IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CRYSTAL HILBORN, EDEN WHEELER, AMBER BASHAM, KALIE BROWN, AMBER MAXWELL, STACY JONES, ELEXAS PIETY and JENNIFER CLIFTON, Each Individually and on Behalf of Others Similarly Situated — **PLAINTIFFS**

vs. No. 4:11-CV-0124 BSM

VISION'S, individually and d/b/a VISIONS and/or d/b/a VISIONS CABARET; RICKY J. EDGE, Individually and d/b/a VISIONS and/or VISIONS CABARET; MINOR BOOTH, Individually and d/b/a VISIONS and/or VISIONS CABARET; and WILLIAM MARFOGLIO, Individually and d/b/a VISIONS and/or VISIONS CABARET — **DEFENDANTS**

EIGHTH AMENDED AND SUBSTITUTED COMPLAINT

COME NOW Plaintiffs Crystal Hilborn, Eden Wheeler, Amber Basham, Kalie Brown, Amber Maxwell, Stacy Jones, Elexas Piety and Jennifer Clifton, each on their own behalf and on behalf of others similarly situated, by and through their attorneys Anne Milligan and Josh Sanford of the Sanford Law Firm, PLLC, and for their Eighth Amended and Substituted Complaint against VISION'S, individually and d/b/a VISIONS and/or d/b/a VISIONS CABARET; RICKY J. EDGE, individually and d/b/a VISIONS and/or VISIONS CABARET; MINOR BOOTH, individually and d/b/a VISIONS and/or VISIONS CABARET; and WILLIAM MARFOGLIO, individually and d/b/a VISIONS and/or VISIONS

CABARET (hereinafter collectively referred to, from time to time and as needed simply as "Defendant" unless the circumstances do not permit such simplification), and in support thereof they do hereby state and allege as follows:

I.

INTRODUCTION

A. General Facts

1. Plaintiffs have obtained service on the original three Defendants herein; Defendants have filed an Answer. (Document No. 33.)

2. Plaintiffs have asked for and expect to receive permission pursuant to Rule 15 of the FRCP to amend the most recent complaint filed herein.

3. In Response to Plaintiffs' Motion for Certification of Collective Action, for Disclosure of Contact Information for Potential Opt-In Plaintiffs, and for Court-Approved Notice (Document No. 34), Defendants filed their Response. (Document No. 48.)

4. Defendant's Response identifies William Marfoglio as the General Manager of Defendant. Id. at Exhibit A.

5. The purposes of this Eighth Amended and Substituted Complaint are four-fold (1) to dismiss a named Plaintiff (Rachel Stallsworth) and (2) to add Mr. William Marfoglio as a named Defendant herein; (3) to re-plead and revise certain allegations about the d/b/a's of Defendant; and (4) to repeat and reiterate those changes, additions, amendments, corrections and substitutions made in the most recent complaint which are not otherwise altered hereby.

6. Plaintiffs continue to assert collective action claims under the FLSA and class action claims under Rule 23 of the FRCP. It is not improper for the definitions of putative Rule 23 classes to be clarified during the course of litigation. Robidoux v. Celani, 987 F.2d 931, 937 (2d Cir. 1993) (noting that because such modification is anticipated in Fed. R. Civ. P. 23(c)(1), a court "is not bound by the class definition proposed in the complaint.").

B. Introduction to FLSA Claims

7. With respect to the FLSA, this is a collective action brought by Plaintiffs Crystal Hilborn, Eden Wheeler, Amber Basham, Kalie Brown, Amber Maxwell, Stacy Jones, Elexas Piety and Jennifer Clifton, each on their own behalf and on behalf of others similarly situated, defined below, against Defendant.

8. The proposed collective class is composed of female employees who, during the relevant time period, worked as exotic dancers for Defendant at its Pulaski County location and were denied their clearly-established, statutory rights under applicable federal law.

9. Specifically, Plaintiffs complain that Defendant intentionally misclassified Plaintiffs and those similarly situated as "independent contractors," as opposed to employees, at all times in which they were employed as dancers at the nightclub operated by Defendant. As a result, Defendant failed to pay Plaintiffs and all other members of the proposed class the minimum wages (and overtime wages) to which they were entitled under federal law.

10. In addition, Defendant required Plaintiffs to pay to Defendant and other employees of Defendant substantial fees from tips they received from Defendant's customers in clear and intentional violation of 29 U.S.C. § 203 (m). Some of the fees exacted were scheduled and some were normative.

11. Plaintiffs bring this action for declaratory judgment, damages, back-pay, restitution, liquidated damages, civil penalties, prejudgment interest, and any other relief that the Court deems just and reasonable under the circumstances, all as allowed under the FLSA.

C. Introduction to Claims Asserted Under Rule 23 of the FRCP

12. With respect to Plaintiffs' claims arising under the Arkansas Minimum Wage Act, the proposed Rule 23 Class One is composed of female employees who, during the relevant time period, worked in the State of Arkansas at any time during the period beginning on April 4, 2006, and continuing through to the date of the trial in this case, as exotic dancers for Defendant and who were denied their clearly-established, statutory rights under applicable statutory laws.

13. With respect to Plaintiffs' unjust enrichment claims, the proposed Rule 23 Class Two is composed of female employees who, during the relevant time period, worked at any of Defendant's locations nationwide during the period beginning on February 11, 2008, and continuing through to the date of the trial in this case, as exotic dancers for Defendant, and who were denied their clearly-established, fundamental rights under applicable common laws, which prohibit the unjust enrichment of a defendant as against a plaintiff.

II.

JURISDICTION AND VENUE

14. Plaintiffs and those similarly situated seek a declaratory judgment under 28 U.S.C. §§ 2201 and 2202. Plaintiffs seek compensation and other relief under the Fair Labor Standards Act, as amended, 29 U.S.C. § 201 *et seq.* Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

15. This amended Complaint also alleges causes of action under the common law and statutes of the State of Arkansas, that arise out of the same set of operative facts as the federal causes of action herein alleged; furthermore; said causes of action would be expected to be tried with the federal claims in a single judicial proceeding. Accordingly, this Court has pendent jurisdiction over those claims pursuant to 28 U.S.C. § 1367(a).

16. The acts complained of herein were committed and had their principal effect within the Eastern District of Arkansas; therefore, venue is proper within this District pursuant to 28 U.S.C. § 1391.

III.

PARTIES

17. Plaintiff Crystal Hilborn (hereinafter "Hilborn") is a citizen of the United States and is a resident and domiciliary of Faulkner County, Arkansas. Plaintiff worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

18. At all times relevant to this amended Complaint, Hilborn was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

19. Plaintiff Eden Wheeler (hereinafter "Wheeler") is a citizen of the United States and is a resident and domiciliary of Saline County, Arkansas. Plaintiff worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

20. At all times relevant to this amended Complaint, Wheeler was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

21. Plaintiff Amber Basham (hereinafter "Basham") is a citizen of the United States and is a resident and domiciliary of Faulkner County, Arkansas. Plaintiff worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

22. At all times relevant to this amended Complaint, Basham was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

23. Plaintiff Kalie Brown (hereinafter "Brown") is a citizen of the United States and is a resident and domiciliary of Faulkner County, Arkansas. Plaintiff worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

24. At all times relevant to this amended Complaint, Brown was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

25. Plaintiff Amber Maxwell (hereinafter "Maxwell") is a citizen of the United States and is a resident and domiciliary of Clark County, Arkansas. Plaintiff Azlin worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

26. At all times relevant to this amended Complaint, Maxwell was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

27. Plaintiff Stacy Jones (hereinafter "Jones") is a citizen of the United States and is a resident and domiciliary of Saline County, Arkansas. Jones worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

28. At all times relevant to this amended Complaint, Jones was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

29. Plaintiff Elexas Piety (hereinafter "Piety") is a citizen of the United States and is a resident and domiciliary of Pulaski County, Arkansas. Piety worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

30. At all times relevant to this amended Complaint, Piety was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

31. Plaintiff Jennifer Clifton (hereinafter "Clifton") is a citizen of the United States and is a resident and domiciliary of Pulaski County, Arkansas. Clifton worked at Defendant's place of business located at 7900 Bicentennial Road, North Little Rock, Arkansas, during the relevant periods within the various applicable statutes of limitations.

32. At all times relevant to this amended Complaint, Clifton was intentionally improperly classified by Defendant as an independent contractor, but in reality she was an employee of Defendant subject to the requirements of the Fair Labor Standards Act and the Arkansas Minimum Wage Act.

33. Plaintiffs bring this action on behalf of themselves and all other individuals who worked at any of Defendant's places of business (within the three years immediately preceding the filing of this case), present or future, who were, are or will be classified as independent contractors but in reality are, were or will be employees of Defendant subject to the requirements of the FLSA.

34. Plaintiffs bring this action on behalf of themselves and all other individuals who worked at Defendant's place of business in the State of Arkansas (within the five years immediately preceding the filing of the Motion for Leave to File Plaintiffs' Sixth Amended and Substituted Complaint), present or future, who were, are or will be classified as independent contractors but in reality are, were or will be employees of Defendant subject to the requirements of the Arkansas Minimum Wage Act.

35. Plaintiffs bring this action on behalf of themselves and all other individuals who worked at any of Defendant's places of business, regardless of location (within the three years immediately preceding the filing of this case), present or future, who were, are or will be classified as independent contractors but in reality are, were or will be employees of Defendant and from whom and by whom Defendant was unjustly enriched.

36. At all relevant times each Defendant has been or was the employer of Plaintiffs and the proposed classes as defined by the FLSA and the Arkansas Minimum Wage Act. As such, Defendant violated the laws set forth below and is liable to Plaintiffs and to the proposed collective class as well as to the Rule 23 classes.

37. Defendant Vision's d/b/a Visions and/or Visions Cabaret is a domestic nonprofit corporation and was Plaintiffs' employer within the meaning of the FLSA, 29 U.S.C. § 203(d), and the Arkansas Minimum Wage Act, A.C.A. § 11-4-203, for all relevant time periods.

38. For all similarly situated employee Plaintiffs, Defendant Vision's is currently or was their employer within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(d) and the Arkansas Minimum Wage Act, A.C.A. § 11-4-203.

39. The registered agent for Vision's is Arkansas Corporation Services, Inc., whose address is 3215 Laredo Drive, Little Rock, Arkansas 72206.

40. Upon information and belief, Ricky J. Edge (hereinafter "Edge") owns, manages and controls the operation of the private club and dictates the employment policies of the club including but not limited to the decision to classify the dancers as independent contracts (and/or lessees) and to require that dancers split their tips with the club and other employees of the club.

41. Defendant Ricky J. Edge is a citizen and resident of the State of Arkansas and upon information and belief is an owner of Defendant Vision's.

42. Upon information and belief, Edge owns, manages and controls Vision's.

43. Edge was at all times relevant to this Complaint, Plaintiffs' employer as defined by the FLSA, 29 U.S.C. § 203(d), and the Arkansas Minimum Wage Act, A.C.A. § 11-4-203.

44. Upon information and belief, Minor Booth (hereinafter "Booth") manages and controls the operation of the private club and dictates the employment policies of the club including but not limited to the decision to classify the dancers as independent contracts (and/or lessees) and to require that dancers split their tips with the club and other employees of the club.

45. Defendant Minor Booth is a citizen and resident of the State of Arkansas and upon information and belief is an owner of Defendant Vision's.

46. Upon information and belief, Booth owns, manages and controls Vision's.

47. Booth was at all times relevant to this Complaint, Plaintiffs' employer as defined by the FLSA, 29 U.S.C. § 203(d) and the Arkansas Minimum Wage Act, A.C.A. § 11-4-203.

48. Upon information and belief, William Marfoglio (hereinafter "Marfoglio") owns, manages and controls the operation of the private club and dictates the employment policies of the club including but not limited to the decision to classify the dancers as independent contracts (and/or lesees) and to require that dancers split their tips with the club and other employees of the club.

49. Defendant Marfoglio is a citizen and resident of the State of Arkansas and upon information and belief is an owner of Defendant Vision's.

50. Upon information and belief, Marfoglio owns, manages and controls Vision's.

51. Edge was at all times relevant to this Complaint, Plaintiffs' employer as defined by the FLSA, 29 U.S.C. § 203(d), and the Arkansas Minimum Wage Act, A.C.A. § 11-4-203.

52. Defendant Vision's sometimes markets itself as Visions, without an apostrophe, and that is the sole reason for that version of the d/b/a for that Defendant.

53. Defendant Vision's sometimes markets itself as Visions Cabaret and that is the reason for that version of the d/b/a for that Defendant.

54. At all relevant times, Defendant has owned and operated a night club business engaged in interstate commerce and which utilized goods which moved in interstate commerce.

55. Upon information and belief, during the relevant time period the annual gross revenues of Defendant Vision's exceeded $500,000.00 per annum.

56. Defendant was at all relevant times engaged in commerce as defined in 29 U.S.C. § 203(r) and § 203(s). Defendant constitutes an "enterprise" within the meaning of 29 U.S.C. § 203(r)(1), because it performed related activities through common control for a common business purpose. At relevant times the enterprise engaged in commerce within the meaning of 29 U.S.C. § 206(a) and § 207(a).

57. At all times material herein, Plaintiffs and those similarly situated have been entitled to the rights, protection and benefits provided under the 29 U.S.C. § 201, *et seq.*

58. At all times material herein, Plaintiffs and those similarly situated (per the description of Rule 23 Class One) have been entitled to the rights, protection and benefits provided under the Arkansas Minimum Wage Act, A.C.A. § 11-4-201, *et seq*.

59. At all times material herein, Plaintiffs and those similarly situated (per the description of Rule 23 Class Two) have been entitled to the rights, protection and benefits provided under common law theories of unjust enrichment.

60. No exceptions to the application of the FLSA apply to Plaintiffs and the proposed collective class members or to either of the Rule 23 Classes. For example, Plaintiffs and the collective class have never been professionals or artists exempt from the provisions of the FLSA.

61. The exotic dancing performed by Plaintiffs and the proposed collective class members and by both of the Rule 23 Classes does not require invention, imagination or talent in a recognized field of artistic endeavor, and they are not compensated on a set salary, wage or fee basis, but rather by tips given to them by patrons.

62. No exceptions to the application of the AMWA apply to Plaintiffs and the proposed Rule 23 Class One members. *See* A.C.A. § 11-4-203(4)(A)-(Q) (itemizing persons who are not "employees" under the AMWA).

63. Plaintiffs and the Rule 23 Class One members have never been professionals, students, or executives exempt from the provisions of the AMWA.

64. The exotic dancing performed by Plaintiffs and the proposed collective class and the members of the Rule 23 Class One does not require invention, imagination or talent in a recognized field of artistic endeavor, and they are not compensated on a set salary, wage or fee basis, but rather by tips given to them by patrons.

65. While work as an independent contractor is an exception to the definition of "employee" under the AMWA, Plaintiffs and the members of the Rule 23 Class One do not fit the definition thereof, to wit: "'Independent contractor' means any individual who contracts to perform certain work away from the premises of his or her employer, uses his or her own methods to accomplish the work, and is subject to the control of the employer only as to the result of his or her work." A.C.A. § 11-4-201, *et seq.*

66. Plaintiffs and all members of all proposed classes are exotic dancers that by definition must perform their work on Defendant's premises, dancing in similar, untrained ways, under the direct, strict, continuing control of Defendant.

IV.

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

67. Defendant is and/or operates a private club that provides entertainment to its patrons in the form of live dancers, alcoholic beverages and music.

68. Plaintiffs and others similarly situated dance in the club without very many clothes on.

69. Hilborn was employed by Defendant as a dancer from about 2005 until about October of 2008, and was classified as an independent contractor. During this time period, Defendant did not pay Hilborn any wages or other compensation. Hilborn typically worked ten (10) hour shifts, from 7:00 p.m. until 5:00 a.m., four (4) days a week, resulting in an average of about forty (40) hours worked each week.

70. Wheeler was first employed by Defendant as a dancer beginning in about 2005 until about April of 2008, and at all times was classified as an independent contractor. During this time period, Defendant did not pay Wheeler any wages or other compensation. Wheeler's schedule and shift lengths have varied over time, but she usually worked five (5) to six (6) hours each night when she worked for Defendant.

71. Basham was employed by Defendant as a dancer beginning in about 2005 until about April 20, 2009, and was classified as an independent contractor. During this time period, Defendant did not pay Basham any wages or other compensation. Basham's schedule and shift lengths varied over time, but she usually worked about nine (9) hours each night, working three (3) or four (4) nights each week.

72. Brown was first employed by Defendant as a dancer beginning in about 2006 until about February of 2010, and was at all times classified by Defendant as an independent contractor. During this time period, Defendant did not pay Brown any wages or other compensation. Brown's schedule and shift

lengths varied over time, but she usually worked about eight to nine hours each night, working three to five nights each week.

73. Maxwell was first employed by Defendant as a dancer beginning in about August of 2008 until about the end of October of 2008, and was at all times classified by Defendant as an independent contractor. During this time period, Defendant did not pay Maxwell any wages or other compensation. Maxwell's schedule and shift lengths varied over time, but she usually worked about ten (10) hours each night, working five (5) nights each week.

74. Jones was first employed by Defendant as a dancer beginning in about March of 2008 until about the end of January of 2009, and was at all times classified by Defendant as an independent contractor. During this time period, Defendant did not pay Jones any wages or other compensation. Jones' schedule and shift lengths varied over time, but she usually worked just under eleven (11) hours each night, working about six (6) nights each week.

75. Piety was employed by Defendant as a dancer from about November of 2009 until about December of 2009 and was classified by Defendant as an independent contractor. During this time period, Defendant did not pay Piety any wages or other compensation. Piety typically worked ten (10) hour shifts, from 7:30 p.m. until 5:30 a.m., two (2) days a week, resulting in an average of about twenty (20) hours worked each week.

76. Clifton was employed by Defendant as a dancer from about April of 2007 until about November of 2007 and was classified by Defendant as an independent contractor. During this time period, Defendant did not pay Clifton

any wages or other compensation. Clifton typically worked nine (9) hour shifts, five (5) or six (6) days a week, resulting in an average of about forty-five (45) to fifty-five (55) hours worked each week.

77. During the relevant time periods, Defendant intentionally misclassified all women who worked as dancers—including Plaintiffs—as independent contractors as opposed to employees. As a result of this intentional misclassification, Plaintiffs and the members of the proposed classes were not paid the minimum wages required under the FLSA and also under the AMWA, and they suffered unlawfully so that Defendant might be unjustly enriched.

78. During the relevant time period, no Plaintiff or any class member received any wages or other compensation of any kind at all from Defendant. Plaintiffs and members of the classes generated their income solely through the tips that they received from customers when they performed dances, less and except that portion of those tips which were unlawfully taken and/or withheld by Defendant from Plaintiffs and members of the classes.

79. Plaintiffs and the members of the proposed collective class are "tipped employees" under the FLSA because they are engaged in an occupation in which they customarily and regularly receive more than $30.00 each month in tips. Throughout the relevant time period, Plaintiffs and each class member have averaged more than $7.25 per hour in tips.

80. Nevertheless, as employees of Defendant, Plaintiffs and the proposed collective class members remain entitled to: (i) receive minimum wages

under the FLSA and (ii) retain all tips given to them by customers when the dancers performed dances.

81. Plaintiffs and the members of the proposed Rule 23 Class One are tipped employees under the AMWA as they are engaged in an occupation in which gratuities have been "customarily and usually constituted and have been recognized as a part of remuneration for hiring purposes." A.C.A. § 11-4-212. Throughout the relevant time period Plaintiffs and each class member have averaged more than $6.25 per hour in tips.

82. Nevertheless, as employees of Defendant, Plaintiffs and the proposed Rule 23 Class One members remain entitled to receive minimum wages under the AMWA, including the right to retain all tips given to them by customers when they performed dances.

83. Defendant's misclassification of Plaintiffs and other proposed class members as independent contractors was designed to deny class members their fundamental rights as employees to receive minimum wages (and overtime wages) and to retain all tips given to them by customers; and it was done to enhance Defendant's profits.

84. Defendant's intentional misclassification of the collective class members was willful. Defendant knew, or should have known, that Plaintiffs and the proposed collective class members were improperly classified as independent contractors. For instance, in Harrell v. Diamond A. Entertainment, Inc., 992 F.Supp. 1343, 1347-48 (M.D. Fla. 1997), the United States District Court for the Middle District of Florida confirmed:

> Arrangements factually similar to the one in this case have been tested by federal courts in Texas, Indiana and Colorado. See Reich v. Circle C. Investments, Inc., 998 F.2d 324 (5th Cir. 1993) (whether dancer was "employee" under FLSA); Reich v. ABC/York-Estes Corp., 1997 WL 264379 (N.D.Ill. 1997) (whether dance fees were "tips" under FLSA); Reich v. Priba Corp., 890 F.Supp. 586 (N.D.Tex. 1995) (whether dancer was "employee" under FLSA); Reich v. ABC/York-Estes Corp., 157 F.R.D. 668 (N.D.Ill. 1994) (whether dance fees were "tips" under FLSA), rev'd on other grounds, 64 F.3d 316 (7th Cir. 1995); Martin v. Priba Corp., 1992 WL 486911 (N.D.Tex.) (whether dancer was "employee" under FLSA); Martin v. Circle C. Investments, Inc., 1991 WL 338239 (W.D. Tex); Donovan v. Tavern Talent & Placements, Inc., 1986 WL 32746 (D.Colo.) (whether "tips" could be used to offset completely the minimum wage requirement). ***Without exception, these courts have found an employment relationship and required the nightclub to pay its dancers a minimum wage.***

(Emphasis added).

85. The touchstone for determining whether an individual is an "employee" under the FLSA is the "economic reality" test. Under the test, employee status turns on whether the individual is, as a matter of economic reality, in business for herself. Here, as a matter of economic reality, Plaintiffs and other members of the proposed collective class were not in business for themselves and truly independent, but rather were "economically dependent" on Defendant.

86. Courts utilize six factors to determine economic dependence. The six factors, discussed more fully below, are as follows:

(i.) the degree of control exercised by the alleged employer;

(ii.) the relative investments of the alleged employer and employee;

(iii.) the degree to which the employee's opportunity for profit and loss is determined by the employer

(iv.) the skill and initiative required in performing the job;

(v.) the permanency of the relationship; and

(vi.) the degree to which the alleged employee's tasks are integral to the employer's business.

87. The totality of the circumstances surrounding the employment relationship between Defendant and Plaintiffs establishes economic dependence by Plaintiffs on Defendant.

88. Plaintiffs are not in business for themselves, but are dependent upon finding employment with others, namely Defendant.

89. Defendant's classification of the dancers fails the "economic reality" test; Plaintiffs and the members of the classes were misclassified.

90. Plaintiffs and proposed plaintiffs made clear and repeated demands upon Defendant to be paid in accordance with applicable federal laws, and these demands were made prior to the date that was exactly three years before the filing of this case.

A. Degree of Control – Plaintiffs and the Proposed Class Exercise No Control Over Their "Own" Or Their Employer's Business.

91. Plaintiffs and the other members of the proposed collective class do not exert meaningful control over Defendant's business and do not stand as separate economic entities from Defendant.

92. Defendant exercises control over all aspects of the working relationship with Plaintiffs and other proposed collective class members.

93. The economic status of Plaintiffs and the other members of the proposed collective class is inextricably linked to those conditions over which Defendant have complete control. They are completely dependent on the club for their earnings.

94. Defendant controls all of the advertising and promotion without which the dancers, including Plaintiffs and the proposed collective class members, could not survive economically.

95. Plaintiffs and other members of the proposed collective class are restricted from working at other exotic dance clubs while in a working arrangement with Defendant.

96. Defendant set the hours of operation, the show times during which a dancer may perform, conduct while at work (i.e., dancers are only permitted to take breaks at times authorized by Defendant), and all other terms and conditions of employment.

97. Dancers are required to account to Defendant for all dances they perform in the club. Defendant requires that the dancers pay a fee from their tips to the disc jockey and other employees of Defendant and to Defendant as "house fees."

98. In addition, dancers are required to pay a separate portion of their tips to Defendant each time they perform private dances. Private dances are available to club patrons at an additional minimum cost set by Defendant.

99. Defendant alone establishes the fee split which each dancer is required to pay Defendant, and the disc jockeys and other employees of Defendant, for each type of dance for which the dancers receive tips during the work shift (i.e., how much per private dance and how much of the tips received for other types of dances such as stage dances.),

100. Defendant increases the "house fees" the dancers must pay to Defendant if they are late for their scheduled shift.

101. Ultimately, Defendant sets the terms and conditions of Plaintiffs' and all proposed collective class members' work. This is the hallmark of economic dependence.

B. Skill and Initiative Required in Performing the Job.

102. Plaintiffs and the other members of the proposed collective class do not exercise the skill and initiative of a person in business for themselves.

103. Plaintiffs and the other members of the proposed collective class are not required to have any specialized or unusual skills to work at Defendant's private club. Prior dance experience is not required.

104. They are not required to attain a certain level of skill in order to work at the private club. There are no dance seminars, no specialized training, no instruction booklets, and no choreography provided or required in order to work at the private club.

105. The dance skills utilized are commensurate with those exercised by ordinary people who choose to dance at a disco or at a wedding.

106. Plaintiffs and the other members of the proposed collective class do not have the opportunity to exercise the business skills and initiative necessary to elevate their status to that of independent contractors.

107. Plaintiffs own no enterprise.

108. They exercise no business management skills.

109. They maintain no separate business structures or facilities.

110. They do not exercise control over customer volume or the atmosphere at the private club.

111. Plaintiffs and the members of the proposed collective class do not actively participate in any effort to increase the club's client base, enhance goodwill, or establish contracting possibilities.

112. The scope of Plaintiffs and the members of the proposed collective class's initiative is restricted to decisions involving what clothes to wear (within Defendant's guidelines) or how provocatively to dance which is consistent with the status of an employee, not an independent contractor.

113. Plaintiffs and other members of the proposed collective class are not permitted to hire or subcontract other qualified individuals to provide additional dances to patrons, which they would be able to do if they were independent contractors and in business for themselves.

C. Relative Investment.

114. Plaintiffs and the other members of the proposed collective class have made miniscule investments into their employment, particularly when compared to the investment made by Defendant.

115. Plaintiffs and other members of the proposed collective class make no capital investment in the facilities, advertising, maintenance, sound system and lights, food, beverage and other inventory, or staffing of the club.

116. Plaintiffs and the proposed collective class members' investment is limited to expenditures on costumes and make-up which they may choose to wear while working, and their own labor. But for Defendant's provision of the club the dancers work in, Plaintiffs and the proposed collective class members would earn nothing.

D. Opportunity for Profit and Loss.

117. Defendant, not Plaintiffs and other members of the proposed collective class, manages all aspects of the business operation. Defendant establishes the hours of operation, set the atmosphere, coordinate advertising, hire and control the staff (managers, waitresses, bartenders, bouncers/doormen, etc.).

118. Defendant, not Plaintiffs or other members of the proposed collective class, take the true business risks for the club.

119. Plaintiffs and other members of the proposed collective class do not control the key determinants of profit and loss of a successful enterprise. Specifically, Plaintiffs and the collective class are not responsible for any aspect of the enterprise's on-going business risk. For example, Defendant, not Plaintiffs or the collective class, are responsible for all financing, the acquisition and/or lease of the physical facilities and equipment, inventory, the payment of wages

(for managers, bartenders, doormen, and waitresses), and obtaining all appropriate business insurance and licenses.

120. Defendant alone establishes the minimum tip amounts that should be collected from patrons for private dances.

E. Permanency of the Relationship.

121. Defendant does not permit Plaintiffs and other members of the proposed collective class to dance professionally at any other venue while employed by Defendant.

122. Plaintiffs and proposed collective class members have a long-term relationship with Defendant and dance at their location multiple times.

F. Integral Part of the Employer's Business.

123. Plaintiffs and the other members of the proposed collective class are dancers that are essential to the success of Defendant's business. In fact, the primary reason the private club exists is to use the showcasing of the dancers' physical attributes for customers in order to sell alcoholic beverages to its customers, while seamlessly diverting money from the dancers in the process.

124. Defendant serves alcoholic beverages at the club. Defendant is able to charge a much higher price for their drinks than establishments without exotic dancers because the dancers are the main attraction of the club. As a result, Plaintiffs and the other proposed class members are an integral part of Defendant's business.

125. The foregoing demonstrates that Plaintiffs and the proposed collective class members are economically dependent on Defendant.

126. Plaintiffs and the proposed collective class members were misclassified as independent contractors and should have been paid minimum wages through the relevant time period and otherwise afforded the rights of employees.

V.

DEFENDANT'S INTENT

127. All actions by Defendant were willful and not the result of mistake or inadvertence.

128. Defendant knew or should have known that the FLSA applied to their operation of the private club at all relevant times. Defendant knew of or should have been aware of previous litigation and enforcement actions relating to wage and hour violations where the misclassification of exotic dancers as independent contractors under the FLSA was challenged.

129. Cases in support of the position taken by Plaintiffs in this lawsuit are many and are found throughout the country. Many of them meaningfully predate the intentional classification committed by Defendant in this case. Harrell v. Diamond Entertainment, Inc., 992 F. Supp. 1343, (M.D. Fla. 1997); Reich v. Circle C. Investments, Inc., 998 F. 2d 324 (5th Cir. 1993); Reich v. ABC/York-Estes Corp, 1997 WL 264379 (N.D.Ill. 1997); Reich v. Priba Corp., 890 F.Supp. 586 (N.D.Tex. 1995); Martin v. Priba Corp., 1992 WL 486911 (N.D.Tex.); Martin v. Circle C. Investments, Inc., 1991 WL 338239 (W.D. Tex); Donovan v. Tavern Talent & Placements, Inc., 1986 WL 32746 (D.Colo.); Morse v. Mer Corp., 2010 WL 2346334 (S.D. Ind.).

130. Plaintiffs are aware of no cases which support Defendant's intentional misclassification.

131. In those prior cases, exotic dancers working under conditions similar to those employed by Defendant were determined to be employees under the FLSA, not independent contractors.

132. Despite being on notice of its violations, Defendant chose to continue to misclassify Plaintiffs and other members of the proposed collective class and withhold minimum (and overtime) wages to them in effort to enhance their profits.

133. Additionally, some Plaintiffs and some members of the proposed collective class from time to time complained to Defendant about the unlawfulness of the intentional misclassification and demanded that dancers be paid according to law and that dancers' tips not be diverted to Defendant and its employees, such as the disc jockeys, waitresses, bar tenders, bouncers and others who were the beneficiaries of some the illegal tip exactions carried out under various policies of Defendant.

VI.

INJURY AND DAMAGE

134. Plaintiffs and all other members of the proposed collective class have suffered injury, incurred damages and financial loss as a result of Defendant's conduct complained of herein.

VII.

COLLECTIVE ACTION ALLEGATIONS

135. Plaintiffs bring their claims for relief for violation of the FLSA as a collective action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of all persons who were, are, or will be employed by Defendant as similarly situated dancers improperly classified as independent contractors at any time within the applicable statute of limitations period, who are entitled to payment of the following types of damages:

(i.) minimum wages for the first forty (40) hours worked each week;

(ii.) overtime premiums for all hours worked for Defendant in excess of forty (40) hours in any week; and

(iii.) tips paid by customers to Plaintiffs and the collective action class members which were exacted by Defendant.

136. The relevant time period dates back three years from the date on which the Original Complaint herein was filed and continues forward through the date of judgment pursuant to 29 U.S.C. § 255(a).

137. Plaintiffs are unable to state the exact number of the class but believe that the class exceeds 50 persons but is less than 200 persons.

138. Defendant can readily identify the members of the class, who are a certain portion of the current and former employees of Defendant.

139. The names and physical and mailing addresses of the FLSA collective action plaintiffs are available from Defendant, and notice should be

provided to the FLSA collective action plaintiffs via first class mail to their last known physical and mailing addresses as soon as possible.

140. The email addresses of many of the FLSA collective action plaintiffs are available from Defendant, and notice should be provided to the FLSA collective action plaintiffs via email to their last known email address as soon as possible.

141. The claimed damages, inclusive of potential opt-in class members, exceed $300,000.00.

142. Plaintiffs assert that other current and former dancers are similarly situated in that they are and/or were subject to Defendant's same and continuing policy and practice of intentionally misclassifying dancers as independent contractors, as opposed to employees, and were not paid the minimum wage required under the FSLA, the overtime wages required under the FLSA, and whose tips were unlawfully exacted by Defendant.

143. The proposed FLSA class members are similarly situated in that they have been subject to uniform practices by Defendant which violated the FLSA, including:

a. Defendant's failure to compensate members of the class at the minimum wage rate required by the FLSA, 29 U.S.C. § 203(m);

b. Defendant's failure to pay members of the class overtime compensation in violation of the FLSA, 29 U.S.C. § 201 *et seq.*;

c. Defendant required members of the class to pay Defendant and other employees of Defendant fees from the tips they received in violation of 29 U.S.C. § 203 (m).

VIII.

RULE 23 CLASS ACTION ALLEGATIONS UNDER THE AMWA

Rule 23 Class One Allegations

144. Plaintiffs also bring this case as a class action claim pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other similarly situated dancers within the State of Arkansas improperly classified by Defendant as independent contractors at any time within the applicable statute of limitations period for the purpose of obtaining relief under Arkansas law for unpaid wages and unpaid overtime wages under the AMWA. A.C.A. § 11-4-201, *et seq.*

145. The relevant time period for the Rule 23 Class One dates back five years from the date on which the Motion for Leave to File Plaintiffs' Third Amended and Substituted Complaint herein was filed and continues forward through the date of judgment pursuant to Ark. Code Ann. § 16-56-115.

146. The members of the proposed Class One are so numerous that joinder of all members is impracticable.

147. Plaintiffs are unable to state the exact number of the class but believe that the class exceeds 100 persons but is less than 400 persons.

148. Plaintiffs will fairly and adequately represent and protect the interests of the proposed Rule 23 Class One because there is no conflict between the claims of the Plaintiffs and those of the proposed Rule 23 Class One.

149. Plaintiffs' claims are typical of the claims of the proposed Rule 23 Class One members.

150. Plaintiffs' counsel are competent to litigate Rule 23 class actions and other complex litigation matters, including wage and hour cases like this one, and to the extent, if any, that they find that they are not, they are capable and willing to associate additional counsel.

151. Plaintiffs named in this case have consented to the association of additional counsel.

152. There are questions of law and fact common to the proposed Rule 23 Class One which predominate over any questions affecting only individual members of the proposed Rule 23 Class One.

153. The proposed Rule 23 Class One members have common questions of law and fact in that they are all exotic dancers that have been subject to uniform practices by Defendant which violated the AMWA, including:

a. Defendant's failure to compensate members of the class at the minimum wage rate required by the AMWA, at A.C.A. § 11-4-210 and/or § 11-4-212; and

b. Defendant's failure to pay members of the class overtime compensation in violation of the AMWA, A.C.A. § 11-4-211; and

c. Defendant's failure to make and keep records "for a period of not less than three (3) years in or about the premises wherein any employee is employed" in violation of the AMWA, A.C.A. § 11-4-217.

See Anderson v. Mt. Clemens Pottery Co., infra at 39, 328 U.S. 680, 687-88, 66 S.Ct. 1187 (1946) (in re record keeping provisions of the FLSA parallel to those

of the AMWA) (absence, inaccuracy, or inadequacy of employer's hour and wage records raises presumption in favor of plaintiff and her calculations).

154. Plaintiffs' claims are typical of the claims of the proposed Rule 23 Class One in the following ways:

a. Plaintiffs are members of the proposed Rule 23 Class One;

b. Plaintiffs' claims arise out the same policies, practices, and course of conduct that form the basis of the proposed Rule 23 Class One;

c. Plaintiffs' claims are based on the same legal and remedial theories as those of the proposed Rule 23 Class One and involve similar factual circumstances;

d. There are no conflicts between the interests of the named Plaintiffs and the Rule 23 Class One members; and

e. The injuries suffered by the named Plaintiffs and the Rule 23 Class One members are the same in kind and generally similar in extent.

155. Class certification is appropriate under FRCP 23(b)(3), because questions of law and fact common to the class predominate over any questions affecting only individual members of the proposed Rule 23 Class One.

156. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without duplication of effort and expense that numerous individual actions would entail.

157. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy

158. The proposed Rule 23 Class One is readily identifiable from Defendant's own employment and/or business records.

159. Prosecution of separate actions by individual members of the proposed classes would create the risk of inconsistent or varying adjudications with respect to individual members of the proposed Rule 23 Class One that would establish potentially incompatible standards of conduct for Defendant.

160. A Rule 23 class action is superior to other available methods for adjudication of this aspect of the controversy because joinder of all members is impracticable. Furthermore, the amounts at stake for many of the proposed Rule 23 Class One members, while potentially substantial, are not great enough to enable them to maintain separate suits against Defendant.

161. Without a Rule 23 class action, Defendant will likely retain the benefit of its wrongdoing and will continue an illegal course of action, which will result in further damages to Plaintiffs and the proposed Rule 23 Class One.

IX.

RULE 23 CLASS ACTION ALLEGATIONS UNDER COMMON LAW THEORIES OF UNJUST ENRICHMENT

Rule 23 Class Two Allegations

162. Plaintiffs also bring this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other similarly situated dancers who suffered unlawfully, to the unjust enrichment of Defendant.

163. The relevant time period for the Rule 23 Class Two dates back three years from the date on which the Original Complaint herein was filed and continues forward through the date of judgment pursuant to Ark. Code Ann. § 16-56-105 (3).

164. The members of the proposed Class Two are so numerous that joinder of all members is impracticable.

165. Plaintiffs are unable to state the exact number of the class but believe that the class exceeds 100 persons but is less than 300 persons.

166. Plaintiffs will fairly and adequately represent and protect the interests of the proposed Rule 23 Class Two because there is no conflict between the claims of the Plaintiffs and those of the proposed Rule 23 Class Two.

167. Plaintiffs' claims are typical of the claims of the proposed Rule 23 Class Two members.

168. Plaintiffs' counsel are competent to litigate Rule 23 class actions and other complex litigation matters, including wage and hour cases like this one, and to the extent, if any, that they find that they are not, they are capable and willing to associate additional counsel.

169. Plaintiffs have consented to the association of additional counsel.

170. There are questions of law and fact common to the proposed Rule 23 Class Two which predominate over any questions affecting only individual members of the proposed Rule 23 Class Two.

171. The proposed Rule 23 Class Two members have common questions of law and fact in that they are all exotic dancers that have been subject to uniform practices by Defendant which constituted unjust enrichment, including Defendant's unlawful exaction of tips and gratuities from Plaintiffs and the proposed class members.

172. Plaintiffs' claims are typical of the claims of the proposed Rule 23 Class Two in the following ways:

a. Plaintiffs are members of the proposed Rule 23 Class Two;

b. Plaintiffs' claims arise out the same policies, practices, and course of conduct that form the basis of the proposed Rule 23 Class Two;

c. Plaintiffs' claims are based on the same legal and remedial theories as those of the proposed Rule 23 Class Two and involve similar factual circumstances;

d. There are no conflicts between the interests of the named Plaintiffs and the Rule 23 Class Two members; and

e. The injuries suffered by the named Plaintiffs and the Rule 23 Class Two members are the same in kind and generally similar in extent.

173. Class certification is appropriate under FRCP 23(b)(3), because questions of law and fact common to the class predominate over any questions affecting only individual members of the proposed Rule 23 Class Two.

174. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without duplication of effort and expense that numerous individual actions would entail.

175. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy

176. The proposed Rule 23 Class Two is readily identifiable from Defendant's own employment and/or business records.

177. Prosecution of separate actions by individual members of the proposed class would create the risk of inconsistent or varying adjudications with respect to individual members of the proposed Rule 23 Class Two that would establish incompatible standards of conduct for Defendant.

178. A Rule 23 class action is superior to other available methods for adjudication of this aspect of the controversy because joinder of all members is impracticable. Furthermore, the amounts at stake for many of the proposed Rule

23 Class Two members, while potentially substantial, are not great enough to enable them to maintain separate suits against Defendant.

179. Without a Rule 23 class action, Defendant will likely retain the benefit of its wrongdoing and will continue an illegal course of action, which will result in further damages to Plaintiffs and the proposed Rule 23 Class Two.

X.

FIRST CAUSE OF ACTION

VIOLATION OF THE FLSA

(Failure to Pay Statutory Minimum Wages, Including Overtime Wages)

180. Plaintiffs hereby re-allege and incorporate by reference the preceding paragraphs as if they were set forth again herein.

181. Plaintiffs assert this claim for damages and declaratory relief pursuant to the FLSA, 29 U.S.C. § 201, *et seq.*

182. At all relevant times Defendant has been, and continues to be, an "employer" engaged in interstate "commerce" and/or in the production of "goods" for "commerce," within the meaning of the FLSA, 29 U.S.C. § 203.

183. At all relevant times Defendant has employed and/or continues to employ "employee[s]," including Plaintiffs and each of the prospective FLSA Collective Action Plaintiffs, who have been and/or continue to be engaged in interstate "commerce" and/or in the production of "goods" for "commerce," within the meaning of the FLSA, 29 U.S.C. § 203.

184. At all relevant times, Defendant has had annual gross operating revenues in excess of $500,000.00.

185. 29 U.S.C. § 206 requires that Defendant pay all employees minimum wages for all hours worked. 29 U.S.C. § 206(a) provides in pertinent part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> (1) Except as otherwise provided in this section, not less than--
>
> (A) $5.85 an hour, beginning on the 60th day after May 25, 2007;
>
> (B) $6.55 an hour, beginning 12 months after that 60th day; and
>
> (C) $7.25 an hour, beginning 24 months after that 60th day.

186. 29 U.S.C. §207(a) provides in pertinent part:

> ...no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged n commerce or in the production of goods for commerce for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

187. Defendant failed to pay Plaintiffs and the collective action class members the minimum wages set forth in 29 U.S.C. §§ 206 and 207—or any wages whatsoever.

188. In fact, Defendant required that Plaintiffs and others similarly situated actually pay Defendant in order to have the opportunity to work for Defendant.

189. Plaintiffs and those similarly situated did in fact pay Defendant for the opportunity to work for Defendant.

190. Defendant failed to pay Plaintiffs and all other members of the proposed class minimum wages throughout the relevant time period because it intentionally misclassified them as independent contractors.

191. The amounts paid to Plaintiffs and the proposed collective action class members by customers in relation to dances performed were tips, not wages paid by Defendant, and cannot be used to offset Defendant's obligation to pay collective class members' minimum wages.

192. The FLSA permits an employer to allocate an employee's tips to satisfy a portion of the statutory minimum wage requirement provided that the following two conditions are *both* satisfied: (1) the employer must inform the tipped employees of the provisions of 29 U.S.C. § 203(m); and (2) tipped employees must retain *all the tips* received, except those tips included in a tipping pool among employees who customarily receive tips. 29 U.S.C. § 203(m).

193. Neither condition was satisfied by Defendant in this case.

194. Defendant did not inform Plaintiffs or other members of the proposed collective class of the provisions of 29 U.S.C. § 203(m).

195. Plaintiffs and other collective action class members did not retain all the tips received excepting those tips included in a tipping pool among employees who customarily receive tips.

196. Defendant never notified Plaintiffs and other collective class members that their tips were being used to reduce the minimum wages otherwise due under FLSA's tip-credit provisions and that they were still due the reduced minimum wage for tipped employees.

197. Rather, Defendant always maintained that Plaintiffs and members of the proposed collective class were never due any minimum wages due to Defendant's intentional misclassification of Plaintiffs and collective action class members as independent contractors; and in turn, Defendant paid Plaintiffs and the proposed collective action class members no wages.

198. Further, Defendant's requirement that Plaintiffs and other collective class members split their tips and pay Defendant's and other employees of Defendant a percentage of all tips paid in relation to dances they performed was not part of a valid tip pooling or sharing arrangement.

199. The amounts Plaintiffs and other members of the collective class paid Defendant and other employees of Defendant were not shared with co-employees who customarily receive tips.

200. Rather, the amounts collected from Plaintiffs and other collective class members were retained by Defendant and/or paid to other employees of Defendant who do not customarily receive tips.

201. Based on the foregoing, Plaintiffs and all members of the proposed collective class are entitled to the full statutory minimum and overtime wages set forth in 29 U.S.C. §§ 206 and 207 for all periods in which they worked for Defendant.

202. Defendant's conduct in misclassifying Plaintiffs and other collective class members as independent contractors was willful and done to avoid paying them minimum and overtime wages and the other benefits that they were legally entitled to.

203. The FLSA provides that a private civil action may be brought for the payment of federal minimum and overtime wages and for an equal amount in liquidated damages in any court of competent jurisdiction by an employee on behalf of him/herself and other employees similarly situated pursuant to 29 U.S.C. § 216(b) ("Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.")

204. Moreover, Plaintiffs should recover attorneys' fees and costs incurred in enforcing their rights pursuant to 29 U.S.C. § 216(b).

205. Based on the foregoing, Plaintiffs seek on behalf of themselves, and all members of the collective class, unpaid minimum wages at the required legal rate for all of their working hours during the relevant time period, reimbursement of any house fees, explicitly required or implicitly required tip sharing with employees of Defendant, or with Defendant itself, and other levies or assessments or exactions by Defendant, liquidated damages, prejudgment interest, attorneys' fees and litigation costs and all other costs and penalties allowed by law.

XI.

SECOND CAUSE OF ACTION

VIOLATION OF THE FLSA

(Unlawful Collection of Tips/Gratuities by Defendant)

206. Plaintiffs hereby re-allege and incorporate by reference the preceding paragraphs as if they were set forth again herein.

207. The amounts paid to Plaintiffs and the other members of the proposed collective class by customers in relation to dances they performed were tips under the FLSA, not wages.

208. Defendant required Plaintiffs and other collective class members to share those tips with Defendant and other employees of Defendant.

209. Under the FLSA tipped employees are entitled to retain all the tips received from patrons except those tips included in a tipping pool among employees who customarily receive tips.

210. Defendant's requirement that Plaintiffs and other members of the proposed collective class split their tips with Defendant and with other employees of Defendant was not part of a valid tip pooling or sharing arrangement.

211. The amounts Plaintiffs and other class members paid to Defendant and other employees of Defendant were not shared with co-employees who customarily receive tips. Rather, the amounts were retained by Defendant and/or distributed to other employees of Defendant who do not customarily receive tips.

212. By reason of the foregoing Defendant violated the FLSA.

213. As a direct result of Defendant's unlawful conduct, Plaintiffs and all members of the proposed collective class have suffered injury, incurred damages and financial loss in an amount to be determined at trial.

214. In addition to other relief due, all tips which Plaintiffs and other collective class members split with Defendant and other employees of Defendant should be refunded to the Plaintiffs and the opt-in members of the collective class along with prejudgment interest.

215. Plaintiffs re-allege their entitlement to the damages they described herein above as house fees, explicitly required or implicitly required tip sharing with employees of Defendant, or with Defendant itself, and other levies or assessments or exactions by Defendant.

XII.

THIRD CAUSE OF ACTION

VIOLATION OF THE FLSA

(Failure to Maintain Records)

216. Plaintiffs hereby re-allege and incorporate by reference the preceding paragraphs as if they were set forth again herein, except to the extent the foregoing allegations are inconsistent with those set forth in this count.

217. 29 U.S.C. § 211(c) provided in pertinent part:

> (c) Records
>
> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such

> periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

218. 29 C.F.R. § 516.2 and 29 C.F.R. § 825.500 further require that every employer shall maintain and preserve payroll or other records containing, without limitation, the total hours worked by each employee each workday and total hours worked by each employee each workweek.

219. 29 U.S.C. § 215(a)(5) provides in pertinent part:

...[I]t shall be unlawful for any person –

(5) to violate any provision of section 211(c) of this title...

220. Defendant failed to maintain all records required by the aforementioned statutes and regulations, including those showing all hours Plaintiffs and other members of the collective class worked during the relevant time period.

221. As a result of the foregoing, Defendant has violated the FLSA.

222. Defendant's conduct was willful and not the result of mistake or inadvertence. It would be inequitable for Defendant to retain the benefits received as a result of its misconduct.

223. As a direct result of Defendant's unlawful conduct, Plaintiffs and all other members of the proposed collective class have suffered injury, incurred damages and financial loss.

224. When the employer fails to keep accurate records of the hours worked by its employees, the rule in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88, 66 S.Ct. 1187 (1946) is controlling. That rule states:

> ...where the employer's records are inaccurate or inadequate...an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

225. The Supreme Court set forth this test to avoid placing a premium on an employer's failure to keep proper records in conformity with its statutory duty, thereby allowing the employer to reap the benefits of the employees' labors without proper compensation as required by the FLSA. Where damages are awarded pursuant to this test, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with...the Act." Id.

226. Accordingly, Plaintiffs, on behalf of themselves and the members of the proposed collective action class, seek appropriate relief against Defendant including damages, restitution, estoppel from asserting the lack of employment records as a defense, penalties, liquidated damages, attorneys' fees and costs and all other relief just and appropriate in the circumstances.

XII.

FOURTH CAUSE OF ACTION

VIOLATION OF THE AMWA

(Failure to Pay the Arkansas State Statutory Minimum Wages and Overtime Premiums)

227. Plaintiffs hereby re-allege and incorporate by reference the preceding paragraphs as if they were set forth again herein.

228. The forgoing conduct, as alleged, violated the Arkansas Minimum Wage Act, as codified at A.C.A. § 11-4-201 *et seq*.

229. At all relevant times, Defendant has been, and continues to be, an "employer" within the meaning of A.C.A. § 11-4-203 (4).

230. At all relevant times, Plaintiffs and the Rule 23 Class One members have been and continue to be "employees" within the meaning of A.C.A. § 11-4-203 (3), without exemption or exception.

231. At all relevant times, Plaintiffs and the Rule 23 Class One members have not been and continue to not be "independent contractors" within the meaning of A.C.A. § 11-4-203 (6), to wit: Plaintiffs and the Rule 23 Class One members worked on the premises of Defendant; do not use their own techniques and methods to accomplish the work set before them by Defendant; and are subject to the control of Defendant not only in the result of their work, but in the method and manner thereof in every way.

232. As a result of Defendant's failure to pay, and decision to withhold wages earned and due to current and former employees in Rule 23 Class One

for all work performed at the regular hourly wage rate in weeks where Plaintiffs worked forty hours a week and for all work performed at the applicable overtime rate for hours worked beyond forty hours a week, Defendant has violated and continues to violate A.C.A. § 11-4-211.

233. As a result of Defendant's failure to record, report, credit, and furnish to each of its employee exotic dancers, including the members of the Rule 23 Class One, their respective wage and hour records showing all wages earned and due for all work performed, Defendant has violated and continues to violate A.C.A. § 11-4-211.

234. Plaintiffs therefore seek damages in the amount of the respective unpaid wages earned and due at the regular hourly wage rate, and at a rate not less than one and one-half times the regular rate of pay for work performed in excess of forty (40) hours in a work week, along with any other legal and equitable relief the Court deems just and proper.

235. Defendant's violations entitle Plaintiffs and the members of Rule 23 Class One to liquidated damages pursuant to A.C.A. § 11-4-218(a)(2) in the form of double the compensatory damages set forth in A.C.A. § 11-4-218(a)(1)(B)(i).

236. Plaintiffs are entitled to an award of attorneys' fees and court costs pursuant to A.C.A. § 11-4-218(a)(1)(B)(ii).

XIII.

FIFTH CAUSE OF ACTION

VIOLATION OF THE AMWA

(Failure to Maintain Records)

237. Plaintiffs hereby re-allege and incorporate by reference the preceding paragraphs as if they were set forth again herein, except to the extent the foregoing allegations are inconsistent with those set forth in this count.

238. Ark. Code Ann. § 11-4-217 provides in pertinent part:

> Every employer subject to any provision of this subchapter or of any regulation issued under this subchapter shall make and keep for a period of not less than three (3) years in or about the premises wherein any employee is employed, a record of the name, address, and occupation of each of his or her employees, the rate of pay, [and, inter alia] the amount paid each pay period to each employee . . . ."

239. The Administrative Regulations of the Labor Standards Division of the Arkansas Department of Labor further require that every employer shall maintain and preserve payroll or other records containing, without limitation, the total hours worked by each employee each workday and total hours worked by each employee each workweek. Admin. Reg. Labor Stand. Div. ARDOL 010.14-102(A)(1) (retrievable publicly at http://www.state.ar.us/labor//pdf/permanent_regs_minwage2007.pdf).

240. Defendant failed to maintain all records required by the aforementioned statutes and regulations for the club's exotic dancers, including those showing all hours Plaintiffs and other members of the Rule 23 Class One worked during the relevant time period.

241. As a result of the foregoing, Defendant has violated the AMWA.

242. Defendant's conduct was willful and not the result of mistake or inadvertence. It would be inequitable for Defendant to retain the benefits received as a result of its misconduct.

243. As a direct result of Defendant's unlawful conduct, Plaintiffs and all other members of Rule 23 Class One have suffered injury, damages and financial loss.

244. The Arkansas Department of Labor set forth the rule above to give incentive to every employer to keep proper records in conformity with the employer's statutory duty.

245. Without such a rule an employer would be permitted to reap the benefits of its employees' labors without proper compensation as required by the AMWA.

246. The Court should adopt the rule of Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88, 66 S.Ct. 1187 (1946) to Plaintiffs' AMWA records claims and find that Defendant's utter lack of wage and hour records for Plaintiffs raises a presumption in favor of Plaintiffs' weekly hours calculations and proof.

247. Accordingly, Plaintiffs, on behalf of themselves and the members of the proposed Rule 23 Class One, seek appropriate relief against Defendant including damages, restitution, estoppel from asserting the lack of employment records as a defense, penalties, liquidated damages, attorneys' fees and costs and all other relief just and appropriate in the circumstances. A. C. A. § 11-4-218.

XVI.

SIXTH CAUSE OF ACTION

UNJUST ENRICHMENT/QUANTUM MERUIT

(Rule 23 Class Two)

248. Plaintiffs hereby re-allege and incorporate by reference the preceding paragraphs as if they were set forth again herein.

249. By unlawfully demanding and retaining Plaintiffs' and members of the proposed Rule 23 Class Two members' gratuities and wages, Defendant obtained a substantial benefit and was unjustly enriched. Such conduct was detrimental to Plaintiffs and to the members of the proposed Rule 23 Class Two.

250. By unlawfully receiving value from Plaintiffs and the proposed class members' labor without providing compensation therefore, Defendant obtained substantial benefits and was unjustly enriched at the expense of Plaintiffs and the Rule 23 Class Two.

251. Defendant's conduct was willful and not the result of mistake or inadvertence.

252. It would be inequitable for Defendant to retain the benefits received.

253. As a direct result of Defendant's unlawful, unjust and inequitable conduct, Plaintiffs and all members of the proposed Rule 23 Class Two have suffered injury, incurred damages and financial loss in an amount to be determined at trial.

254. Accordingly, on behalf of themselves and the members of the proposed Rule 23 Class Two, Plaintiffs seek appropriate relief against Defendant

including damages, restitution, a refund of all tips paid to Defendant and other employees of Defendant, prejudgment interest, attorneys' fees and costs and all other relief that the Court deems just and appropriate.

XVII.

DEMAND FOR JURY TRIAL

255. Plaintiffs demand a trial by jury upon all issues herein.

XVIII.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiffs Crystal Hilborn, Eden Wheeler, Amber Basham, Kalie Brown, Amber Maxwell, Stacy Jones, Elexas Piety and Jennifer Clifton, each on behalf of themselves and for others similarly situated, respectfully pray that each Defendant be summoned to appear and answer herein; for orders regarding certification of and notice to the proposed collective class and the Rule 23 Class One and Class Two; for an order of this Honorable Court entering judgment in Plaintiffs' favor against Defendant; and that the Court award Plaintiffs and others sirnilarly situated their actual economic damages in an amount to be determined at trial, but in any event an amount not less than that which would compensate them for unpaid back wages, in addition to wages equal to the amount they were required to give Defendant and other employees as "dance fees" and "DJ fees" and "house" and/or "floor fees," any and all other diversions or exactions of gratuities, overtime wages that have not been paid, for accrued interest, for their liquidated damages for Defendant's willful violations of the FLSA, for liquidated damages without a showing of

willfulness under the AMWA, any and all civil penalties to which they may be entitled, for their attorneys' fees, costs, post-judgment interest, such other relief as provided by law and for such other and further relief as this Court deems necessary, just and proper.

Respectfully submitted,

CRYSTAL HILBORN, EDEN WHEELER, AMBER BASHAM, KALIE BROWN, AMBER MAXWELL, STACY JONES, ELEXAS PIETY and JENNIFER CLIFTON, Each Individually and on behalf of Others Similarly Situated, PLAINTIFFS

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CERTIFICATE OF SERVICE

I, Josh Sanford, do hereby certify that on the 29th day of August, 2011, a true and correct copy of the foregoing EIGHTH AMENDED AND SUBSTITUTED COMPLAINT was filed via the CM/ECF system and that the attorneys named below have consented to the electronic distribution of pleadings by the CM/ECF system:

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