NRS 608.0155 To Apply to Claims Brought Under the MWA.

The express language of the Minimum Wage Amendment to the Nevada Constitution, Art. XV, sec. 16 (hereafter, "MWA") is clear that the Nevada Legislature intended NRS 608.0155 to apply to claims brought under the MWA. Dancers disagree and argue that the District Court erred in applying NRS 608.0155 to their wage claims brought under the MWA. Opening Brief at 11-13. Dancers base their argument on the part of NRS 608.0155, which says "[for] the purposes of this Chapter [608]." *Id*. Thus, Dancers contend that NRS 608.0155 only applies to claims asserted under NRS Chapter 608[1]. *Id*. Dancers reason that had the Legislature intended for NRS 608.0155 to apply to claims brought under the MWA, it would

[1] Since nothing in Dancers' Opening Brief states otherwise, Respondent La Fuente, Inc. d/b/a Cheetahs Topless Lounge ("Cheetahs") presumes Dancers are not seeking review of those portions of the District Court's order granting summary judgment on any claims other than those brought under the MWA.

have said so. *Id*.

It did. Section 7 of Senate Bill 224, later codified as NRS 608.0155, expressly states:

> The amendatory provisions of this act apply to **an action or proceeding to recover unpaid wages pursuant to Section 16 of Article 15 of the Nevada Constitution [the MWA]** or NRS 608.250 to 608.290, inclusive, in which a final decision has not been rendered before, on or after the effective date of this act. 2015 Statutes of Nevada, Chapter 325, Pages 1743-44. (Emphasis Added).

Based on the above, it is clear that NRS 608.0155 applies to the Dancers' MWA claims.

B. Applying NRS 608.0155 Does Not Run Afoul of the MWA's Protections.

Dancers incorrectly argue that NRS 608.0155 improperly removes persons from the MWA's protections. Opening Brief at 13. They reason that by applying NRS 608.0155 to their MWA claims, Nevada's Constitution would be rendered inferior to NRS 608.0155, and no statute can remove the protections provided by the MWA. Opening Brief at 13-14. Dancers' argument relies upon an assumption that they are presumptive "employees" pursuant to the definition of employee under the MWA, and that NRS 608.0155 cannot remove them from the scope of the MWA's definition of "employee." *Id*. However, no such "employee presumption" exists in Nevada.

NRS 608.0155 only provides a test by which to presumptively conclude whether an individual is an independent contractor, not an employee. No definition of an independent contractor exists in the MWA, and, prior to the enactment of NRS 608.0155, none existed within NRS Chapter 608. Nev. Const. Art. XV, § 16. However, individuals were obviously identified as "independent contractors" under Nevada law prior to the enactment of the MWA.

Additionally, this Court has found that when there is no direct conflict between the MWA and the provisions of NRS Chapter 608, they can be "'...capable of coexistence' so long as the statute is understood, as it may reasonably be, to supplement gaps in the MWA's terms." *Perry v. Terrible Herbst,* 132 Nev. 767, 772, 383 P.3d 257, 261 (2016) (relying NRS Chapter 608 to enforce rights under MWA). Moreover, "[W]hen possible, the interpretation of a . . . constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results." *We the People Nevada ex rel. Angle v. Miller,* 124 Nev. 874, 881, 192 P.3d 1166 (2008).

Here, no direct conflict exists between the MWA and NRS Chapter 608. The statutory test to determine whether someone is an independent contractor does not abrogate the definition of employee in the MWA. *See*

NRS Chapter 608. See also, Nev. Const. Art. XV, § 16. Dancers cite *Thomas v. Nevada Yellow Cab Corp.,* 130 Nev. 484, 327 P.3d 518, 521 (Nev. 2014) in support of their argument that NRS 608.0155 subordinates the Nevada Constitution and therefore should be ignored. Opening Brief at 14-15. Dancers' reliance on *Thomas* is incorrect because this Court did not make such a determination, and instead found that the MWA definition of "employee" was "vague" and that "independent contractor" was a recognized business relationship not within the definition of an "employee." *Terry v. Sapphire Gentlemen's Club, 336 P.3d 951, 954,* 130 Nev. 879, 883-84 (2014). In fact, in *Terry* this Court held that the courts were obligated to look within Nevada statutes to determine definitions for both an employee and an independent contractor. *Id*. at 955.

Accordingly, NRS 608.0155 can be applied harmoniously with the MWA because since its enactment the statute now provides a clear definition of when a person can be conclusively be presumed to be an independent contractor and not an employee. Notably, NRS 608.0155 does not state that a person who does not meet those criteria is automatically an employee. It follows, therefore, that the MWA's definition of an "employee" remains unchanged by NRS 608.0155, and none of the protections of the MWA are removed.

C. NRS 608.0155 Is Not Preempted By the FLSA.

Dancers contend NRS 608.0155 is preempted by the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq*. ("FLSA"). Opening Brief at 16-17. This argument fails because this Court has previously determined that the FLSA does not preempt NRS Chapter 608 and does not conflict with the FLSA. *See Dancer I-VII v. Golden Coin, Ltd.,* 124 Nev. 28, 32, 176 P.3d 271, 274 (2008).[2] Opening Brief at 16-17. Further, NRS 608.0155 does not define who is or who is not an employee under Nevada law, nor does it affect in any manner the implementation of the FLSA under any circumstance. *Id*. Accordingly, neither NRS 608.0155, nor NRS Chapter 608 more broadly, is preempted by the FLSA. *Golden Coin, Ltd.* 124 Nev. at 32.

D. No Genuine Issue of Material Fact Exists Whether Dancers Are Conclusively Presumed Independent Contractors Under NRS 608.0155.

Dancers appeal the District Court's order granting Cheetahs' Motion for Summary Judgment which determined that no genuine issue of material fact remained as to whether Dancers satisfied all of the criteria required by NRS 608.0155 to be conclusively presumed independent contractors as a matter of law. Summary judgment is appropriate when the evidence and

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[2] Dancers' Opening Brief does not address this Court's decision in *Golden Coin, Ltd.*, even though Appellants' counsel herein was counsel of record for Appellants in *Golden Coin, Ltd.*

pleadings on file, viewed in light most favorable to the non-moving party, demonstrates that no genuine issue of material fact remains and the moving party is entitled to a judgment as a matter of law. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

To be conclusively presumed an independent contractor under NRS 608.0155, a person must satisfy the criteria set forth in NRS 608.0155(1)(a)-(c). As shown more fully below, the District Court did not err in concluding that no genuine issue of material fact remained as to whether Dancers satisfied all of the criteria required by NRS 608.0155(1)(a)-(c) to be conclusively presumed to be independent contractors.

1. Dancers Entered Into Performance Leases with Cheetahs.

Dancers argue that NRS 608.0155 does not apply if no contract existed between them and Cheetahs to perform work. Opening Brief at 36-39. Yet, the record clearly demonstrates there were, in fact, written contracts between the parties. APPX. at II, 328-333 and at III, 648-650 (the "Dancer Performance Leases"). Dancers do not specifically argue that no contracts exist between the parties; rather, they contend that Cheetahs' Dancer Performance Leases characterized Dancers as "licensees" instead of as independent contractors, and, therefore, conclude

that NRS 608.0155 cannot apply. This is a distinction without a difference.

The evidence of record plainly demonstrates the existence of written contracts between the parties. *Id.* Dancers cite no appellate decision holding that because a party is "characterized" in a certain manner that no contract can exist preventing the application of NRS 608.0155. Opening Brief at 37-38. Further, Dancers' argument fails because NRS 608.0155(1)(c)(5)(II) and (III) specifically contemplates that part of an exotic dancer's capital investment is the purchase of a license to utilize space to perform or pay rent to lease space to perform, which is precisely what the Dancer Performance Leases do.

2. Dancers Met the Requirements of NRS 605.0155(1)(a) and (b).

Dancers conceded below (and the District Court concluded) that Dancers met the requirements of NRS 605.0155(1)(a) and (b). APPX. at V, 956-957, 959. Dancers do not challenge the portion of the District Court's Order which found that the requirements of NRS 608.0155(1)(a) and (b) were satisfied.

3. Dancers Met All of The Required Criteria of NRS 608.0155(1)(c).

In addition to meeting the requirements of NRS 608.0155(1)(a) and

(b), NRS 608.0155(1)(c) requires that:

The person satisfies three or more of the following five criteria:

(1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.

(2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.

(3) The person is not required to work exclusively for one principal unless:

(I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or

(II) The person has entered into a written contract to provide services to only one principal for a limited period.

(4) The person is free to hire employees to assist with the work.

(5) The person contributes a substantial investment of capital in

the business of the person, including, without limitation, the:

(I) Purchase or lease of ordinary tools, material and equipment regardless of source;

(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and

(III) Lease of any work space from the principal required to

perform the work for which the person was engaged.

> The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.

Dancers conceded below that the requirements of NRS 608.0155(1)(c)(3) were met but disputed that the remaining sub-sections of NRS 608.0155(1)(c) were satisfied. Opening Brief at 39-42. The District Court disagreed, determining that no genuine issue of material fact remained as to whether Dancers met the first three criteria set forth in NRS 608.0155(1)(c). APPX. at V, 959-960. As is shown below, the District Court properly applied the facts below to NRS 608.0155(1)(c)(1)-(3), and had no reason to reach the issue of whether Dancers also satisfied subsections (1)(c)(4) or (5).

a. Dancers Had Complete Control Over the Means and Manner Of their Performance and Result of Their Work.

Regarding the criteria set forth in NRS 608.0155(1)(c)(1), the District Court properly determined that there were indisputable facts demonstrating that Dancers had complete control over the means and manner of the performance and the result of their work, including without limitation, their undisputed ability to choose when and how

frequently to perform, how long to perform, their ability to perform at other clubs or work other jobs, which of Cheetahs' customers they choose to entertain, and how to do so. APPX. at V, 957-960.

Dancers contend that NRS 608.0155(1)(c) actually consists of two components with the first being the "exercise of control" component and the second, the "result of the work being the primary element bargained for by the principal in the contract." Opening Brief at 39. They do not, however, offer any legal authority for this proposition. *Id*. Regardless, Dancers apparently contend that they do not meet the self-defined "second component" of this subsection since the Dancer Performance Leases signed by Dancers describes them as "licensees" instead of independent contractors and do not state that Cheetahs bargained for any work performed by Dancers at Cheetahs. Opening Brief at 38. While not a model of clarity, Dancers appear to argue that the "primary element bargained for" cannot be a license fee paid by Dancers for work that they may or may not have performed. *Id*.

This argument is without merit. The criteria identified in NRS 608.0155(1)(c)(1) plainly contemplate that the issue of control is concerned with whether Dancers entered into an agreement wherein they had control over the means of performing and the result of those

performances. NRS 608.0155(1)(c). As the District Court recognized, indisputable facts existed demonstrating that Dancers had such control. APPX. at V, 957-960. Specifically, Section 10 of the Dancer Performance Lease expressly provides that Cheetahs:

> shall have no right to direct and/or control the nature, content, character, manner or means of PERFORMER's performances. PERFORMER acknowledges and agrees, however, to perform live nude and/or semi-nude entertainment consistent with the type of entertainment regularly performed on the PREMISES.

APPX. at III, 649.

Both contractually and in fact, Dancers had substantial control over the time their work is performed and discretion over the means and manner of the performance of and the result of the work. *Id.* As such, Dancers had and entered into an agreement with Cheetahs in which they had the necessary control required by NRS 608.0155(1)(c)(1).

b. NRS 608.0155(1)(c)(2) Applies to the Dancers.

Dancers contend that since the Dancer Performance Lease with Cheetahs is for entertainment work, NRS 608.0155(1)(c)(2) does not apply to them. Opening Brief at 40. But NRS 608.0155(1)(c)(2) does not exclude entertainment agreements. The plain language of NRS 608.0155(1)(c)(2) provides that only if the contract is for entertainment where the time for such entertainment "is to be presented," then such a

contract is excepted. *Id*. Dancers provide no evidence that the Dancer Performance Lease is such an entertainment contract which is excepted from NRS 608.0155(1)(c)(2). Opening Brief at 40.

Indeed, the District Court found that Dancers' contract was not excepted from NRS 608.0155(1)(c)(2) because Dancers were not required to work on any specific days and could determine for themselves what dates and shifts they wish to perform. APPX. at V, 958. Dancers meet the requirements of NRS 608.0155(1)(c)(2).

c. Appellants Conceded Below that NRS 608.0155(1)(c)(3) Is Satisfied.

The District Court found that Dancers satisfied the requirements of NRS 608.0155(1)(c)(3). APPX. at V, 956-957, 959. Dancers have not challenged this issue in their Opening Brief.

d. NRS 608.0155(1)(c)(4) Is Also Satisfied.

Dancers do not argue that NRS 608.0155(1)(c)(4) was not met because they could not hire their own assistants to assist them with their costumes, hairdressing or make-up application. Opening Brief at 40-41. Instead, Dancers argue that NRS 608.0155(1)(c)(4) should only be met upon an affirmative showing that the Dancer Performance Lease expressly permitted or authorized Dancers to hire employees to assist them with the work they performed for Cheetahs. *Id*. at 41. Yet, Dancers

offer no legal authority explaining how or why such a showing is required by NRS 608.0155(1)(c)(4), and its plain text does not so require. *Id*. Indeed, the Dancer Performance Lease (APPX. at III, 648-650) contains no prohibition for Dancers hiring or using their own assistants to help them perform at Cheetahs, and there is no evidence in the record indicating Dancers are prohibited from doing so. The District Court did not reach the issue of whether subsection (1)(c)(4) was satisfied, having already determined the requirements of subsections (c)(1)-(3) were satisfied. APPX. at V, 960.

e. Dancers Satisfy Subsection (1)(c)(5) Because They Contributed A Substantial Investment of Capital.

Dancers invested substantial capital in being exotic dancers. As described below, such investments included state business licenses and permits to perform, payments of house fees to Cheetahs to perform, tip-outs to the Cheetahs' DJ and other club personnel, hairstyling, nails, costumes, clothing, and related supplies and accessories.

Dancers argue they do not satisfy NRS 608.0155(1)(c)(5) because the sums they spent were insignificant considering the amount of capital required to operate a gentlemen's club. Opening Brief at 41-42. This argument also is without merit. Dancers are not in the business of operating a gentlemen's club, which obviously requires a substantial

investment of capital to own or lease and run such a facility, including, marketing, supplies, personnel, and licensing. Opening Brief at 42. Dancers, on the other hand, are in the business of being exotic dancers, which in itself requires substantial investment of capital, but in other areas, such as in their performance and appearance, but not to operate a facility for customers and other dancers. The District Court never reached the issue of whether subsection (1)(c)(5) was met because it concluded that the requirements of NRS 608.0155(1)(a), (b) and (c)(1)-(3) were satisfied. APPX at V, 960.

Regardless, the record contains ample evidence that Dancers made significant investments in performing as exotic dancers to satisfy the requirements of NRS 608.0155(1)(c)(5). In order to perform at Cheetahs, Dancers had to pay lease the premises where they performed in the form of "house fees." APPX. at II, 282-283. Dancers had to pay for their own business licenses, permits and "Sheriff's cards." APPX. at II, 234, 284, 354-355, 376, 383. Dancers had to pay for their own costumes. APPX. at II, 262-263, 404-406. One Appellant admitted she purchased a dancer costume every day she performed at Cheetahs at a cost of approximately $100 each. APPX. at II, 389-390. Dancers pay for their own dancing shoes. APPX. at II, 265, 406-407. One Appellant paid up to $95 for a

pair of dancing shoes every five months. Id. Dancers pay for their own cosmetics. APPX. at II, 266, 407-408. They pay for their own hairstyling. *Id.* Appellant Jane Doe Dancer III paid roughly $300 every two months for hairstyling. APPX. at II, 266-267. Another dancer admits spending between $50 and $100 per month on hairstyling, and another $40 - $70 per month on her nails. APPX. at II, 408.

Each time a dancer performs at Cheetahs, she pays a house fee and it is customary for her to tip the club's house mom, DJ and security/floor men. APPX. at II, 244-245, 274-275, 284-285, 321-325. Accordingly, the record contains ample evidence that Dancers made substantial investment of capital to perform at Cheetahs, including the cost of dancing shoes, costumes, hairstyling, cosmetics, licenses, permits and leasing the Cheetahs' premises to perform such that the requirements of NRS 608.0155(1)(c)(5) has been satisfied.

E. NRS 608.0155 Can Be Applied Retroactively.

Dancers argue that NRS 608.0155 cannot be applied retroactively because it would impair vested rights. Opening Brief at 18-19. This argument fails because Dancers have not proffered any evidence that Nevada has deemed the right to a minimum hourly wage a fundamental right warranting due process protections. *Id*. Dancers have not cited any

Nevada law that makes such "rights" vested. *Id*. They cite only *Sandpointe Apts. v. Eighth Jud. Dist. Ct.,* 313 P.3d 849 (Nev. 2013) to support their conclusion. Opening Brief at 18. However, *Sandpointe Apts.* is not relevant since it only concerns final deficiency judgments, which is not at issue in this matter. *See,* 129 Nev. at 823-24.

Dancers also argue that as putative class members they have a vested property right in the existing class action which cannot be impaired by a retroactive application of NRS 608.0155. Opening Brief at 19. However, Dancers have cited no binding authority holding that the certification of their wage claims under Nev.R.Civ.P. 23 constitutes a vested property right which would be impaired by the retroactive application of NRS 608.0155.

The Nevada Legislature plainly intended that NRS 608.0155 be retroactive. *See Valdez v. Employers Ins. Co., of Nev.,* 123 Nev. 170, 179, 162 P.3d 148, 154 (2007) (retroactivity of newly enacted statutes applies if Legislature clearly indicates such application). Section 7 of Senate Bill 224, which was enacted and later codified as NRS 608.0155, expressly declares:

> The amendatory provisions of this act **apply to an action or proceeding to recover unpaid wages pursuant to Section 16 of Article 15 of the Nevada Constitution the MWA or NRS 608.250 to 608.290, inclusive, in which a**

final decision has not been rendered before, on or after the effective date of this act. 2015 Statutes of Nevada, Chapter 325, Pages 1743-44. (Emphasis Added).

This language makes it clear that NRS 608.0155 applies retroactively and includes Dancers' MWA claims since Senate Bill 224 was enacted on June 2, 2015 and the final judgment in this action was entered on January 4, 2019. Opening Brief at 3; *Cf.* APPX. at V, 952-960.

F. The MWA's definition of "Employee" Does Not Incorporate the FLSA's Economic Realities Test.

Asking this Court to deem all exotic dancers *per se* employees under Nevada law, Dancers contend that the MWA's definition of "employee" incorporates the FLSA's economic realities test. Opening Brief at 20-23. It does not. The MWA requires each employer in Nevada pay a wage to each employee at a prescribed rate. Nev. Const. art. XV § 16(A). The MWA defines an employee as "any person who is employed by an employer," expressly excluding those under the age of 18, those employed by a non-profit for after school or summer work, or a trainee for a period of no longer than 90 days. *Id*. Nowhere in its text does the MWA incorporate any aspect of the FLSA, much less any federal definition of "employee."

In *Terry,* this Court addressed whether performers at Sapphire's Gentlemen's Club were employees within the meaning of NRS 608.010,

not the MWA. *See,* 130 Nev. 879, 881, 336 P.3d 951, 953 (Nev. 2014). This Court recognized the MWA's definition of "employee," but found it vague and unhelpful. *See,* 336 P.3d at 954. Consequently, because the NRS did not have a statutory definition of "employee," this Court adopted the FLSA's "economic realities" test at that time. *Id*. at 958. *Terry* was decided before the Legislature enacted NRS 608.0155. However, this Court's adoption of the "economic realities" test in *Terry* does not make it an incorporated part of the definition of "employee" in the MWA, especially considering this Court expressly stated otherwise in *Terry,* nor does it create any presumption that that the FLSA applies in lieu of Nevada law. *Id*. at 953. *See also, e.g., Campbell v. Dean Martin Dr-Las Vegas, LLC,* 2015 U.S. Dist. LEXIS 170855 *6, fn. 1 (D. Nev. 2015) (utilizing a federal standard in interpreting Nevada law does not transform Nevada law into federal law).

Since *Terry,* the Nevada Legislature enacted NRS 608.0155, the purpose of which is to determine who should be conclusively presumed an independent contractor under Nevada law, including under the MWA. Thus, the enactment of NRS 608.0155 now provides Nevada's courts with statutory guidance to distinguish between those who are conclusively presumed to be independent contractors. The enactment of

NRS 608.0155 indicated the Nevada Legislature's desire to distance itself from the FLSA by conclusively presuming certain workers as independent contractors and not incorporating as a matter of law the FLSA's broader definition of "employee" into the MWA, which the Legislature could have done when it enacted NRS 608.0155.

G. Dancers Are Not Deemed Employees Under the MWA.

Dancers argue that because various federal courts (which were not interpreting or applying NRS 608.0155) have applied the "economic realities" test to exotic dancers found them to be employees under the FLSA, they should be deemed employees as a matter of law in this action.[3] Opening Brief at 24-26 (citations omitted).

Regardless of this conclusion, no court, including this one, and all of the courts string cited by Dancers, has held as a matter of law that there can never be any relationship other than employee/employer between exotic dancers and the exotic dance establishment. *Id*. *See also, e.g., Terry,* 336 P.3d at 957. The mere fact that other courts have found an employment relationship under the FLSA does not compel the same conclusion in this case.

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[3] Dancers make this argument notwithstanding the fact they asserted no FLSA claim in this civil action though they plainly could have done so.

H. The Undisputed Material Facts Demonstrate that Dancers Were Not Employees.

Preferring to disregard the required application of NRS 608.0155, which the District Court concluded left no material fact in dispute that Dancers were independent contractors, Dancers argue that the application of the "economic realities" test mandates the conclusion they were Cheetahs' "employees." Opening Brief at 24-34. However, a review of the record facts demonstrate that Dancers were not Cheetahs' employees even when applying the "economic realities" test.

1. Cheetahs Did Not Exert Control Over a Meaningful Part of Dancers' Business.

Dancers argue that Cheetahs exercises nearly complete control over them because it generated a "pricing sheet," required dancers to sign in and out, and imposed certain guidelines on the dancers who performed there. Opening Brief at 27-28. However, Dancers do not cite any authority that completely relieves them from agreeing to certain club-imposed rules while performing. *Id*.

The record does not establish the control necessary for Dancers to be deemed an employee. Cheetahs dancers are not assigned to work any particular shift. APPX. at II, 340. Cheetahs dancers are not required to work any specific days and can determine for themselves what dates and

shifts they wish to perform. APPX. at II, 283, 341 and at III, 499-501. One dancer testified she chose to work about 20 days per month but would work more if a convention was in town. APPX. at II, 267. She further testified she would typically work a few days before her personal bills were coming due. APPX. at II, 396. At Cheetahs, dancers can work as long as they wish. APPX. at II, 240-241, 249. They had the discretion to arrive and leave Cheetahs when they wished. APPX. at II, 241, 249, 337 and at III, 496.

Cheetahs dancers are not required to perform exclusively at Cheetahs, and they are free to perform at other gentlemen's clubs if they wish to do so. APPX. 242, 336. Cheetahs dancers may attend school or hold other jobs while performing at Cheetahs. APPX. at II, 267 and at III, 478, 488. Cheetahs dancers are free to take time off from performing at Cheetahs at their discretion. APPX. at II, 243.

Cheetahs dancers are free to consume alcohol and smoke cigarettes while they work at Cheetahs. APPX. at II, 247, 249, 267-268, 409-410. Cheetahs dancers are not asked or required to disclose to Cheetahs their earnings from performing at Cheetahs. APPX. at II, 248, 435. Cheetahs dancers are free to perform on stage, on the floor of the club, or in its VIP area. APPX. at II, 251. Dancers are not required to perform on

stage or in the VIP area if they do not wish to do so. APPX. at II, 254, 271, 374 and at III, 482-483. Cheetahs dancers can determine how much to charge Cheetahs' customers for private dances. APPX. at II, 251 and at III, 532. Cheetahs dancers are free to perform as many dancers as they can convince customers to purchase from them. APPX. at II, 253. On the floor of the club, Cheetahs dancers are free to pick and choose the customers for whom they want to perform. APPX. at II, 271. Cheetahs dancers can perform as they please. *Id*. ("[On stage, you] can pretty much do whatever you want.")). *See also*: APPX. at II, 410-412 (dancer could dance as she pleased, the only restriction imposed by Cheetahs was no prostitution)). Cheetahs dancers are free to opt-out of the club's stage rotation. APPX. at II, 271, 374, 382. Cheetahs dancers are free to sit and mingle with the club's customers. APPX. at II, 271. Cheetahs dancers are free to take a break during their shifts, as needed. *Id*. Thus, the actual facts of this case show that Cheetahs did not exert any significant control over Dancers as contemplated by the FLSA.

2. Most Dancers Who Perform at Cheetahs Are Skilled, Experienced Entertainers.

Dancers contend that Cheetahs did not require them to have any formal dance training, certification, or other special skills. Opening Brief at 32-33. While Cheetahs did not expressly require its dancers to

have formal dance training or prior dance experience, the fact is that virtually all dancers who performed at Cheetahs had prior dancing experience. APPX. at III, 454 ("Q: Were you skilled at what you did? A: I would say you had to be skilled. I mean, I don't really understand what skills you are looking for. Q: I mean, you would have danced for a lot of clubs for a lot of years; right? A: Yes."). *See also*: APPX. at II, 235-236. ("Q: So you had a considerable amount of prior dancing experience before you began working at Cheetah's Lounge? A: Yes, I had.").

3. Dancers Were Not Prohibited from Performing at Other Clubs.

A factor in considering whether a worker is an employee under the "economic realities" test whether Dancers were able to perform at other clubs while performing at Cheetahs. Dancers do not appear to argue that they were prohibited from performing at other exotic dance clubs while performing at Cheetahs. *See* Id. One dancer testified:

> Q. And nothing prevented you from performing at other clubs [other than Cheetahs] during that time; that was just your choice to work exclusively at Cheetah's during that time?

A. Correct. That's where I was active, so –

APPX. at II, 365. Similarly, Appellant Jane Doe Dancer III testified:

> Q. And you could have worked at other clubs if you wanted to?
>
> A.Yes, I could have.
>
> Q. As long as you had that business, you could – and you could show up at any club, at any time, and say Hey, I'd like to dance here?
>
> A.Yes. As long as you're a dancer and you have that, you can work at any club.
>
> Q.Okay. So you were not restricted to the Cheetah's?
>
> A. No, I wasn't.

APPX. at II, 242.

Thus, even assuming the economic realities test, rather than NRS 608.0155, is applied to determine whether Dancers were Cheetahs' employees, considering all of the above factors, it is clear they were independent contractors, and not employees.

IV. CONCLUSION

The District Court correctly applied NRS 608.0155 to the Dancers' MWA claims and determined that no genuine issue of material fact existed to conclusively presume the Dancers were independent contractors as a matter of Nevada law. By its express language, the Legislature intended NRS 608.0155 to apply to claims brought under the MWA, and for it to apply retroactively. NRS 608.0155 does not run afoul of the MWA's protections, nor is it preempted by the Fair Labor Standards Act. Even if the traditional "economic realities" test is

applied to the facts of record, Dancers would still fall outside the definition of "employees" of Cheetahs. For all of these reasons, the Final Order of the District Court should be AFFIRMED.

DATED this 8th day of April, 2020.

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CERTIFICATE OF COMPLIANCE PURSUANT TO N.R.A.P. 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief, including footnotes, has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point.

2. I further certify that this brief complies with the page limit and/or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(A)(ii) and (C), is proportionately spaced, has a typeface of 14 points or more, and only contains 6,298 words, including footnotes, quotations, and signature block.

3. I further certify that I have read Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Hartwell Thalacker, Ltd. and that on the 8th day of April, 2020, I served Respondent's Answering Brief via electronic filing on the following:

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