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10 LITTLE DARLINGS OF LAS VEGAS, LLC  
11 LAS VEGAS ENTERTAINMENT, LLC

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF, NEVADA

11 THEODORE TRAPP, on his own behalf and  
12 on behalf of all others similarly situated,

13 Plaintiff,

14 vs.

15 BIG POPPA'S, LLC, a Nevada limited  
16 liability company d/b/a BADDA  
17 BINGMEN'S CLUB; SKY TOP VENDING,  
18 INC., a Nevada Corporation d/b/a CAN CAN  
19 ROOM; LA FUENTE, INC., a Nevada  
20 corporation d/b/a CHEETAH'S; C.P. FOOD  
21 AND BEVERAGE, INC., a Nevada  
22 corporation d/b/a CLUB PARADISE; DEJA  
23 VU SHOWGIRLS OF LAS VEGAS, LLC, a  
24 Nevada limited liability company d/b/a DEJA  
25 VU SHOWGIRLS; PALOMINO CLUB,  
26 INC., a Nevada corporation d/b/a  
27 PALOMINO CLUB; SHAC, LLC, a Nevada  
28 limited liability company d/b/a SAPPHIRE;  
d/b/a STAR CAB COMPANY; K-KEL,  
INC., a Nevada corporation d/b/a  
SPEARMINT RHINO; D. 2801  
WESTWOOD, INC., a Nevada corporation  
d/b/a TREASURES; LITTLE DARLINGS  
OF LAS VEGAS, LLC, a Nevada limited  
liability company d/b/a LITTLE DARLINGS;

CASE NO. 2:09-cv-00995

**DEFENDANTS DEJA VU SHOWGIRLS  
OF LAS VEGAS, LLC, LITTLE  
DARLINGS OF LAS VEGAS, LLC'S,  
AND LAS VEGAS ENTERTAINMENT,  
LLC D/B/A LARRY FLYNT'S HUSTLER  
CLUB'S MOTION TO DISMISS**

1 O.G. ELIADES, A.D., LLC, a Nevada  
2 limited liability company d/b/a OLYMPIC  
3 GARDENS; LAS VEGAS  
4 ENTERTAINMENT, LLC, a Nevada limited  
5 liability company d/b/a LARRY FLYNT'S  
6 HUSTLER CLUB; MICHAEL A.  
7 SALTMAN d/b/a MINXX; RICK'S LAS  
8 VEGAS; FRIAS MANAGEMENT, LLC, a  
9 Nevada limited liability company d/b/a ACE  
10 CAB COMPANY and A-NORTH LAS  
11 VEGAS CAB; WESTERN CAB  
12 COMPANY, a Nevada corporation d/b/a  
13 WESTERN CAB COMPANY and  
14 WESTERN LIMOUSINE; NEVADA  
15 CHECKER CAB CORPORATION, a  
16 Nevada corporation d/b/a CHECKER CAB  
17 COMPANY; NEVADA STAR CAB  
18 CORPORATION, a Nevada corporation  
19 d/b/a STAR CAB COMPANY; NEVADA  
20 YELLOW CAB CORPORATION, a Nevada  
21 corporation d/b/a YELLOW CAB  
22 COMPANY; LUCKY CAB COMPANY OF  
23 NEVADA, a Nevada corporation d/b/a  
24 LUCKY TRANS; SUN CAB, INC., a  
25 Nevada corporation d/b/a NELLIS CAB  
26 COMPANY; CLS NEVADA, LLC, a  
27 Nevada limited liability company d/b/a CLS  
28 TRANSPORTATION LAS VEGAS; ON  
DEMAND SEDAN SERVICES, LLC, a  
Nevada limited liability company d/b/a ODS  
LIMOUSINE and ODS CHAUFFEURED  
TRANSPORTATION; BLS LIMOUSINE  
SERVICE OF LAS VEGAS, INC., a Nevada  
corporation d/b/a BLS LIMOUSINE  
SERVICE OF LAS VEGAS; DESERT CAB,  
INC., a Nevada corporation d/b/a DESERT  
CAB COMPANY and ODYSSEY  
LIMOUSINE; BELL TRANS A NEVADA  
CORPORATION, a Nevada corporation  
d/b/a BELL TRANS; TONY CHONG, an  
individual; and DOE EMPLOYEES 1-1000;

Defendants.



1 Stanton v. Boeing Co., 327 F.3d 938 (9<sup>th</sup> Cir. 2003).

2 The burden is on the party seeking to maintain the class action to establish a prima facie  
3 showing of each of the elements of Rule 23 (a) prerequisites and the appropriate Rule 23(b)  
4 grounds for a class action. Andrews Farms v. Calcot, Ltd., 2009 WL 1211374 (E.D.Cal. 2009).  
5 The burden is to produce evidence by affidavits, documents or testimony establishing each Rule  
6 or requirements. Id. at 3. A class action may only be certified if the trial court is satisfied after a  
7 rigorous analysis that the prerequisites of Rule 23(a) have been satisfied. In re Initial Public  
8 Offering Sec. Litig., 471 F.3d 24,33 (2<sup>nd</sup> Cir. 2006).[Stating that Rule 23 requirements must be  
9 met, not just supported by some evidence.]

10 The Calcot court stated that although the class representative lacked personal knowledge  
11 of the number of present members, they did establish in their declarations that they have personal  
12 knowledge of Calcot members. (The court did approve the numerosity requirement, although it  
13 denied class certification.)

14 However, regarding numerosity in this instant action, Plaintiff has only presented the  
15 incident that he experienced, and has not identified any other specific persons experiencing the  
16 same treatment.

17 Plaintiff Trapp's claim could not have arisen out of the same transaction or occurrence as  
18 any other class member because each incident would have occurred at a different location,  
19 different time, different driver and club. It appears that Plaintiff Trapp is unable to specifically  
20 identify any other individual who might be a proposed class member.

21  
22 It is incumbent upon the plaintiffs under the numerosity requirement of Rule 23 to identify  
23 some individual who falls within the proposed class. Perez v. Personnel Bd. of City of Chicago,  
24 690 F.Supp.670, 672 (N.D.Ill.1988) cited in Cummings v. Charter Hosp. Of Las Vegas, Inc., 111  
25 Nev. 639, 896 P.2d 1137 (1995).[Where the court determined that the patients' claims did not  
26 arise out of the same transaction, occurrence, or series of transactions or occurrences, but rather  
27 arose from separate incidents.]

1 No minimum number of plaintiffs is necessary to meet the dictates of Rule 23 (a)(1).  
2 Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D 439, 448 (N.D.Cal.1994); Schwartz v.  
3 Upper Deck Co., 183 F.R.D 672, 681 (S.D.Cal.1999) [Where the central question was whether  
4 plaintiffs had sufficiently identified and demonstrated the existence of the numbers of persons for  
5 whom they speak and the court determined they had not.]

6 In his Complaint, Plaintiff alleges “on information and belief, there are over 100,000  
7 members of the Class.” Page 17, line 3. Because the alleged incidents could not possibly have  
8 occurred at the same time, same place, or involve the same drivers or clubs, how are these other  
9 prospective members of the Class to be notified. How are they to be queried by this Court to  
10 determine if they belong to the Class? Does Plaintiff plan to place ads in papers all over the  
11 county stating that if “you have taken a taxi to go to a club and the driver diverted you to another  
12 club, contact \_\_\_\_”? What proof would they have to support their incident? Plaintiff could end  
13 up with a million members in a Class, all of whom would have to present to this Court, the date,  
14 place, taxi company, names of clubs, etc. to qualify as a class member.

15 A prerequisite to satisfy the requirement that a certified class must be ascertainable is a  
16 class definition that clearly delineates who is and is not in each class. Shiteway v. FedEx Kinko’s,  
17 2006 WL264528 (N.D.Cal. 2006) [ Where the court held that an identifiable class exists only if its  
18 members can be ascertained by reference to objective criteria. }

19 Certification of a class in this action would prove unmanageable and is not a superior  
20 vehicle for resolution of Plaintiff’s claims because there could hardly be any records to prove  
21 class membership and individual damages. Identification alone would be time consuming  
22 because Plaintiff has no idea who is or is not a member of the class he seeks to certify.

23 Courts have held that the class must be adequately defined and clearly ascertainable before  
24 a class action may proceed. An identifiable class exists if its members can be ascertained by  
25 reference to objective criteria, but not if membership is contingent on the prospective member’s  
26 state of mind. Schwartz v. Upper Deck Co., 183 F.R.D. 672, 680 (S.D.Cal. 1999). [Where the  
27 court found manageability problems exist and class certification would be improper under Rule  
28 23(b)(3)(D).]

1 "Sales volume standing alone cannot serve as the basis of a numerosity finding in this  
2 case. Even the allegations of the named representative Plaintiffs leave the Court in doubt as to  
3 numerosity. Without assistance of plaintiffs, the Court has no idea who buys sports cards, or even  
4 how many, for the purpose of finding chase cards as opposed to other rationales." Id. at 681.

5 Reasonable judgments cannot be made out of thin air; sufficient information to make such  
6 a judgment is a required preliminary step. Case law is consistent with this view. Id. at 681.

7 Defendants contend there is insufficient information for this Court to determine the  
8 numerosity requirement because no objective criteria exists to serve as a basis of a numerosity  
9 finding. As in Schwartz, supra, where sales volume could not serve as a basis for the numerosity  
10 requirement, neither can Plaintiff's allegations that Defendant Drivers divert customers to certain  
11 Defendant Clubs serve as a basis for numerosity. Plaintiff's allegations are not objective criteria,  
12 but relate to the state of mind of the prospective class member.

13 Thus, Plaintiff fails to meet the numerosity requirement of Rule 23 (a).

14 Failure to prove any one of Rule 23's requirements destroys the alleged class action.

15 Rutledge v. Electric Hoe & Rubber Co., 511 F.2d 668, 673 (9<sup>th</sup> Cir. 1975).

16 Plaintiff's request for class certification should be denied.

17 **2. Or In the Alternative, Plaintiffs' RICO Claims Should Be Dismissed**

18 Regardless of whether this Court certifies Plaintiff's action as a class action, the RICO  
19 causes of action should be dismissed under Rule 12 (b)(6) for failure to state a claim upon which  
20 relief can be granted. Rule 12(b)(6) dismissal is appropriate if there is an absence of sufficient  
21 facts alleged to support a legal theory. See, Ravet v. Solomon, et al. 2007 WL 2088381 (S.D.Cal.  
22 2007).

23 Although motions to dismiss for failure to state a claim must take the complaint in the  
24 light most favorable to the plaintiff and take the allegations as true, the factual allegations must be  
25 sufficient to raise a right to relief above the speculative level. Id. The allegations must provide  
26 plausible grounds to infer that the plaintiff is entitled to relief i.e. enough facts to raise a  
27 reasonable expectation that discovery will reveal evidence of illegality.

1 In addition, pleadings of fraud in the RICO context cannot be based on conclusory  
2 allegations or speculation. See, Telephonic Serv., Inc. V. TBS Int'l, Inc. 975 F.2d 1135 (5<sup>th</sup> Cir.  
3 1992) (Rule 9(b) applies to the pleading of fraud as a predicate act in a RICO claim.) Plaintiffs  
4 must plead the fraudulent acts that form the alleged pattern of racketeering with specificity under  
5 Rule 9(b). Defendants contend Plaintiff has failed to satisfy his burden of pleading his RICO  
6 claims.

7 A party may assert a civil RICO claim only if it can properly plead a violation of one of  
8 the subparts of NRS 207.360. Based on Plaintiff's allegations that Defendants are in violation of  
9 Clark County Code 8.20.297 makes this somewhat impossible.

10 Plaintiff alleges that "Ordinances enacted by Clark County, Nevada (Ordinance  
11 8.20.297) and other states law make payments of this type to Drivers illegal." See, page3, lines  
12 22-24. Plaintiff bases its entire RICO claims upon the fact that all the named Defendants drivers  
13 and clubs are illegally making payments of this type. Plaintiff fails to recognize that the Clark  
14 County Ordinance 8.20.297 was repealed in 2006 and is no longer in effect. Thus, the activity  
15 Plaintiff alleges cannot be considered illegal and cannot be the basis for his RICO claims.

### 16 **3. Plaintiff Fails to Plead Fraud With Particularity**

17 Plaintiff, in stating the "Predicate Acts of the Club Defendants", generally alleges fraud:  
18 "The Club Defendants, though (sic) false pretense, knowingly and designedly, and with the intent  
19 to cheat or defraud the customer...." (Page 24, lines 12-14); The fraud perpetrated and the sums of  
20 money wrongfully generated therefrom have enriched the Club Defendants...." Page 25, lines 10-  
21 11, and other allegations of fraud.

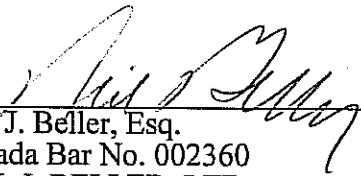
22 In the Ninth Circuit, averments of fraud must comply with the pleading requirement of  
23 Rule 9(b). Vess v. Ciba-Geigy Corp.USA, 317 F.3d 1097 (9<sup>th</sup> Cir. 2003). Thus, when a RICO  
24 claim of "racketeering activity" is based on predicate acts of fraud, the particularity requirements  
25 of Rule 9(b) apply to that claim. Edwards v. Marin Park, Inc. 356 F.3d 1058, 1065 (9<sup>th</sup> Cir. 2004).  
26 Rule 9(b) requires plaintiffs to provide allegations that are specific enough to enable defendants to  
27 refute the charges, not just to deny that they have done anything wrong. Bly-Magee v. California,  
28 236 F.3d 1014, 1019 (9<sup>th</sup> Cir. 2001).

1 Plaintiff asserts that the predicate acts that constitute a pattern of racketeering were  
2 purported thousands of instances of fraud. Plaintiff, with the exception of his own experience,  
3 however fails to identify these instances with the particularity required by Rule 9(b). As an initial  
4 matter, it is impossible to determine what conduct Plaintiff believes each Defendant engaged in.  
5 Plaintiff does not allege any facts to support a basis for collective responsibility. Defendants,  
6 therefore, are left to wonder what role they purportedly play in the scheme of fraud Plaintiff has  
7 brought and that renders the RICO claim fatally defective. See, Lui Ciro, Inc. v. Ciro, Inc. 895  
8 F.Supp.1365 (D.Hawaii 1995) where the court stated that plaintiffs must identify the roles of each  
9 defendant and that before plaintiffs can benefit from a presumption of collective action, plaintiffs  
10 must allege facts to demonstrate collective responsibility.

11 **4. Conclusion**

12 Based on the foregoing, these moving Defendants respectfully request this Honorable  
13 Court to deny certification of Plaintiff's complaint as a class action and to grant their motion to  
14 dismiss Plaintiff's RICO claims and to dismiss all fraud claims based on failure to plead fraud  
15 with particularity.

16 Dated this 29 day of June, 2009.

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19   
20 \_\_\_\_\_  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the law firm of NEIL J. BELLER, LTD. and on  
3 the 29 of June, 2009, service of the foregoing **DEFENDANTS DEJA VU SHOWGIRLS OF**  
4 **LAS VEGAS, LLC, LITTLE DARLINGS OF LAS VEGAS, LLC'S, AND LAS VEGAS**  
5 **ENTERTAINMENT, LLC D/B/A LARRY FLYNT'S HUSTLER CLUB'S MOTION TO**  
6 **DISMISS** was made, by depositing a true and correct copy of the same in the United States mail,  
7 postage prepaid, addressed to the following:

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