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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KANIE KASTROLL, on her own behalf and on behalf of all others similarly situated, Plaintiff, v. WYNN RESORTS, LTD., a Nevada corporation d/b/a WYNN LAS VEGAS, Defendant.	CASE NO. 2:09-cv-02034-LDG-LRL **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, ALTERNATIVELY, MOTION TO STRIKE**

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I. INTRODUCTION

As predicted in Wynn's opening Motion, this action is nothing more than a tool for Plaintiff in the pursuit of her political and professional agenda. With stereotypical aggression and flare reminiscent of union leaders of the 1950's, Plaintiff has continued to use this legal process as a public relations platform to extol her own courage and to demonize Wynn. Though plainly irrelevant to the narrow issues raised in Wynn's Motion, Plaintiff's Opposition is peppered with inflammatory catch phrases obviously designed to catch the eye of the press (*e.g.*, "cancer-causing toxins," "49,000 [deaths]," "unbearable working conditions," "choking off all employees from oxygen," "Wynn has done nothing to protect," etc., etc., etc.). To the extent this case is designed to bring attention to herself and her union battle with Wynn, Plaintiff can rest assured her mission

is accomplished. *See* http://www.lasvegassun.com/photos/2010/feb/13/61681. On the other hand, if Plaintiff's Opposition was truly intended to establish a right to pursue her "claims" in federal court, she missed her mark.

With the sole purpose of cramming an obvious local controversy into a federal statutory scheme designed to govern interstate cases, Plaintiff brings her case as a broadly based class action. She has no right to bring her grievance to federal court on her own, and so she claims to champion the cause for all Wynn employees, be they present, past or future. Her intentionally broad (and reckless) pleading, she claims, opens the doors of the federal courthouse without challenge to the pleading's legitimacy or even common sense. Stated another way, Plaintiff's position is simply that federal court jurisdiction is based solely on the artistry of broad-stroke pleading and not the actual circumstances of the controversy. Plaintiff is wrong.

The holes in Plaintiff's logic are glaring. Through this action she seeks the sole, albeit staggering, remedy of an injunction requiring Wynn to redesign its operations and reconstruct its facilities. Such relief, of course, would bring no benefit to the tag-along class of past employees – a common sense fact that plaintiff all but ignores. Likewise, the fictitious group of future employees, even if identifiable, has suffered no harm and is therefore equally indifferent to this action. Thus, Plaintiff's attempt to surround herself with similarly situated "victims" fails. Without the legitimacy of that company, Plaintiff has no basis whatsoever to bring this case in this Court. This case presents a Nevada home state controversy that must be prosecuted, if at all, in a Nevada state court. Plaintiff cannot avoid this rule of law.

Even if the Court looks past the fact that this case should be filed, if at all, in a Nevada state court, the merits require dismissal. Plaintiff is a dealer in Wynn's casino, where smoking is legal. In fact, Nevada's citizens and its Legislature declared loud and clear that they want smoking to be allowed in casinos. The rationale supporting their choice is obvious. Plaintiff, however, is asking this Court to override the conscious and considered policy choices of Nevada's elected representatives, and indeed, the will of Nevada's citizens. The Court must decline Plaintiff's invitation.

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Finally, the lack of any legal duty to stop patrons from smoking freely in casinos is not the only glaring deficiency present on the face of Plaintiff's Complaint. Plaintiff proposes a class so replete with individualized issues that it must fail as a matter of law. The threshold requirements of Rule 23(a) are clear and the Court already ruled in a very similar case that they cannot be met by a proposed class of current and/or former casino employees whose exposure to second-hand smoke is inherently varied and diverse. Because Plaintiff's proposed class fares no better, her class allegations should be stricken from her pleading now.

II. DISCUSSION

A. This Court Must Decline To Exercise Jurisdiction Over This Action As Per The Home-State Controversy Exception To The Class Action Fairness Act.

Plaintiff cannot escape five very important, undisputed facts: (1) the only named Plaintiff is a Nevada resident; (2) Wynn, the only Defendant, is a Nevada resident; (3) the alleged wrongdoing or injury necessarily takes place in Nevada; (4) Plaintiff asserts only Nevada state law claims; and (5) Plaintiff seeks only injunctive relief in the form of a prospective change in the conditions of a Nevada workplace. Also undisputed, and at the heart of this debate, is that Plaintiff's only basis for federal jurisdiction is through the Class Action Fairness Act ("CAFA"). Plaintiff does not allege and cannot meet the requisites for complete diversity or federal question jurisdiction. In other words, to have her Nevada state law claims against her Nevada employer heard in federal court, Plaintiff apparently thinks she need only draft her Complaint "to gain" federal jurisdiction through the backdoor of a class action. She is wrong.

1. Congress' intent behind CAFA and its exceptions supports dismissal of this Nevada Plaintiff's Complaint.

In her Opposition, Plaintiff offers a partially correct rendition of the law that dictates class actions. It is true that CAFA did relax certain jurisdictional requisites, conferring federal courts with original jurisdiction where: (1) the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs; (2) the aggregate number of proposed plaintiffs is 100 or greater; and (3) any member of the plaintiff class is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d); *see also Lowdermilk v. U. S. Bank Nat'l Ass'n*, 479 F.3d 994,

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997 (9th Cir. 2007). Congress, however, balanced that expansion by including express exceptions to CAFA jurisdiction for home-state and local controversies. Plaintiff all but ignored this balance in her Opposition. Nonetheless, Congress' intent behind CAFA (and its exceptions) is key to the issues before the Court.

Congress enacted CAFA in response to abusive practices by plaintiffs and their attorneys in litigating major interstate class actions in state courts which had, among other things, "adversely affected interstate commerce," and "undermined public respect for our judicial system." *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 47 (1st Cir. 2009) (citing CAFA, Pub.L. No. 109-2, § 2(a), 119 Stat. 4, 4 (2005)) (emphasis added). Commonly, plaintiffs file suit in the court of their home state, and the out-of-state defendant seeks to remove the case to federal court; both sides thinking that they have some advantage in their selection. Congress designed CAFA to prevent these harms "by providing for [f]ederal court consideration of interstate cases of national importance under diversity jurisdiction." *Id*.

It is against the backdrop of concerns over interstate commerce that a spotlight shines on Congress' intent behind the home-state and local controversy exceptions. In that regard, Congress expressly mandated that a federal court "shall decline to exercise jurisdiction" over actions that are primarily state or local concerns. In other words, Congress was clear that CAFA should not be used as a tool (or weapon) in a forum shopping debate where the controversy is local in nature. That Congress called for mandatory dismissal of such actions speaks volumes. This is, of course, of great import in the instant action, which involves a Nevada plaintiff who is suing her Nevada employer for an alleged violation of a heretofore non-existent Nevada common law duty – a local controversy by any measure. Neither Plaintiff's Opposition nor her Complaint touch upon interstate concerns because there are none. Plaintiff's Complaint does not belong in this Court.

2. Plaintiff cannot artfully plead facts "to gain" otherwise limited federal court jurisdiction and avoid the home-state controversy exception.

Plaintiff brushes the home-state controversy exception aside by claiming that she is the master of her own Complaint, and has alleged sufficient facts "to gain" federal jurisdiction. (Opp'n 7:8-10.) While Plaintiff may very well be the master of her own Complaint, she is most

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definitely wrong to think that she can artfully plead "to gain" federal jurisdiction. The law is to the contrary.

Federal courts are courts of limited jurisdiction. *Lowdermilk*, 479 F.3d at 998-99 (cited by Plaintiff). The jurisdiction of federal courts is "limited by the Constitution and those subjects encompassed within a statutory grant of jurisdiction." *Richardson v. United States*, 943 F.2d 1107, 1112-13 (9th Cir. 1991) (quoting *Ins. Corp. of Ireland, Ltd. v. Compangnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982)). Parties cannot do anything, including stipulate, "to gain" federal jurisdiction over claims that would not otherwise fall under the jurisdiction of the federal courts. *See, e.g., Janakes v. U.S.P.S.*, 768 F.2d 1091 (9th Cir. 1985); *Ins. Corp. of Ireland, Ltd*. 456 U.S. at 702 (stating that federal subject matter jurisdiction cannot be conferred upon the courts by the actions of the parties). Consistent with this tenant, a court is not limited (as Plaintiff suggests) to the facts and law conclusorily pleaded in the complaint when deciding jurisdiction. *See Hannaford Bros. Co. Customer Data Sec. Breach Litig. v. Kash N' Karry Food Stores, Inc.*, 564 F.3d 75, 79 (1st Cir. 2009) (stating that the four corners of plaintiff's complaint "do not necessarily control the question about whether CAFA's home-state controversy applies. We do not rely on the maxim that plaintiff is the master of his own complaint . . . ."); *see also Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003) (recognizing that a 12(b)(1) motion can be either "facial, confining the inquiry to the allegations in the complaint, or factual, permitting the court to look beyond the complaint.").

Plaintiff's argument concerning the adequacy and integrity of her pleading misses its mark. Plaintiff cites cases that stand only for the proposition that a plaintiff can plead a cause of action to avoid federal jurisdiction subject to a good faith requirement. For example, a plaintiff can plead facts and assert only a state law claim in state court even though the same facts may state a claim arising under federal law. *Rains v. Criterion Sys. Inc.*, 80 F.3d 339, 344 (1996) (discussing how a plaintiff can avoid federal jurisdiction) (cited by Plaintiff). Neither of the cases Plaintiff cites stands for the converse notion that a plaintiff, through artful pleading of otherwise legally nonviable claims and legal conclusions, can "gain" federal jurisdiction. *See, e.g., Lowdermilk*, 479 F.3d at 999 (to avoid federal jurisdiction); *Rains*, 80 F.3d at 344 (same).

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Simply, Plaintiff's argument is contrary to the law. As discussed more fully below, Plaintiff's attempt to surround herself with legally irrelevant "co-victims" (past or future employees) fails both factually and legally to "gain" her jurisdiction in this Court.

a. Former employees cannot, as a matter of law, seek only prospective injunctive relief against their former employer**.**

As a matter of law, former non-smoking Wynn employees cannot be plaintiffs in cases that seek only prospective injunctive relief because the relief, even if afforded, will not redress any alleged injury or harm (*i.e.*, the working conditions of a workplace unknown to individuals who have long since left). *See, e.g., In re Wal-Mart Wage & Hour Employment Practices Litig.*, No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315, *17 (D. Nev. June 20, 2008) (denying class certification where "a large percentage of the class will be former Wal-Mart employees who could not seek injunctive or declaratory relief, as they have no standing to seek such relief."). Wynn has not argued that past employees could never have standing within the context of a class action. Such a broad-sweeping proposition would be absurd and legally incorrect. Rather, former employees cannot seek mere injunctive relief against a former employer, and none of the cases cited by Plaintiff supports a contrary conclusion.[1]

Plaintiff is correct that the Ninth Circuit in *Probe v. State Teacher's Retirement System*, 780 F.2d 776 (9th Cir. 1986), certified a class that included former employees. But, the plaintiffs there challenged a discriminatory retirement benefit calculation that would have entitled those former employee class members to a monetary adjustment to their retirement benefits (*i.e.*, their existing relationships). In short, the alleged injuries of the former employees in that case were redressable by the court's favorable decision, and thus their claims did not fail as a matter of law.

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[1] Perhaps for purposes of distraction, Plaintiff makes a bit of a ruckus about any citation to a non-class action case, even if the citation is to support a general principle of law unchanged or unaffected by CAFA. Nevertheless, Plaintiff can hardly challenge the legal axiom that one cannot seek injunctive relief without an existing relationship with the targeted defendant to the action. *See Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (stating that a plaintiff who has no on-going relationship with the defendant cannot seek an injunction against its future conduct); *see cf. Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1040 n. 1 (9th Cir. 1999) (en banc) ("[S]tanding to seek damages does not serve as a basis for standing to seek equitable relief.").

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The two other cases cited by Plaintiff, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999), and *Kilgo v. Bowman Transporation, Inc.*, 789 F.2d 859 (11th Cir. 1986), are no different. In *Mullen*, the former employee class members certified by the Fifth Circuit had respiratory illness and sought compensatory damages – not injunctive relief.[2] And, *Kilgo*, where the Eleventh Circuit affirmed certification of a class that included former employees, was a Title VII action where former employees sought back-pay to "make [themselves] whole". *Id.* at 866, 876. Here, Plaintiff offers no legitimate reason (because none exists) to justify the inclusion of former employees to her injunctive relief action.

b. Subject matter jurisdiction cannot rest solely on an artful pleading by Plaintiff to include an otherwise unnecessary and ill-defined group of future employees.

As a matter of law, future employees – whoever they may be – do not have an injury-in-fact that this Court can remedy. (Mot. 10:16-11:16.) *See, e.g., Strong v. Ark. Blue Cross & Blue Shield Inc.*, 87 F.R.D. 496, 508 (D.C. Ark. 1980); *Moore v. W. Penn. Water Co.*, 73 F.R.D. 875, 878 (D.C.S.D. 1982). Thus, they are also improperly piled onto Plaintiff's "class" of victims.

To overcome the lack of injury, Plaintiff relies upon the Ninth Circuit in *Probe*. There, the court determined that the inclusion of future employees did not render the class definition "so vague as to preclude class certification." 780 F.2d at 780. "Not so vague" however, is hardly an endorsement that federal jurisdiction should lie solely on the inclusion of a group of indefinable individuals. Notably, subject matter jurisdiction was not an issue in *Probe*, where the federal court determined the legality of a practice under Title VII of the Civil Rights Act of 1964. *Id.* at 779. Accordingly, *Probe* offers nothing to this debate.

To be clear, subject matter jurisdiction was not a concern of any of the federal courts in the other pre-CAFA cases cited by Plaintiff to support her proposition that future employees can

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[2] *Mullen*, a pre-CAFA class action involved a riverboat casino and secondhand smoke, but it is not "a very similar case to the case at bar" for purposes of determining subject matter jurisdiction under CAFA and its exceptions. In *Mullen*, the Fifth Circuit had federal question jurisdiction through plaintiffs' claims that they were seaman on an unseaworthy vessel under the Jones Act (aka The Merchant Marine Act of 1920). The opinion concerns only Rule 23 class certification questions.

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properly be included in a class in order to "gain" jurisdiction. In fact, each of those cases concerned federal question jurisdiction. *See Paton v. New Mex. Highlands Univ.*, 275 F.3d 1274 (10th Cir. 2002) (Title IX claims); *Kilgo*, 789 F.2d at 859 (Title VII); *Walters v. Thompson*, 615 F. Supp. 330 (N.D. Ill. 1985) (42 U.S.C. § 1983); *Wilmington Firefighters Local 1590 v. City of Wilmington*, 109 F.R.D. 89 (D. Del. 1985) (Title VII); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir 1975 (Americans with Disabilities Act); *Ahrens v. Thomas*, 570 F.2d 286 (8th Cir. 1978) (42 U.S.C. § 1983). The fact that these cases were brought as class actions did not serve – and would not have served – to deprive those federal courts of jurisdiction to hear the claims of the named plaintiffs and any unnamed class member with a real stake in the action. In other words, the inclusion of an amorphous and ill-defined class of "future" individuals without any injury-in-fact was inconsequential and irrelevant to jurisdiction.[3]

The injunctive relief sought by Plaintiff in this case, if awarded by this Court, would naturally inure to the benefit of any future Wynn employee regardless of whether they are included in a class ultimately certified by this Court. *See, e.g., Selzer v. Bd. of Ed.. of City of New York*, 112 F.R.D. 176, 182 (S.D.N.Y. 1986) (holding that inclusion of future employees "is not necessary to protect whatever rights they may possess" because any injunctive relief granted "will redound to the benefit of these persons in any event"). The inclusion of an ill-defined and unknown group of future Wynn employees is, therefore, superfluous and legally irrelevant. They add nothing at all to Plaintiff's claims, but rather reveal Plaintiff's only actual motive behind their inclusion – "to gain" jurisdiction through artful pleading.

Finally, the only form of relief Plaintiff seeks is a mandatory injunction to alter the conditions of her current workplace – the casino floor at Wynn, in Las Vegas, Nevada. Assuming that Plaintiff's conclusory class action allegations are acceptable, any individual whose alleged

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[3] Plaintiff refers this Court to an opinion from the Eastern District of Wisconsin to support her proposition that it is "well-established" that a "precise class definition is less critical" when a plaintiff seeks only injunctive or declaratory relief. (Opp'n 10:16-20 (citing *Bzdawka v. Milwaukee County*, 238 F.R.D. 469, 474, (E.D. Wisc. 2006)). But, the court in *Bzdawka* was addressing class certification, not a blatant lack of subject matter jurisdiction. Furthermore, like all of Plaintiff's other cases, the district court in *Bzdawka* had federal question jurisdiction inasmuch as the plaintiff's claims arose under the Americans with Disabilities Act. It is Plaintiff, rather than Wynn, who is conflating the Rule 23 and subject matter jurisdiction legal standards.

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ailments may be remedied by a judgment granting the requested relief must necessarily reside in Nevada. Once this group is finally capable of definition and actually gains a real stake in the case and the relief sought, they will reside in Nevada. This is hardly a controversy that invokes Congress' concerns about interstate commerce. It is entirely a home-state Nevada controversy.

3. Plaintiff's jurisdictional ruse must be acknowledged now; not at the stage of class certification.

After brushing aside the home-state controversy exception with a sidelong glance, Plaintiff asks this Court to defer considering the defects of her Complaint. (*See* Opp'n 8:23-27.) Plaintiff is essentially asking this Court to disregard its obvious lack of subject matter jurisdiction (due to the home-state exception to CAFA), arguing instead that subject matter jurisdiction need not be addressed until after discovery, when she moves for class certification. This is simply incorrect and, quite frankly, an abuse of the CAFA statutory scheme. The determination about whether the Court may exercise jurisdiction over this case must be made before the case proceeds. *See* Fed. R. Civ. P. 12(b)(1) (subject matter jurisdiction is required before a federal court can preside over an action); *Mallard Auto. Group, Ltd. v. United States*, 343 F. Supp. 2d 949, 952-53 (D. Nev. 2004) (stating subject matter jurisdiction is a "threshold" issue).

Plaintiff simplistically states that class certification issues are "logically antecedent" to Article III concerns, citing the Supreme Court case of *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999). (Opp'n 8:23-27.) Not only is this an overstatement of the Supreme Court's holding, but it also is a misstatement of Wynn's position and therefore a complete red herring. First, contrary to Plaintiff's argument, the *Ortiz* court did not hold that class certification issues must, or even should, precede jurisdictional analysis. To the contrary, the Supreme Court recognized that "ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits." 527 U.S. at 831 (emphasis added).

In *Ortiz*, as well as in the case upon which it relies, *AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Supreme Court held that class certification and statutory standing issues "may properly be treated before Article III constraints" in certain, special circumstances. *Ortiz*, 527 U.S. at 831 (emphasis added); *see also AmChem*, 521 U.S. at 612-13. Both cases were

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unique in that they addressed asbestos, limited fund litigation where the parties resolved their disputes prior to commencement of the action in federal court. The actions were filed for the sole purpose of certifying the class and getting the settlement approved by the court. The facts and procedural posture of the instant case, of course, are entirely different from those of *Ortiz* and *AmChem.* Most notably, this case is far from resolved. Thus, the Supreme Court's reasoning for veering from the long-established path of addressing subject matter jurisdiction before the merits is not implicated here.[4]

Next, and perhaps more importantly, Plaintiff's argument concerning Rule 23 is irrelevant. Wynn moved this Court to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction (*i.e.*, the applicability of the home-state exception to CAFA). As discussed above, federal court jurisdiction is limited by the "case and controversy" requirements of Article III and the federal statute that confers jurisdiction on the federal courts. *Richardson*, 943 F.2d at 1112-13. Plaintiff argues that because she has personally met the Article III constitutional standing requirements, this federal court has subject matter jurisdiction. (Opp'n 9:6-9.) This is just not true.[5] Plaintiff must also demonstrate that CAFA confers jurisdiction on this federal court to hear her claims. While Plaintiff discusses meeting CAFA's basic requirements, she blatantly ignores the plain language of the statute's express exceptions to that jurisdiction. Neither *Ortiz*, nor *AmChem*, nor any other of the cases Plaintiff cites stand for the absurd proposition that the CAFA exceptions

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[4] Plaintiff repeatedly accuses Wynn of trying to force this Court to determine Rule 23 class certification at this early stage in the case. This is just untrue. Wynn is not asking this Court to determine whether Plaintiff Kanie Kastroll (a current Wynn employee) can adequately represent the interests of former or future class members, or whether the other Rule 23 issues of numerosity, typicality, and commonality are met here. Wynn is simply stating that former and future employees – the only "people" who can even possibly get this Nevada plaintiff through the door of the federal courthouse – have no legally viable, redressable claim in this injunctive relief action. Ironically, by citing *Ortiz*, it is Plaintiff who is advocating for an immediate class certification determination. Worse yet, Plaintiff is calling for a hybrid approach by asking this Court to do neither a 12(b) nor a Rule 23 analysis, but rather let the case proceed to discovery. Nothing under the law permits such an approach.

[5] In this instance, Plaintiff may arguably have a "case or controversy" but one that belongs in state court only. *See Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (noting that a plaintiff may have a perfectly viable action under state law in state court but may be nonetheless foreclosed from litigating that claim in federal court).

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are superfluous and can be ignored or that this Court can put off its otherwise threshold analysis of jurisdiction until after Plaintiff engages in discovery.

This Court need not, should not, and indeed must not wait until after discovery when finally confronted with a request to certify the class to acknowledge the inevitable conclusion that the alleged classes fail as a matter of law. What is actually before the Court – and what will be unquestionably left before the Court following discovery if Plaintiff's ploy is permitted to proceed – is a home-state controversy over which this federal court is statutorily mandated to decline to exercise jurisdiction. Nothing Plaintiff can do in discovery can or will change the application of the home-state controversy exception and therefore her claim should be dismissed now.

B. Plaintiff's Claims Must Fail As A Matter Of Law.

1. Wynn does not have a duty to interfere with its patrons' right to smoke freely in its casino.

Smoking in casinos is legal in Nevada. In fact, it has been specifically sanctioned by both Nevada voters and the Legislature. *See* N.R.S. § 202.2483(3)(a). Despite this, Plaintiff contends that Wynn (a casino) should be held liable for allowing its patrons to smoke freely. (Opp'n 15:1-2.) In sole support of her assertion, Plaintiff makes up a duty that exists nowhere in Nevada law. Neither Nevada's judiciary nor its Legislature has made second hand smoke in casinos a tort or a crime. Instead, casinos are a designated space where smoking, and second hand smoke, is expressly allowed. Wynn cannot be made liable for allowing its patrons to smoke freely in a place where the law specifically says that they can. Plaintiff's claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). [6]

Recognizing this, Plaintiff attempts to convince the Court that it should ignore the Legislature and Nevada voters and create liability for employers like Wynn who are fully complying with the law. Yet, Plaintiff's only support for this bold request is her assertion that the

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[6] In her Opposition, Plaintiff withdrew her second claim for relief alleging a private cause of action under the Nevada Occupational Safety Act.

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Court would be joining in on a rising "trend". (Opp'n 15:1-18.) Even if this were a valid basis for the Court to create a new tort, which it is not, Plaintiff failed to demonstrate any actual "trend". Indeed, all of Plaintiff's cases, with the exception of one, are over two decades old. (*See id.* citing *Shimp v. N.J. Bell Tel. Co.*, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976); *Smith v. W. Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982); *McCarthy v. Dep't of Soc. & Health Servs.*, 759 P.2d 351 (Wash. 1988)).[7] Plaintiff's only recent example (from seven years ago) involves the Sixth Circuit's imposition of liability against a railroad company for violating the Federal Employers' Liability Act ("FELA"). (*See id.* citing *Wilhelm v. CSX Transp., Inc.*, 65 Fed. Appx. 973 (6th Cir. 2003)). In *Wilhelm*, the defendant railroad violated FELA by regularly breaching its own non-smoking policy and aggravating the plaintiff employee's well-known lung disease. *Wilhelm*, 65 Fed. Appx. at 974-78. Importantly, FELA is "liberally construed to further Congress's remedial goals." *Id.* at 976. In light of this, and the FELA's "relaxed standard of causation", the court found that the railroad had breached its duty to provide a safe workplace by customarily failing to enforce its own "safety rule". *Id.* at 977-78.

Here, Plaintiff is not a federal employee. She does not work for the railroads. She is a casino dealer working for Wynn and she does not accuse her employer of habitually breaking its own safety rules. Her claims are not supported by any federal law and the Court is not being asked to "further Congress's remedial goals." Rather, the Court is being asked to create a new duty that does not presently exist under Nevada law. Other courts have rejected similar invitations and this Court should reject Plaintiff's request now. *See Gordon v. Raven Sys. Research, Inc.*, 462 A.2d 10 (D.C. 1983) (rejecting plaintiff's request "to act where the legislature has not, by declaring that an employee with particular sensitivities to tobacco smoke has a common law right to a smoke-free environment.").

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[7] Not surprisingly, none of the cases Plaintiff relies upon in support of her alleged duty involve an environment where smoking was specifically paralleled. Rather, with the exception of *Wilhelm*, the plaintiffs in these cases worked in traditional private office environments. As shown *infra*, *Wilhelm* was filed by railroad company train engineer who brought claims pursuant to federal law.

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2. The courts are not a suitable forum for this policy debate.

As pointed out by Wynn in its Motion, "the judicial process . . . is peculiarly ill-suited to solving problems of environmental control." *Gordon,* 462 A.2d at 14 (internal citation omitted). Plaintiff's claims represent a struggle between competing values – not questions of law. Plaintiff concedes that her alleged duty does not exist in Nevada. (Opp'n 15:1-2.) She wants the Court to create it for the first time. Nevada state courts have refused to judicially legislate to expand rights and/or remedies related to second hand smoke in the workplace. *See, c.f., Palmer v. Del Webb's High Sierra,* 108 Nev. 673, 838 P.2d 435 (1992) ("The Legislature, of course, is free to declare that any person who contracts some secondary smoke-related disease at work is eligible for occupational disease compensation. The courts, we believe, do not have this power."). This subject matter is "inherently political" and "far too serious to relegate to the ad hoc process of [a] . . . lawsuit . . . ." *Gordon,* 462 A.2d at 14. This is especially true here since the Nevada citizenry and Legislature already addressed this exact issue and took appropriate action in the Clean Indoor Air Act.

Frankly, this Court is not, nor can it, be adequately apprised of the competing social interests involved in anti-tobacco legislation. Nor does it have the specialized expertise required to effectively measure the "trade-off between economic and ecological values." *Gordon,* 462 A.2d at 14. As aptly recognized by the Tenth Circuit, "the United States Constitution does not empower the federal judiciary, upon the plaintiff's application, to impose no-smoking rules in the plaintiff's workplace. To do so would support the most extreme expectations of the critics who fear the federal judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights." *Kensell v. Oklahoma*, 716 F.2d 1350, 1351 (10th Cir. 1983).

Plaintiff's own case law illustrates this point best of all. As the Court can see, each of the opinions Plaintiff relies upon in support of the alleged duty, with the exception of *Wilhelm*, was written by a state court of appeals applying the relevant laws of its own state and local

jurisdictions. (Opp'n 15:1-18.)[8] The opinions were not drafted by a federal court acting to impose a new duty in direct derogation of a state's existing statutory law. Accordingly, Plaintiffs' claims should be dismissed.

C. Plaintiff's Class Allegations Cannot Meet The Requirements Of Rule 23(a).

As thoroughly demonstrated in Wynn's Motion, Plaintiff's proposed class is replete with individualized issues like causation, comparative fault, assumption of the risk and damages. Because these individualized issues preclude Plaintiff from ever meeting the requirements for class certification, Plaintiff's class allegations should be stricken from her pleading now. Predictably, Plaintiff fails to defend her failure and instead tells the Court that it would be violating "standard procedure" if it considers Plaintiff's defective class allegations at this stage of the case. Once again, however, Plaintiff's own case law conclusively demonstrates that not only can the Court strike Plaintiff's class allegations now, but this Court should strike Plaintiff's class allegations now.

1. Courts readily strike defective class allegations like those in Plaintiff's Complaint.

In support of her contention that the Court should not consider the inherent defectiveness of her Complaint at this stage of the litigation, Plaintiff cites to several cases. (Opp'n 20:8-21:14.) Each of those cases, however, recognizes the Court's right to strike class allegations when, as here, they are defective on their face. For example, the Sixth Circuit in *Weathers v. Peters Realty Corporation*, a case cited by Plaintiff, noted the propriety of striking defective class allegations at the beginning of a case:

> [A]n action is not maintainable as a class action merely because it is designated as such in the pleadings. Mere repetition of the language of Rule 23(a) is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled. Maintainability may be determined by the court on the basis of the pleadings, if sufficient facts are set forth.

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[8] Perhaps the best example of this fact is the Washington Court of Appeals' decision in *McCarthy*. There, the court's decision was based, in part, on the fact that several local ordinances had been enacted to prohibit smoking in the type of office where plaintiff had formerly worked. *See McCarthy*, 759 P.2d at 355.

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499 F.2d 1197, 1200 (6th Cir. 1974) (citing 3B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 23.02-2, 230.5 (2d ed. 1969)) (emphasis added). Additionally, in *Walker v. World Tire Corporation, Inc.*, another case cited Plaintiff, the Eighth Circuit acknowledged that parties need not be afforded an opportunity "to discover and present documentary evidence on the issue [of class certification]" if "the pleadings themselves . . . conclusively show whether the Rule 23 requirements are met." 563 F.2d 918, 921 (8th Cir. 1977). Plaintiff's additional case law supports this point as well. *See, e.g., In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007) (recognizing that "Wal-Mart correctly cites *Kamm v. Cal. City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975), for the proposition that class allegations may be stricken at the pleading stage . . . ."); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975) ("[T]he judge may not conditionally certify an improper class on the basis of a speculative possibility that it may later meet the requirements."); *Shabaz v. Polo Ralph Lauren Corp.*, 586 F. Supp. 2d 1205, 1211 (C.D. Cal. 2008) ("Where the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claims, courts may address class certification issues in a 12(b)(6) motion.").

Here, Plaintiff's pleading is defective on its face. As discussed above, former Wynn employees cannot state a viable claim for only prospective injunctive relief, and future Wynn employees are ill-defined and have no injury to redress. Their claims are thus legally deficient. Additionally, due to the abundance of individualized issues present in her proposed class, it is simply impossible for Plaintiff to meet the requirements of Rule 23(a). Her class action allegations must therefore be stricken.

2. Plaintiff's own pleading plainly demonstrates that class certification cannot be sought here.

Nothing illustrates Plaintiff's failure better than the Court's decision in *Badillo v. American Tobacco Company*. 202 F.R.D. 261 (2001). While Plaintiff is correct that the Court's order in *Badillo* pertained to a motion for class certification, that fact is irrelevant to Wynn's purpose in

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citing it here.[9] Wynn relies upon *Badillo* because it definitively illustrates the inherent deficiencies in Plaintiff's proposed class. Like the proposed class here, each of the five proposed classes rejected in *Badillo* involved Nevada casino employees exposed to second hand smoke while at work. *Id.* And, like Plaintiff's proposed class here, all of the proposed classes in *Badillo* failed three of the four factors required by Rule 23(a). *Id.* at 264-65 (holding that plaintiffs had failed to adequately demonstrate commonality, typicality or adequacy of representation).

Plaintiff tries to escape *Badillo's* holding by accusing Wynn of confusing the commonality requirement of Rule 23(a)(2) with the preponderance requirement of Rule 23(b)(3). (Opp'n 22:9-23:4.) Plaintiff contends she is safe from the Court's analysis in *Badillo* because she seeks certification pursuant to Rule 23(b)(2). (*See id.*) Plaintiff is wrong. As the Court can easily see, the proposed classes in *Badillo* failed under both Rule 23(a) and Rule 23(b). *Id.* at 264 ("The Court finds that Plaintiffs in each of the four consolidated cases herein have failed to meet their burden of satisfying all of the foregoing prerequisites under Rule 23.") (emphasis added). Moreover, while the Court did combine its consideration of Rule 23(a)(2) with its consideration of 23(b)(3), the Court also found that the *Badillo* plaintiffs failed to meet the typicality and adequacy of representation requirements imposed by Rule 23(a)(3) and Rule 23(a)(4) as well. *Id.* at 265. Therefore, Plaintiff's reliance on Rule 23(b)(2) cannot save her allegations here.

Like *Badillo*, Plaintiff's proposed class is still inherently "replete with individual issues such as causation, comparative fault, assumption of risk, . . . statute of limitations and damages . . . ." *Id.* at 264. For example, "employees of Nevada casinos perform a variety of work tasks in a variety of locations within casinos . . . [and] it does not require an expert to conclude that the exposure to second hand tobacco smoke of an employee who works in one area of a particular casino would be different from that of an employee who works in another area." *Id.* at 265. "[T]he permutations are endless and do not lend themselves easily to grouping under the

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[9] Notably, while Plaintiff attempts to use *Badillo* as support for her assertion that the Court should allow discovery and receive evidence before ruling on the legitimacy of Plaintiff's class, the Court's order in *Badillo* makes no mention of any evidence nor does it appear that the parties engaged in any significant discovery before the proposed classes were stricken down. *See* 202 F.R.D. at 262-63.

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rubric of a class action." *Id.* Again, Plaintiff's class allegations are even more deficient than those considered by the Court in *Badillo*. Unlike Badillo, Plaintiff wants to include Wynn's future casino employees as well. (Compl. at ¶ 33.) However, adding these employees only serves to increase exponentially the potential locations, work environments, and tasks involved in Plaintiff's case. The potential variations are endless and presently still unknown. Therefore, Plaintiff's class allegations fail on their face.

While these variations alone require Plaintiff's allegations to fail, her proposed class definition fails for an additional reason as well. Specifically, Plaintiff's proposed class is described as those employees "exposed to unsafe levels of second-hand smoke." (*Id.*) (emphasis added). The question of whether Wynn's employees have been, are, or will be exposed to unsafe levels of second-hand smoke is a legal determination that cannot be made without first determining an ultimate issue in this case (*i.e.*, whether Wynn exposes its employees to levels of second-hand smoke which are unsafe). This is called a "fail-safe" class definition and it is impermissible as a matter of law. *See Ostler v. Level 3 Commc'n, Inc.*, No. IP 00-0718-C H/K, 2002 WL 31040337, at *2 (S.D. Ind. Aug. 27, 2002) ("Where such a decision on the merits of a person's claim is needed to determine whether a person is a member of a class, the proposed class action is unmanageable virtually by definition."); *Genenbacher v. Centurytel Fiber Co., LLC*, 244 F.R.D. 485, 488 (C.D. Ill. 2007) ("This type of class definition is called a 'fail safe' class because the class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class."); *Dafforn v. Rousseau Assoc., Inc.*, No. F 75-74, 1976 WL 1358, at *1 (S.D. Ind. Jul. 27, 1976) (class definition of those homeowners charged illegal fees created impermissible "fail safe" class because jury finding that fees were not illegal would at the same time determine that there was no class). Plaintiff's class definition requires a finding that Wynn exposed its employees to unsafe levels of second hand smoke. Because this is the ultimate issue in this case, Plaintiff's proposed class is "unmanageable by definition."

Finally, Plaintiff's reliance on the Fifth Circuit's decision in *Mullen v. Treasure Chest Casino, LLC* is misplaced. 186 F.3d 620 (5th Cir. 1999). In *Mullen*, the proposed class was much narrower and better defined than Plaintiff's proposed class here. Specifically, the class

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proposed in *Mullen* consisted of "all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness caused by or exacerbated by the defective ventilation system in place aboard the vessel." *Id.* at 623. Accordingly, "the putative class members [were] . . . all symptomatic by definition and claim injury from the same defective ventilation system over the same general period of time." *Id.* at 627. Here, in contrast, Plaintiff proposes a class of "all former, current, and future nonsmoking employees of Wynn . . . ." (Compl. at ¶ 33) (emphasis added). As the Court can see, Plaintiff's proposed class is vastly more expansive and overbroad. Plaintiff's proposed class is not defined by a common injury or a specific cause. Rather, it includes all nonsmoking employees exposed to unsafe levels of second hand smoke. Again, because such a class is facially untenable, her class allegations must be stricken as insufficient now.[10]

III. CONCLUSION

In light of the foregoing, the Wynn Las Vegas respectfully requests that this Court grant its Motion and dismiss Plaintiff's Complaint because (a) it lacks subject matter jurisdiction over a home state controversy pursuant to CAFA and/or (b) Plaintiff fails to state a viable negligence claim against Wynn Las Vegas. In the alternative, Wynn Las Vegas requests that this Court strike each and every class action allegation from Plaintiff's Complaint pursuant to Rule 12(f).

DATED this 16th day of February, 2010.

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[10] The court's opinion in *Mullen* only serves to further Wynn's point that Plaintiff's proposed class is inherently filled with individualized issues. There, the court was forced to bifurcate the trial and tried "the issues affecting only individual class members" "in a second phase in waves of approximately five class members at a time." *Mullen*, 186 F.3d at 623.

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