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13 Attorneys for Representative Plaintiffs and Class Members

14 **UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF NEVADA**
 16

17 KEVIN CARTER and DANIEL GERSTEL,
 individually and on behalf of all other persons
 18 similarly situated and on behalf of the general
 public,

19 Plaintiffs,

20 vs.

21 WYNN LAS VEGAS, LLC, a Nevada Limited
 22 Liability Company,

23 Defendant.

DOCKET NO.

COMPLAINT

- (1) Conversion
- (2) Breach of Written Contract
- (3) Breach of Covenant of Good Faith
- (4) Unjust Enrichment
- (5) Declaratory Relief
- (6) Accounting
- (7) Injunctive Relief

(File as a collective and class action)

JURY DEMAND

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1 Pursuant to 29 U.S.C. §185, Representative Plaintiffs, Kevin Carter and Daniel Gerstel
2 (hereinafter “Plaintiffs”), by and through their attorneys, Megan K. Dorsey, Esq. of Koeller,
3 Nebeker, Carlson & Haluck, LLP, and Jon R. Mower, Esq. of Mower, Carreon, & Desai, LLP,
4 on behalf of themselves and all similarly situated Class Members, file this complaint against
5 Wynn Las Vegas, LLC (hereinafter "Defendant") for compensation and injunctive and
6 declaratory relief. Attorney Mower will contemporaneously seek pro hac vice admission in this
7 case and will comply with LR IA 10-2 within forty five (45) days.

8 **I. JURISDICTION**

9 1. Jurisdiction exists pursuant to 29 USC § 185 in that the instant Complaint alleges
10 violation of a contract between an employer and a labor organization representing employees in
11 an industry affecting commerce, the resolution of which is substantially dependent upon
12 analysis of the terms of a collective bargaining agreement.

13 **II. INTRODUCTION**

14 2. This action is brought as a collective and representative class action to recover wages
15 and/or gratuities due to Plaintiffs and all other bartenders, culinary workers and/or similarly
16 situated job positions currently or formerly employed by Wynn Las Vegas, LLC (hereinafter
17 “Defendant”) at its nightclubs, commonly referred to as Tryst and XS, under the terms of the
18 Collective Bargaining Agreement (hereinafter “CBA”) between Defendant and the Local Joint
19 Executive Board of Las Vegas Culinary Workers Union Local 226 and Bartenders Local Union
20 Local 165 (hereinafter “ Employees”).

21 3. In accordance with the terms of the CBA, all gratuities left by customers are the property
22 of the Employees.

23 4. Defendant had, and continues to have, a uniform policy and practice of requiring
24 Employees to share with management personnel not covered by the CBA and specifically
25 precluded from partaking of Employees’ gratuities under the terms of the CBA (hereinafter
26 “Management Personnel”) all tips and/or gratuities received from Defendant’s customers and
27 intended for Employees (hereinafter “Mandatory Tip Distribution Policy”). Upon information
28 and belief, Plaintiffs allege this Mandatory Tip Distribution Policy has been in effect for

1 approximately four (4) years at Tryst, and has been in effect at XS since that nightclub opened
2 approximately one and a half (1 ½) years ago (hereinafter “Applicable Liability Period”).

3 5. Defendant instituted, carried out and applied the foregoing Mandatory Tip Distribution
4 Policy to Plaintiffs and Class Members because Defendant improperly treated Management
5 Personnel as if such personnel were working under one or more of the job classifications listed
6 on Exhibit 1 of the CBA (a copy of which is attached hereto as Exhibit 1), and as if such
7 Management Personnel were entitled to gratuities left by customers, which they are not, or
8 alternatively because Defendant has simply chosen to ignore or otherwise intentionally violate
9 the express provisions of the CBA.

10 **III. VENUE**

11 6. Venue is proper in this District under 29 USC § 185 because substantially all of the
12 events, acts, or omissions giving rise to the claims asserted occurred in Clark County, Nevada.
13 Defendant has maintained and continues to maintain offices in Clark County, Nevada, and the
14 Class Members were or are employed in Clark County, Nevada.

15 **IV. PARTIES**

16 **A. Plaintiffs**

17 7. The following Representative Plaintiffs bring claims on behalf of themselves, the
18 general public, and in a representative capacity on behalf of all similarly situated Employees:

19 8. Plaintiff KEVIN CARTER:

20 (a) Plaintiff Kevin Carter is a resident of Clark County, Nevada. He has worked as an
21 Employee for Defendant in Tryst and XS nightclubs located within Defendant’s Wynn and
22 Encore resort hotel casinos located in Clark County, Nevada from approximately November of
23 2007 until the present time. Plaintiff Carter is a shop steward for Bartenders Union Local 165.

24 (b) During the Applicable Liability Period, Defendant required Plaintiff Carter to participate
25 in its Mandatory Tip Distribution Policy.

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1 9. Plaintiff DANIEL GERSTEL:

2 (a) Plaintiff Daniel Gerstel is a resident of Clark County, Nevada. He has worked as an
3 Employee for Defendant in Tryst and XS nightclubs located within Defendant's Wynn and
4 Encore resort hotel casinos located in Clark County, Nevada from approximately October of
5 2008 until the present time. Plaintiff Gerstel is a shop steward for Culinary Union Local 226.

6 (b) During the Applicable Liability Period, Defendant required Plaintiff Gerstel to
7 participate in its Mandatory Tip Distribution Policy.

8 **B. Defendant**

9 10. WYNN LAS VEGAS, LLC is a Nevada Limited Liability Company and the owner and
10 operator of the Wynn Casino in Las Vegas, Nevada. Defendant has been doing business in the
11 State of Nevada throughout the Applicable Liability Period. Defendant employed
12 Representative Plaintiffs and Class Members during the Applicable Liability Period.

13 11. Defendant directed, authorized, ratified and/or participated in the conduct that gives
14 rise to the claims asserted herein, and derived personal financial benefit from such conduct.

15 **V. FACTUAL BACKGROUND FOR ALL CLAIMS**

16 12. Defendant is a limited liability company and operates, and at all times during the
17 Applicable Liability Period has operated, resort hotel casinos in Clark County, Nevada in which
18 the nightclubs Tryst and XS are located. At these nightclubs, Defendant employed, and
19 continues to employ, numerous bartenders, culinary workers and related employee service
20 personnel who are Employees as designated in and covered by the provisions of the CBA.
21 Plaintiffs are informed and believe and on that basis allege that, during the Applicable Liability
22 Period, Defendant has employed approximately three hundred (300) persons as such
23 Employees.

24 13. Defendant and Class Members, including Plaintiffs, are subject to the CBA between
25 Defendant and the Local Joint Executive Board of Las Vegas Culinary Workers Union Local
26 226 and Bartenders Local Union Local 165.

27 14. The Employee Class Members, including Plaintiffs, are employees working in certain
28 job classifications defined on Exhibit 1 of the CBA. These Employees are not managerial

1 personnel but instead are involved in providing direct services to Defendant's customers at the
2 Tryst and XS nightclubs.

3 15. Defendant has engaged in a regular practice of requiring Employee Class Members to
4 share tips and/or gratuities received from Defendant's customers with Management Personnel
5 pursuant to Defendant's Mandatory Tip Distribution Policy, despite the contractual provisions
6 prohibiting such conduct.

7 16. Plaintiffs, on behalf of all similarly situated employees, submitted a grievance to
8 Defendant on June 30, 2010, pursuant to Section 21.03(a) of the CBA, objecting to Defendant's
9 Mandatory Tip Distribution Policy.

10 17. Plaintiffs, on behalf of all similarly situated employees, participated in a hearing on their
11 grievance with the Board of Adjustment on September 17, 2010, pursuant to Section 21.03(b) of
12 the CBA, at which relief was denied. At the Board of Adjustment hearing, Defendant made
13 clear to Plaintiffs that as to all bartenders, culinary workers, and related service providers
14 covered by the CBA and employed at Tryst or XS nightclubs, the Mandatory Tip Distribution
15 Policy would not be revised and that all such Employees would continue to be required to share
16 tips with Management Personnel despite the objections made by Plaintiffs, and that no further
17 discussion of the issue would be undertaken.

18 18. Arbitration is permitted under Section 21.03(c) of the CBA, but is not mandatory.
19 Plaintiffs have elected not to arbitrate but instead to pursue their remedies by way of the present
20 action.

21 19. Plaintiffs are informed and believe and thereon allege they have exhausted all
22 administrative remedies on behalf of all similarly situated employees under the CBA.

23 **VI. CLASS ACTION ALLEGATIONS**

24 24. This action is maintainable as a class action pursuant to FRCP 23(a) and 23(b)(3) as to
25 claims for tips and/or gratuities improperly taken and retained by Defendant from Plaintiffs and
26 all similarly situated Employees. As alleged hereinabove, Plaintiffs and the Class Member
27 Employees have been required by Defendant to share gratuities with management personnel
28 specifically excluded from receiving same under the terms of the CBA. Plaintiffs are

1 representative of those other employees and are acting on behalf of their interests, as well as
2 their own, in addition to the interests of the general public in a private attorney general capacity.
3 The similarly situated Class Members are readily identifiable and locatable through Defendant's
4 own employment records.

5 25. Plaintiffs bring this action as a class action pursuant to FRCP 23(a) and 23(b)(3) on
6 behalf of themselves and the class of employees and former employees of Defendant who,
7 within the Applicable Liability Period, worked as Employees and were required to share
8 gratuities with Management Personnel.

9 26. Numerosity. The employees in the class identified above are so numerous that joinder
10 of all members is impracticable. Although the precise number of employees is unknown,
11 Plaintiffs are informed and believe and on that basis allege that, during the Applicable Liability
12 Period, Defendant employed approximately three hundred (300) Employees at the Tryst and XS
13 nightclubs in Clark County, Nevada. The exact number is easily ascertainable from
14 Defendant's own employment records, which are presently within the possession and/or control
15 of Defendant.

16 27. Commonality. There are questions of law and fact common to the Class Members
17 which predominate over any questions affecting only individual Class Members including, but
18 not limited to, the following:

19 (a) Whether Defendant wrongfully exerted dominion over the personal property of
20 Representative Plaintiffs and Employee Class Members;

21 (b) Whether Defendant breached the CBA by requiring Plaintiffs and Employee Class
22 Members to share gratuities with Management Personnel;

23 (c) Whether Defendant breached its duty of good faith and fair dealing to Plaintiffs and
24 Employee Class Members as alleged herein; and

25 (d) Whether Defendant wrongfully retained gratuities belonging to Plaintiffs and Employee
26 Class Members as alleged herein.

27 28. Typicality. The claims of the Representative Plaintiffs are typical of the claims of the
28 Employee Class Members they seek to represent. Each of the Representative Plaintiffs was

1 subject to the same Mandatory Tip Distribution Policy and seeks the same type of damages and
2 restitution and other relief based on the same theories and legal grounds as those of the
3 Employee Class Members.

4 29. Adequacy of Representation. The Representative Plaintiffs will fairly and adequately
5 represent and protect the interests of the Employee Class Members. Plaintiffs' counsel are
6 competent and experienced in litigating class actions, consumer class actions, and other
7 complex litigation matters, including wage and hour cases for unpaid minimum wages, tip
8 pooling and tip sharing, unpaid overtime compensation, and applicable penalties similar to the
9 claims presented in this action.

10 30. Superiority. This class action is superior to other available means for the fair and
11 efficient adjudication of this litigation. The Employee Class Members have been damaged and
12 are entitled to recovery as a result of Defendant's common and uniform policies, practices, and
13 procedures. Although the damages suffered by individual Employee Class Members may not
14 be *de minimis*, such damages are small compared to the expense and burden of individual
15 prosecution of this litigation. Individual litigants may lack the financial resources to vigorously
16 prosecute a lawsuit against corporate defendants to recover such damages. Even if individual
17 Employee Class Members could afford to prosecute their claims separately, individualized
18 litigation presents a potential for inconsistent or contrary judgments regarding Defendant's
19 policies and practices. By contrast, the class action device presents far fewer management
20 difficulties and provides the benefits of single adjudication, economy of scale, and
21 comprehensive supervision by a single court.

22 **VII. FIRST CLAIM FOR RELIEF**
23 **(CONSERVATION)**

24 31. Plaintiffs hereby incorporate by reference all prior allegations as though fully set forth
25 herein.

26 32. Under the terms of the CBA, gratuities are the property of the Employees and cannot be
27 appropriated by Management Personnel. Throughout the Applicable Liability Period, Plaintiffs
28 and all similarly situated Employees were required to participate in Defendant's Mandatory

1 Tip Distribution Policy and to forego a portion of the gratuities left to them by customers and
2 instead to pay such portion of said gratuities directly to Management Personnel.

3 33. Plaintiffs allege Defendant wrongfully exerted dominion over Employees' personal
4 property.

5 34. Plaintiffs further allege Defendant's acts were in defiance of, and inconsistent with,
6 Employees' title or rights in such personal property.

7 35. As a result of the unlawful acts of Defendant, Plaintiffs and all similarly situated
8 Employee Class Members have been deprived of compensation earned in the form of gratuities
9 in amounts to be determined at trial, and are entitled to recovery of such amounts. Plaintiffs
10 request relief as described below on behalf of themselves, all similarly situated Employees.

11 **VIII. SECOND CLAIM FOR RELIEF**
12 **(BREACH OF CONTRACT)**

13 36. Plaintiffs hereby incorporate by reference all prior allegations as though fully set forth
14 herein.

15 37. Plaintiffs are informed and believe and thereon allege Defendant's Mandatory Tip-
16 Sharing Policy violates the CBA, and in particular Section 5.02 thereof, which states in
17 pertinent part:

18 "All gratuities left by customers are the property of the
19 employees and no employee or department heads not covered by this
20 Agreement shall take any part of such gratuities or credit the same in
any manner toward the payment of an employee's wages..."

21 38. Plaintiffs are informed and believe, and thereon allege, that Defendant has breached
22 said written agreement by forcing Plaintiffs and all similarly situated Employees to share
23 gratuities with Management Personnel.

24 39. As a result of the unlawful acts of Defendant, Plaintiffs and all similarly situated
25 Employees have been deprived of compensation earned in the form of gratuities in amounts to
26 be determined at trial, and are entitled to recovery of such amounts. Plaintiffs request relief as
27 described below on behalf of themselves, all similarly situated Employees.

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**IX. THIRD CLAIM FOR RELIEF
(BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING)**

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2 40. Plaintiffs hereby incorporate by reference all prior allegations as though fully set forth
3 herein.

4 41. Plaintiffs are informed and believe and thereon allege Defendant owed a duty of good
5 faith and fair dealing to Plaintiffs and all similarly situated Employees.

6 42. Plaintiffs are informed and believe and thereon allege a special element of reliance
7 existed between Plaintiffs and all similarly situated Employees and Defendant because
8 Defendant was in a superior position as the employer of Plaintiffs and all similarly situated
9 Employees.

10 43. Plaintiffs are informed and believe and thereon allege Defendant breached its duty of
11 good faith and fair dealing by forcing Plaintiffs and all similarly situated Employees to
12 participate in Defendant's Mandatory Tip Distribution Policy, in direct violation of the CBA.

13 44. Defendant's actions caused the denial of Plaintiffs' and all similarly situated
14 Employees' justified expectations that all gratuities left by customers were their property,
15 pursuant to the CBA.

16 45. As a result of the unlawful acts of Defendant, Plaintiffs and all similarly situated
17 Employees have been deprived of compensation earned in the form of gratuities in amounts to
18 be determined at trial, and are entitled to recovery of such amounts. Plaintiffs request relief as
19 described below on behalf of themselves, all similarly situated Employees.

20 **X. FOURTH CLAIM FOR RELIEF**
21 **(UNJUST ENRICHMENT)**

22 46. Plaintiffs hereby incorporate by reference all prior allegations as though fully set forth
23 herein.

24 47. Plaintiffs are informed and believe and thereon allege Defendant unjustly retained the
25 property of Plaintiffs and all similarly situated Employees, which actions and conduct are
26 contrary to fundamental principles of justice or equity and good conscience, by refusing to
27 return tips and/or gratuities rightfully belonging to Plaintiffs and all similarly situated
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1 Employees when Defendant and its Management Personnel had no right to such tips and/or
2 gratuities.

3 48. As a result of the unlawful acts of Defendant, Plaintiffs and all similarly situated
4 Employees have been deprived of compensation earned in the form of gratuities in amounts to
5 be determined at trial, and are entitled to recovery of such amounts. Plaintiffs request relief as
6 described below on behalf of themselves, all similarly situated Employees.

7 **XI. FIFTH CLAIM FOR RELIEF**
8 **(DECLARATORY RELIEF)**

9 49. Plaintiffs hereby incorporate by reference all prior allegations as though fully set forth
10 herein.

11 50. An actual controversy has arisen between Plaintiffs and all similarly situated Employees
12 and Defendant relating to the following matters:

13 a) Whether Defendant violated the CBA by forcing Plaintiffs and all similarly situated
14 Class Member Employees to share gratuities with Management Personnel;

15 b) Whether Plaintiffs and all similarly situated Class Member Employees are lawfully
16 entitled to the tips and/or gratuities taken and retained by Defendant and its Management
17 Personnel;

18 c) Whether Plaintiffs and all similarly situated Class Member Employees have sustained
19 damages and, if so, the proper measure of such damages.

20 51. Plaintiffs therefore seek entry of a declaratory judgment in their favor that Defendant's
21 practices as heretofore alleged are in violation of the CBA, and providing for recovery of all
22 sums determined by the Court to be owed by Defendant to Representative Plaintiffs and Class
23 Members.

24 **XII. SIXTH CLAIM FOR RELIEF**
25 **(FOR AN ACCOUNTING AGAINST DEFENDANTS)**

26 52. Plaintiffs hereby incorporate by reference all prior allegations as though fully set forth
27 herein.

28 53. Plaintiffs are informed and believe and thereon allege Plaintiffs and all similarly situated
Employees are owed tips and/or gratuities unlawfully taken and retained by Defendant and its

1 Management Personnel.

2 54. Plaintiffs do not know the precise amount of tips and/or gratuities owed to Plaintiffs and
3 all similarly situated Class Member Employees. Upon information and belief, Defendant
4 possesses books and records from which the amount of tips and/or gratuities due and owing to
5 Plaintiffs and all similarly situated Employees herein can be determined and ascertained.

6 **XIII. SEVENTH CLAIM FOR RELIEF**
7 **(REQUEST FOR INJUNCTIVE RELIEF AGAINST DEFENDANTS)**

8 55. Plaintiffs hereby incorporate by reference all prior allegations as though fully set forth
9 herein.

10 56. Plaintiffs are informed and believe and thereon allege Defendant will continue its
11 Mandatory Tip Distribution Policy in the future.

12 57. Plaintiffs and all similarly situated Employees have been injured and damaged, and are
13 threatened with continuing injury or damage, through Defendant's continuing enforcement of its
14 Mandatory Tip Distribution Policy.

15 58. Defendant's continuing enforcement of its Mandatory Tip Distribution Policy makes
16 preliminary and permanent injunctive relief enjoining Defendant from continuing its Mandatory
17 Tip Distribution Policy appropriate.

18 **XIV. PRAYER FOR RELIEF**

19 59. WHEREFORE, PLAINTIFFS, on behalf of themselves, all present and former similarly
20 situated Employees request the following relief:

21 1. A determination that this action may proceed and be maintained by Plaintiffs as a class
22 action pursuant to FRCP 23(a) and 23(b)(3) on behalf of themselves and the class of employees
23 alleged herein;

24 2. A permanent injunction enjoining Defendant and any and all persons acting in concert or
25 in participation with Defendant from directly or indirectly continuing the Mandatory Tip
26 Distribution Policy under which Plaintiffs and Class Member Employees are required to share
27 gratuities with Management Personnel;

28 3. An accounting to Plaintiffs of all gratuities Employees were required to share with
Management Personnel;

DEMAND FOR JURY TRIAL

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Plaintiffs, on behalf of themselves and all other similarly situated employees and former employees of Defendant, hereby demand trial of these claims by jury to the extent authorized by law.

DATED this 25th day of October, 2010.

By: /s/ Kathy A. McCarthy NV# 11204
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