COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 07-2505

NOTICE SENT
08-05-09
P.R.L+E
T.A.C.
L.+L-R.
H.L.L.
S.E.L-R.
B.+M.
R.K.B
K.L.M.
R.L.S.

LUCIENNE CHAVES[1] & another[2]

vs.

KING ARTHUR'S LOUNGE, INC.

RECEIVED AUG 0 7 2009

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

(LAT)

The plaintiff, Lucienne Chaves, alleges that the defendant, her former employer, misclassified her as an independent contractor rather than an employee in violation of G. L. c. 149, § 148B. This matter is before this Court on the defendant's Motion for Summary Judgment and the plaintiff's Cross-motion for Partial Summary Judgment. For the reasons set forth below, the defendant's motion is **denied** and the plaintiff's motion is **allowed**.

Background

The plaintiffs, Lucienne Chaves ("Chaves") and William Carvalho ("Carvalho") were employed by King Arthur's Lounge ("King Arthur's"), a bar and lounge located in Chelsea, Massachusetts, as an exotic dancer and a bookkeeper/ manager, respectively. Chaves worked at King Arthur's from January 2005 until May 2007, when, she alleges, a dispute with a bartender led to its refusal to re-employ her.

King Arthur's classified Chaves and the other dancers who worked there as independent

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[1] On behalf of herself and all others similarly situated.

[2] Wilson Carvalho

contractors rather than as employees. The plaintiffs argue that this classification "resulted in numerous violations of statutory and common law," including G. L. c. 149, § 148B, the Massachusetts independent contractor law. They also allege that King Arthur's discharged Carvalho in retaliation for "defending" Chaves' rights under the wage and hour provisions of Chapter 149.

King Arthur's moves for summary judgment, arguing that there are no material facts establishing that Chaves was an employee rather than an independent contactor; that King Arthur's violated any relevant wage statutes; that Chaves suffered any damages; or that King Arthur's improperly discharged Carvalho. The plaintiffs cross-move for partial summary judgment on the question of whether King Arthur's mis-classified Chaves as an employee rather than an independent contractor.

Discussion

I. Standard of Review

Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact[]" and that the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *DuPont v. Comm'r of Corr.*, 448 Mass. 389, 397 (2007). A fact is "material" if it would affect the outcome of the suit. *Carey v. New England Organ Bank*, 446 Mass. 270, 278 (2006). A dispute is "genuine" where a reasonable finder of fact could return a verdict for the non-moving party. *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991). The moving party bears the initial burden of demonstrating the absence of a triable issue and that the summary judgment record entitles it to judgment as a matter of law. *Kourouvacilis*

v. Gen. Motors Corp., 410 Mass. 706. 716 (1991). In reviewing a motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in his or her favor. *Jupin v. Kask*, 447 Mass. 141. 143 (2006).

II. Analysis

A. The Employee/Independent Contractor Classification Standard

Chaves's claims turn on whether she was mis-classified as an independent contractor while she worked at King Arthur's. If the classification was accurate, she cannot recover on her other claims for failure to pay minimum wage, overtime, violation of G. L. c. 149, § 152A, or violation of the wage law. She also requests restitution under quantum meruit and alleges that King Arthur's has been unjustly enriched by mis-classifying its exotic dancers.

Under Massachusetts law, a worker will be considered an employee unless: "(1) The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; *and* (2) the service is performed outside the usual course of the business of the employer; *and*, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." G. L. c. 149, § 148B(a)(1)-(3). The burden of proof is on the employer, and "because the conditions are conjunctive, [the employer's] failure to demonstrate any one of the criteria set forth in subsections (1), (2), or (3) suffices to establish that the services in question constitute "employment" within the meaning of the statute." *Rainbow Development, LLC v. Commonwealth of Massachusetts Department of Industrial Accidents,* 2005 WL 3543770 (Mass. Super. 2005), at *2, quoting *Silva v. Director of*

the Division of Employment Sec., 398 Mass. 609, 613 (referring to identical language found in G. L. c. 151A, § 2, the unemployment compensation statute[3]). There is a rebuttable presumption that "any person performing services for another is an employee unless the employer meets the three prong test." *Rainbow Development*, 2005 WL 3543770 at *2, citing *Athol Daily News v. Bd. of Review of Employment and Training*, 439 Mass. 171, 175 (2003) (interpreting G. L. c. 151A, § 2).

B. Chaves's Status as an Employee

To prove the first prong of the independent contractor test, King Arthur's must show that Chaves was free from its control and direction in connection with the performance of her services. King Arthur's asserts that because Chaves earned money only through gratuities, chose her own music, costumes, partners, and routines, and paid a $35 fee to King Arthur's to dance each night, Chaves was free from King Arthur's control in the performance of her services. King Arthur's further states that it never gave Chaves written rules to comply with, documentation stating that she was an employee, or instruction as to if or when she should perform private dances at the club.

Chaves responds that King Arthur's trained her to perform as an exotic dancer; she had no previous experience. She states that dancers were not permitted to negotiate the fees they paid

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[3] Courts have had limited opportunity to interpret the independent contractor law. Because G. L. c. 149, § 148B is nearly identical to G. L. c. 151A, § 2, the statute used by the Division of Unemployment Assistance, courts have relied on case law analyzing the latter statute to interpret the former. "If the legislature uses the same language in several provisions concerning the same subject matter the courts will presume it to have given the language the same meaning in each provision." *College News Service v. Department of Industrial Accidents*, 2006 WL 2830971 (2006), at *4

to perform, that each dancer worked specific shifts created by King Arthur's[4] and was assigned to a 15-minute performance slot, and that when she was not performing on stage, "she was supposed to move from one table to the next sitting with customers and encouraging them to buy drinks." She also states that when exotic dancers performed private dances for patrons, they had no discretion over how much to charge or which patron they would dance for.

The test for the first prong of the independent contractor test is "not so narrow as to require that the worker be entirely 'free from direction and control from outside forces.'" *Athol Daily News*, 439 Mass. at 178. However, "'it is the right of control rather than the exercise of it' . . .that is legally determinative." *Rainbow Development, LLC*, 2005 WL 3543770 at *3. King Arthur's cites several cases from other jurisdictions for the proposition that dancers are independent contractors free from employer control if they choose their own music, costumes, and routines and earn their payment solely through gratuities.[5] However, the statutory scheme is quite different. Massachusetts's independent contractor statute is stringent, and it appears that no court in this state has adopted such a rule. Alternately, as Chaves asserts, other jurisdictions have found that exotic dancers are employees rather than independent contractors.[6]

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[4] There was a day shift for dancers at King Arthur's that lasted from noon until 7:00 pm; the night shift lasted from 7:00 pm until 1:00 am. See defendant's Statement of Undisputed Facts and Legal Elements, ¶¶ 29-30.

[5] See, e.g., *Deja Vu Entertainment Enter. v. U.S.*, 1 F. Supp. 3d 964 (D. Minn. 1998) (dancers were independent contractors even though the prices paid for lap dances were set by the club, dancers were fined if they failed to arrive for their shifts, and they were expected to circulate among patrons when not peforming); *Taylor Blvd. Theatre Inc. v. U.S.*, 1998 WL 375291 (W.D. Ky. 1998) (dancers were independent contractors where they choreographed their own dances, chose their costumes, and maintained the option of performing at other clubs).

[6] See, e.g., *303 W. 42nd Street Enterprises, Inc. v. IRS*, 916 F. Supp. 349 (S.D.N.Y. 1996) (exotic dance booth performers were not independent contractors; the training of a worker by management or an experienced employee was indicative of an employer-employee relationship because it demonstrates the

It is clear that despite the dancers' freedom to control the artistic aspects of their performances, King Arthur's did exert a measure of control over them. Chaves was trained by King Arthur's, which apparently hired its dancers based solely on whether they "look good"[7] rather than individual performance experience or talent. King Arthur's hired and fired dancers, and had them perform according to a set shift schedule that it determined. However, it is unnecessary to determine whether King Arthur's has satisfied the first prong of the independent contractor test, because it has failed to establish either the second or third prong.

Under the second prong of the test, the employer must prove that the service performed by the worker is outside of its usual course of business. The law does not define "usual course of business," and case law provides limited guidance in interpreting this fact-specific provision.

Chaves argues that King Arthur's is "principally engaged in providing exotic dancing entertainment to its customers so they will purchase the lounge's alcoholic beverages."

King Arthur's asserts that its "usual course of business . . . is selling alcohol rather than exotic dancing. . .[and that it] does not even profit from exotic dancing unless private lap dances are given . . . ." It argues that the strip dancing that takes place in the lounge is merely a form of entertainment it provides for its patrons, akin to the televisions and pool tables in a sports bar. Thus, it analogizes, just as televisions airing sporting events do not make sports the "usual course of business" for a sports bar, neither do exotic dancers make King Arthur's a strip club. King Arthur's argument likening its exotic dancers to televisions or Keno machines is not persuasive.

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employer's desire to have the work performed in a particular fashion); *Jeffcoat v. Alaska Department of Labor*, 732 P. 2d 1073 (exotic dancers were employees; the fact that neither long training nor highly developed skills were required weighed against independent contractor status).

[7] See Statement of Additional Material Facts, ¶ 76; Rivera Depo., 25:23-24.

First, this Court is satisfied that the facts establish that King Arthur's is in the business of providing adult entertainment, that is, nude dancing and alcohol, and that the exotic dancers work in the furtherance, or the course, of that business. In its Answer, defendant concedes that it maintains a facility where exotic dancers perform. The manager, Edwin Rivera, at deposition characterized King Arthur's as a "strip joint." Here, the stage where the dancers perform is in the center of the strip club side of the facility, and in direct view of those patrons. Dancers are in active performance whenever King Arthur's is open for business; they dance in fifteen minute intervals over two seven-hour shifts from noon to 1:00 AM. King Arthur's has constructed video-monitored private booths for private dancing by certain performers as requested, and thus has invested resources in providing individualized performances for its patrons. The patrons are restricted; no touching of the performers is allowed. Most importantly, King Arthur's receives direct revenue from the private dancing. It costs $30 per session, paid to King Arthur's, with $20 of that being paid to the dancer. There is evidence that 70% of the total revenue is derived from the strip club operation. "Adult entertainment" is the business of King Arthur's.

Television and pool in a sports bar–the analogue suggested by defendant–are inapposite. Televisions and pool tables do not bring revenue directly into a sports bar; they are a sidelight to the business of selling alcohol. There is no market in architectural accommodation for the specialized viewing of sporting events in a bar. The nature of the televised sporting events is not so compelling as to require the strict regulation of patrons, i.e., "no touching." A court would need to be blind to human instinct to decide that live nude entertainment was equivalent to the wallpaper of routinely- televised matches, games, tournaments and sports talk in such a place. The dancing is an integral part of King Arthur's business.

While it may be true that the bulk of King Arthur's revenue is derived from alcohol sales as distinguished from stage dancing, the dancers perform and interact with patrons in the direct furtherance of those sales. The sale of alcohol and the exotic dancing, together and intertwined, both clearly comprise the adult entertainment portfolio of King Arthur's.

The relatively few Massachusetts cases construing the independent contractor statute are consistent with a finding that King Arthur's has failed to prove the second prong and that its exotic dancers should therefore be classified as employees. A worker is generally an employee if her services "form a regular and continuing part of the employer's business [and if her] method of operation is not such an independent business . . ." through which her risk and liabilities might be channeled. *American Zurich Ins. Co. v. Department of Industrial Accidents*, 2006 WL 2205085, at *4 (2006).

Similarly, in *Rainbow Development, LLC,* 2005 WL 3543770 (2005), the workers who performed the detailing and reconditioning offered by a car detailing service were employees rather than independent contractors, despite the fact that they were required to sign an agreement classifying them as independent contractors. *Id.* at 3. Although the court in *Athol Daily News,* 439 Mass. 171 (2003), determined that newspaper carriers were independent contractors of the newspaper that employed them, it based this on the unemployment compensation statute, G. L. c. 151A, § 2, which is more lenient than the independent contractor statute in that it allows employers to prove the second prong of the test *either* by showing that the worker's services are carried out outside the usual course of the employer's business *or* that the service was performed outside of all the places of business of the enterprise. *Id.* at 178. The court agreed that the carriers' services were performed in the usual course of the newspaper's business, which the

employer itself defined as publishing and distributing a daily newspaper. *Id.* at 179. But because all of the carriers made their deliveries outside the premises owned by the employer. the court found that the newspaper proved the second prong of the easier-to-prove version of the second prong of the test provided by the unemployment compensation statute.

Clearly, Chaves and the other exotic dancers' performances at King Arthur's are not outside of its usual course of business. Therefore, King Arthur's cannot prove the second prong of the independent contractor test.

Although failing to prove the second prong of the test is sufficient to find that Chaves was an employee under the statute, King Arthur's also fails to prove the third prong, which requires that the worker be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. In analyzing this prong, the court may consider both "whether a worker is 'capable of performing the service to anyone wishing to avail themselves of the services'" and "whether 'the nature of the business compels the worker to depend on a single employer for the continuation of the services.'" *Coverall North America, Inc. v. Commissioner of the Division of Unemployment Assistance,* 447 Mass. 852, 858 (2006).

It is undisputed that Chaves did not perform exotic dance at any other strip clubs during the time she worked at King Arthur's. There is no evidence that other dancers worked at other venues.[8] Although Chaves admits that she performed dances at private barbeques on three occasions over two years, these were the only commercial engagements she had, but for dancing at King Arthur's.

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[8] See Rivera Depo., 29:14-22.

The evidence permits the inference that Chaves had few, if any, other venues in which to work but for King Arthur's. Adult entertainment facilities are restricted by licensing, zoning and other regulatory hurdles and the venues are limited. In an age of electronic and Internet access to a wide variety of adult media, exotic dancing is unlikely to offer a commercial opportunity---over the long term–that would rise to an independently established trade or occupation.

As noted, Chaves was obligated to pay King Arthur's a $35 fee for each shift she danced. Thus, the opportunity to work came dear to Chavez and warrants the inference that there were few other opportunities to earn money in this fashion. In a free market where exotic dancing was an independently established occupation, the dancer would not need to pay to ply it. Therefore, Chaves was dependent on King Arthur's as a commercial outlet for her services.

Further in this regard, the case law invites the court to look at "whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise." *Boston Bicycle Couriers, Inc. v. Deputy Director of the Div. of Employment & Training,* 56 Mass. App. Ct. 473, 480 (2002). In *Boston Bicycle Couriers, Inc.*, a courier was determined to be an employee; the employer failed to prove the third prong of the test despite the fact that the worker had signed an agreement stating that he was an independent contractor and that he occasionally hired another individual to assist him with pick-ups and deliveries. *Id.* at 483-484. The court noted that "the question whether an employer has satisfied the statutory requirements of [the third prong of the independent contractor test] . . . must be based on a comprehensive analysis of the totality of relevant facts and circumstances of the working relationship. No one factor is outcome-determinative." *Id.* at 484. However, the court in *Athol Daily News* distinguished *Boston Bicycle Couriers, Inc.*, describing the latter court's

standard as "unnecessarily rigid" but allowing that because the couriers did not, as a practical matter, have the option of performing their services for similar companies, they were correctly deemed to be employees. *Athol Daily News*, 439 Mass. at 181. In determining that the employer had satisfied the third prong of the test, the *Athol Daily News* court relied on the fact that the carriers used their own vehicles, purchased the newspapers from the employer and sold them at a price of their own choosing rather than being paid an hourly wage, were free to contract with competitors of the newspaper, and the breadth of each carrier's delivery service was a function of the individual initiative of the carrier. *Id.* at 182. In contrast, although Chaves paid a fee to King Arthur's for each shift, she was subject to its control in that King Arthur's determined the work schedule, directed her private dancing and owned the premises at which she performed. There is a question of fact as to whether King Arthur's actively discouraged or prevented its dancers from performing at other strip clubs.

In *Boston Bicycle Couriers,* 56 Mass. App. Ct. at 480, the court stated that "[t]he essential determination is whether 'the worker is an entrepreneur and service is performed by him or her in that capacity'" (additional citations omitted). Although exotic dancing could potentially become an independent business if a worker was interested in making it one, it is unlikely that Chaves's exotic dancing, which was taught to her by King Arthur's employees, and which apparently took place outside King Arthur's on only three occasions during the more than two years she was employed there, rises to the level of an independent entrepreneurial business. Different courts have applied more or less stringent standards, and, like the other prongs of the independent contractor test, this parameters of this one are so far somewhat ambiguous. But when the totality of circumstances in this working relationship are examined, it is more likely that Chaves was

"wearing the hat of an employee" of King Arthur's than "the hat of [her] own enterprise," even if she performed exotic dancing for more than one employer. *Athol Daily News*, 439 Mass. at 191, citing *Boston Bicycle Couriers, Inc.*, 56 Mass. App. Ct. at 480.

The defendants also argue that the plaintiffs' claims must be dismissed because Chaves cannot show that she suffered any damages. They assert that Chaves would have earned more in tips than she would have received in minimum wage, and therefore, under *Somers v. Converged Access, Inc.*, 2008 WL 497982 (Mass. Super. 2008), which found that a plaintiff did not suffer any damages because he had earned more as an independent contractor than he would have in a similar salaried position at the company, she cannot recover. The plaintiffs contend that this case was wrongly decided, but, more importantly, the defendants fail to consider that, had the dancers been characterized as employees, they would have earned both the minimum wage required for tipped employees under G. L. c. 151, §§ 1, 7, and the tips they earned while dancing. The fact that Chaves sometimes earned considerable amounts of money in tips while performing does not allow King Arthur's to escape liability under G. L. c. 149, § 148B.

Finally, the defendants argue that plaintiff Carvalho admits that he did not help Chaves with her lawsuit until after his termination and that he was not told that he had been terminated due to his support of Chaves's lawsuit; therefore, they state, his causes of action should be dismissed. However, Carvalho's causes of action are based on his alleged inability to convince Chaves to drop her lawsuit and what he says was his subsequent termination. There remain questions of fact on Carvalho's claims that preclude summary judgment for the defendants.

ORDER

For the foregoing reasons, the defendant's motion for summary judgment is **DENIED** and the plaintiffs' cross-motion is **ALLOWED.** Defendant violated M.G.L. c. 149, s 148B by mis-classifying its dancers as independent contractors and not as employees. Plaintiff is entitled to judgment on Count I of her Amended Complaint.

So ordered:

Frances A. McIntyre
Justice of the Superior Court

DATED: July 30, 2009

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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LUCIENNE CHAVES[1] & another[2]

vs.

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KING ARTHUR'S LOUNGE, INC.

(LAT)

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

The plaintiffs, Lucienne Chaves ("Chaves") and William Carvalho ("Carvalho") were employed by King Arthur's Lounge ("King Arthur's"), a bar and lounge located in Chelsea, Massachusetts, as an exotic dancer and a bookkeeper/ manager, respectively. Chaves worked at King Arthur's from January 2005 until May 2007, when, she alleges, a dispute with a bartender led to its refusal to re-employ her.

King Arthur's classified Chaves and the other dancers who worked there as independent contractors rather than as employees. The plaintiffs argue that this classification "resulted in numerous violations of statutory and common law," including G. L. c. 149, § 148B, the Massachusetts independent contractor law.

In this motion, Chaves seeks certification to represent herself and others similarly situated, that is, the other exotic dancers at the King Arthur. Relying on the Wage Act,[3] she

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[1] On behalf of herself and all others similarly situated.

[2] Wilson Carvalho

[3] An employee claiming to be aggrieved by a violation of sections 33E, 148, 148A, 148B, 150C, 152, 152A or 159C or section 19 of chapter 151 may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf,

seeks to dispense with the process of findings required under Rule 23. Defendants contest this point.

While Chaves' argument as to private attorney generals is persuasive, the Act does not appear to grant automatic class status or certification without compliance with the Rule. Therefore, this Court will follow those dictates. which are easily met in this case.

DISCUSSION

Under the Rule, this case may only be sustained as a class action if 1.) the class is so numerous that joinder of all members is impracticable, 2.) there are questions of law or fact common to the class, 3.) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and 4.) the representative parties will fairly and adequately protect the interests of the class. Mass.R.Civ.P. Rule 23

(1) The class is so numerous that joinder of all members is impracticable.

Plaintiff submits innumerable pages of dancing schedules from King Arthur's establishing at least seventy dancers were thus employed. As plaintiff points out, in other employment cases class size has been much less. and still satisfied the numerosity requirement. A class size estimated at 70 persons is impracticable to bring separately. In a line of work where education and developed skills were not critical, it is likely that some class members were temporarily dancing and they may now be difficult to locate. Joinder is surely impracticable.

(2) There are questions of law or fact common to the class; and

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or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. M.G.L. c.149 § 150.

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class.

This type of case is uniquely suited to class treatment. All of the putative class would stand in the same position relative to King Arthur's, i.e, allegedly mis-classified. The claim of each of the dancers would therefore be identical and based on the independent contractor law: the lounge, it is claimed, mis-classified them as independent contractors rather than employees. The wage claim that may flow from a correct classification will affect them in identical fashion. The facts, law, claims and defenses are narrow and identical as to each exotic dancer working at King Arthur.

The only distinction pointed out by the defendant in contesting commonality and typicality is that Chaves did not actively market her dancing as an occupation. He argues that other dancers may have had a different experience pursuing such a career. This claim is not supported by evidence, is highly speculative, and under the independent contractor statute, M.G.L. c. 149 s. 148B, is only one factor in a fact-specific analysis. All other working conditions would apparently have been identical and experienced in common. Moreover, the Rules requires only that questions of law or fact "predominate" over issues affecting individual members. *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass 337, 362 (2008). The commonality and typicality requirements are met.

(4) The representative parties will fairly and adequately protect the interests of the class.

Chaves' situation is typical of all dancers at King Arthur's. Largely because the common issue is so narrow, there appears to be no legal conflict between her position as plaintiff and that

of other dancers. Her counsel is exceptionally well-suited by experience with prior litigation to handle this case on behalf of an entire class.

The defendant claims that class certification is not a proper format because of Carvalho's presence in the case. However, his claim or retaliation arises directly from Chaves' Wage Claim, and so, involves similar facts and law. The retaliation claim does not undermine the common interest these plaintiffs have with the other dancers in being correctly classified. Plaintiff offers to sever the Carvalho claim, and for the sake of clarity, this Court will so order.

Defendant expresses concern that exotic dancers not presently parties to the lawsuit do not wish to be involved and worries that their inability to opt-out of the lawsuit compromises their rights. This Court considers that the economic disparity between the defendants and the other dancers, as well as their dependence on the club for employment, is likely a factor in the other dancers' reluctance to litigate. The interests of justice are served by litigating the classification issue as to all dancers.

CONCLUSION AND ORDER

For the foregoing reasons, this Court **allows** the motion and **orders** that Lucienne Chaves, and the exotic dancers at the King Arthur Lounge Inc. be certified as a class, and this action as a class action. The claim of Wilson Carvalho is severed and stayed pending resolution of the class claims.

So ordered:

Frances A. McIntyre
Justice of the Superior Court

DATED: July 31, 2009