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11 Attorney for Defendants,

12 **WESTERN CAB COMPANY,**

13 **LUCKY CAB COMPANY OF NEVADA,**

14 **ON DEMAND SEDAN SERVICES, LLC,**

15 **BLS LIMOUSINE SERVICES OF LAS VEGAS, INC.,**

16 **DESERT CAB, INC., and SUN CAB, INC.**

11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 THEODORE TRAPP, on his own behalf)

14 And on behalf of all others similarly)

15 situated,)

16 Plaintiff,

) Case No: 2:09-CV-00995

)

)

) **WESTERN CAB COMPANY,**

) **LUCKY CAB COMPANY OF NEVADA,**

) **ON DEMAND SEDAN SERVICES, LLC,**

) **BLS LIMOUSINE SERVICES OF LAS**

) **VEGAS, INC., DESERT CAB, INC., AND**

) **SUN CAB, INC.'S MOTION TO DISMISS**

) **PURSUANT TO FED. R. CIV. P. 9(b) AND**

) **12(b)(6) AND FED R. CIV. P. 12(b)(1)**

20 vs.)

)

)

21 **BIG POPPA'S, LLC, a Nevada limited**)

22 **Liability company d/b/a BADDABING**)

23 **MEN'S CLUB; SKY TOP VENDING,**)

24 **INC., a Nevada Corporation d/b/a CAN**)

25 **CAN ROOM; LA FUENTE, INC., a**)

26 **Nevada Corporation d/b/a CHEETAH'S;**)

27 **C.P. FOOD AND BEVERAGE, INC., a**)

28 **Nevada Corporation d/b/a CLUB**)

PARADISE; DÉJÀ VU SHOWGIRLS OF)

LAS VEGAS, LLC, a Nevada Limited)

Liability Company d/b/a DÉJÀ VU)

SHOWGIRLS; PALOMINO CLUB, INC.,)

1 A Nevada Corporation d/b/a PALOMINO)
2 CLUB; SHAC, LLC, a Nevada Limited)
3 Liability Company d/b/a SAPPHIRE;)
4 K-KEL, INC., a Nevada Corporation d/b/a)
5 SPEARMINT RHINO; D.2801)
6 WESTWOOD, INC., a Nevada Corporation)
7 d/b/a TREASURES; LITTLE DARLINGS)
8 OF LAS VEGAS, LLC, a Nevada Limited)
9 Liability Company d/b/a LITTLE)
10 DARLINGS; O.G. ELIADES, A.D., LLC,)
11 A Nevada Limited Liability Company d/b/a)
12 OLYMPIC GARDENS; LAS VEGAS)
13 ENTERTAINMENT, LLC, a Nevada)
14 Limited Liability Company d/b/a LARRY)
15 FLYNT'S HUSTLER CLUB; MICHAEL)
16 A SALTMAN d/b/a MINXX; RICK'S)
17 LAS VEGAS; FRIAS MANAGEMENT,)
18 LLC, a Nevada Limited Liability Company)
19 d/b/a ACE CAB COMPANY and)
20 A-NORTH LAS VEGAS CAB; WESTERN)
21 CAB COMPANY, a Nevada Corporation)
22 d/b/a WESTERN CAB COMPANY and)
23 WESTERN LIMOUSINE; NEVADA)
24 CHECKER CAB CORPORATION, a)
25 Nevada Corporation d/b/a CHECKER CAB)
26 COMPANY; NEVADA STAR CAB)
27 CORPORATION, a Nevada Corporation)
28 d/b/a STAR CAB COMPANY; NEVADA)
29 YELLOW CAB CORPORATION, a)
30 Nevada Corporation d/b/a YELLOW CAB)
31 COMPANY; LUCKY CAB COMPANY)
32 OF NEVADA, a Nevada Corporation d/b/a)
33 LUCKY TRANS; SUN CAB, INC., a)
34 Nevada Corporation d/b/a NELLIS CAB)
35 COMPANY; CLS NEVADA, LLC, a)
36 Nevada Limited Liability Company d/b/a)
37 CLS TRANSPORTATION LAS VEGAS;)
38 ON DEMAND SEDAN SERVICES, LLC,)
39 A Nevada Limited Liability Company d/b/a)
40 ODS LIMOUSINE and ODS)
41 CHAUFFEURED TRANSPORTATION;)
42 BLS LIMOUSINE SERVICE OF LAS)
43 VEGAS, INC., a Nevada Corporation d/b/a)
44 BLS LIMOUSINE SERVICE OF LAS)
45 VEGAS; DESERT CAB, INC., a Nevada)

1 Corporation d/b/a DESERT CAB)
 2 COMPANY and ODYSSEY)
 3 LIMOUSINE; BELL TRANS A NEVADA)
 4 CORPORATION, a Nevada Corporation)
 5 d/b/a BELL TRANS; TONY CHONG, an)
 6 individual; and DOE EMPLOYEES 1-1000;))
 7)
 8 Defendants.)
 9)

10 **DEFENDANTS, WESTERN CAB COMPANY, LUCKY CAB COMPANY OF NEVADA,**
 11 **ON DEMAND SEDAN SERVICES, LLC, BLS LIMOUSINE SERVICES OF LAS**
 12 **VEGAS, INC., DESERT CAB, INC., AND SUN CAB, INC.’S MOTION TO DISMISS**
 13 **PURSUANT TO FED. R. CIV. P. 9(b) AND)12(b)(6) AND FED R. CIV. P. 12(b)(1)**

14 Defendants, WESTERN CAB COMPANY, a Nevada corporation, dba WESTERN CAB
 15 COMPANY AND WESTERN LIMOUSINE, LUCKY CAB COMPANY OF NEVADA a
 16 Nevada corporation, dba LUCKY TRANS, SUN CAB, INC., A Nevada corporation, dba
 17 NELLIS CAB COMPANY, ON DEMAND SEDAN SERVICES, LLC, a Nevada limited
 18 liability company, dba ODS LIMOUSINE and ODS CHAUFFEURED TRANSPORTATION,
 19 BLS LIMOUSINE SERVICES OF LAS VEGAS, INC., a Nevada corporation, dba BLS
 20 LIMOUSINE SERVICE OF LAS VEGAS, and DESERT CAB, INC., a Nevada corporation dba
 21 DESERT CAB COMPANY AND ODYSSEY LIMOUSINE (collectively, the “Moving
 22 Defendant Cab/Limousine Companies”) by and through their counsel of record, JOHN T.
 23 MORAN, JR., ESQ., JEFFERY A. BENDAVID, ESQ. and JUSTIN W. SMERBER, ESQ. of the
 24 Moran Law Firm, LLC, moves this Court to Dismiss Plaintiff’s Complaint pursuant to Fed. R.
 25 Civ. P. 9(b) and 12(b)(6) and/or pursuant to Fed. R. Civ. P. 12(b)(1).

26 This Motion is made and based upon the Points and Authorities submitted herewith,
 27 together with the papers and pleadings on file herein, and oral arguments at the time of Hearing.
 28

1 Dated this 31st day of July, 2009.

2 **MORAN LAW FIRM, LLC**

3 **/s/JOHN T. MORAN, JR., ESQ.**

4 **JOHN T. MORAN, JR., ESQ.**

5 Nevada Bar No. 2271

6 **JEFFERY A. BENDAVID, ESQ.**

7 Nevada Bar No. 6220

8 **JUSTIN W. SMERBER, ESQ.**

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10 630 S. 4th Street

11 Las Vegas, Nevada 89101

12 (702) 384-8424

13 *Attorneys for Moving Defendant Cab/Limousine*
14 *Companies*

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 Plaintiff, Theodore Trapp (the “Plaintiff”), a resident of California, alleges that while
18 visiting Las Vegas, Nevada on January 17, 2009, he retained the services of an unknown taxicab
19 from the taxi-stand at Caesar’s Palace. *See Plaintiff’s Complaint at 15.* Plaintiff alleges that his
20 initial destination was the Gentlemen’s club, “Play It Again Sam.” *Id.* Upon informing the
21 unidentified cab driver of his intended destination, Plaintiff alleges that the unidentified cab
22 driver informed Plaintiff that this club was “kinda sketchy.” *Id.* The unknown cab driver then
23 allegedly informed Plaintiff that he would take him to a “better club.” *Id.* Plaintiff alleges that
24 the cab driver then proceeded, apparently without any refusal on the part of Plaintiff, to take him
25 to the Spearmint Rhino Gentlemen’s club. *See Id.* Upon Plaintiff’s arrival, Plaintiff alleges that
26 the unidentified cab driver received a tip from an employee of this club. *See Id.*

27 Based on these allegations alone, which constitute nothing more than a single cab ride of
28 less than three (3) miles from an unknown taxi, driven by an unidentified driver to one
Gentlemen’s club, Plaintiff filed a forty-one (41) page Complaint in the United States District

1 Court for Southern Nevada against nearly every Gentlemen’s club, cab, and limousine company
2 operating in Clark County, Nevada. *See Id. at 15.* Plaintiff and his attorneys are shockingly
3 seeking to certify a class of Plaintiffs consisting of “over 100,000,” members who took or more
4 amazingly, will take, a cab or limousine ride to a Las Vegas Gentlemen’s club as well as any
5 person who has, or will, frequent a Gentlemen’s Club in Clark County, Nevada. *See Id. at 16.*
6 Specifically, Plaintiff has asserted nine (9) individual claims against Defendants for supposed
7 violations of the Nevada RICO statute, NRS 207.400, and for alleged violations of Nevada’s
8 Consumer Fraud statute, NRS 41.600, all as a result of this single taxi ride taken by Plaintiff.
9 *See Id. at 27-37.*

10
11 On its face, Plaintiff’s Complaint completely fails under existing law since it is
12 impossible for Plaintiff to transform allegations of taking a single cab ride from a unknown cab
13 company, driven by an unidentified driver, to one specific Gentlemen’s club, into a class of
14 Plaintiffs consisting of every person that took a cab to a Gentlemen’s club and a Complaint
15 seeking damages from nearly every cab and limousine company and nearly every Gentlemen’s
16 club operating in Clark County. As the Court will see below, Plaintiff’s Complaint fails on its
17 face and must be dismissed pursuant to Fed. R. Civ. P. 9(b), 12(b)(1), and/or 12(b)(6) since:
18
19

- 20 1. Plaintiff’s claims for alleged violations of Nevada’s RICO statute are not plead with
21 the particularity required by law and otherwise lacks the necessary standing to assert
22 such claims against Defendants, either individually or on behalf of a class;
- 23 2. Plaintiff has failed to plead his Complaint with the particularity required for claims
24 involving protected speech;
- 25 3. Plaintiff has failed to plead his claims for alleged violations of NRS 41.600 (i.e.,
26 Consumer Fraud) with the necessary particularity required by law and otherwise lacks
27 the necessary standing to assert such claims against Defendants, either individually or
28 on behalf of a class;

- 1 4. Plaintiff has failed to plead his claims for alleged violations of NRS 41.600 (i.e.,
2 Consumer Fraud) with the necessary particularity required by law and otherwise lacks
3 the necessary standing to assert such claims against Defendants, either individually or
4 on behalf of a class, since Plaintiff has failed to provide any allegations or otherwise
5 assert that he is a victim or he was harmed because of the alleged deceptive trade
6 practices performed by an unidentified cab driver of an unknown taxicab company;
- 7 5. Plaintiff's claims for alleged violations of Nevada's RICO statute is not pled with the
8 necessary particularity required by law and otherwise lacks the necessary standing to
9 assert such claims against Defendants, either individually or on behalf of a class,
10 since Plaintiff has failed to identify two (2) not isolated substantive, predicate acts;
- 11 6. The United States District Court for Southern Nevada lacks the appropriate subject
12 matter jurisdiction to hear Plaintiff's Complaint since Plaintiff's allegations are not
13 sufficient to satisfy the \$5,000,000 requirement for an amount in controversy
14 prescribed by the Class Action Fairness Act;
- 15 7. The United States District Court for Southern Nevada lacks the appropriate subject
16 matter jurisdiction to hear Plaintiff's Complaint since Plaintiff is unable to certify his
17 proposed class; and
- 18 8. Plaintiff's proposed class is unmanageable since membership in Plaintiff's proposed
19 class is contingent upon each prospective member's state of mind.

20 As a result, Plaintiff's Complaint must be dismissed as a matter of law.

21 **II. FACTS ALLEGED IN PLAINTIFF'S COMPLAINT**

22 On January 17, 2009, Plaintiff, Theodore Trapp visited the City of Las Vegas. *See Id.* at
23 15. Plaintiff alleges that he entered an unknown taxicab and requested to be taken to "Play It
24 Again Sam," however, he alleges that he was diverted to another destination by the unidentified
25 cab driver¹. *See Id.* Plaintiff alleges that the cab driver intentionally made false representations
26 to the Plaintiff regarding his chosen destination in order to divert Plaintiff to another destination

27 ¹ Plaintiff's Complaint never identifies the identity of the cab driver or the name of the cab company that allegedly
28 picked him up on January 17, 2009. *See Plaintiff's Complaint at 15-16.*

1 that would pay the cab driver a “kickback.” *See Id.* Specifically, Plaintiff’s Complaint alleges as
2 follows:

3 On or about January 17, 2009, Plaintiff Theodore Trapp visited the City of Las
4 Vegas. On or around that date, Plaintiff boarded a taxi cab at Caesar’s Palace.
5 Upon entering the vehicle, Plaintiff told the driver his intended destination was
6 Play it Again Sam, located at 4120 Spring Mountain Rd. Las Vegas, NV 89102.
7 Plaintiff was discouraged from traveling to his chosen destination, and was misled
8 into believing that his chosen destination was somehow undesirable. Specifically,
9 the driver told him, inter alia:

- 10 a. “There are better clubs than Play it Again Sam;”
- 11 b. “There are better clubs;”
- 12 c. “There girls are better at other clubs;”
- 13 d. “Play it Again Sam is kinda (sic) sketchy;” and
- 14 e. “I’ll take you to a better club.” *Id. at 15.*

15 Plaintiff’s Complaint does not provide any information with regards to the cab driver or
16 cab company that allegedly transported him on January 17, 2009. *See Id.* Plaintiff does not
17 provide the name of the cab driver. *See Id.* Plaintiff does not provide the name of the cab
18 company, for which the cab driver allegedly worked. *See Id.* Plaintiff does not identify the cab
19 number of the cab that allegedly transported him. *See Id.* In fact, Plaintiff does not identify the
20 cab or cab driver alleged in his complaint in any fashion. *See Id.* In fact, Plaintiff’s entire
21 Complaint is based upon this single trip that allegedly occurred in (1) one cab on January 17,
22 2009. *See generally, Plaintiff’s Complaint.*

23 With regards to the “Driver Defendants” named in Plaintiff’s Complaint, Plaintiff alleges
24 that their actions are illegal and constitute an unlawful taking from another under circumstances
25 not amounting to robbery under NRS § 205.380. *See Id. at 23.* Specifically, Plaintiff alleges that
26 the “Driver Defendants” actions, through false pretense, knowingly and designedly, and with
27 the intent to cheat or defraud the customer, obtained additional cab fare from their customers,
28 and knowingly and designedly diverted their customers to clubs that would charge their

1 customers a higher admission fee that would then be paid back to the Driver in the form of a
2 kickback. *See Id.* at 23. This alleged violation of NRS § 205.380 serves as the predicate act of
3 the “Driver Defendants” for purposes of Plaintiff’s R.I.C.O. claims. *See Id.* at 23-24.

4 On June 3, 2009, Plaintiff filed a Class Action Complaint based upon the actions
5 referenced above. *See generally, Plaintiff’s Complaint.* Plaintiff’s Complaint seeks certification
6 of a class under Rule 23(b)(2), which Plaintiff intends to be defined as follows:
7

8 All persons who have or will travel to Defendant’s Clubs via Defendant’s Drivers,
9 or otherwise has attended such Defendant’s Clubs in the past or will attend such
10 Defendant’s Clubs in the future. *Id.* at 16.

11 As stated, this “proposed class” includes any person who has, or will attend a named
12 Defendant’s nightclub, regardless of whether they traveled by way of a named Defendant’s
13 taxicab. *See Id.* The Moving Defendant Cab/Limousine Companies now seek to have this
14 Honorable Court Dismiss Plaintiff’s Complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6)
15 and/or Fed. R. Civ. P. 12(b)(1). It is clear that Plaintiff’s Complaint fails to state a claim upon
16 which relief can be granted, and further, Plaintiff’s Complaint does not satisfy the requirements
17 of the Class Action Fairness Act, thus depriving this Honorable Court of original jurisdiction.
18 Accordingly, dismissal of Plaintiff’s Complaint is appropriate.
19

20 **III. STANDARD FOR DISMISSAL**

21 Pursuant to Fed. R. Civ. P. 12(b)(6), a Court may dismiss a Complaint for failure to state
22 a claim upon which relief may be granted. The purpose of a motion to dismiss under Fed. R. Civ.
23 P. 12(b)(6) is to test the legal sufficiency of the Complaint. *See North Star Int’l v. Ariz. Corp.*
24 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). In ruling on a Fed. R. Civ. P. 12(b)(6) motion, the
25 Court must examine the Complaint to determine whether it contains sufficient factual allegations
26 “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
27
28

1 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). In examining the Complaint, "conclusory
2 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss."
3 Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001)². The Court may dismiss a Complaint for "(1)
4 lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." Henkle
5 v. Gregory, 150 F. Supp. 2d 1067, 1071 (D. Nev. 2001)³.

6
7 Fed. R. Civ. P. 12(b)(1) provides for the dismissal of an action if a United States District
8 Court lacks jurisdiction over the subject matter of the action. Since a United States District
9 Court is a court of limited subject matter jurisdiction, "the preferred -- and often the obligatory --
10 practice is that a court, when confronted with a colorable challenge to its subject-matter
11 jurisdiction, should resolve that question before weighing the merits of a pending action."
12 Morales Feliciano v. Rullan, 303 F.3d 1, 6 (1st Cir. 2002)⁴.

13 14 **IV. LEGAL ARGUMENT**

15 **A. Plaintiff's Complaint Must Be Dismissed Since Plaintiff Failed to Plead His** 16 **Complaint With the Required Particularity Prescribed by Fed. R. Civ. P. 9(b).**

17 Pursuant to Fed. R. Civ. P. 9(b), a party is required to plead certain matters with
18 particularity. Both Federal and Nevada Courts have determined that the special pleading
19 requirements prescribed by Fed. R. Civ. P. 9(b) applies to claims alleged for fraud, civil RICO,
20 and for claims involving protected speech⁵. Generally, this "particularity" requirement is met by
21 asserting allegations that provide for "the who, what, when, where, and how" of the misconduct
22 charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2002).

23
24
25 _____
26 ² Citing, Assoc. General Contractors v. Met. Water Dist., 159 F.3d 1178, 1181 (9th Cir. 1998).

27 ³ Quoting, Smilecare Dental Group v. Delta Dental Plan, 88 F.3d 780, 783 (9th Cir. 1996), quoting, Robertson v.
28 Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

⁴ See also, Donahue v. City of Boston, 304 F.3d 110, 117 (1st Cir. 2002).

⁵ See Flowers v. Carville, 310 F.3d 1118, 1130 (9th Cir. 2002); North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d
578, 581 (9th Cir. 1983); and Hale v. Burkhardt, 104 Nev. 632, 637 (Nev. 1988).

1 As provided below, Plaintiff's Complaint must be dismissed since Plaintiff failed to plead
2 his claims with the required particularity prescribed by Fed. R. Civ. P. 9(b). *See infra*.

3 **1. Plaintiff's Complaint Must Be Dismissed as a Matter of Law Since Plaintiff**
4 **Failed to Assert His Civil RICO Claims with the Sufficient Particularity.**

5 As discussed above, Counts IV, VI and VII of Plaintiff's Complaint are directed at the
6 "Defendant Drivers" and specifically allege Civil R.I.C.O violations predicated under N.R.S. §
7 205.380. The elements of a violation of N.R.S. § 205.380 are as follows: (1) intent to defraud;
8 (2) a false representation; (3) reliance on the false representation; and (4) that the victim be
9 defrauded. *See Hale*, 104 Nev. at 639. As such, a violation of N.R.S. § 205.380 involves
10 elements of fraud and therefore requires Plaintiff to plead such claims with the appropriate
11 particularity⁶. *See Id.*

12
13 In the *Hale v. Burkhardt* case, the Nevada Supreme Court dismissed a Plaintiff's
14 Complaint that was founded upon Nevada's R.I.C.O. statute, because the Complaint failed to
15 state "when, where or how" the allegedly false representations were made to the Plaintiff. *See*
16 *Hale*, 104 Nev. at 637. It has been held that the identity of the alleged Defendant is a crucial
17 element to any such tort claim. *Siragusa v. Brown*, 114 Nev. 1384, 1393 (Nev. 1998).

18
19 In the present matter, Plaintiff has alleged three (3) counts of R.I.C.O. violations against
20 the Moving Defendant Cab Companies. *See Plaintiff's Complaint at 30, 33, and 36*. However,
21 Plaintiff's Complaint does not plead these alleged violations with particularity as required. *See*
22 *Id.* Specifically, Plaintiff has failed to provide the most basic element required for such claims –
23 the "Who." In fact, Plaintiff has failed to make any allegations with regards to any of the named
24 Moving Defendant Cab/Limousine Companies or even to identify the cab company or cab driver
25
26

27 ⁶ Like Nevada, Federal Courts have also demanded that a plaintiff plead any claims involving civil R.I.C.O. with the
28 required particularity. *See e.g., Bache Halsey Stuart Shields v. Tracy Collins Bank*, 558 F.Supp.1042 (C.D. Utah
1983).

1 that allegedly took his fare on January 17, 2009. *See Id.* at 15. Rather than provide the identities
2 of these parties, Plaintiff instead named twelve (12) different cab and limousine companies in his
3 Complaint in the hope of diverting the Court’s attention away from this glaring absence. *See Id.*
4 *at 1.*

5 Plaintiff’s failure to identify these parties critically wounds Plaintiff’s claims for civil
6 RICO since he must provide this element of “Who” in order to meet the heightened pleading
7 requirements that accompany such claims. *See Fed. R. Civ. P. 9(b).* Since Plaintiff failed to
8 identify these parties, Plaintiff’s Complaint must be dismissed as a matter of law.

9
10 In addition to Plaintiff’s failure to identify the required parties involved, Plaintiff’s
11 Complaint must also be dismissed since Plaintiff also has failed to plead his claims for civil
12 RICO in a manner that provides the “what” and “how” elements required for a suitable
13 Complaint pled with particularity. In *Kahre v. Damm*, 2007 U.S. Dist. LEXIS 95978 (D. Nev.
14 Dec. 18, 2007), this Court dismissed five (5) Defendants from a RICO suit based upon Plaintiff’s
15 failure to properly plead claims against these Defendants. *See Id.* In dismissing these
16 defendants, the Court noted that there were no allegations specifically linking these defendants to
17 the alleged wrongful activities in the Plaintiff’s Complaint. *See Id.* This Court ruled:

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20 Clearly, in failing to even mention five of the individually-named State
21 Defendants, let alone setting forth a plain statement that would provide a person
22 with notice of the charges, Plaintiff falls well short of his pleading burden
23 required by Nevada RICO.

24 Based upon the Plaintiff’s failure to properly plead specific allegations against these Defendants,
25 this Court dismissed Plaintiff’s RICO claims pursuant to Fed. R. Civ. P. 12(b)(6). *See Id.*

26 Here, Plaintiff has not provided any allegations to explain how each of the individual
27 Moving Defendant Cab/Limousine Companies violated N.R.S. § 205.380 or R.I.C.O as to
28 Plaintiff. *See Plaintiff’s Complaint at 19-31.* In fact, Plaintiff’s “General Allegations” are so

1 vague and ambiguous, they fail to meet the general burden of raising a right to relief above the
2 speculative level. *See Bell Atl. Corp.*, 550 U.S. at 544. As was determined in *Kahre*, Plaintiff's
3 Complaint does not even mention the individually named Moving Defendant Cab/Limousine
4 Companies, let alone set forth a plain statement that would provide a person with notice of the
5 charges. *See Id.*

6
7 Further, based upon the allegations in Plaintiff's Complaint, it would be impossible for
8 Plaintiff to allege that each of the individual Moving Defendant Cab/Limousine Companies
9 violated N.R.S. § 205.380 or RICO. Again, Plaintiff's Complaint is based upon a single trip that
10 occurred on January 17, 2009. *See Plaintiff's Complaint at 15.* It is impossible for each or all of
11 the Moving Defendant Cab/Limousine Companies to have violated N.R.S. § 205.380 and
12 R.I.C.O. on this single trip. At a maximum, only one cab company could have violated N.R.S. §
13 205.380 and R.I.C.O. on this single trip. However, due to Plaintiff's failure to plead with
14 particularity; the Moving Defendant Cab/Limousine Companies are left with no idea what cab
15 company is being identified in Plaintiff's Complaint. Plaintiff will undoubtedly contend that the
16 Discovery process will reveal or sort through which Defendant cab or limousine company he
17 rode in on January 17, 2009. However, such contentions are not permitted in cases requiring
18 heightened pleading such as this one. *See supra.* Also, Plaintiff cannot allege that all Moving
19 Defendant Cab/Limousine Companies are liable while later contending that he was simply trying
20 to identify the correct Defendant Cab/Limousine company. *See Id.*

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24 As a result of Plaintiff's failure to plead with particularity, the Moving Defendant
25 Cab/Limousine Companies are left in a position which is impossible to defend against. Plaintiff
26 cannot simply allege that all the Moving Defendant Cab/Limousine Companies have violated
27 R.I.C.O. based upon the single action of an unknown cab driver. Further, the Moving Defendant
28

1 Cab/Limousine Companies have no ability to identify or defend against the alleged wrongful
2 actions; as Plaintiff has failed to make a single specific allegation against any of the Moving
3 Defendant Cab/Limousine Companies⁷. Plaintiff has not pled his Complaint sufficiently to assert
4 theories of liability against any or all of the Moving Defendant Cab/Limousine Companies,
5 because his Complaint is based upon a single cab ride in a cab that has not been identified. Even
6 if Plaintiff were able to identify this single cab company, this would still leave no basis for
7 Plaintiff to recover from all of the named Defendants. Consequently, Counts IV, VI and VII of
8 Plaintiff's Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a
9 claim upon which relief may be granted.
10

11 **2. Plaintiff's Complaint Must Be Dismissed, Because the Alleged Violations of Civil**
12 **RICO Are Based Upon Protected Speech, Which Requires Plaintiff to Plead**
13 **With His Claims With the Required Particularity.**

14 Counts I through IV of Plaintiff's Complaint are based upon the Defendant's "knowingly
15 making false representations" regarding certain adult nightclubs. *See* Plaintiff's Complaint
16 generally. Every single claim asserted by Plaintiff is founded upon these alleged
17 "misrepresentations." *See Id.* However, these alleged misrepresentations regarding the quality of
18 various adult nightclubs are opinions, which are subject to protection under the First Amendment
19 of the United States Constitution. Accordingly, Plaintiff is required to plead his Complaint with
20 particularity, due to the fact that his claims are based upon protected speech.
21

22 The Ninth Circuit has repeatedly held that where a plaintiff seeks damages for conduct
23 which is prima facie protected by the First Amendment, the danger that the mere pendency of the
24 action will chill the exercise of First Amendment rights requires more specific allegations than
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26
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⁷ A review of Plaintiff's Complaint will reveal that Plaintiff has not identified one single action specifically undertaken by any one of the Moving Defendant Cab/Limousine Companies. *See generally, Plaintiff's Complaint.*

1 would otherwise be required. See *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002)⁸. In
2 examining whether any statement constitutes constitutionally protected opinion, the Ninth
3 Circuit examines first whether a reasonable fact finder could conclude that the contested
4 statement implies an assertion of objective fact. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th
5 Cir. 1995). In making this analysis, the Court must examine the totality of the circumstances in
6 which the statement was made, engaging in a three-part inquiry: (1) whether the general tenor of
7 the entire work negates the impression that the defendant was asserting an objective fact; (2)
8 whether the defendant used figurative or hyperbolic language that negates that impression; and
9 (3) whether the statement in question is susceptible of being proved true or false⁹. *Partington*, 56
10 F.3d at 1153¹⁰.

11
12
13 In the present matter, an application of the factors set forth in *Partington* clearly
14 demonstrates that the alleged statements made by the unknown cab driver are protected speech
15 under the First Amendment. Recall, Plaintiff alleges that the unknown cab driver made the
16 following statements:

- 17 a. “There are better clubs than Play it Again Sam;”
- 18 b. “There are better clubs;”
- 19 c. “There girls are better at other clubs;”
- 20 d. “Play it Again Sam is kinda (sic) sketchy;” and
- 21 e. “I’ll take you to a better club.” *Plaintiff’s Complaint p. 15*.

22 First, the general tenor of these statements negates the impression that the unknown cab
23 driver was asserting an objective fact. See *Id.* Each of the foregoing statements is extremely
24 subjective and could in no possible way be proven in an objective manner. Second, the quality of

25 ⁸ Citing *Franchise Realty Interstate Corp. v. S.F. Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076,
1082-83 (9th Cir. 1976).

26 ⁹ See also, *See also Lieberman v. Fieger*, 338 F.3d 1076, 1079 (9th Cir. 2003); and *Unelko Corp. v. Rooney*, 912
27 F.2d 1049, 1053 (9th Cir. 1990).

28 ¹⁰ While the *Parrington* Court was addressing the applicability of First Amendment protection to defamatory
statements regarding quality of an attorney’s performance, the Court’s analysis is equally applicable to the present
matter wherein the Plaintiff’s claims are founded upon statements regarding the quality of certain adult nightclubs.

1 two (2) different “girls” is not susceptible of being proven true or false. The mere assertion that
2 one could quantify the quality of a person is repugnant. Further, the description of an
3 establishment as “sketchy” is clearly use of figurative and/or hyperbolic language. Obviously,
4 the foregoing statements are opinions and subject to protection under the First Amendment of the
5 United States Constitution.

6
7 As a result of the alleged statements being subject to protection under the First
8 Amendment of the United States Constitution, Plaintiff is again required to plead his claims with
9 particularity. *Flowers*, 310 F.3d at 1130. Again, Plaintiff has failed to provide these essential
10 details in his Complaint, including the identity of the cab driver with whom he allegedly had
11 contact. *See Plaintiff’s Complaint at 15*. In fact, Plaintiff fails to make a single fact specific
12 allegation with regards to any of the Moving Defendant Cab/Limousine Companies. *See Id.*

13
14 Further, it would be impossible for Plaintiff to make fact specific allegations with regards
15 to all of the Moving Defendant Cab/Limousine Companies, because his entire Complaint is
16 based upon one (1) single encounter. *See Id.* at 15. In order to recover against each Moving
17 Defendant Cab/Limousine Companies, Plaintiff is required to specifically allege how each
18 Moving Defendant Cab/Limousine Companies violated Civil R.I.C.O. and/or Nevada’s
19 Deceptive Trade Practices Act. *Kahre v. Damm*, 2007 U.S. Dist. LEXIS 95978 (D. Nev. Dec.
20 18, 2007). However, Plaintiff’s Complaint contains no such particular allegations, and cannot
21 ever contain such allegations based upon the single cab ride alleged, and must be dismissed
22 accordingly for failure to state a claim upon which relief can be granted.
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1 **B. Plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. P. 9(b) and**
2 **12(b)(6), because Plaintiff Has Failed to Identify the Actual Parties Involved and**
3 **Does Not Assert Any Allegations as to How Plaintiff Was a Victim or Otherwise was**
4 **Harmed by Defendants .**

5 Count IX of Plaintiff's Complaint is based on the Nevada Deceptive Trade Practices Act.
6 *See Plaintiff's Complaint at 37-41.* Specifically, Plaintiff has relied solely on the provisions of
7 N.R.S. § 41.600, N.R.S. § 598.0915, N.R.S. § 598.0923, N.R.S § 706.8846 and N.A.C. §
8 706.552 to allege that Defendant Drivers have committed "Consumer Fraud" by diverting
9 passengers to destinations other than those directed by their passengers. *See Id.* With misguided
10 confidence that the allegation that Moving Defendant Cab/Limousine Companies' actions violate
11 the provisions of the above-referenced statutes, Plaintiff, as an individual and on behalf of an
12 alleged class, asserted causes of action against the Moving Defendant Cab/Limousine Companies
13 for "Deceptive Trade Practices." *See Id.*

14 As already discussed previously, any claims for fraud or based in fraud must be pled with
15 the necessary particularity required by Fed. R. Civ. P. 9(b). *See supra at 9-11.* Plaintiff once
16 again fails to meet this heightened pleading standard since Plaintiff has failed to identify the
17 parties involved in these alleged deceptive trade practices. *See Id.* *See also, Plaintiff's*
18 *Complaint at 15.* Once again, this absence of "the Who" element necessary to meet any
19 heightened pleading standard prescribed by Fed. R. Civ. P. 9(b), is absent from Plaintiff's claim,
20 which in this instance is a claim for Consumer Fraud. *See Id. at 37-40.* As such, Plaintiff's
21 claim for Consumer Fraud must be dismissed as a matter of law.
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24 Further, the issue of what constitutes a deceptive trade practice in Nevada and whether or
25 not the Moving Defendant Cab/Limousine Companies' alleged actions fall within the definition
26 of a deceptive trade practice is irrelevant at this time. This is due to the unequivocal fact that
27 Plaintiff does not properly alleged to be a victim of these deceptive trade practices, nor does
28

1 Plaintiff allege an injury resulting from these alleged deceptive trade practices. *See Plaintiff's*
2 *Complaint at 37-41.*

3 In Nevada, the right to bring an action for consumer fraud in the manner asserted by
4 Plaintiff (i.e. Deceptive Trade Practices) is only available to actual victims of the alleged
5 consumer fraud. *See* N.R.S. § 41.600. N.R.S. § 41.600 states in part:

- 6 1. An action may be brought by any person who is a victim of
7 consumer fraud.
- 8 2. As used in this section, “consumer fraud” means:
 - 9 (a) An unlawful act as defined in NRS 119.330;
 - 10 (b) An unlawful act as defined in NRS 205.2747;
 - 11 (c) An act prohibited by NRS 482.36655 to 482.36667, inclusive;
 - 12 (d) An act prohibited by NRS 482.351; or
 - 13 (e) A deceptive trade practice as defined in NRS 598.0915 to
14 598.0925, inclusive. (*Emphasis Added*).

15 Accordingly, N.R.S. § 41.600 clearly requires a Plaintiff to be a victim of fraud before
16 they may recover for the defendant’s alleged violations of the statute¹¹. As such, N.R.S. § 41.600
17 requires Plaintiff, at the very least, to establish that he was harmed in some way by the Moving
18 Defendant Cab/Limousine Companies’ alleged use of deceptive trade practices. *See NRS*
19 *41.600*. For purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a Plaintiff must
20 plead sufficient factual allegations of this injury and his victim status "to raise a right to relief
21 above the speculative level." *Bell Atl. Corp.*, 550 U.S. at 544.

22 In this matter, Plaintiff has failed to assert any allegations in his Complaint to meet the
23 definition of a “victim.” *See generally, Plaintiff's Complaint*. The primary reason for Plaintiff’s
24 failure is that Plaintiff does not actually provide any factual allegations regarding Plaintiff’s
25 involvement with the actual Moving Defendant Cab/Limousine Companies. *See Id.* Instead,

26 ¹¹ Unfortunately, neither the Nevada Revised Statutes nor Nevada common law provides a precise definition of what
27 constitutes a “victim” of consumer fraud as identified in *NRS 41.600*. However, Black’s Law Dictionary generally
28 defines a “victim” as, “a person harmed by a crime, tort, or other wrong.” *Black’s Law Dictionary at p. 749*
(*Second Pocket Edition*). (*Emphasis Added*).

1 Plaintiff's Complaint contains an exhaustive discourse as to how Defendants' alleged actions are
2 supposedly "deceptive trade practices" under Nevada law. *See Id.* However, this collection of
3 citations does nothing more than camouflage the fact that Plaintiff has not alleged any facts
4 whatsoever that link the Moving Defendant Cab/Limousine Companies to the Plaintiff. *See Id.*
5 As noted repeatedly above, Plaintiff's entire Complaint is based upon a single cab ride occurring
6 on January 17, 2009; however, Plaintiff fails to identify the name of the cab driver or cab
7 company. *See Id.* at 15.

9 In addition to the fact that Plaintiff fails to establish any relationship between the specific
10 Moving Defendant Cab/Limousine Companies and any alleged deceptive trade practices,
11 Plaintiff also completely fails to allege any injury resulting from these alleged deceptive trade
12 practices. Plaintiff alleges that the unknown driver made false representations to Plaintiff for
13 purposes of: (1) obtaining a "significant kickback for diverting Plaintiff," which included an
14 inflated admission charge paid by Plaintiff; and (2) receiving a larger tip from the Plaintiff. *See*
15 *Id.* at 15-16 and at 23-24. Unfortunately, Plaintiff fails to allege that he did in fact pay the
16 Defendant Driver a "larger tip" for taking the Plaintiff to an alternative destination. *See Id.*
17 Further, Plaintiff provides no allegations to substantiate his assertion that he paid an "inflated"
18 admission charge into the subject club. *See Id.* As stated above, unwarranted inferences are
19 insufficient to defeat a motion to dismiss. *See Ove*, 264 F.3d at 821.

22 In reviewing Plaintiff's Complaint for purposes of a Fed. R. Civ. P. 12(b)(6) analysis, a
23 Court may dismiss the Complaint for Plaintiff's failure to plead sufficient facts under a
24 cognizable legal claim *See Henkle*, 150 F. Supp. 2d at 1071¹². First, Plaintiff cannot establish a
25 factual basis for Civil R.I.C.O. and/or Deceptive Trade Practices against all of the Moving
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28 ¹² *See also, Smilecare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996); and *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

1 Defendant Cab/Limousine Companies based upon a single cab ride. Second, it is not enough for
2 Plaintiff to allege that all the Moving Defendant Cab/Limousine Companies have harmed
3 Plaintiff because one unknown cab driver allegedly made misrepresentations and omissions to
4 Plaintiff for the purpose of inducing Plaintiff to do something. To the contrary, Plaintiff must
5 allege that he was induced, that he acted based upon that inducement, and that Plaintiff was
6 harmed. *See Hale*, 104 Nev. at 639. Here, Plaintiff does not allege to have paid a higher cab fare,
7 larger tip or inflated entry fee to the subject club. *See generally, Plaintiff's Complaint*. In fact,
8 Plaintiff does not even allege to have paid an entry fee to the subject club, rather he states that
9 "on information and belief" the Defendant Driver would receive "approximately \$100, which
10 sum included the admission charge that Defendant SPEARMINT RHINO would collect from the
11 Plaintiff." *See Id.* at p. 16. Allegations of what "would" happen will not suffice for purposes of
12 asserting a consumer fraud claim under the Nevada Deceptive Trade Practices Act. *See Hale*,
13 104 Nev. at 639.

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16 Further, Plaintiff clearly does not have standing to allege an injury, or a right to collect
17 damages, against all the Moving Defendant Cab/Limousine Companies based upon his single
18 interaction with one cab company. Even if Plaintiff was able to establish a case against the
19 single unknown cab company referenced in his Complaint, this still does not provide Plaintiff
20 with standing to sue all of the Moving Defendant Cab/Limousine Companies. Plaintiff cannot
21 simply allege that he has been damaged by all cab company's actions based upon his interaction
22 with a single driver. This would be the equivalent of a plaintiff suing all tire manufacturers
23 because he had a single defective tire on his vehicle. Further, Plaintiff cannot allege that he is
24 similarly situated to all persons who have traveled by way of any of the Moving Defendant's
25 cabs based upon his single cab ride. Plaintiff simply has no standing to allege that he has been
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1 injured, or sustained damages, by the actions of every Moving Defendant Cab/Limousine
2 Company, because he has not alleged how they have specifically injured him or caused him
3 damage.

4 As a result of Plaintiff's failure to plead his Complaint with particularity, Plaintiff has
5 failed to satisfy the requirements of N.R.S. § 41.600. Most specifically, Plaintiff has failed to
6 allege how he was a victim, and how each of the moving Defendant Cab/Limousine Company's
7 actions caused him to be a victim who was harmed. Accordingly, Plaintiff's claims against the
8 Moving Defendant Cab/Limousine Companies under Nevada's Deceptive Trade Practices Act
9 must be dismissed.
10

11 **C. Plaintiff's Complaint Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6),**
12 **Because Plaintiff Has Failed to Specifically Plead Two (2) Consecutive Predicate**
13 **Acts in Order to Substantiate His allegations Concerning Civil RICO.**

14 Counts IV, VI and VIII of Plaintiff's Complaint allege claims against the Moving
15 Defendant Cab/Limousine Companies under Nevada's RICO Statute, N.R.S. § 207.400¹³.
16 Again, Plaintiff's Complaint is based upon a single cab ride that took place on January 17, 2009.
17 *See Plaintiff's Complaint at 15.* Unfortunately, Plaintiff's Complaint is deficient in that it does
18 not specifically allege two (2) consecutive criminal acts committed by each of the Moving
19 Defendant Cab/Limousine Companies, which is required under Nevada's Civil R.I.C.O. Act.
20 *Siragusa v. Brown*, 971 P.2d 801, 810 (Nev. 1998)¹⁴. Accordingly, Plaintiff's Complaint does
21 not allege sufficient facts under R.I.C.O. and must be dismissed accordingly. *See Ove v. Gwinn*,
22 264 F.3d 817, 820 (9th Cir. Cal. 2001).
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27 ¹³ Counts I, II, III, V, VII of Plaintiff's Complaint are directed specifically towards the "Club Defendants" and do
28 not pertain to the "Driver Defendants." Count IX is directed towards all Defendants and consists of Plaintiff's claim
under Nevada's Deceptive Trade Practices Act. *See Plaintiff's Complaint 27-40.*

¹⁴ *See also, Kahre v. Damm*, 2007 U.S. Dist. LEXIS 95978 (D. Nev. Dec. 18, 2007).

1 Pursuant to N.R.S. § 207.470 and N.R.S. § 207.400, a civil RICO cause of action must be
2 based upon allegations and proof that the defendants engaged in at least two (2) crimes related to
3 racketeering that have the same or similar: (1) pattern; (2) intents; (3) results; (4) accomplices;
4 (5) victims; or (6) methods of commission, or are otherwise interrelated by distinguishing
5 characteristics and are not isolated incidents. See Hale, 104 Nev. at 634. In order to survive a
6 Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), the Plaintiff must allege at least two "not
7 isolated" incidents involving the foregoing factors. Siragusa, 971 P.2d at 810.

9 In the Kahre v. Damm case, the U.S. District Court dismissed Plaintiff's Complaint for
10 failure to allege the required number of "not isolated" predicate acts to establish a R.I.C.O.
11 claim. Kahre, 2007 U.S. Dist. LEXIS 95978. In Kahre, Plaintiff's Complaint was based entirely
12 upon events taking place on a single day, which consisted of more than one event occurring on
13 that date. See Id. The Court in Kahre held that all such events were "not isolated" predicate acts
14 because they all occurred on the same day as part of a single coordinated operation. See Id.

16 In the present matter, Plaintiff has failed to allege two (2) not isolated predicate acts
17 conducted by each Moving Defendant Cab/Limousine Company with each named Club
18 Defendant. See generally, Plaintiff's Complaint. Plaintiff's Complaint is based entirely upon a
19 single cab trip occurring on January 17, 2009. See Id. at 15. Therefore, Plaintiff has only alleged
20 one (1) predicate act. See Id.

22 Further, Plaintiff has not, and cannot, allege that the Moving Defendant Cab/Limousine
23 Companies have acted with the same or similar pattern, intent, results, accomplices, victims or
24 methods of commission, because Plaintiff has not specifically identified any of the Moving
25 Defendant Cab/Limousine Companies as engaging in any activity whatsoever. See Id. To
26 reiterate, Plaintiff's entire Complaint is based upon the single action of an unknown cab driver.
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1 *See Id.* Plaintiff cannot identify the individual involved in his single incident, let alone identify
2 each of the Moving Defendant Cab/Limousine Companies as engaging in two (2) consecutive
3 “not isolated” acts.

4 In order to survive a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), Plaintiff would
5 have to allege that each Moving Defendant Cab/Limousine Company engaged in two (2)
6 consecutive not isolated incidents. *Siragusa*, 971 P.2d at 810. Accordingly, Plaintiff would have
7 to allege that each Moving Defendant Cab/Limousine Company picked up Plaintiff, diverted
8 him, and engaged in specific violations of N.R.S. § 207.400, N.R.S. § 205.380, while specifically
9 identifying each party involved in these alleged criminal schemes, including each named Club
10 Defendant. It is not sufficient for Plaintiff to merely assert that all Moving Defendant
11 Cab/Limousine Companies have violated Nevada’s R.I.C.O. statute merely because a single
12 unknown cab driver may have violated this statute. Based upon the allegations in Plaintiff’s
13 Complaint, he can never satisfy Nevada’s R.I.C.O. statute’s two (2) predicate act requirements,
14 because he has only alleged one (1) single cab ride.
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17 Additionally, Plaintiff cannot possibly have standing to recover against each of the
18 Moving Defendant Cab/Limousine Companies based upon his single cab ride. Again, even if
19 Plaintiff were to establish a claim against this single unknown cab company and Club
20 Defendant¹⁵, Plaintiff cannot then assert claims against all named Cab Companies and Club
21 Defendants based upon this single encounter. As a result of Plaintiff’s lack of the required
22 standing and his failure to specifically allege two (2) consecutive not isolated predicate acts for
23 each Moving Defendant Cab/Limousine Company, Plaintiff has failed to state a claim under
24 Nevada’s Civil R.I.C.O. Act and therefore, Plaintiff’s Complaint must therefore be dismissed.
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28 ¹⁵ Which he clearly cannot because he has failed to allege two (2) not isolated predicate acts.

1 **D. Plaintiff’s Complaint Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(1),**
2 **Because Plaintiff Does Not Allege Sufficient Facts to Satisfy the Class Action**
3 **Fairness Act’s \$5,000,000.00 Amount in Controversy Requirement.**

4 Plaintiff alleges that this Honorable Court has original jurisdiction over this matter
5 pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(b). *See Plaintiff’s Complaint at 11.*
6 It is Plaintiff’s contention that “the cost and value of the injunctions sought easily exceed
7 \$5,000,000.00.” *Id.* Unfortunately, Plaintiff does not allege an injury from the Moving
8 Defendant Cab/Limousine Companies’ actions, and therefore cannot substantiate beyond a
9 speculative level his allegation that the amount in controversy exceeds \$5,000,000.00.

10 As discussed in above, Plaintiff does not allege sufficient facts to establish any injury.
11 Plaintiff’s Complaint is based upon speculative hypotheticals of what “would” have happen or
12 that things were done for the “purposes” of causing harm. *See Id. at 15-16.* However, a simple
13 reading of Plaintiff’s Complaint reveals that Plaintiff does not allege to have actually sustained
14 any injury. *See Id.* Nowhere does Plaintiff’s Complaint allege that he actually paid an inflated
15 admission fee to any club, increased cab fare to any driver, or increased gratuity to any driver.
16 *See generally, Plaintiff’s Complaint.* Further, Plaintiff provides no basis to demonstrate the
17 figures he “would” have paid were inflated. *See Id.* Plaintiff has no allegations with regards to
18 what a standard rate would be for any of the services that would allegedly have been inflated by
19 the schemes he alleges. *See Id.* Accordingly, there is no basis for calculating any damages in
20 this matter and Plaintiff cannot substantiate his allegation that the amount in controversy in this
21 matter exceeds the \$5,000,000.00 required under the Class Action Fairness Act. *See 28 U.S.C. §*
22 *1332(b).*

1 **E. Plaintiff's Complaint Should Be dismissed Pursuant to Fed. R. Civ. P. 12(b)(1),**
2 **Because Plaintiff Cannot Certify the Class He Alleges in His Complaint.**

3 Plaintiff alleges that this Honorable Court has original jurisdiction over this matter
4 pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(b). (*See* Plaintiff's Complaint at 11.
5 In order for this Court to have original jurisdiction under the Class Action Fairness Act, 28
6 U.S.C. § 1332(b), Plaintiff must establish and have certified a class. Accordingly, Plaintiff must
7 satisfy the prerequisites set forth in Fed. R. Civ. P. 23(a), including: (1) numerosity; (2)
8 commonality; (3) typicality; and adequacy of representation. *See Santoro v. Aargon Agency,*
9 *Inc.*, 252 F.R.D. 675, 680 (D. Nev. 2008)¹⁶. Upon satisfying Fed. R. Civ. P. 23(a), Plaintiff must
10 then satisfy Fed. R. Civ. P. 23(b). Unfortunately, Plaintiff cannot satisfy the prerequisites set
11 forth in Fed. R. Civ. P. 23(a) or Fed. R. Civ. P. 23(b)(3)(D), and as a result no class action can
12 exist, and this Honorable Court is deprived of original jurisdiction over this matter.
13

14 In the present matter, Plaintiff proposes certification of the following class:

15 All persons who have or will travel to Defendant's Clubs via Defendant's Drivers,
16 or otherwise has attended such Defendant's Clubs in the past or will attend such
17 Defendant's Clubs in the future. *Plaintiff's Complaint at 16.*

18 Unfortunately, this class is so broad that the named Plaintiff and its potential members
19 can never satisfy the Fed. R. Civ. P. 23(a) prerequisites of commonality, typicality, or adequacy
20 of representation. Further, the nature of Plaintiff's claims creates a class, whose membership is
21 contingent upon the state of mind of the potential member. Accordingly, the class identified is
22 not ascertainable by objective criteria and is unmanageable under Fed. R. Civ. P. 23(b)(3)(D).
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28 ¹⁶ *See also, Stanton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003).

1 **1. Plaintiff Cannot Satisfy the Prerequisites of Fed. R. Civ. P. 23(a), and Therefore**
2 **Cannot establish Original Jurisdiction for This Honorable Court.**

3 To qualify for certification under Rule 23, Plaintiff bears the burden of proving that all
4 four elements of Rule 23(a) are satisfied and that one or more of the three alternatives of Rule
5 23(b) are satisfied. *See Hernandez v. Alexander*, 152 F.R.D. 192, 194 (D. Nev. 1993)¹⁷. To
6 determine if these requirements are met, the Court must look particularly to the allegations of the
7 Complaint, which the Court must accept as true. *See Blackie v. Barrack*, 524 F.2d 891, 900 (9th
8 Cir. 1975). Failure to satisfy any one of the requirements of Rule 23(a) precludes class
9 certification. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 72 L. Ed.
10 2d 740, 102 S. Ct. 2364 (1982). The determination of whether to certify a class does not permit
11 or require a preliminary inquiry into the merits¹⁸. However, before certifying a class action the
12 trial court must be satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have
13 been met. *See Id.*

14 Plaintiff's proposed class includes all persons who have or will attend Defendant's Clubs
15 via Defendant's drivers "or otherwise." *Plaintiffs' Complaint at 16*. Accordingly, Plaintiff's
16 proposed class includes persons who did not attend THE Defendants Clubs via any of the named
17 Driver Defendants' cabs. *See Id.* This portion of the class will not have any questions of law or
18 fact common with any of the other class members, including Plaintiff, because there is absolutely
19 no way that these class members could have been part of the "criminal schemes" alleged by
20 Plaintiff. Any class member who did not travel to the Defendant's clubs by way of Driver
21 Defendants' cabs could not possibly have been diverted or defrauded by the Driver Defendants
22 in any way. Similarly, the claims and defenses of the parties with regards to class members not

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27 ¹⁷ *See also, Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

28 ¹⁸ *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974) (Only the class
certification requirements of Rule 23 need be considered at the class certification stage).

1 traveling to the Defendant Clubs by way of cab will be significantly different, thus eliminating
2 class typicality required under Fed. R. Civ. P. 23(a).

3 Plaintiff's Complaint is extremely deficient since he failed to assert any allegations that
4 Plaintiff can adequately represent the class proposed. *See generally, Plaintiff's Complaint.* It
5 would be impossible for Plaintiff to ever adequately represent the class proposed based upon the
6 allegations contained in the Complaint. Plaintiff alleges to have taken a single cab ride to a
7 single Gentlemen's club. *See Id. at 15.* Plaintiff has no standing to assert claims against all
8 named Driver or Club Defendants based upon this single encounter. Plaintiff has not been
9 harmed from his one cab ride by the actions of all named Driver or Club Defendants. Further,
10 Plaintiff has not asserted any allegations that he was harmed by the actions of any of the Moving
11 Defendant Cab/Limousine Companies during his single cab ride. *See Id.* In order to establish
12 the class that Plaintiff seeks, he must at least be able to allege that he traveled in each of the
13 Moving Defendant Cab/Limousine Companies' Cabs, to each of the Club Defendant's clubs and
14 was defrauded in a similar fashion, on two, or more, separate occasions. *See Siragusa*, 971 P.2d
15 at 810. Plaintiff has not, and cannot allege these facts, and therefore he cannot adequately
16 represent the proposed class.
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20 **2. Membership in Plaintiff's Proposed Class Is Contingent Upon the Prospective**
21 **Class Member's State of Mind, Which Makes the Class Unmanageable Under**
22 **Fed. R. Civ. P. 12(b)(3)(D) and Prevents the Proposed Class From ever Being**
23 **Certified.**

24 Under Fed. R. Civ. P. 23(b)(3)(D), the Court must find that a class action is superior to
25 other available methods for fairly and efficiently adjudicating the controversy, which includes an
26 analysis of the difficulties in managing a class. *See Fed. R. Civ. P. 23(b)(3)(D).* Difficulties in
27 managing a class are directly related to whether or not the class is identifiable and can be
28 identified by objective criteria. *See Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal.

1 1999). A class description is insufficient, if membership is contingent on the prospective
2 member's state of mind. *See Id*¹⁹. A class where membership is contingent upon a prospective
3 member's state of mind creates an unmanageable class, because individual inquiries would be
4 required into each prospective class member's situation in order to determine whether or not they
5 were of the proper state of mind to join the class. *See Id*²⁰. Accordingly, it has been held that in
6 cases involving classes contingent upon the state of mind of the potential class member,
7 manageability issues exist, which preclude class certification under Fed. R. Civ. P. 23(b)(3)(D).
8

9 In the present matter, Plaintiff alleges that the Moving Defendant Cab/Limousine
10 Companies attempted to divert class members by “[k]nowingly making false representations
11 regarding the quality of services and amenities offered at certain Clubs.” *Plaintiff's Complaint*
12 *at 11*. With specific regards to the Driver Defendant's predicate act under R.I.C.O., Plaintiff
13 alleges as follows:
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15 The Driver Defendants, through false pretense, knowingly and designedly, and
16 with the intent to cheat or defraud the customer, obtained additional cab fare from
17 their customers, and knowingly and designedly diverted their customers to clubs
18 that would charge their customers a higher admission fee that would then be paid
back to the Driver in the form of a kickback. *Id.* at 23.

19 Plaintiff goes on to allege that the customer, and proposed class member, would not have paid
20 the cab driver the foregoing monies, including a “larger tip,” had the customer not been cheated,
21 deceived and defrauded by the cab driver. *See Id.* at 23.
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23 However, as discussed in above, the alleged fraud and deception relied upon by Plaintiff
24 are nothing more than protected speech in the form of opinions. Specifically, Plaintiff alleges
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26 ¹⁹ *See also, Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D. Ill. 1987); *Elliott v. ITT Corp.*, 150
F.R.D. 569, 573-74 (N.D. Ill. 1992) (“Although there is no explicit requirement concerning the class definition in
27 Fed. R. Civ. P. 23, courts have held that the class must be adequately defined and clearly ascertainable before a
class action may proceed. An identifiable class exists if its members can be ascertained by reference to objective
28 criteria, but not if membership is contingent on the prospective member's state of mind.”).

²⁰ Citing *Simer v. Rios*, 661 F.2d 655, 668 (7th Cir. 1981).

1 that the Driver Defendant cab drivers are informing customers of the quality of various
2 Defendants' clubs. *See Id.* at 15-16. Therefore, whether or not these opinions are true will
3 dictate whether or not the customer, and potential class member, was deceived or defrauded.
4 Accordingly, one must make the subjective analysis of whether or not the Defendant Driver
5 actually took them to a "better" club. This is an individual inquiry that would have to be made on
6 a case-by-case basis, just as discussed in the Schwartz case above. *See Schwartz*, 183 F.R.D. at
7 672. It is impossible for Plaintiff to conclusively allege that all customers who followed the
8 Driver Defendant's opinions were defrauded, because in numerous cases the customer may very
9 well agree with the cab driver's opinion and feel that they benefited from the opinions.
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11 Additionally, it is completely subjective as to whether the customers, and potential class
12 members, would have paid larger tips to the cab drivers had the driver merely taken them to their
13 initial destination. Each individual customer will have different subjective opinions on the way
14 they tip cab drivers. It is impossible to make a blanket assertion that all customers taking a cab
15 driver's advice will resultantly pay the driver a larger gratuity. Consequently, the Court is again
16 in a position where it would need to make individual inquiries into the subjective intent of each
17 proposed class member with regards to these alleged damages and the class member's state of
18 mind. *See Id.*
19

20 It is clear that the Plaintiff's proposed class is unmanageable and certification cannot be
21 granted under Fed. R. Civ. P. 23(b)(3)(D). The proposed injuries in this class are far too
22 subjective and cannot be identified under any objective data. In addition to the fact that each
23 proposed class member would have to make the subjective determination of whether they were
24 defrauded or if they agreed with the cab driver's opinions, each class member would have to
25 demonstrate that they were actually diverted by the Defendant Drivers. Therefore, additional
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1 individual inquiries will need to be had in order to determine if the individual class member ever
2 even came in contact with a Driver Defendant. The final result is that the subject class is
3 unmanageable and cannot be certified.

4 Once this Honorable Court determines that Plaintiff's Complaint does not satisfy the
5 requirements of the Class Action Fairness Act, then Plaintiff remains as an individual in Federal
6 Court based upon Diversity Jurisdiction. Diversity Jurisdiction under 28 U.S.C. § 1332 requires
7 an amount in controversy of \$75,000.00. *See* 28 U.S.C. § 1332(a). Unfortunately, it is clear that
8 Plaintiff cannot meet this jurisdictional requirement, because he has failed to allege any
9 damages²¹. Further, it is clear that Plaintiff can never have sustained damages in excess of
10 \$75,000.00 based upon the single cab ride alleged in his Complaint. Even if the Court were to
11 assume that Plaintiff paid an inflated cab fare, larger tip, and inflated entry fee to the Spearmint
12 Rhino²², Plaintiff's damages would be far below the \$75,000.00 required for Diversity
13 Jurisdiction under 28 U.S.C. § 1332(a). As a result of Plaintiff's inability to ever be able to
14 establish damages in excess of \$75,000.00 based upon the single encounter alleged in his
15 Complaint, this Honorable Court is deprived of jurisdiction to hear this matter.
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19 Thus, based upon Plaintiff's inability to certify the proposed class, the Class Action
20 Fairness Act is inapplicable and Plaintiff cannot rely upon the proposed class member's damages
21 in order to satisfy the amount in controversy requirements of 28 U.S.C. § 1332. Plaintiff then
22 remains in Federal Court based upon Diversity Jurisdiction under 28 U.S.C. § 1332(a), and must
23 demonstrate an amount in controversy in excess of \$75,000.00. Plaintiff cannot possibly satisfy
24 this requirement based upon the allegations in his Complaint. Thus, this Honorable Court is
25 deprived of original jurisdiction over this matter and must dismiss Plaintiff's Complaint.
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27 ²¹ *See supra* at 15-19.

28 ²² Please note that Plaintiff's Complaint does not actually allege these damages and this argument is being offered in the abstract based upon the Court's assumption that Plaintiff actually incurred any damages at all.

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V. CONCLUSION

Plaintiff's Complaint must be dismissed pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6) and/or Fed. R. Civ. P. 12(b)(1). Initially, Plaintiff's Complaint has not been pled with particularity, which is required given the nature of Plaintiff's claims. Further, Plaintiff has failed to plead an injury or state beyond a speculative level that he has been a victim as required under Nevada's Deceptive Trade Practices Act. Additionally, Plaintiff has not pled two (2) predicate acts as required for a Civil R.I.C.O. claim. Lastly, this Honorable Court does not have jurisdiction over this matter, because Plaintiff cannot ever certify the proposed class as Plaintiff cannot meet the prerequisites of Fed. R. Civ. P. 23(a), meet the minimum amounts in controversy, or the manageability requirement of Fed. R. Civ. P. 23(b).

Based upon the foregoing, Moving Defendant Cab/Limousine Companies respectfully request that Plaintiff's Complaint be dismissed pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6) and/or Fed. R. Civ. P. 12(b)(1).

Dated this 31st day of July, 2009.

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