IN THE SUPREME COURT FOR STATE OF NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *Deja Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *Little Darlings*, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, L.L.C. d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*,

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her Official Capacity Only,

Respondents.

Supreme Court Case No. 59752

District Court Case No. A558787

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[1] Because the case below (A554970) and "Case 1" (A533273) were coordinated (Order of August, 4, 2010, App.Apx. 1699-1702) and later consolidated (Order of April 6, 2011, App.Apx. 2638-2640) the relevant documents for both actions are included in an abundance of caution.

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Exhibit 7

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *DÉJÀ VU SHOWGIRLS*; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *LITTLE DARLINGS*; K-KEL, INC. d/b/a *SPEARMINT RHINO GENTLEMAN'S CLUB*; OLYMPUS GARDEN, INC. d/b/a *OLYMPIC GARDEN*; SHAC, L.L.C. d/b/a *SAPPHIRE*; THE POWER COMPANY, INC., d/b/a *CRAZY HORSE TOO GENTLEMEN'S CLUB*; D. WESTWOOD, INC. d/b/a *TREASURES*; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *SCORES*.

Plaintiffs,

v.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No. CV-S-06-00480-RLH-RJJ

Reply To Plaintiffs' Opposition to Motion to Dismiss

REPLY TO MOTION TO DISMISS AMENDED COMPLAINT

Come now Defendants, the Nevada Department of Taxation ("the Department"), the Nevada Tax Commission ("the Commission"), and the Nevada State Board of Examiners ("the Board"), hereinafter collectively referred to as "Defendants," through their attorneys, Attorney

General George Chanos and Deputy Attorney General Dennis L. Belcourt, and reply to Plaintiffs' Opposition to their Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

A. This Court Lacks Subject Matter Jurisdiction Over the Amended Complaint Under the Tax Injunction Act

The primary purpose of the Tax Injunction Act is to "limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 1233, 67 L.Ed.2d 464 (1981). The Tax Injunction Act is a withdrawal of federal court jurisdiction that cannot be waived. *S/N1 Reo Limited Liability Co. v. City of New London* 127 F.Supp.2d 287, 295-6 (D.Conn. 2000).

As such, this Court need not reach the merits of whether the live entertainment tax violates Federal Constitutional rights.[1] The sole issues on this motion are jurisdiction of the federal district court to decide the matter under the Tax Injunction Act and whether Plaintiffs are entitled to relief under section 1983 of title 42 of the United States Code and under the Eleventh Amendment of the United States Constitution. The motion concerns the proper forum for deciding the matter, not the underlying merits.

1. Plaintiffs Fail to Meet Burden of Pleading and Proving Jurisdiction

A party asserting jurisdiction in federal court has the burden of pleading and proving it. *Unicon Management Corp v. Koppers Company, Inc.*, 250 F.Supp. 850, 852 (D.C. N.Y. 1966). The burden of proof of showing lack of the state remedy in a matter subject to the Tax Injunction Act lies with the taxpayer. *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242(11th Cir. 1991).

The items of relief requested by Plaintiffs—declaratory relief, injunctive relief, and damages—are squarely subject to the jurisdictional bar of the Tax Injunction Act, section 1341

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[1] Defendants, in making the motion herein, have not taken any position on the merits on the substance of the matter.

of title 28 of the United States Code. As a further step invoking the Tax Injunction Act, the Amended Complaint alleges the existence of a remedy in state court, by citing to the relevant provisions of law. Amended Complaint, ¶1, incorporating by reference NRS Chapter 368A. Insofar as Plaintiffs seek relief that is on its face within the bar of the tax injunction act, their burden of pleading and proving jurisdiction extends beyond merely alleging a federal question. Plaintiffs bear the burden of pleading and proving that the remedy afforded under Nevada law is not plain, speedy or efficient. However, Plaintiffs have failed to meet their burdens.

a. Plainness of Remedy

Plaintiffs have not met their burden of pleading or proving jurisdiction based on the lack of a plain remedy. Plaintiffs allege only the limitations of relief in NRS 368A.280(1), which provision appears to bar injunctive relief and is interpreted by Plaintiffs to bar declaratory relief.[2] In a patently unreasonable interpretation, Plaintiffs also interpret said provision to bar any judicial remedy whatsoever as to the validity of the tax in question.

Plaintiffs' mere reference to NRS 386A.280(1) is, as a matter of law, an insufficient allegation of the lack of a plain remedy. By any reasonable interpretation of NRS Chapter 368A, Plaintiffs have a refund remedy that affords them the opportunity to have their constitutional challenges heard in state district court. A refund remedy meets the requirement for plainness, speed and efficiency contained in the Tax Injunction Act. As the U.S. Supreme Court noted in *California v. Grace Brethren Church*, 457 U.S. 393, 416, 102 S.Ct. 2498, 2512 (1982):

> (A)t the time that it passed the Tax Injunction Act, Congress was well aware that refund procedures were the sole remedy in many States for unlawfully collected taxes... (W)e do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available...

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[2] *But see State v. Scotsman Mfg. Co. Inc.*, 109 Nev. 252, 849 P.2d 317 (1993)(*Scotsman II*), which, along with *Scotsman Manufacturing Co., Inc. v. State of Nevada*, 107 Nev. 127, 808 P.2d 517 (1991) (*Scotsman I*), involved a similar statute and would support the proposition that declaratory relief is available notwithstanding NRS 368A.280(1).

The U.S. Supreme Court has thus already answered the question of whether the lack of injunctive or other equitable relief in state court was a sufficient basis for federal district court jurisdiction, and the answer is "no." Plaintiffs' allegations of the provisions of NRS 368A.280(1) are therefore not a sufficient pleading of lack of a plain remedy.

Notwithstanding the U.S. Supreme Court's clear pronouncement that an action for refund was in itself sufficient, Plaintiffs misconstrue the holding in *Grace Brethren Church* to suggest that the holding hinged on the availability of declaratory relief in state court. While the U.S. Supreme Court in that decision made passing references to the availability of declaratory relief in California, it did not consider the possible availability of such relief in any way vital:

> There is no dispute that appellees (taxpayers) in the present cases can seek a refund of the California unemployment tax through state administrative and judicial procedures. Once a taxpayer has sought from, and been denied by the appropriate state agency...he may file an action in Superior Court for a refund of the taxes paid, raising all argument against validity of the tax. ...If the taxpayer is unsuccessful at trial, he may appeal the decision to higher state courts and ultimately seek review in this Court. ... As the Court in *Rosewell* noted, **the "Act contemplates nothing more**."
>
> Id., at p. 413-414, 102 S.Ct. 2510-2511 (citation omitted)(emphasis added).

The issue of availability of declaratory relief, which had not been expressly ruled on by the California Supreme Court at the time of *Grace Brethren Church*, was thus not essential to the holding of the U.S. Supreme Court in that case.

As discussed at length in the moving papers, the provisions of NRS 368A.250-.320 afford taxpayers the opportunity to raise the constitutionality of the live entertainment tax in the context of a request for a refund in an administrative proceeding. That procedure is subject to judicial review. NRS 368A.290. On judicial review, a district court may set aside the agency decision if it violates constitutional or statutory provisions. NRS 233B.135(3)(a). In the event of an adverse decision in district court, the taxpayer has a right to appeal to the Nevada Supreme Court. NEV. CONST., art. 6, § 4, and NRS 233B.150. At that level, a taxpayer will get a declaration by an appellate court with regard to the Constitutionality of the tax, one way or another.

NRS 368A.280(1), ensconced as it is within the provisions setting forth the refund procedure, cannot be read to nullify the entire such procedure, as Plaintiffs would have this court read it to do. Harmonization of NRS 368A.280(1) with its surroundings is a proper method of interpretation. *Nevada State Dep't of Motor Vehicles v. Turner*, 89 Nev. 514, 517, 515 P.2d 1265 (1973). Plaintiffs' suggestion that NRS 368A.280(1) should be read to deny courts any authority to grant relief (see Plaintiff's Opposition, page 13), if accepted, would render it entirely inconsistent with NRS 368A.280(2) and NRS 368A.290, both of which clearly contemplate a day in court for taxpayers on all issues before the administrative agency.

Plaintiffs attempt to construe NRS 368A.280(1) in the same very broad fashion as the U.S. Supreme Court has construed the Tax Injunction Act. While the U.S. Court has read breadth into the Tax Injunction Act based on legislative history and against its equity backdrop (see, e.g., *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 526, 101 S.Ct. 1221, 1236 (1981)), Plaintiffs failed to bring forth any such history relating to NRS 368A.280(1) that would support their position.

Moreover, resort to rules of decisions of the Nevada Supreme Court and proper legislative construction leads to an interpretation exactly contrary to that which Plaintiffs assert. That an action for refund provides a plain remedy is supported by a decision cited by Plaintiffs, *State v. Scotsman Mfg. Co. Inc.*, 109 Nev. 252, 849 P.2d 317 (1993)(*Scotsman II*). *Scotsman II* involved a challenge to application of the local school support tax, NRS Chapter 374, to the taxpayer, a federal contractor providing housing to the Nevada Test Site. The provisions of NRS 374.635-.720 contain a refund remedy substantially the same as that found in NRS 368A.250-320. Significantly, NRS 374.675 is almost identical to NRS 368A.280(1).[3]

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[3] Compare NRS 374.675 with NRS 368A.280(1):

NRS 374.675: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against the State, a county, any officer thereof to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected."

Under this substantially parallel legislative framework, most importantly the limitations of NRS 374.675, the Court in *Scotsman* affirmed a direct refund action of the tax, even though the taxpayer did not first pursue its remedy through the administrative levels. In doing so, the Nevada Supreme Court implicitly acknowledged that the refund remedy was available notwithstanding the limitations in NRS 374.675.[4] If the remedy of a refund action is available under NRS Chapter 374, it is available under NRS Chapter 368A, which is *in pari materia*. *State, Division of Insurance v. State Farm Mutual Auto Insurance Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000).

In summary, Plaintiffs offer an unreasonable interpretation of NRS 368A.280(1) in order to muddle a clear statutory refund procedure–in which the law makes the issue of constitutionality a basis for refund at the administrative level, fully reviewable on all legal grounds, including Constitutionality, in state court. Plaintiffs offer their unreasonable interpretation transparently for the purpose of suggesting that there is no plain remedy. Plaintiffs' assertion of jurisdiction based therein is "fatally flawed" in its legal premises and thus destined to fail." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys.*, Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993).

The dubiousness of Plaintiffs' concern about the plainness of the remedy is underscored by the apparent lack of any attempt on their part to pursue the refund procedure. They have not alleged, nor do they contend, in opposition to the subject motion, that they

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NRS 368A.280(1): "No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected."

[4] *Scotsman I and II* arguably imply declaratory relief is an available option. The Supreme Court suggested this when it noted "It (A refund) is the only effective remedy available to Scotsman; prospective relief alone (i.e., future exemption from tax) would hardly afford Scotsman a meaningful remedy for the unconstitutional deprivation of its property." *Scotsman (II), supra*, at 256, 849 P.2d at 320. When that case was earlier up on appeal, it was noted but not discussed that the suit was for declaratory relief. *Scotsman Manufacturing Co., Inc. v. State of Nevada*, 107 Nev. 127, 129, 808 P.2d 517, 518 (1991) (*Scotsman I*).

have so much as requested a refund in writing, even though the Live Entertainment Tax has been applicable as to non-gaming entertainers since 2003.

Therefore, under all authoritative judicial holdings cited in the moving and opposing memoranda of points and authorities, Plaintiffs' citation to NRS Chapter 368A.280(1), is insufficient to allege a lack of plain remedy.

b. Speediness

Plaintiffs do not allege in the complaint, nor do they offer any proof in their motion, of any delay concerning claims that they might have, let alone delay in an amount akin to that found acceptable in *Rosewell, supra*. Nor do they counter a mitigating factor present here and not in *Rosewell*--the availability of interest to the taxpayer under NRS Chapters 360 or 368A.

Rather, Plaintiffs argue a lack of speediness based on the fact that there is no absolute time limit on when the Commission must rule. This, however, is not the test under *Rosewell. Rosewell* looked to whether there is real, not hypothetical, delay. Additionally, *Rosewell* assessed speediness of the matter before it based on the duration of other proceedings. *Rosewell , supra*, 450 U.S. at 518-9, 101 S.Ct. at 1232. Likewise, Plaintiffs herein must allege and prove delay and that delay is excessive by comparison. The non-existence of a rule setting a time limit on the Commission's decisions creates only the possibility of delay, not real delay. In short, it does not prove Plaintiffs' case for them.

Furthermore, having failed to seek any remedy by way of request for refund or otherwise at the state level, Plaintiffs can hardly be believed in their assertion that such remedy is inadequate.

c. Efficiency

Plaintiffs fails to plead any basis for finding the refund remedy in NRS 368A to be inefficient. In opposition to this motion, Plaintiffs contend that the requirement of exhaustion of administrative remedies renders the state-law remedy inefficient. However, Plaintiffs fail to

cite to case law to support that a remedy is in and of itself inefficient under the Tax Injunction Act based on the requirement of exhaustion of administrative remedies.[5]

Plaintiffs further come to the erroneous conclusion that they will be required to exhaust administrative remedies that are futile, notwithstanding the holding in *Scotsman II.*, *supra*, 109 Nev. 252, 849 P.2d 317. The conclusion is erroneous for two reasons: (1) it assumes that the futility exception does not apply to the administrative remedies under NRS Chapter 368A; and (2) it assumes without proof that the administrative proceedings in fact would be futile.

The Nevada Supreme Court in *Scotsman* found two alternative scenarios of exemption from the requirement of exhaustion of administrative remedies: (1) the challenge is based on constitutional grounds, or (2) such remedies are futile. The first grounds would appear to not be present in the instant case, as the Nevada State Legislature expressly has decided that the Department of Taxation and the Commission should consider challenges to the constitutionality in the course of administrative proceedings. However, there is nothing in NRS Chapter 368A materially different from NRS Chapter 374, under consideration in *Scotsman,* which would lead to the conclusion that the legislature intended to override the futility exception.

Second, *Scotsman* does not support the proposition that administrative proceedings are futile in all cases, as suggested by Plaintiffs. Rather, it found, "under the facts" in the case before it, that such proceedings were futile because the claims were largely time-barred and the State had already taken a position as to the constitutionality of the tax at issue. *Id.* at 255-6, 849 P.2d at 320. In contrast, in the facts at hand, fewer than three years have passed since the Live Entertainment Tax became applicable to Plaintiffs, and, as such, Plaintiffs herein could still seek timely relief for all payments by way of an application for refund. Further, Plaintiffs offer no credible basis for disqualifying the Departments' administrative law

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[5] Defendants, on the other hand, have cited to law. *Age Intern, Inc. v. Miller*, 830 F.Supp. 1484, 1492 (1993)

judges or the Commission from giving fair consideration to Plaintiffs' claims of unconstitutionality.

Plaintiffs further suggest that the requirements of filing monthly returns and pursuing a claim for a refund within three years somehow render the state remedy inefficient, by necessitating a number of lawsuits. Plaintiffs did not allege, and do not now substantiate, a "real risk of 'numerous suits between the same parties involving the same issues of law or fact.'" Plaintiff's Opposition to Defendants' Motion to Dismiss, page 18, lines 15-17, quoting *Matthews v. Rodgers*, 284 U.S. 521, 530, 52 S.Ct. 217, 221 (1932). On the contrary, under NRS Chapter 368A, Plaintiffs could file requests for refunds for the periods going back over the entire span of time at issue herein, and if denied, could proceed to judicial review thereon. Prospectively, there is nothing hindering consolidations. In the event that the Commission[6] or the Nevada Supreme Court were to decide that the Live Entertainment Tax were unconstitutional, that would be determinative as to Plaintiffs and similarly situated taxpayers, obviating further litigation. See NRS 360.291(1)(a) and (g) (requiring prompt refunds and consistent treatment taxpayers).

Overall, it is not required that the remedy be the best. It is respectfully submitted that Plaintiffs have an efficient remedy.

2. <u>There is No "Facial Challenge" exception to the Tax Injunction Act</u>

Plaintiffs assert that there is a facial challenge exception to the tax injunction act. However, they marshal no support from its legislative history. Rather they cite to *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1946), a decision that does not apply the Tax Injunction Act but rather looks to the equity rules in force before the Tax Injunction Act was enacted. Plaintiffs also quote *Dows v. City of Chicago*, 78 U.S. 108 (1870) (by way of *Grace Brethren Church)*, which dates back long before the Tax Injunction Act.

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[6] While the taxpayer may seek judicial review of decisions by the Nevada Tax Commission, the Department may not. NRS 360.245(5) may not.

Plaintiffs' efforts to pass off decisions addressing the pre-Tax Injunction Act era as determinative of the Act's scope and meaning suffer from at least one major defect. The Tax Injunction Act was enacted to cut back on federal equity jurisdiction. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 526, 101 S.Ct. 1221, 1236 (1945)(court refused to equate "plain, speedy and efficient" remedy with "plain, adequate and complete" standard of equity). As support for that departure from prior law, the *Rosewell* court noted the persistent reasons for federal noninterference—a concern that if federal injunctive relief were unavailable that

> "(S)tate tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. "

Id. at 527, 101 S.Ct. at 1236 (quoting Justice Brennan's opinion in *Perez v. Ledesma*, 401 U.S. 82, 128, n. 17, 91 S.Ct. 674, 699 (1971), concurring in part and dissenting in part.).

Further, *Rosewell* itself distinguished *Cromwell, supra*, noting that *Cromwell* did "no more than confirm that 'the statute (the Tax Injunction Act) has its roots in equity practice.'" *Rosewell*, supra, 450 U.S. at 525, 101 S.Ct. at 1235 (citation omitted).

Over all, none of the decisions cited by Plaintiffs establish an exception to the Tax Injunction Act for facial constitutional challenges. In asserting such an exception now, Plaintiffs are therefore requesting that this Court make new law, in disregard of the U.S. Supreme Court's already-stated refusal to carve "out a special exception for taxpayers raising First Amendment claims. ..." *California v. Grace Brethren Church, supra*, 457 U.S. at 416-7, 102 S.Ct. at 2512.

3. Relief Under 42 U.S.C. §1983 Is Unavailable to Plaintffs

Plaintiffs appear to concede that they cannot obtain damages against Defendants under section1983 of title 42 of the United States Code, since Defendants are not persons within the meaning of the statute. Rather, Plaintiffs seek leave to amend the Complaint a second time to include an official with the state government, for the purpose of seeking injunctive relief.

Aside from the fact that such claims are also barred under the Tax Injunction Act, without a proper motion for leave attaching a copy of the proposed second amended complaint, the

Court should deny the motion for failure to comply with L-R 15-1, which requires attachment of the original amended pleading.

4. Monetary Relief Is Unavailable In Federal Court Under the Eleventh Amendment.

None of the authorities cited by Plaintiffs for this Court granting monetary relief support a conclusion that the Eleventh Amendment allows claims for monetary relief against unconsenting States. The only case authority cited by Plaintiffs, *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523 (1997), is not on point in the following respects: (1) it did not involve an action for monetary relief; and (2) it did not involve a state government or state officer in his official capacity, the Eleventh Amendment generally only applying to actions against states (*see, e.g., Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363 (1890)), and (3) the defendant therein, City of Chicago, had itself removed to Federal Court, effectively consenting to suit in Federal Court even were it immune. *City of Chicago* thus does not stand for the proposition that this Court may award monetary relief against the Defendants absent their consent to suit under the Eleventh Amendment.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Tax Injunction Act precludes federal court jurisdiction over the subject action and that it must be dismissed as a whole. Further, Plaintiffs' claims for monetary relief must be dismissed on the grounds that Defendants are not "persons" under section 1983 of title 42 of the United States Code and that the Eleventh Amendment serves as a bar to said relief.

DATED THIS 14th day of June, 2006.

/s/ Dennis L. Belcourt
DENNIS L. BELCOURT

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 14th day of June, 2006, I served the foregoing document via ECF to the following:

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Exhibit 8

DOCKET NO. 06-16634

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *DÉJÀ VU SHOWGIRLS*; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *LITTLE DARLINGS*; K-KEL, INC. d/b/a *SPEARMINT RHINO GENTLEMAN'S CLUB*; OLYMPUS GARDEN, INC. d/b/a *OLYMPIC GARDEN*; SHAC, L.L.C. d/b/a *SAPPHIRE*; THE POWER COMPANY, INC., d/b/a *CRAZY HORSE TOO GENTLEMEN'S CLUB*; D. WESTWOOD, INC. d/b/a *TREASURES*; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *SCORES*.

Appellants,

v.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

APPELLEES' ANSWERING BRIEF

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California v. Grace Brethren Church, 457 U.S. 393, 417, 102 S.Ct. 2498, 2512, 2513 (1982).

It is clear, therefore, that Nev. Rev. Stat. Chapter 368A confers upon the taxpayer a plain remedy in the form of the right to bring an action in state district court upon denial of a claim for refund by the NTC. The District Court properly rejected the Clubs' efforts to nullify Nev. Rev. Stat. § 368A.290-.300 through a misinterpretation of Nev. Rev. Stat. § 368A.280. E.R. 47. The District Court further noted that the Nevada Supreme Court had specifically recognized a judicial remedy in the face of parallel language in Nev. Rev. Stat. Chapters 372 and 374. *State, Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.*, 109 Nev. 252, 849 P.2d 317 (1993), E.R. 48.[7]

Scotsman involved an action for declaratory relief by a taxpayer challenging application of the sales tax to it. The various components of the sales tax in Nevada are governed by procedures set forth in Nev. Rev. Stat. Chapters 372 and 374, which contained provisions with respect to judicial review that are almost identical to those in Nev. Rev. Stat. Chapter 368A. For example, Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675, applicable to the sales taxes, and Nev. Rev. Stat. § 368A.280(1), applicable to the Live Entertainment tax, are substantially identical:

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[7] Even if *Scotsman* is merely persuasive, not determinative, of the State court's interpretation of Nev. Rev. Stat. § 368A.280(1), it should carry sufficient weight against the Clubs' unproven arguments concerning the lack of a remedy. *Cf. Franchise Tax Board v. Alcan Aluminum Limited*, 493 U.S. 331, 341, 110 S.Ct. 661, 667(1990)(Supreme Court declined to assume that California court would not afford opportunity to seek relief, noting California intermediate appellate decision supportive of such an opportunity).

Sales Tax

Nev. Rev. Stat. § 372.670: "No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected."

Sales Taxes

Nev. Rev. Stat. § 374.675: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against the State, a county, any officer thereof to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected."

Live Entertainment Tax

Nev. Rev. Stat. § 368A.280(1): "No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected."

Applying the sales tax law to the matter before it, the Nevada Supreme Court in *Scotsman* found not only that the taxpayer was entitled to challenge the Constitutionality of the tax as applied to it, but, under the circumstances, it could do so without having exhausted administrative remedies. *Id.* at 255-6, 849 P.2d at 320-1.

The Clubs take the position that Nev. Rev. Stat. § 368A.280(1) should be construed to bar any judicial remedy for taxpayers. In doing so, the Clubs do not harmonize Nev. Rev. Stat. § 368A.280(1) with the remedy clearly laid out in Nev. Rev. Stat. § 368A.290, they do not distinguish *Scotsman*, and they do not cite any other Nevada legal authority in support

parties involving the same issues of law or fact.'" Appellant's Opening Brief, p. 30, citing *Matthews v. Rodgers*, 284 U.S. 521, 530, 52 S.Ct. 217, 221 (1932). On the contrary, under Nev. Rev. Stat. Chapter 368A, the Clubs could file requests for refunds for the periods going back over the entire span of time at issue herein, and if denied, could proceed to judicial review thereon. Prospectively, there is nothing hindering consolidations. In the event that the NTC[9] decides that the Live Entertainment Tax is unconstitutional, that would be determinative as to Plaintiffs and similarly situated taxpayers, obviating further litigation. *See* Nev. Rev. Stat. § 360.291(1)(a) and (g) (requiring prompt refunds and consistent treatment taxpayers).[10]

Hypothetical concerns about the state administrative remedy under Nev. Rev. Stat. Chapter 368A disappear in light of *Scotsman, supra*, which the District Court found to be authority for a direct action to the state district court in the case of a challenge to the sales tax on Federal constitutional grounds. E.R. 47-48. If the remedy of a refund action directly brought in state district court is available under Nevada's sales tax provisions, it is available under Nev. Rev. Stat. Chapter 368A, which is *in part materia*, with its virtually identical refund provisions. *State, Division of Insurance v. State Farm Mutual Auto Insurance Co.*, 116 Nev. 290, 294, 995 P.2d 482,

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[9] While the taxpayer may seek judicial review of decisions by the Nevada Tax Commission, the Department may not. Nev. Rev. Stat. § 360.245(5).

[10] The Clubs raise a concern that each will be required to file a separate lawsuit. That, too, is unsubstantiated. Nevada's permissive joinder rules are the same as the Federal. *Compare* NRCP 20 and FRCP 20. Moreover, the Clubs point to no caselaw that for a state law procedure to be efficient, there must be permissive joinder at either the administrative level or the court level.

employee of the state, the claim for damages against that person in her official capacity would nevertheless be barred under that same provision as well as by the Eleventh Amendment, which precludes damage actions against the state in Federal district court without consent or abrogation by Congress. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890), cited in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906 (1984); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 237-41, 105 S.Ct. 3142, 3145-6 (1985)(superseded by statute on other grounds). The State of Nevada has specifically retained Eleventh Amendment immunity by statute. Nev. Rev. Stat. § 41.031(3). *Cent. Reserve Life Ins. Co. of North America v. Struve*, 852 F.2d 1158, 1160 (9th Cir. 1988).

VII.

CONCLUSION

Without so much as an attempt at testing the refund procedures under Nev. Rev. Stat. Chapter 368A, the Clubs filed this action in U.S. District Court, District of Nevada. The Clubs failed to plead, in a short and plain statement, that these procedures were not plain, not speedy, or not efficient. They offer as argument on this appeal only speculative bases for concluding that the procedures are deficient. These speculative bases are insufficient; they do not give any convincing reason for doubting that the Nevada district court will entertain the Clubs' arguments in a speedy or efficient manner. *Cf. Franchise Tax Board v. Alcan Aluminum Limited, supra*, 493 U.S. at 341, 110 S.Ct. at 667. Measuring the procedures against case law interpreting and applying the Tax Injunction Act, 28 U.S.C.A. § 1341, these procedures are in fact not wanting. Therefore, it is respectfully submitted

that the decision of the District Court, the Honorable Roger Hunt presiding, should be upheld.

Dated this 5th day of January, 2007.

Respectfully submitted,
CATHERINE CORTEZ MASTO
Nevada Attorney General

By: [signature] Deputy for NV BAR #2658
Dennis L. Belcourt
Nevada State Bar # 2658
Deputy Attorney General
555 E. Washington Ave., # 3900
Las Vegas, NV 89101
702-486-3326
Attorneys for Nevada Department of Taxation, the Nevada Tax Commission, and the Nevada Board of Examiners

STATEMENT OF RELATED CASES
(Ninth Circuit Rule 28-2.6)

Appellees and their counsel are unaware of any cases presently pending in this Court which are related to this one within the meaning of Ninth Circuit Rule 28-2.6.

DATED THIS 5th day of January, 2007.

Respectfully submitted,

CATHERINE CORTEZ MASTO NV Bar #8709
Nevada Attorney General

By: [signature]
Dennis L. Belcourt
Nevada State Bar # 2658
Deputy Attorney General
555 E. Washington Ave., # 3900
Las Vegas, NV 89101
702-486-3326
Attorneys for Nevada Department of Taxation, the Nevada Tax Commission, and the Nevada Board of Examiners

Exhibit 9

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *DÉJÀ VU SHOWGIRLS*; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *LITTLE DARLINGS*; K-KEL, INC. d/b/a *SPEARMINT RHINO GENTLEMAN'S CLUB*; OLYMPUS GARDEN, INC. d/b/a *OLYMPIC GARDEN*; SHAC, L.L.C. d/b/a *SAPPHIRE*; THE POWER COMPANY, INC., d/b/a *CRAZY HORSE TOO GENTLEMEN'S CLUB*; D. WESTWOOD, INC. d/b/a *TREASURES*; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *SCORES*, Plaintiffs/Appellants, v. **NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS,** Defendants/Appellees.	Case No. 06-16634 D.C. No. CV-S-06-00480 (RLH)(RJJ) **APPELLEES' OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT THE APPELLATE RECORD**

COME NOW, Appellees Nevada Department of Taxation ("the Department"), Nevada Tax Commission ("the NTC"), and the Nevada State Board of Examiners, agencies of the State of Nevada (hereinafter collectively referred to as "the State of Nevada"), and oppose Appellants' Motion for Leave to Supplement the Appellate Record, as follows ("the Motion"):

1. Appellants' Are Requesting Relief Not Authorized by FRAP 10.

In substance, the Motion would add to the administrative record a reference to an aspect of the remedy available to Appellants' that was not raised in Appellants' complaint or other pleadings before the District Court, to wit: Nev. Admin. Code § 368A.170, which requires live entertainment establishments to pass along refunds of taxes for which they collected reimbursement from their patrons.

Appellants cite no legal authority in support of their request. The State of Nevada objects on the basis that said provision could have been pled and raised by Appellants below, but was not, and that it is not properly the subject of supplementation under Rule 10 of the Federal Rules of Appellate Proceeding. *Kemlon Products and Development Co. v. U.S.* 646 F.2d 223 (5th Cir., 1981); *Anthony v. U.S.*, 667 F.2d 870 (10th Cir., 1981)(FRAP Rule 10(e) not available to build new record on appeal).

Further, while seeking to bring in portions of proceedings below as evidence in support of their contention that there is no plain, speedy and efficient remedy, Appellants fail to make mention that they have brought two actions in the Eighth Judicial District Court for the State of Nevada to challenge the Constitutionality of the live entertainment tax. To the extent this Court would be inclined to open up the record to consider state proceedings in progress, Appellees would request it to take judicial notice of pending Nevada state court proceedings. *See* Exhibits A and B (complaints in actions A533273 and A554970, in the Eighth Judicial District Court, State of Nevada (without exhibits)).

2. Nevada Administrative Code § 368A.170 Does Not Apply to Appellants If They Do Not Obtain Reimbursement for the Tax From Their Patrons.

Appellants contend that they do not collect reimbursement from their patrons. Declaration of Bradley J. Shafer, ¶15.

Nev. Rev. Stat. § 368A.200, subsection (3), provides that collecting reimbursement from patrons is optional:

> "A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount."

(Emphasis added.)

Nev. Admin. Code § 368A.170 provides for a taxpayer duty to repay patrons after receiving a refund only when it has "over-collected":

> "1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of Nev. Rev. Stat. § 368A.200, or any amount in excess of the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of Nev. Rev. Stat. § 368A.200.
>
> 2. Any over-collection must, if possible, be refunded by the taxpayer to the patron from whom it was collected.
>
> 3. A taxpayer shall:
>
> (a) Use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made.
>
> (b) Within 60 days after reporting to the Department that a refund must be made, make an accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.
>
> 4. If a taxpayer is unable for any reason to refund an over-collection, the taxpayer shall pay the over-collection to the Department.

(Emphasis added.)

In other words, Nev. Rev. Stat. § 368A.200(3) DOES NOT require a business entity subject to the live entertainment tax to collect reimbursement of the tax from its patron. If Appellants have not collected the tax from their patrons, they would not be found to have "overcollected" the tax and would

therefore not be required to make the efforts to refund patrons called for by Nev. Admin. Code § 368A.170.[1]

Even so, the efforts required by Nev. Admin. Code § 368A.170 are not burdensome. They would presumptively call for a taxpayer to which it applies to make known to its clientele through practical means that there were refunds available and to give refunds out to those who would give their names and addresses. Insofar as records of such are given to the Department as part of an accounting or an audit under Nev. Admin. Code § 368A.170, the records are subject to confidentiality requirements under Nev. Rev. Stat. § 368A.180. Importantly, the provision of such information is not a prerequisite for the initial granting of the refund, nor a precondition for patronage of Appellants' facilities. It is only a condition that those taxpayers who were reimbursed for the tax by patrons pass along the refunds once they receive them, account for such payments, and to the extent the refunds cannot be made, remit the balance to the Department.

---

[1]This plain reading of NRS 368A.200(3) and NAC 368A.170 comports with the decision of the NTC. Commissioner Turner's unjust enrichment comment had as its logical premise that Nev. Admin. Code § 368A.170 would not require Appellants to pass along any refund. Mr. Turner's comment did not form a basis for the NTC's decision, which was expressly made on the constitutionality issue, not on whether Appellants would be unjustly enriched. *See* Supp.E.R. page 107, line 7 to page 110, line 25.

3. Appellants Have Plain, Speedy and Efficient Remedies In Addition to the Administrative Refund Procedure.

Even where applicable, Nev. Admin. Code § 368A.170 does not mean the absence of other remedies. Taxpayers to whom that provision applies would, in the event of a determination of unconstitutionality of the live entertainment tax, receive a conditional refund of taxes collected in the past, but would also receive a remedy of cessation of tax liability going forward, applicable to all similarly situated taxpayers. *See* Nev. Rev. Stat. § 360.291(a) and (g). *See* Appellees' Answering Brief, page 20.

Appellees do hereby object to the extent that Appellants use the Motion to simply reargue the positions set forth in their appellate briefs, and further object that the Motion does not accurately characterize the contentions in Appellants' Answering Brief, suggesting that Appellants are contending that the administrative refund remedy stands by itself as the plain, speedy and efficient remedy.

Rather, in their brief herein, Appellees simply argued that under *California v. Grace Brethren Church*, 457 U.S. 393, 417, 102 S. Ct. 2498, 2512, 2513, the availability of a refund procedure is itself sufficient to deny jurisdiction under 28 U.S.C. 1341. However, Appellees went on in the same brief to argue that there is a direct action remedy, under *State, Nevada Dep't of Taxation v. Scotsman Mfg, Co., Inc.*, 109 Nev. 252, 849 P.2d 317 (1993).

In that case, the Nevada Supreme Court afforded a refund remedy notwithstanding the failure to exhaust the administrative remedy regarding pure constitutional issues. *Id.* at 255-6, 849 P.2d at 320-1. *See* Appellees' Answering Brief, pages 14 and 15. If Appellants are right in their contention that the administrative remedy is somehow futile, that would provide an additional basis for proceeding by direct refund action in Nevada courts under *Scotsman*, *supra*, at 255, 849 P.2d at 319.[2]

Appellants are thus well-placed to litigate the issue of the Constitutionality of the tax at issue in Nevada state courts, something they have commenced already. *See* Exhibits A and B.

---

[2] *See, also, Metropolitan Water District of Southern California v. State of Nevada*, 99 Nev. 506, 665 P.2d 262 (1983), in which the Nevada Supreme Court accorded a refund remedy where the administrative refund procedure was unavailable.

4. Conclusion.

It is respectfully requested that the Motion be denied. In event this Court were to grant the Motion and to give consideration to the contents thereof, it is respectfully submitted that Appellants have failed to bring anything to this Court's attention that would undercut the District Court's determination that it lacked jurisdiction under the Amended Complaint pursuant to 28 U.S.C. 1341.

Dated this 23rd day of April, 2008.

Respectfully submitted,

CATHERINE CORTEZ MASTO
Nevada Attorney General

By: _____
Dennis L. Belcourt
Nevada State Bar # 2658
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717
775-684-1206

Attorneys for Nevada Department of Taxation, the Nevada Tax Commission, and the Nevada Board of Examiners

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 24th day of April, 2008, I served the APPELLEES' OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT THE APPELLATE RECORD AND DECLARATION OF BRADLEY J. SHAFER by mailing true copies thereof addressed as follows, postage thereon prepaid:

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Boulevard,
Suite 2
Lansing, Michigan 48906-2110

An Employee of the Attorney General's Office

Exhibit 10

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION
Web Site: http://tax.state.nv.us
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada, 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE
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Building L, Suite 235
Reno, Nevada 89502
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Fax: (775) 688-1303

HENDERSON OFFICE
2550 Paseo Verde Parkway Suite 180
Henderson, Nevada 89074
Phone:(702) 486-2300
Fax: (702) 486-3377

March 21, 2008

Diana L. Sullivan
Ghanem Sullivan
930 South Fourth Street, Suite 210
Las Vegas, NV 89101

Re: K-Kel, Inc.
Request for Refund of Live Entertainment Tax

Dear Ms. Sullivan:

This letter is sent to acknowledge receipt of the notice of appeal filed on behalf of the above-referenced taxpayer (hereinafter "Taxpayer") in response to the Department's letter, dated February 5, 2008, denying Taxpayer's claim for refund. Taxpayer had requested a refund of Live Entertainment Tax for the period of December 2004.

This letter is also sent to notify Taxpayer that the Department will hold Taxpayer's case in abeyance pending the outcome of the case known as K-Kel, Inc., d/b/a Spearmint Rhino Gentlemen's Club, et al. vs. Nevada Department of Taxation, et al., Case No. A554970, currently pending in the District Court, Clark County, as the issues in both cases are substantially similar.

In the meantime, should Taxpayer decide to discontinue its pursuit of a refund, please withdraw the appeal in writing.

Should you have any questions, please call me at (775) 684-2070.

Sincerely,

Christopher G. Nielsen
Deputy Executive Director

Exhibit 11

CERTIFIED COPY

STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, JULY 9, 2007

CARSON CITY AND LAS VEGAS, NEVADA

THE BOARD:	THOMAS SHEETS, Chairman HANK VOGLER, Member JOHN MARVEL, Member JOAN LAMBERT, Member ROBERT BARENGO, Member GEORGE KELESIS, Member ANN BERSI, Member
FOR THE DEPARTMENT:	DINO DiCIANNO Executive Director TOM SUMMERS Deputy Executive Director CHRISTOPHER NIELSEN Deputy Executive Director ERIN FIERRO Management Assistant
FOR THE BOARD:	JENNIFER CRANDALL Senior Deputy Attorney General
REPORTED BY:	CAPITOL REPORTERS BY: MARY E. CAMERON, RPR, CP Nevada CCR #98 410 East John Street, Ste. A Carson City, Nevada, 89706 (775) 882-5322

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facility where live entertainment is provided, and the Department maintains that the LET is a generally applicable content neutral tax that presents no danger of suppressing particular ideas.

As such, the LET is subject to a rational basis review and passes constitutional muster because it's a reasonable means of raising revenue.

It's also important to mention NAC 368A.170 which requires that if it is determined that a refund is appropriate in this case, that the taxpayer would first have to establish that any amounts of the refund could be or have been actually refunded to the patrons of the taxpayer, and there has been no indication in this case that there is any ability of the taxpayer to refund that money to the patrons.

With that, the Department has nothing further.

MR. SHAFER: Thank you, Mr. Chairman and Members of the Commission. I guess I want to go back in regard to something that you said at the very end when you were talking to me about possibly supplementing the record, and I would just like to go through very briefly what we had discussed off the record a few moments ago, and that is the fact that Mr. Pope and I were having a discussion at approximately 3:30 eastern time Friday afternoon in regard to whether the Commission had in front of it the original version of the statute because the current version is different, the

Exhibit 12

Nev. Admin. Code ch. 368A, s. 170

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through August 1, 2007, Supplement 2007-2

NAC 368A.170 Over-collection of tax: Duties of taxpayer and Department. (NRS 360.090, 368A.140)

1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200, or any amount in excess of the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of NRS 368A.200.

2. Any over-collection must, if possible, be refunded by the taxpayer to the patron from whom it was collected.

3. A taxpayer shall:

(a) Use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made.

(b) Within 60 days after reporting to the Department that a refund must be made, make an accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

4. If a taxpayer is unable for any reason to refund an over-collection, the taxpayer shall pay the over-collection to the Department.

5. If an audit of a taxpayer reveals the existence of an over-collection, the Department shall:

(a) Credit the over-collection toward any deficiency that results from the audit, if the taxpayer furnishes the Department with satisfactory evidence that the taxpayer has refunded the over-collection as required by subsection 2.

(b) Within 60 days after receiving notice from the Department that a refund must be made, seek an accounting of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.170, **NV ADC 368A.170**

NV ADC 368A.170
END OF DOCUMENT

Exhibit 13

CERTIFIED COPY

STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, AUGUST 6, 2007

CARSON CITY AND LAS VEGAS, NEVADA

THE BOARD:	THOMAS SHEETS, Chairman HANK VOGLER, Member JOHN MARVEL, Member JOAN LAMBERT, Member DAVID TURNER, Member ROBERT BARENGO, Member GEORGE KELESIS, Member ANN BERSI, Member
FOR THE DEPARTMENT:	DINO DiCIANNO Executive Director CHRISTOPHER NIELSEN Deputy Executive Director ERIN FIERRO Management Assistant
FOR THE BOARD:	JENNIFER CRANDALL Senior Deputy Attorney General
REPORTED BY:	CAPITOL REPORTERS BY: MARY E. CAMERON, RPR, CP Nevada CCR #98 410 East John Street, Ste. A Carson City, Nevada, 89706 (775) 882-5322

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INDEX (Continued)

the taxes back to the people who paid them. I actually intended to address that first but they have not raised that in this presentation, so am I to assume that I do not have to address that?

MR. POPE: To the extent that the tax is applicable it's to be collected from the patrons of the gentlemen's clubs, and in fact, there is to be an accounting or should have been an accounting by the gentlemen's club six days after they indicated that they were entitled to a refund.

I think that they may have some approach to that and it may lead to further argument, so I think it's still an issue that is applicable and we'll have to address.

CHAIRMAN SHEETS: You ought to go ahead and address that, then.

MR. SHAFER: Thank you, Mr. Chairman. I think we are basically in the position where this NAC has never been utilized before because I think these are the first appeals of the live entertainment tax, and as I read this and all the NACs, all regulations are in our materials as I see it, it only applies when there is a determination of an over collection, number one, and I think what we're here to determine is whether we're entitled to a refund as opposed to what happens with that refund.

And to the extent that a refund is ordered, a

reversal is ordered by this Commission, I think we can address that issue, it would be appropriate to address that issue at that time if the Department still took that position.

However, in an effort just to make sure that I had an appropriate record, what I did and I gave this to Mr. Belcourt this morning, I have prepared affidavits on behalf of four of the clients in the time period that we had for the taxpayers, in the time period we had that talks about the fact that the tax is taken out of the receipts of the business for the admissions which, depending upon the way the tax operates and the definition of admission, also includes merchandise, food and refreshments.

Now, I guess what the Commission, I'm sorry, what the Department would say is that if a customer buys Coca-Cola, for us to get a refund of this tax, we have to get the name and address of every person buying a Coca-Cola or a beer coming in the facility and I don't think any of you in your real life experiences have ever had anytime where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

What the affidavits say is that none of the facilities have raised their admission fees in order to recoup the tax, the tax merely is deducted out of the general receipts of the business and it's the businesses' money that

we're trying to get back.

Now, irrespective of the fact that I don't believe this NAC even applies in these proceedings, you can take that representation of me as a matter of fact. I can submit the affidavits or I can put on one or two witnesses to talk about that, and I'd defer to the Commission how they want to handle that.

MR. POPE: May I respond?

CHAIRMAN SHEETS: All right.

MR. POPE: First of all, I would object even if it's just for the record to the extent that we just got these affidavits today and I'd object to the affidavits as well as any testimony.

CHAIRMAN SHEETS: Just to cut this short, we're going to accept counsel's representations with respect to the matter. That will solve the issue of the affidavits. We don't need testimony from the witnesses today.

And if as a result of the Commission's action this were to become an issue, we can come back another time and we can talk about this, even whether it's applicable or not. So let's not get caught up in a side issue. Let's talk about what we're really here to talk about this morning.

MR. POPE: So further comments should be reserved for another time on that issue?

CHAIRMAN SHEETS: That's right. If this becomes

way with --

MEMBER BARENGO: We're not regulating the dancers here.

MR. SHAFER: No, I understand, but your tax isn't on the dancers either. We have to pay the tax. We're the ones paying the tax.

MEMBER BARENGO: You collect the tax.

MR. SHAFER: I think we're paying the tax.

MEMBER BARENGO: You collect it from the person that seeks admission.

MR. SHAFER: Well, you can go through those gymnastics, but the charges as I pointed out at the very introduction of my presentation, we have not increased any of our fees in order to collect that tax. That tax is coming out of what would be the profits of the establishments.

MR. POPE: Chairman Sheets, may I make a quick comment to that?

CHAIRMAN SHEETS: Sure. Go ahead.

MR. POPE: I know we've reserved time to argue this, but the law does require that that admission charge be collected from the patrons and I believe it also requires that if it's included in the ticket or included in the admission charge, then there has to be some notification of that.

To the extent that it's not included as was

stated here today, that it's just being paid on behalf of the patrons, then I think it's difficult to say that the patrons aren't paying it even though they don't know that they are not. The law requires that it's being collected from the patrons and the appellants are paying it on behalf of the patrons.

MR. SHAFER: And because of our size we're also paying it on food, beverage and merchandise as well, and like I said at the beginning of my presentation, I'm sure you have not been in a store in your entire life where someone asked you your name or address to buyy a Coca-Cola, nor do I believe you've ever for the purchase of a Coca-Cola gotten a segregated tax bill for it.

CHAIRMAN SHEETS: Commissioner Bersi.

MEMBER BERSI: Mr. Shafer, I wasn't going to ask this question, but you are relying on legislative history a lot to make your points in your argument, and I notice in your Minneapolis Star case, the United States Supreme Court said we don't want to, and it's not our intent to, infringe on the motives of the Minnesota legislature because the illicit intent, and I think I'm getting this pretty close, the illicit intent of the legislature is not the sine qua non of a violation of the first amendment, so what do you make of that?

MR. SHAFER: Right, but respectfully I believe

problem with the legislature expanding their tax base.

In light of all that, reading the cases, the portions that I read from the cases, as well as reading the portions of the briefs I referred to, I would move that, I hope I get this correct here, I would move that we deny the refund claims; isn't that correct?

It would be a motion to deny the taxpayers' claim for refund.

CHAIRMAN SHEETS: It's a motion to deny the taxpayers' appeal of the Hearing Officer's decision or the Department's denial, I'm sorry.

MEMBER KELESIS: It would be a motion to uphold the Department's denial of the taxpayers' claims of refund.

CHAIRMAN SHEETS: There's a motion to uphold the Department's denial of the taxpayers' refund. Is there a second?

MEMBER LAMBERT: Second.

CHAIRMAN SHEETS: There's a motion and a second. Any discussion?

MEMBER TURNER: Mr. Chair, I would put one additional comment on the record. Counsel for the taxpayers, Mr. Shafer, argued that this is really a tax that's being absorbed by the businesses he represents.

It is a pass-through tax, and the businesses if the tax did not exist could reduce what they're charging to

their customers by the amount of the tax and have the same bottom line today.

Even though we didn't deal with this really in any depth during the course of our discussions with the Attorney General's office or the taxpayers' counsel, I would find in addition that a refund to the taxpayers being the clients of Mr. Shafer at this point in time would constitute an unjust enrichment at the same time.

CHAIRMAN SHEETS: There's a motion and a second. Further discussion? I guess before we vote, I just want to say a couple things and I'll let Commissioner Barengo speak too.

The Commission appreciates the depth of the materials that were provided to it and we appreciate the arguments you've made today. This is the first time since I've been on the Commission that I believe the Commission finds itself as a defendant in a lawsuit already filed attacking the same law that we are being asked to now administratively decipher.

Not that that has made any difference to the Chairman or I think to any other Commissioner, but it is a unique situation to be put into, to be a named defendant in a lawsuit and then after the fact be asked to make a determination about the underlying law.

There might have been a different way to do this,

CIVIL COURT MINUTES

06-A-533273-C Deja Vu Showgirls Of Las Vegas vs Nevada Dept Of Taxation

CONTINUED FROM PAGE: 001

07/31/08 09:00 AM 00 ALL PENDING MOTIONS 07/31/08

HEARD BY: Jennifer Togliatti, Judge; Dept. 9

OFFICERS: Alan Paul Castle, Court Clerk
Yvette Lester, Reporter/Recorder

REQ. BY: Togliatti Jennifer, Judge; Dept. 9

PARTIES:	0001 P1	Deja Vu Showgirls Of Las Vegas LLC	N
	004701	Sullivan, Diana L.	Y
	0002 D1	Nevada Dept Of Taxation	N
	008617	Pope, David J.	Y
	009001	Doerr, Blake A.	Y
	0003 DB	Deja Vu Showgirls	N
	004701	Sullivan, Diana L.	Y

DEFENDANTS NEVADA DEPT OF TAXATION, NEVADA TAX COMMISSION & NEVADA STATE BOARD OF EXAMINERS' MOTION TO DISMISS...PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Arguments by counsel. COURT ORDERED, transcript be prepared for today's proceedings and matter continued to chambers for status check on decision. Court notes if the motion to dismiss is denied, this court wants to make a substantive ruling for the purposes of the also pending motion for preliminary injunction.

8/14/08 (CHAMBER) STATUS CHECK: TRANSCRIPT / DECISION PENDING MOTIONS

8

TRAN

ORIGINAL

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

AUG 13 1 11 PM '08

FILED

DÉJÀ VU SHOWGIRLS OF LAS VEGAS LLC, et al.,

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Defendants.

CASE NO. A533273

DEPT. IX

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

THURSDAY, JULY 31, 2008

RECORDER'S TRANSCRIPT RE:
DEFENDANTS DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, AND NEVADA STATE BOARD OF EXAMINERS' MOTION TO DISMISS/ AND MOTION FOR PRELIMINARY INJUNCTION

APPEARANCES:

For the Plaintiffs: DIANA L. SULLIVAN, ESQ.
BRADLEY J. SHAFER, ESQ.

For the Defendants: DAVID J. POPE, ESQ.
Senior Deputy Attorney General
BLAKE A. DOERR, ESQ.
Deputy Attorney General

RECORDED BY: YVETTE LESTER, COURT RECORDER/TRANSCRIBER

RECEIVED
AUG 13 2008
CLERK OF THE COURT

LAS VEGAS, NEVADA, THURSDAY, JULY 31, 2008, 9:00 A.M.

THE COURT: Déjà Vu Showgirls versus Nevada Department of Taxation, A533273.

MS. SULLIVAN: Judge, do you have a court reporter?

THE COURT: We have recording equipment.

MS. SULLIVAN: Okay.

THE COURT: You need to state your appearances, and you're being –

MS. SULLIVAN: Diana Sullivan on behalf of the plaintiffs' local counsel.

MR. SHAFER: Your Honor, Bradley Shafer, a member of the Michigan and Arizona bars appearing pursuant to a pro hac vice admission on behalf of plaintiffs, Your Honor.

MR. POPE: Your Honor, good morning, David Pope with the Nevada Attorney General's Office on behalf of the defendants.

MR. DOERR: Good morning, Your Honor, Blake Doerr on behalf of the Attorney General's Office on behalf of defendants.

THE COURT: Good Morning. Do you want to address the motion to dismiss first and then –

MR. DOERR: Yes we do.

THE COURT: Okay. I've reviewed the motion, the opposition, the rebuttal, the complaint. There were no erratas or supplements to that set of pleadings that I'm aware of. Correct?

MR. DOERR: That's correct.

THE COURT: Okay. Ready when you are.

MR. DOERR: We brought this motion. We don't believe, because of the way the matter was filed, that the Court has jurisdiction. We brought the motion

to sort of clean up the matter procedurally. And we believe the argument was simple and we included that in our brief. And unless you have a specific question –

THE COURT: Not really.

MR. DOERR: Okay.

THE COURT: I think you were very thorough and I might have a question or two for plaintiffs, but you can address their comments in reply if you like.

MR. POPE: Okay.

MR. DOERR: Okay. Thank you.

MR. SHAFER: Thank you, Your Honor.

There are numerous arguments that they have raised in their motion, and in response we set out in very detailed form why that motion is not well taken.

The first argument is because of the line of cases from the United States Supreme Court dealing with Patsy where the United States Supreme Court has said that when you have a 1983 action, a federal civil rights violation action, exhaustion of administrative remedies is not required.

Your Honor, we've cited all those cases. The State hasn't responded to that argument at all. They have cited no cases in response because there are none. There's nothing to respond to Patsy. That is hornbook law from the United States Supreme Court, and, in fact, Your Honor, in the Scotsman Manufacturing and the Malecon Tobacco case, the Nevada Supreme Court has recognized that. And, in fact, in Malecon Tobacco – if I'm pronouncing that company's name correctly – the State Supreme Court said they are aware of no state that does not have an exception, when constitutional rights are at issue, to the exhaustion requirement.

Now, there is only one argument that the State has made in regard to why the Scotsman Manufacturing direct refund action, which they have asserted to

the federal court and the federal court agreed with them, gave us a plain, speedy and efficient remedy in order to the – for the federal court to dismiss out that lawsuit because it didn't have jurisdiction under the Tax Injunction Act.

And the only reason that they assert that is because they contend that, unlike Scotsman Manufacturing, our case does not deal with constitutional issues because we have added – in addition to a declaratory judgment action we've requested injunctive relief, we've requested refund, we've requested damages, we've requested attorney fees. Your Honor, all of those forms of relief are conditioned and contingent upon the constitutionality of the law. If the Court rules that the law is constitutional there is no injunctive relief, there are no damages, there is no refund, there is no attorney fees and costs.

THE COURT: So on page 12 of your complaint, at paragraph 56, when you plead that, "both as a result of the constitutional violations as enumerated above, as well as the specific exemption as set forth in NRS 368A.200(5)(a)." – just kind of leaving it there – "as well as" – I mean, and then in the motions for preliminary injunction you reference those exemptions as further, you know, being illustrative of the content-based nature of all of this, and the intent of the legislature to purposely target these types of businesses.

So, what are you alluding to when you say, above "as well as the specific exemption"?

MR. SHAFER: Your Honor, if you take a look at that specific exemption, that isn't the exemption in regard to the content; that is the first exemption that says that what is exempted out is any live entertainment, which the State of Nevada can't tax because the – of the federal or state constitutions.

THE COURT: So the other – so 368A.200(5), that you cite in

paragraph 47, and then (5)(a) is the –

MR. SHAFER: It is that exemption that I just said, Your Honor.

And so, realistically, the Court can rule in my clients' favor on the injunctive relief in one of two fashions. Number one, the Court can just rule it's a reasonable likely [sic] that the statute is unconstitutional, or it's reasonable – there's a reasonable likelihood that we fall within that exemption.

I can't tell Your Honor why they put that exemption in there. That exemption is there. If in fact they cannot tax my clients, which I believe they cannot for all the reasons set forth in our motion for preliminary injunction, they just – by definition they fall within that exemption.

THE COURT: And you're talking about the paragraph starting, "Some" – well, the sentence starting, "Some of the exemptions include live entertainment that the State is prohibited from taxing under the constitutional laws or treaty of the United States or Nevada constitution, live entertainment that is not provided at a licensed gaming establishment if the facility has a maximum seating capacity of less than 200, live" – and it goes on.

MR. SHAFER: Yes, but, Your Honor, only that first one. That –

THE COURT: Well, that's what I'm trying to get at.

MR. SHAFER: Yes.

THE COURT: Are you suggesting to me that part of this complaint is that one of the other exemptions could apply to your clients?

MR. SHAFER: No, no.

THE COURT: Okay, because it's – because then we're not strictly talking about constitutionality necessarily.

MR. SHAFER: No. I apologize if that was not clear enough.

THE COURT: Okay.

MR. SHAFER: But all of the briefing we've alluded to that –

THE COURT: Right.

MR. SHAFER: -- specific exemption.

THE COURT: But, I mean, I'm looking at the complaint –

MR. SHAFER: Okay.

THE COURT: -- and the complaint says, "as well as the specific exemption." You did cite it. I just want to make sure –

MR. SHAFER: Yes, Your Honor.

THE COURT: -- because I go back to 47, where you –

MR. SHAFER: Okay.

THE COURT: -- lay out the language and you include all the other, you know, seating capacity and all those other things.

MR. SHAFER: Right.

THE COURT: I just want to make sure I was clear.

MR. SHAFER: No, Your Honor. There is no other exemption we're claiming we fall within.

THE COURT: You're not trying to just sniggle that in with the sentence fragment?

MR. SHAFER: Your Honor, I'm an officer of the court. I'm an Eagle Scout; just came back from Boy Scout camp. Okay? We're not claiming we're falling within any other exemption.

THE COURT: Okay.

MR. SHAFER: Your Honor, the next issue that we have raised under Nevada law is if the administrative is futile. And what I would like to point out to

Your Honor is the differences of the plaintiffs in the two cases, because Déjà Vu and Little Darlings of Las Vegas LLC, which are two of the plaintiffs in the lawsuit that we're in front of Your Honor right now on the motion to dismiss, which is the first lawsuit, they are not plaintiffs in the second lawsuit, for the reason that they have yet to undergo their administrative refund claims in the Nevada Tax Commission. The reason for that, Your Honor, is that the statute was amended in 2005 to reduce the seating capacity to capture those clients.

So, because of the timing for the refund claims, and then the proceedings in front of the Nevada Tax Commission, they didn't have to file administrative refund claims previously. They have not done that. They are seeking injunctive relief. And it would obviously be futile for them to make any claims in regard to the Nevada Tax Commission, because the Nevada Tax Commission has already said they don't find any merit in regard to the claims that we have – the claims that the other plaintiffs have raised, Your Honor.

I should also point out that they have raised two other arguments, Your Honor, which would also make it futile. Number one is the NAC, 368A.170, which is the NAC that says – that they contended for the first time in front of the Nevada Tax Commission would preclude my client from obtaining a refund – which says that unless you can give the money back to the customer you can't get a refund. So, there is no administrative remedy, according to them, for my client; that would apply to the Déjà Vu and the Little Darlings clients as well.

But most ironic, Your Honor, is that in their response to the motion for preliminary injunction, now they're even making an argument that my client doesn't even have standing to bring an administrative refund claim because of that NAC. Now I think that's totally false, but that's their argument.

And again, Your Honor, they specifically cited Scotsman Manufacturing to the Federal District Court here, to the Ninth Circuit, and those courts utilized that decision by saying my client has a right – an independent right of relief. It is this lawsuit that is the independent right of relief. They already won on that issue. We talked about judicial estoppel, Your Honor, in our brief. They cannot have it both ways. They can't say to one court, you have an independent claim of remedy, go do it in state court, and then we get into state court and they say, oh, you don't have that.

Your Honor, the last argument that they have is in regard to the inability to bring injunctive relief because of the statute, and I mean the live entertainment tax statute. Your Honor, we have said in elaborate detail, briefing both in response to the motion for dismissal and the motion for preliminary injunction, why it is a blatant violation of the separation of powers to enforce that statute because that statute deprives this Court of its inherent, and more importantly, constitutional power of injunctive relief.

And, Your Honor, I want to point out to the Court; we cited the Nevada Constitution, Article 6, section 6 that gives this Court the constitutional authority to grant injunctive relief. We cited Nevada decisions in regard to the separation of powers where the Nevada Supreme Court says that that separation cannot ever be infringed upon.

And, more importantly, we cited to Your Honor the elaborate analysis by the Ohio Supreme Court in The City of Norwood vs. Horney case, in discussing why a similar type of proscription is unconstitutional, and, Your Honor, they didn't respond. The State of Nevada has not responded to that argument in the least. All they have said is that the statute precludes it. For me to lose on that argument they

have to have a response. They have no response because the law is so clear.

And, Your Honor, what I would point out even more to this Court is that take a look at The City of Norwood case where they're just talking about the inherent rights of courts to grant injunctive relief, and that's a violation of the separation of powers. Here the authority of this Court to grant injunctive relief comes from the state constitution. Again, they haven't responded to that argument in the least.

And for all those reasons, Your Honor, clearly this Court should not dismiss this first lawsuit.

Did Your Honor have any questions of me?

THE COURT: No. Thank you.

MR. POPE: Your Honor, if I may, with regard to the cases dealing with 1983 actions, I don't believe that the plaintiffs included a claim for 1983 damages in their second complaint, and so if the first complaint is dismissed that goes away. It also seems as though in their moving papers that they've more or less admitted that they can't get damages. The defendants are not persons for purposes of 1983, so those cases should have no effect.

With regard to Little Darlings and Déjà Vu, it's – it may be true. It's been alleged that they still have time to file claims for refund, but, you know, they have three years to do that, and it doesn't say that they don't have to or can't file their claim for refund to comply with the statutes that require that such a claim for refund be filed in order for them to come to this Court with their action. So, to say that we haven't had to file that claim for a refund yet, yeah, they – maybe they haven't, maybe the statute hasn't run, but it doesn't mean that they don't have to comply with the statute that requires them to file a claim for refund to come here.

With regard to any NAC 368A.170, now that regulation speaks for itself,

and it says that if the plaintiffs collect the tax from their patrons then they need to show that they've refunded it to their patrons in order to get a refund themselves. That was an issue left open before the Commission.

It's an issue here with regard to whether they're collecting it or not. I think that the regulation also has to be read with the statute that requires that if the admission charge – or if the tax is included in the admission charge that the ticket says so; otherwise the entire admission charge is taxable. So that's still an issue that's left open.

With regard to the, you know, allegations that that's been argued two different ways, the case law says that you can take a different position as, you know, as long as the two positions weren't argued for, we'll just say, purposes to better your position in the case – or whatever the exact language was. That wasn't – it's not why it was done.

And, in fact, you know, if the plaintiffs are able to prove that the way that they do collect and pay the tax then that issue might be resolved, you know, in their favor. In other words, it could have been a mistake. It could have been the position is argued on a set of facts or in the context that's present on that day of hearing. So I don't think that there is judicial estoppel on that issue.

With regard to the other issue that – you know, regarding the direct and speedy remedy and that it was argued in the federal case that there is a direct – or that there is a plain and speedy remedy and that there's a direct remedy on constitutional issues, all that was argued in that case was that in addition to a refund claim being a remedy at law that there is this additional remedy of the direct remedy on constitutional issues.

I don't think that it was ever represented that they were entitled to it. I

don't think it was represented that this case was in fact gonna be, you know, their direct-remedy refund case. It's something that they have to establish pursuant to the cases. They have to show that it's – that it meets one of the two exceptions. That it's limited to constitutional issues would be the exception in this case.

And because there is a claim for damages pursuant to 1983, there is something other than constitutional issues. Attorney's fees, the question of, are they collecting the tax from their patrons or are they paying it themselves, is another question. There's all kinds of questions in this case that's beyond the constitutional question. It's not just limited to a declaratory – a request for declaratory relief as to whether or not this tax is constitutional.

You know, they could have done it this way, Your Honor; they could have filed a claim for refund, held that in abeyance, requested dec relief from this Court, and then when they got that answer could have went back and pursued the administrative claim for refund. They didn't do it that way. They're trying to put it all together and bring it directly here.

With regard to the injunction statute, Your Honor, statutes are presumed constitutional. The statute says no injunctions. There's a really good reason for that. The State's budget is based on revenue. It's projected. The State needs that revenue to operate. Therefore, I think tax statutes are different than other statutes. There's a different need.

THE COURT: All right. I mean, but that's – what does that have to do with the separation-of-powers argument? There's a really – either it's – you know, I'm not really hearing any comments on that.

There's – you know, what I'm hearing is, there's a really good reason for it, and that's fine. But if it is, in fact, a separation-of-powers issues, there's no

really good reason that you get to do that.

MR. POPE: Well, citing the –

THE COURT: As far as the legislature, not you.

MR. POPE: Right.

THE COURT: So, could you maybe highlight – because you have a lot of issues and a lot of briefing, highlight for me what your response was to that argument?

MR. POPE: I think that our general response to that argument would be that the statute –

THE COURT: Presumes.

MR. POPE: -- was presumed constitutional. In addition, Article 6, you know, gives this Court jurisdiction. It doesn't specifically mention injunctions, at least not when I reviewed it. That's all I have on that one, Your Honor, but in – you know –

THE COURT: I mean, they kind of cross over, the motions. So I understand we're in motion-to-dismiss mode right now –

MR. POPE: Yeah.

THE COURT: -- but I – so, you know, if we get to that point later I guess you can further address it, but it's in your pleadings in some form or fashion, either in the reply, or in the motions for preliminary injunction, or both – I mean, in your opposition. Correct?

So I went back and I carefully culled through. I could find all the arguments that you have to address. Otherwise it's just basically the presumption –

MR. POPE: Yeah. And we argue that there's no irreparable harm because it's just – it's money.

THE COURT: Well, that's different.

MR. POPE: Right.

THE COURT: That's me deciding whether there's a reasonable likelihood of success on the merits, balancing the hardships and ignoring the provision that you're referencing and making a substantive decision; two different things.

So, I mean, I know those arguments because you went through very carefully. And, so, I was just curious as to the specific arguments in response to the suggestion that – the separation-of-powers argument.

And you're saying the presumption in your pleadings – and what else? Remind me one more time – you said – I'll find it, don't worry.

MR. POPE: It wasn't specifically addressed in the authorities cited.

THE COURT: Okay.

MR. POPE: At least – well, I should say I cited in the Article 6.

THE COURT: Right. So, you're saying –

MR. POPE: Yeah.

THE COURT: -- there's nothing in what you reviewed that gives this Court that particular power.

MR. POPE: Specifically, yeah.

THE COURT: Okay.

MR. POPE: Thank you.

THE COURT: Did you have anything in light of those comments at the end there, before we move on to the motion for preliminary injunction?

MR. SHAFER: Yes, Your Honor, just briefly. There is nothing in either of their responses dealing with the separation-of-powers argument other than the

simple statement that the statute says you can't have injunctive relief. That's – that is flat-out it.

In regard –

MR. DOERR: Your Honor, we'd be happy to brief that if you'd so desire.

MR. SHAFER: Well, Your Honor, you know –

MR. DOERR: We'd be happy to brief that specific issue if you are inclined to take it under advisement.

THE COURT: Well, let's do this: let's hear what he has to say. I'll hear arguments on the injunction since you're all here and you're all prepared to go, and then if I need any additional anything I'll let you know.

MR. SHAFER: Thank you, Your Honor.

Your Honor, in regard to the NAC in – as being something different than the constitutionality, no. That deals with the refund action, Your Honor, which is the second lawsuit. The second lawsuit is the refund action.

This is a prophylactic, offensive attack against the constitutionality of this statute so that we could get injunctive relief so that we don't have to pay the tax in the future, and then potentially put the State in the position that seven years down the road, after the U.S. Supreme Court either takes the case and hears it or denies cert, whichever way it goes, and, if we were to win, that the State then doesn't have to have a humongous bill that they have to refund. So this case deals only with the constitutional arguments.

And I swear to God, I think I heard Mr. Pope say that even though we have a 1983 action in this case, we don't have a 1983 action in the second case, so if the Court dismisses this case then there won't be a 1983 action. That was in

response to his argument about Patsy.

But we're here for the dismissal of this case. This is a 1983 action. Patsy – and it's just not Patsy, we've cited a plethora of cases. There are no exceptions to that, Your Honor. The only case law this Court will find, is there a final determination from the State? There is a final determination from the State; they said we're not entitled to it. So Patsy says that we do not have to exhaust administrative remedies.

And more importantly, Your Honor – and I'll point this out – the Nevada Supreme Court in the Scotsman Manufacturing case said, all you have to do to prove futility of your administrative remedies in order to have an exception is have the State say they believe the statute is constitutional. That's what Scotsman Manufacturing says.

They have defended this tooth and nail. And they say to this Court that it's constitutional. They said it to the Nevada Tax Commission that it's constitutional. That's all we need. And that's only one exception, the futility exception. We fall within every one of them. We fall within Scotsman, we fall within Patsy – with Patsy, we fall within the futility.

If the Court doesn't have any other questions, those are my comments in regard to the motion to dismiss.

THE COURT: Can we address the motion for preliminary injunction now and make a complete record on that so that –

MR. SHAFER: Yes, Your Honor.

Again, Your Honor, probably the critical issue for the Court's consideration is not what is in the briefing but what is not in the briefing. I've set forth all the constitutional protections. Clearly, live entertainment, in and of itself, let

alone exotic dancing, they are both protected under both the federal and state constitutions.

And I should also point out, Your Honor, as we pointed out in our reply brief, there's really two taxes here. There's the casino tax and the live entertainment tax. And, Your Honor, we're not trying to get any type of injunction in regard to the casino tax. I'm only dealing with the live entertainment tax in regard to my clients. That's the injunction I want. I want my clients not to have to pay this tax.

Now, every case that has ever been decided in the history of this country in regard to laws which impact upon first amendment rights, which this law clearly does because it is a direct tax on first amendment-protected activities, say that the government has the burden of coming forward – setting aside the level of constitutional scrutiny to apply – the government has the burden of coming forward with the compelling or important governmental interest.

And we know from the United States Supreme Court in the Murta [phonetic] case they also have to show narrow tailoring, and they have to show why the governmental interest cannot be satisfied with a – without a differential tax on first amendment rights, without taxing some first amendment rights or not others, or having a special tax on first amendment rights and not having a tax on other people. There's no dispute that that is what the case law is.

Your Honor, comb their pleadings. They never say to this Court what the compelling governmental interest is to have a differential tax. They have never articulated to this Court why animal shows are exempted and my clients are not, why baseball is exempted and my clients are not, why NASCAR is exempted and my clients are not, why roving musicians are exempted and my clients are not, and why the other twenty-five – there are twenty-five in total exemptions and exceptions

– why there's a differential tax on those modes of entertainment. It is their burden.

Your Honor, we cited the Ninth Circuit decision in Lakewood. We've cited the U.S. Supreme Court decisions. It is clear that on these tax cases they have that burden. They haven't met that burden. They haven's said anything, let alone a laughable argument; they haven't even made an argument.

Now, if they want to come before Your Honor, which they do, and in their reply – I'm sorry, in their response and talk about the need to raise revenue, that issue has been authoritatively decided by the United States Supreme Court. They have said time and time again – we've cited it to the Court – raising revenue cannot be a governmental interest for a differential tax on first amendment activity, cannot.

And the reason for that, Your Honor, is articulated in the cases – and we've cited it to the Court – because if you have a generally applicable tax the political process will protect from an over-taxation. If you're only taxing a few people – and, by the way, people that a lot of people don't like – that political process breaks down. There is no political protection there.

And that is, in fact, Your Honor, what has occurred here, because we have given Your Honor the legislative history. And it is clear that this statute, the extension of the casino-entertainment tax, in order to capture in live entertainment that is not exempted, was meant to get to the strip clubs, Your Honor. And, in fact, you'll see not only that, but the quotations from the legislative history that we have included, talks about what is the second greatest amount of revenue of the live entertainment tax?

And, Your Honor, the legislative history, in fact, demonstrates that these are two taxes, because you will see in the quotations that we have included for the

Court, they talk about the largest taxes paid by the gentlemen's clubs – by the strip clubs in Las Vegas. Okay? They don't say anything about the casino. Even the legislature recognized that these were two separate taxes.

But what else did they say? The second greatest avenue of revenue is the racetrack. So what did they do? They exempted out the racetrack.

Your Honor, we have tried to make this constitutional issue very easy for this Court. When I went in front of the Nevada Tax Commission I raised the three constitutional arguments that make a tax on first amendment activities unconstitutional: Number one, it's a direct tax on first amendment activity. Number two, it only applies to a small group of taxpayers. Number three, it's content based.

Our motion today is only on that third argument. And the reason for that is very simple. This issue has been taken up across the United States as a way in these times of troubled economics to raise additional revenues for states. Pick out the adult businesses because no politician is going to say in the legislature: We ought not be doing that. They're easy pickings.

And, Your Honor, we have presented to the Court – and the reason we limited it to this one issue is that although Nevada wasn't the first state to enact one of these, now the cases are coming up where they have been enacted in other jurisdictions and they have uniformly been stricken.

And so we have given Your Honor the Poo-Bah case out of the Illinois Court of Appeals. We have given Your Honor the recent decision of the trial court in the state of Texas which also ruled one of these adult entertainment taxes unconstitutional. We have given Your Honor the recent opinion by the Tennessee Attorney General that says – because Tennessee was going to enact the same statute, basically, that Texas had enacted. The Tennessee Attorney General ruled

and said that if you pass this it is more than likely unconstitutional.

And then most recently, Your Honor, we cited to Your Honor the case of Big Hat Entertainment that was just decided by a federal district court that ruled an adult tax unconstitutional as well, because they are differential taxes, because they are content-based taxes, because they pick on some people and don't pick on others.

Your Honor, the sole argument that the State has made that this is not a content-based tax is that it's not a content-based tax. And I guess if you say Your Honor's wearing a yellow robe you can say it's not a content-based tax, but there is no way a reasonable person can look at the language in these exceptions and exemptions and say that this is not a content-based tax when you say: If the entertainment is musicians, if the entertainment is, by the way, musical entertainment that doesn't cause the patron to turn their head and look at the entertainment – I'm not making this up, Your Honor. That's actually in there. That's one of the exceptions. Calm, soothing, music, that's exempted. Animals, exempted, NASCAR. I've gone through all of it. I've put it all in the brief. Are they all content based? No, Your Honor, they are not all content based, but a ton of them are content based.

And, Your Honor, I was actually ready on a reply brief to brief something because I anticipated that the State was going to argue this. They didn't, so I didn't it include it in my reply. But if Your Honor is thinking about the fact: Well, maybe the constitutional problem is the exemption as opposed to the tax, Your Honor, I would submit to you – and I will be more than happy to provide additional briefing on this issue because I briefed this in other places – it is improper for you to blue-pencil out exemptions that create unconstitutionality.

And the reason for that is very simple, the state legislature has indicated its clear intent: They don't want those people taxed. So if the Court blue-pencils out the exemptions, those people are taxed, which is absolutely the opposite intent of the legislature. So the Court can't do that. Given the clear content-based nature of this legislation, it is unconstitutional under any line of cases under the United States Supreme Court or any other cases.

And again, Your Honor, I didn't want – I apologize for the length of some of these briefs. I had to deal with all of these issues, but I didn't give Your Honor the ton of tax cases out there because I wanted to limit this to one simple-but-irrefutable issue, that this is a content-based tax. Now, Your Honor, that deals with the – having a reasonable likelihood of success on the merits.

We've cited to the Court the case law that says one of the issues you have to take into consideration is the public policy. The case law is clear that public policy is in favor of enjoining unconstitutional laws. The balancing of the harm clearly weighs in my clients' favor. And let me lastly talk about the prospect of irreparable harm.

Your Honor, let's take for example, for giggles sake, that their argument about the NAC is correct and my client can't get back the tax, a refund, if we do not get the name and address of every person walking into our establishment who buys a Coca-Cola, because remember that the tax is not just on admissions, in my clients' establishment, unlike the casinos, it's also a tax on merchandise, food and refreshments. Now, nobody's going to do that. My clients haven't done that. I've represented that to the Nevada Tax Commission. I'm representing that to the Court.

There's actually a line of case law that says that customers in adult businesses have a right of privacy. They don't have to tell people who they are,

because people in general have the right to engage in first amendment expression anonymously. There's a U.S. Supreme Court case called Watchtower Bible, comes out of a decision out of the Sixth Circuit, U.S. Court of Appeals, but there's a number of cases before that.

So let's assume they're correct and we're never going to get a refund. Now, what we're limited to, Your Honor, is our sole remedy of getting an injunction because we're never going to get the money back. We can't have a damage claim and we can't have a refund claim, because if their argument about the NAC is correct we never get the money back. Under every definition of U.S. Supreme Court and Nevada Supreme Court jurisprudence, that's irreparable harm. There's no damage claim that we can get back.

Setting aside for the moment, Your Honor – there's a – I didn't cite it in the briefs, but there's a U.S. Supreme Court case, you might remember it from law school; I think everybody learns it at some point – called Steffel vs. Thompson, where the U.S. Supreme Court talks about: You shouldn't put a litigant – and they cite Homer – between the Scylla of flaunting the law or the Charybdis of not engaging in first amendment protected activity, Your Honor.

So, my clients if they wanted, Your Honor, they could not pay this tax. They have been paying the tax. But they could not – they could take the position: I want to defend my constitutional rights and not pay the tax. But, Your Honor, this statute has a criminal component as well. My clients could be subject to criminal sanctions if they don't comply with the law, and, therefore, that's irreparable harm as well.

I've also pointed out in my briefing, Your Honor, that the U.S. Supreme Court, and all these cases, all talk about the fact that the ability to tax is the ability to

destroy speech and expression. And we've also cited all of the case law – and again, it is irrefutable that the harm of – to first amendment activities, even for a "minimal period of time" constitutes irreparable harm. So under all of the elements, Your Honor, we meet the standards for this Court to enjoin this.

But again, let me reiterate, Your Honor, something I said earlier in regard to the motion to dismiss: I'm not dumb enough that I don't understand the practicalities and the politics involved in this, but, Your Honor, we have a big problem here if we don't get an injunction here and this case goes on for seven years and then my client's entitled to a refund. And that is one big number, Your Honor, and that is a problem for the State.

Here what this Court should do is enjoin the collection of this tax now. In the other case we'll deal with the refund action. Maybe my clients are entitled to it and maybe we're not, but the Court should enjoin it. And like I say: The primary issue here, constitutionally, is they have their burden to establish a governmental interest for differential taxation. They haven't articulated it at all.

You would be the first judge that I'm aware of in the United States that has written an opinion that says that, well, even though the government doesn't articulate a reason, you know, I'm not – I'm going to say it's not unconstitutional. It's their burden, Your Honor. Thank you.

MR. POPE: Your Honor, I'm going to begin and then my co-counsel is going to follow up with a couple of things.

If I could just quote from the statute first of all, it – "The live entertainment tax is an excise tax imposed on admission to any facility that has live entertainment." So from the language of the statute it's generally applicable tax.

The plaintiffs have to show, as opposing counsel said, that it singles out

the press, targets a small group or that it's content based. You know, it's this – in this case it's not singling out the press. It's not targeting a small group. It's generally applicable to all facilities – to admission charges to all facilities that have live entertainment. The only argument they could make is that it's content based.

Just a few quick additional notes about the statute: One is the legislative history, to the extent that plaintiffs quote to, I think it's AB247, I believe that that was rejected. So, any comments or notes or minutes regarding that really have no effect.

Talking about the exemptions for the racetracks – I believe that it says racetracks – that it exempts the Nextel race series, not all racetracks. If there's a difference, I don't know. If it applies to more, I don't know, but I believe it says Nextel series, which is a specific series.

With regard to boxing, boxing has an exemption because it pays a different kind of tax. Now in fairness I didn't cite this case, but it's Madden, which basically says that a legislature has broad discretion with regard to classifications – or differential taxing because it's tied to local needs. The legislature has to figure out where it can get its revenue from. And I'm looking for that cite, Your Honor.

In this case that's precisely what the LET exemptions do, that they're looking for a revenue base. It's not content based. There's nothing in the legislative history that says that we don't like the message so we're going to tax it. In fact, I think that the plaintiffs' brief indicates that there – that these – there are two plaintiffs that weren't originally included and those may be the only two plaintiffs that were added after the amendment. I'm not sure. That hasn't been addressed.

Because the legislature has this broad discretion with regard to taxing matters, and because statutes are presumed constitutional, and because it's a

generally applicable tax, the State's position is that this – the test is low-level scrutiny, whether there's a rational basis for it.

And this is where my co-counsel's going to pick up. Thank you.

MR. DOERR: I'd just like to address – counsel said that we never addressed the compelling-interest standard, and we didn't because we don't think that's the standard that's applicable. That assumes strict scrutiny.

The cases that counsel has cited deal with regulations. And there's a difference between a tax and a regulation. Regulations are enacted to alter behavior; taxes are enacted to generate revenue. And we allude to that in our opposition. And we have a case out of Pennsylvania that I haven't cited.

I have a copy for you if you'd like, if you'd like me to approach?

It makes the distinction. It makes those arguments. And we cited that when we argued this in front of the NTC. And again, we did not – we don't believe that's the standard. We don't believe it's content based. And, therefore, if it's not content based we don't address the compelling-interest standard.

Everything that the plaintiff said assumes that the live entertainment tax targets their message, everything he says. This statute gives the Department of Taxation no authority to regulate their business. It gives them authority to collect tax. And the tax is not really collected from them. It's collected from the patrons.

So – and, you know – and that brings me to my next point about irreparable harm. They can choose to start collecting the money from their patrons. They claim they're not doing that. If they start collecting it, they're not out any money. Their claim is that they're paying it now.

We don't actually believe they're actually paying it. We believe it's the patrons who are paying it the whole time. And that's what's gets us to the argument

as to who's entitled to a refund, which I know that's – we're not addressing that here, but, you know, what's the irreparable harm if he can turn around and collect it from his patrons? He's not out any money. And his only claim is that now he's just not doing that.

I think there are cases certainly dealing with sales and use tax that say it is the customer who pays the tax. And I believe that's the situation here. And I believe that that case is applicable in this matter, although this is specifically the live entertainment tax.

As to their other points, I believe that we've laid out our position as to a lot of his points in our brief, so I won't elaborate.

Would you like – may I approach and give you this case? And I –

MR. SHAFER: Is that Adams Outdoor Advertising?

MR. DOERR: Yes, it is.

MR. SHAFER: Thank you.

MR. POPE: Your Honor –

THE COURT: Yes. You can give me any case you want to give me –

MR. POPE: -- if I may? I found –

THE COURT: -- that you cited, that you cited.

MR. DOERR: We did not cite this case.

THE COURT: Oh.

You're aware of this case though?

MR. SHAFER: Oh, yes, and I'm gonna respond to it.

THE COURT: Okay.

I'm sorry, so this is the case – the differential taxing that you referenced – or which case is this?

MR. DOERR: This case describes – distinguishes taxes from regulations.

THE COURT: Okay.

MR. DOERR: And it's sort of a standard that may be applicable when it's a taxing statute.

THE COURT: Thank you.

MR. POPE: Your Honor, I did find that cite. It's 309 U.S. at 8788.

MR. SHAFER: Can't be. They don't go into the thousands. The Supreme Court would go into the thousands.

MR. POPE: I'm sorry, 87-88.

MR. SHAFER: Oh, okay.

MR. POPE: I just misspoke.

THE COURT: It just seems like it when you're reading.

MR. POPE: In addition, to follow up on that point, Your Honor, in Leathers, at 49 U.S. 451, even if this were a differential burden, that in and of itself is insufficient to raise first amendment concerns.

MR. DOERR: I'd just make one more point. The Pooh-Bah case really – that Court held that the exception to the exemption was not constitutional. It did not – and we've stated that in our brief. It did not say that the broad-based, generally-applicable entertainment tax was unconstitutional. It was the exception to the exemption. And that targeted new dancers. It took them out of the exception.

So his assertion that you can't just blue-line things out, I don't know that I agree with that. And clearly when you read that case, that's what happened there. They did not declare the generally-applicable tax unconstitutional. It was the exception to the exemption.

MR. SHAFER: Thank you, Your Honor.

First of all, in regard to Adams Outdoor Advertising, Your Honor can take a look at page 27 of the opinion. It says, "The ordinance imposes the tax on all off-premises signs regardless of their content."

On page 26, it says, "Here, there was nothing in the record or in the ordinance suggesting that the tax was directed at suppressing any particular ideas." Here, we have the legislative history quite to the contrary. "Moreover, because that tax was imposed on all off-premises signs, it does not single out one small group of off-premises signs while exempting others from taxation under the reasoning of Leathers" – that's one of the U.S. Supreme Court cases that we're dealing with, Your Honor – "therefore, the tax cannot be deemed to be unconstitutional."

You know, Your Honor, if they want to have a live entertainment tax that has no exemptions, let them pass it, and let's see if that passes constitutional muster under the first prong of the U.S. Supreme Court cases of why a tax is unconstitutional, but that's not what we're dealing with here. We're dealing with a gerrymandered tax so that they exempt out virtually everybody but my clients. The tax in regard to the adult businesses in Pooh-Bah was rendered unconstitutional, could not be applied to them.

Now, in regard to what Mr. Pope said about this is a generally-applicable tax. Again, Your Honor, if you say you're wearing a yellow robe, it's a generally-applicable tax. This is what a generally-applicable tax is: Tax on all business income at X percent. That is a generally-applicable tax.

A tax on live entertainment is not a generally-applicable tax. A tax on only one form of live entertainment, because you gerrymander it so that everyone else is exempted other than adult businesses, is not a generally-applicable tax. If in

fact it was a generally applicable tax everyone would be paying it.

And, Your Honor, again, I'm going to point this out in regard to one of my original comments; I'm not coming here, Your Honor, and saying that because my clients are engaged in first amendment activity we have some special exemption from generally-applicable taxes. They want to change the tax rate in this state, they can do that and I don't have – I don't have any argument. They want to, you know, tax toilet paper in regard to all businesses; that applies to us as well, just like it does everybody else. But what you can't do, you can't – you can't have a separate tax over and above the general taxes that only applies to first amendment activity and then is gerrymandered in such a fashion that it really only applies to one category of taxpayers.

Your Honor, he talks about AB2 – I think it was 247. He said that was rejected. And that's exactly right, because take a look at what they did, because AB247 was going to say, this is a tax on adult businesses. So I gave you the legislative history and they said, we don't want to say that because that would be a "red flag" for the Court. So then let's do it this way: have it generally put, well, but just exempt everybody else out. That's what happened here, Your Honor. That's exactly what happened.

Your Honor, in regard to the Madden case, I haven't read it in a couple of years, but all that case stands for is the standpoint that states and municipalities are given broad discretion in regard to their taxing. That doesn't mean you can tax in an unconstitutional manner, which is what has been done here.

Again, you know, I mean, I don't know how many times I can say this, but, again, I said in my earlier arguments, it – you know, it's content based. And, again, all he did is stand up and say it's not content based. You can't say it's not

content based when half of the exemptions would require you to look at the content of the entertainment in order to figure out whether the exemption applies. It's clearly content based.

One of counsel, I'm not sure which one, said, you know, there's no evidence in the – there's no claim that the legislature didn't like the message. Yeah, there is. I gave you the legislative history. It said, our idea initially was to get at the strip clubs, and then because of the 200 – the 300-seat-capacity exemption they missed some of them so they had to change it, and then they had to add exemptions because they got in people in the tax they didn't intend to get. They wanted this to apply to the adult businesses.

Your Honor, then counsel said that rational basis applies here. What case has anyone cited that said that rational basis applies in this type of case? There are none. That's number one.

Number two, is even under rational basis, which doesn't apply, the government has to have a reason. You can't arbitrarily say we're going to do this to this person and not do that to that person. The Court's probably dealt with over the years plenty of equal protection arguments that people have come in and made. You have to have a reason. It may be a rational reason, and you may not have to have strict scrutiny or intermediate scrutiny, but you have to have a reason. I've given them five opportunities now to articulate a reason and they still haven't articulated a reason for any of these exemptions. But, Your Honor, there is not one case that has been decided that decides these cases on rational-basis scrutiny.

And, again, Your Honor, I will go to the four cases and the attorney general opinion that I've given you that are all recent. They're all recent because they're dealing with this issue because this is the hot revenue-raising issue now.

There's not one court across this country yet, appellate court, that has upheld the constitutionality of one of these things. It is because they're subject to strict scrutiny. It's because you're trying to tax somebody a lot of people don't like differently. We'll pay our fair share of taxes. We'll pay our fair share of general taxes. We're not exempt from those, but you can't tax us specially.

And, Your Honor, again, if – you know, if these things were subject to rational-basis scrutiny, all these courts wouldn't be declaring these things, and the attorney general of Tennessee wouldn't be saying these things are unconstitutional.

Your Honor, the last argument about that, you know, we could choose to collect this from the patrons. We don't have to collect it from the patrons because in the Nevada Tax Commission they're saying it's interposed as being a true tax from the patrons as well.

The fact is, we're paying it. We have the right – and I've pointed out, Your Honor, the cases that we've cited to, that adult businesses even have standing to raise constitutional arguments of their customers. And there's a very important reason for that. If somebody buys a Coca Cola and his live entertainment tax is fifty cents, he's not going to go file a state court lawsuit to get that case [sic] back. He's not going to file a refund action. He doesn't even have standing under the statute to file a refund action. We have the right to protect the business and the clients from this unconstitutional tax. We're paying it. It's irreparable harm to us.

And, in fact, if we wanted to raise the entry fee in order to recoup that tax, let's just take a look at, you know, simple economics. You raise fees, less people buy it. That means less people are coming into the business. That means less people are engaging in first amendment protected activity. Therefore, under the definition of the U.S. Supreme Court that's irreparable harm because you're

decreasing the amount of constitutionally-protected activity.

I apologize, Your Honor, but this seems very clear to me, but unless the Court has any other questions I'll sit down.

THE COURT: I don't. Thank you.

Well, a couple things. First of all, preliminary injunctions are my favorite type of proceeding because it requires the Court to look into the future and make, essentially, what is an early decision on the merits of everything to do with the case. Those are my favorite kinds of motions to do early on.

I will tell you a couple things. One, I'm going to issue a minute order with regards to the motion to dismiss. Two, if that motion to dismiss gets denied I'm inclined to make a substantive ruling on the motion for preliminary injunction.

I struggle with – the one thing I do know is I struggle with the legislature, or any administrative code, telling me – limiting my powers, if you will – or a court's powers. And at some point when does that stop?

So I expect a couple things – doesn't mean I'll grant a preliminary injunction, simply means I'm going to make a substantive ruling. And I guess if that substantive ruling is in favor of the plaintiff then you'll have two avenues to pursue with the Supreme Court. If it doesn't it really won't matter, but I intend to make a substantive ruling. I don't intend to rely on that provision, if you will, to beg off, for the reasons that have been argued today which I agree with.

And so I'm not saying I'm going to grant a preliminary injunction; I'm simply saying I'm going to make a substantive decision. And if that means that the plaintiff prevails then you two grounds, I guess, to pursue relief, but that should in no way indicate I'm going to grant it or not. I really want to look at your briefs more carefully. I'm going to order a transcript of your arguments.

And so I appreciate that you've been – well, first of all, the good news is there's a five-year rule limitation in the state of Nevada, so it won't last – this case won't last seven years. That's the first good piece of information for you.

MR. SHAFER: Well, Your Honor, I was in front of Judge Saitta, and irrespective of that of rule, it lasted more than five years.

THE COURT: Not in Department IX it doesn't. So, I don't know – I can't speak for her. I can only speak for me. But because of the fact that, you know, you've been litigating this for a long time, and I appreciate that this was on calendar a couple months ago, but really I've just been looking at your pleadings in the last week. So, I beg your indulgence while I get as familiar with the issues as I know you are, and the case law, and make a decision.

So, I'd, you know, love to rule from the bench and give you certainty and let you be able to go off and conduct your affairs, but out of fairness to me, this matter that it appears you've been litigating for years now, needs a little more of my time and attention.

And so, what I'm going to do – excuse me.

(Court colloquy, off the record)

THE COURT: So, I'm going to set this on a chamber calendar for the purposes of tracking it for a decision, and I wanted to get a transcript which will be prepared as soon as she can. And, so, I'm going to put it on in two weeks. That's for my purposes. I mean, you know, you'll understand that I'm looking at it as I can over the next two weeks and I hope to render a decision as soon as possible. And I know you're waiting, and you're welcome to check Blackstone, and you're welcome to call my law clerk, although, not too much.

MR. DOERR: Take all the time you need as far as we're concerned.

THE COURT: I'm not going to say anything on that.

And you'd like me to hurry up and decide, so I'll do the best I can.

MR. SHAFER: I just want you to reach the right decision, Your Honor.

THE COURT: Sure, I understand.

So, I appreciate your patience and your thoroughness. And you've certainly – you know, these cases are difficult enough, particularly if the lawyers don't present the quality of briefing that you all have, so I do really appreciate it.

MR. SHAFER: Your Honor, could I ask one question?

THE COURT: Sure.

MR. SHAFER: There was an issue that was obliquely addressed in the pleadings, and that is that we do have this case and then we have the refund action. I don't know if it's coincidence that they're both in front of you, but they are both in front of you.

THE COURT: It's random assignment.

MR. SHAFER: Okay.

MS. SULLIVAN: Wow.

MR. SHAFER: At some point we were – we actually talked telephonically. I believe, the State does not –

THE COURT: Well, they say is they're not proper for consolidation – they're not proper for consolidation, twice. And, so, I expect that you're going to move to consolidate?

MR. SHAFER: Well, my question was, should I just file a formal motion for that?

THE COURT: Yes.

MR. SHAFER: Or should we have a pre-trial – okay. We'll do –

THE COURT: I mean, unless you stipulate then –

MR. SHAFER: Okay.

THE COURT: -- if there's no stipulation you have to file a motion and –

MR. SHAFER: Thank you.

THE COURT: -- I'll consider it –

MR. SHAFER: Thank you.

THE COURT: -- based upon whatever I read.

MR. SHAFER: Thank you.

THE COURT: Okay. Now, normally those would go on my chamber calendar, which would mean that you wouldn't be having oral argument unless there was something special about it.

MR. SHAFER: Okay.

THE COURT: Okay.

MR. SHAFER: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. POPE: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 10:24 A.M.

* * * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording in the above-entitled case.

Beverly Sigurnik

BEVERLY SIGURNIK
Court Recorder/Transcriber

CIVIL COURT MINUTES

06-A-533273-C Deja Vu Showgirls Of Las Vegas vs Nevada Dept Of Taxation

CONTINUED FROM PAGE: 002

08/14/08 ??:?? ?M 00 STATUS CHECK: TRANSCRIPT/DECISION PENDING MOTIONS

HEARD BY: Jennifer Togliatti, Judge; Dept. 9

OFFICERS: Alan Paul Castle, Court Clerk

PARTIES: NO PARTIES PRESENT

COURT ORDERED, matter CONTINUED 30 Days for further consideration.

CLERK'S NOTE: The above Minute Order has been distributed to: Ghanem & Sullivan; Catherine Cortez Masto, Attorney General (David J. Pope, Senior Deputy Attorney General).

CONTINUED TO: 09/18/08 ??:?? ?M 01

ORIGINAL

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FILED

2008 SEP 17 P 4:53

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls,* LITTLE DARLINGS OF LAS VEGAS, LLC d/b/a *Little Darlings,* K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiff(s),

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Defendants.

Case No. A533273
Dept. No. IX

MOTION FOR SUMMARY JUDGMENT

Date of Hearing:
Time of Hearing:

COME NOW, Defendants Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners and Michelle Jacobs, in her official capacity only, by and through their attorneys, Catherine Cortez Masto, Attorney General, David J. Pope,

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, and hereby move this Court for an Order granting Summary Judgment.

This Motion is made and based on all pleadings and papers on file, the attached Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

Respectfully submitted:

Dated September 17, 2008

CATHERINE CORTEZ MASTO
Attorney General

By: _____

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Sr. Deputy Attorney General
Nevada State Bar #8617
Blake A. Doerr
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NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Summary Judgment will be heard before the above-entitled Court on the 21 day of OCT, 2008 at 9:00 AM in Department IX or as soon thereafter as counsel may be heard.

Dated September _____, 2008

CATHERINE CORTEZ MASTO
Attorney General

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

BACKGROUND

PLAINTIFFS are owners of a number of exotic dancing establishments. DEFENDANTS are the various agencies of the State of Nevada which administer the Live Entertainment Tax (LET). In January 2007, certain PLAINTIFFS requested a refund for the LET which they paid for January, February, March and April 2004-others have not yet requested a refund. The Department of Taxation denied the refund request. PLAINTIFFS appealed the denial of the refund to the Nevada Tax Commission and the refund request was denied. On December 19, 2006, PLAINTIFFS filed their Complaint. PLAINTIFFS allege that the LET, established by Title 32, Chapter 368A of the Nevada Revised Statutes is an impermissible, unconstitutional infringement by the State of Nevada on constitutionally protected expression. Plaintiffs seek as their remedy: (1) an injunction enjoining the Defendants from enforcing the provisions of the LET; (2) a refund of all LET payments which they paid for January, February, March and April 2004; (3) a declaration that the LET is unconstitutional; and (4) an award for damages, costs and fees pursuant to 42 U.S.C. §1988.

A taxing statute is different than a regulatory statute. Where the taxing statute does nothing to inhibit or prohibit a person's message, it will not be subjected to strict scrutiny.

II.

ARGUMENT

A. Summary Judgment is Appropriate Where No Material Issues of Fact Exist

Nevada Rule of Civil Procedure 56 provides that a party against whom a claim is made may, at any time, move with or without supporting affidavits for summary judgment in his or her favor. Summary judgment is proper whenever there is no genuine issue as to any material fact and the moving party is entitled to a judgment as

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a matter of law. NRCP 56(c); *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258 (1981); *Bader Enterprises, Inc. v. Becker*, 95 Nev. 807, 809, 603 P.2d 268 (1979).

To defeat a motion for summary judgment, the non-moving party must offer competent evidence demonstrating there exists a question of fact on the issue. To that end, the Nevada Supreme Court has previously ruled that "[t]he non-moving party must, by competent evidence, produce specific facts that demonstrate the presence of a genuine issue for trial." *Elizabeth v. ADT Security Systems West*, 108 Nev. 889, 892, 839 P.2d 1308, 1310 (1992). In addition, the Court in *Maine v. Stewart*, 109 Nev. 721, 727, 857 P.2d 755, 759 (1993) observed, "[i]f the moving party satisfies its burden and the motion for summary judgment is supported as required by NRCP 56, the adverse party may not rest upon the "mere allegations of his pleading, but must, by affidavit or otherwise, set forth facts demonstrating the existence of genuine issue for trial.'"

The United States Supreme Court has explained that in opposing a Motion for Summary Judgment a party, "must do more than simply show that there is some metaphysical doubt as to the material facts...In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'...Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'". *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). The Nevada Supreme Court has added: "the nonmoving party is not entitled to build a case on gossamer threads of whimsy, speculation, and conjecture." *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 445, 956 P.2d 1382, 1385 (Nev. 1998). (internal quotations omitted.)

The Nevada Supreme Court has embraced the United States Supreme Court's view of the burden placed upon a party when it seeks to defeat a motion for summary adjudication. Specifically, the Nevada Supreme Court had held "[w]hile the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some

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metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (Nev. 2005) *citing Matsushita Elec. Ind. Co.*, 475 U.S. 586.

As will be demonstrated below, the LET is not unconstitutional. The question as to the constitutionality of the LET is a question of law and the specific facts which have given rise to the Complaint have no effect on the determination of whether the LET is constitutional on its face. The LET was not enacted with the intent to--nor does it inhibit or prohibit any constitutionally protected activity and should therefore not be subjected to strict scrutiny.

B. Legislation Is Presumed Constitutional

All acts passed by the Legislature are presumed to be valid until the contrary is clearly established, and courts will only interfere when the Constitution is clearly violated. *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). The burden of making a clear showing rebutting the presumption is on the party challenging the law's validity. *Id.* at 138. Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, a court is obliged to construe the statute so that it does not violate the constitution. *Whitehead v. Comm'n on Judicial Discipline*, 110 Nev. 874, 883, 878 P.2d 913, 919 (1994).

PLAINTIFFS urge the Court to adopt an interpretation of the LET statute that is unconstitutional. However, the law is clear, where a Court can interpret a statute so that it is constitutional, it must. *Id.* It is PLAINTIFFS' burden to rebut the presumption that the LET statute is constitutional.

C. A State May Tax Commerce When Doing So Does Not Violate the Constitution

i. The State Can Levy a Tax on Constitutionally Protected Activity So Long as It is Not Contrary to the Uniformity or Equal Protection Clauses of the Constitution

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a. Nevada Has Levied Taxes on Cabaret Entertainment Since the 1960s

Admission charges, food, drink, and merchandise sales in nude or partially nude dancing establishments have been taxed in Nevada for many years. The LET was enacted in 2003, when the 20th Special Session of the Nevada State Legislature approved and the Governor signed Senate Bill No. 8 ("SB 8"). The title of SB 8 states: "AN ACT ... replacing the casino entertainment tax with a tax on all live entertainment;. . ." Act of July 22, 2003, ch. 5, 2003 Nev.Stat 133 (Emphasis added). The LET replaced the Casino Entertainment Tax which replaced the Federal Cabaret Tax. *See* Nevada State Attorney General's Opinion No. 85-17, which reads in pertinent part:

> ... The original casino entertainment tax was passed in 1965 at the urging of Governor Grant Sawyer as a revenue measure. Journal of the Senate, 53d Sess., at 619-26 (Nev. Apr. 3. 1965). The original casino entertainment tax was based upon the federal cabaret tax. NRS 463.401(1) (1965) was very similar in language to 26 U.S.C. § 4232(b) (1964), which provided the definition of "roof garden, cabaret, and other similar places" for the imposition of the federal cabaret tax.

See also, *Cashman Photo Concessions and Labs, Inc. v. Nevada Gaming Commission*, 91 Nev. 424, 427, 538 P.2d 158, 159 (1975) (casino entertainment tax was derived from federal cabaret tax statute).

The statutory provisions governing the former Casino Entertainment Tax were contained in chapter 463 of NRS. With certain exceptions, the Casino Entertainment Tax was imposed on "each licensed gaming establishment in this state where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise." NRS 463.401 (1975) (repealed 2003 by S.B. 8, 20th Special Session); *see also Cashman*, at 426, (quoting NRS 463.401 (1975)). S.B. 8 expanded the Casino Entertainment Tax to include non-gaming establishments. Cabarets where nude and semi-nude dancing occurs have existed in Las Vegas for many years and the Casino Entertainment Tax was applied to the admission charges to those facilities only when the cabarets were located in a gaming establishment. Thus,

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prior to the enactment of the LET, admission charges to nude dancing establishments were only being taxed when the dancing was performed in a gaming establishment. With the growth of Las Vegas, establishments such as the Plaintiffs' developed in places other than casinos. So, while the cabarets which were located in casinos were required to tax admission charges, cabarets such as the Plaintiffs' were not.

With the enactment of the LET, live entertainment was statutorily defined as "any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present." NRS 368A.060. Pursuant to NRS 368A.140(2), the Department administers the LET with regard to non-licensed gaming establishments; whereas the Nevada Gaming Control Board along with the Nevada Gaming Commission administer the LET with regard to licensed gaming establishments. NRS 368A.200(1) provides:

> [T]here is hereby imposed an excise tax on admissions to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of: (a) Less than 7,500 persons, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility[;] (b) At least 7,500 persons, the rate of the tax is 5 percent of the admission charge to the facility.

Thus the enactment of the LET was a measure to generate revenue by extending the cabaret taxes to all establishments where live entertainment was being performed but not taxed under the cabaret tax. The tax was in no way enacted to inhibit or prohibit any message. PLAINTIFFS have asserted that the enactment of the LET is specifically targeting them and their message. This is contrary to the statutory history which clearly demonstrates that entry to this type of establishment has been taxed in the past.

b. The State May Tax Admission to Taxpayers' Businesses, Therefore PLAINTIFFS are not Exempt from Taxation Pursuant to NRS 368A.200(5)

Pursuant to NRS 368A.200(5)(a), "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada

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Constitutions" is exempt from the LET. Since the State of Nevada is not prohibited by the Constitution, law or treaties of the Untied States or the Nevada Constitution from taxing the live entertainment at issue in this case, the exemption is not applicable. Furthermore, with respect to taxing statutes, "[a]ny reasonable doubt about the applicability of an exemption must be construed against the taxpayer." *Sierra Pac. Power Co. v. Department of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980).

Here, the PLAINTIFFS are alleging that they are exempt from taxation. Tax exemptions are strictly construed against the Taxpayer. See *Id.* Where, as here, there is a reasonable doubt that this exemption applies to the PLAINTIFFS, the exemption must be construed against the PLAINTIFFS.

c. While Nude Dancing is Entitled to Some Level of Constitutional Protection Exactly What That Level Is, Has Not Been Clearly Established

The US Supreme Court has addressed the issue of constitutional protection of nude dancing in a number of cases. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991), the Court addressed a statute that required go-go dancers to wear pasties and a G-string. The *Barnes* court held that "go-go dancing" was expressive conduct within the outer perimeters of the First Amendment . *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000.) In *City of Erie*, the Court also stated that, while being "in a state of nudity" is not an inherently expressive condition, nude dancing is entitled to some level of constitutional protection. *Id.* Whether erotic dance is afforded full First Amendment protection was addressed in *Colacurcio v. City of Kent*, 163 F.3d 545, 550 (9th Cir.1998).

> Scholars have grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment. Professor Lawrence Tribe noted that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed.1988). Although his comment was made prior to *Barnes*, the

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observation continues to be accurate today. Professor Erwin Chemerinsky views Supreme Court precedent as according sexually explicit expression "low-value" status. Chemerinsky, *Constitutional Law* § 11..3.4.4, p. 836-41 (1st Ed.1997). Professors Gerald Gunther and Kathleen Sullivan suggest that even in cases where courts do not explicitly treat sexual expression as lower-value speech, the decisions have implicitly treated such speech as a "subordinate species" in their tolerance of content-specific regulation. Gunther and Sullivan, *Constitutional Law* § 5(D), p. 1155-56 (13th Ed.1997). *Id.*

Note also that each of the three cases cited deal with statutes or ordinances whose purpose is to modify behavior and not merely to tax.

PLAINTIFFS have consistently urged that their activities are entitled to full First Amendment protection and that the LET should be subjected to the highest level of statutory scrutiny. The position is contrary to above cited cases and the body of case law dealing with nude dancing generally. *See also* Chemerinsky, Constitutional Law Principles and Policies, Second Edition. 2002, at p. 989 et seq. (explaining that nude dancing is protected by the First Amendment but is treated as being "low value" expression and thus the government has latitude to regulate such expression)

d. The LET is Not Invalid by Reason Of It Generating Revenue In Excess Of the Cost of Administration--Regulatory Statutes are Subject to Different Review than Taxing Statutes

The vast majority of cases, and indeed many of the cases cited by the PLAINTIFFS throughout the pendency of this matter, discuss constitutional protections of nude dancing and regulations whose purpose is to limit or restrict nude dancing. In *Barnes*, an Indiana statute required exotic dancers to wear pasties and a g-string. In *City of Erie*, the city enacted an ordinance that made public nudity a criminal offense. And in *Colacurcio*, the City of Kent, Washington enacted an ordinance which required nude dancers to perform their dances at least 10 feet away from patrons. Thus the reason for the enactment of those statutes or ordinances was to regulate behavior. This is in contrast to the LET which is merely a taxing statute. The record reflects that the PLAINTIFFS are urging this Court to take the position that the LET is a regulation and

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then to apply the standards of review relevant to regulations that are enacted to modify behavior. Neither the US Supreme Court nor the Nevada Supreme court has specifically addressed this issue.

However, in *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (Pa.Cmwlth. 1995), the Commonwealth Court of Pennsylvania addressed this issue. In *Adams Outdoor Advertising, Ltd.*, the borough of Stroudsburg, Pennsylvania enacted an ordinance which taxed off-premise signs based upon the size of the sign. *Id.* The *Adams Outdoor Advertising, Ltd.* court held that the tax was not a constitutional violation. In their analysis, the Court distinguished taxes from regulations. "[U]nlike a license fee, the purpose of which is to offset the costs of regulation, a tax is imposed for the purpose of raising revenue." *Id.* at 24. "[T]he primary purpose of taxes is always to raise money for the taxing authority." *Id.* When dealing with a tax versus a regulation, the issues presented are whether the tax is uniform and whether it is an unlawful infringement upon the First Amendment rights. *Id.* When dealing with a tax, the court need not address the fact that the tax amount exceeds the reasonable costs of administration because that is not applicable to tax legislation; it only applies to challenges to license fees. *Id.*

The purpose of the LET is to generate revenue and not to regulate First Amendment protected behavior. Evidence of this is the fact that nothing in chapter 368A of NRS authorizes the Department to supervise or regulate the PLAINTIFFS' business activities. Nor is the payment of the tax a condition precedent to exercise any constitutionally protected act. Chapter 368A of NRS is an empowerment measure authorizing the Department to administer the LET through the collection of the tax. Further evidence that chapter 368A of NRS is strictly a tax and not a regulatory measure is the fact that the US District Court dismissed the PLAINTIFFS' Complaint on the grounds that the federal court lacked jurisdiction based on the Tax Injunction Act because the issue presented was strictly a taxing measure. That decision was later affirmed by the 9th Circuit Court of Appeals.

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e. Nevada's LET Is A Broad-Based, Content-Neutral Generally Applicable Tax And Is Not A Facially Unconstitutional Direct Tax On The Exercise Of Constitutional Freedoms

It is settled that speech can be effectively limited by the exercise of the taxing power. *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936). A state "may tax the property used in, or the income derived from" commerce. *Murdock v. Commw. Of Penn.*, 319 U.S. 105, 113 (1943). In *Murdock*, the Court determined that a tax was unconstitutional where a license fee was being charged to missionaries for the privilege of canvassing within a certain area. *Id.* The Court ruled that the statute which authorized the tax discriminated based on the content of the speaker's message and stated that because the payment of the licensing fee was a condition precedent to the exercise of the constitutional privileges, it would allow the state to control the message. *Id.* The Court likened the collection of the tax to "exact[ing] a tax from [the preacher] for the privilege of delivering a sermon." *Id.* at 112.

However, the *Murdock* court also stated, "We do not mean to say that all religious groups and the press are free from all financial burdens of government." Id. The Court distinguished the licensing fee from "a tax on the income or property used or employed in connection with [the constitutionally protected] activities" and stated, a state "may tax the property used in, or the income derived from" commerce. *Id* .

Where, as here, a tax does not discriminate based on the content of the Taxpayer's message, the State may tax a business activity. Moreover, this tax is not a regulatory measure at all and it does not tax speech but rather the privilege of entering an establishment where any form of live entertainment is performed.

The PLAINTIFFS take the position that because entertainment is protected as a form of speech, a tax just on entertainment is unconstitutional. This premise is clearly contrary to the Court's holding in *Murdock*. Furthermore, subsequent Supreme Court precedent has extended the holding in *Murdock* to uphold sales and use tax to sales of religious materials. *See Jimmy Swaggart Ministries v. Board of Equalization,* 493 U.S.

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378 (1990).

Furthermore, the LET does not fall within the bar of *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, (1983). In *Minneapolis Star*, the State of Minnesota had set up a separate taxing scheme for newspaper print and ink, with a rather large exemption that rendered only a handful of newspapers or other members of the press within the state actually subject to the tax.

There is ample indication from *Minneapolis Star* that its analysis only applies to the protections of the institution of the press, not to the more general protections of freedom of expression that the PLAINTIFFS would have this Court believe. In *Minnesota Star,* the Supreme Court cited the Framers' concern about the role of the press in mobilizing sentiment in favor of independence. *Id.* at 583-585. For example, *Minneapolis Star* cited to a speech by Potter Stewart in which he argues that the protection of the "Freedom of the Press" clause puts the protection of the Press on a different level than protection of other forms of expression by the rest of us. As Justice Stewart stated:

> It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

26 Hastings L.J. 631, 633-4 (1975).

Obviously, the Supreme Court was concerned about the coercive effects that a tax uniquely applicable to the press would have on that institution's independence as the "fourth branch of government." A differential tax on live entertainment does not carry with it the same level of concern.

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In contrast to the laws targeting newpapers and laws regulating speech based on its content, the LET is a taxing measure. As a taxing measure, the LET was designed to generate revenue for the state and was not enacted to inhibit anyone's freedom of expression.

e. Nevada's LET Does Not Violate the Constitution By Taxing Differently Based on Content

The U.S. Supreme Court has articulated the following as the test for whether a regulation is content neutral:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . The government's purpose is the controlling consideration. **A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.**

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added). "In determining whether a governmental regulation of speech is content based, our principal inquiry is whether the government adopted the regulation because of its disagreement with the message to be conveyed by the speech." *Adams Outdoor Advertising, Ltd.*, 667 A.2d 21 at 27, *citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The government's purpose in enacting the legislation is the Court's controlling consideration and if that purpose is unrelated to the content of the speech, then the regulation is content neutral. *Ward*, 491 U.S. 781. If on the other hand, the purpose of the regulation is related to the content of the speech, or if, in determining whether the regulation applies, one must look to the content of the speech, then, absent a compelling reason offered by the government, it will be found to be unconstitutional. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

There is no indication that the classifications set forth in NRS chapter 368A are for purposes other than optimizing tax revenues by an expansion of the Casino Entertainment Tax from cabarets (and all other live entertainment venues) in casinos to

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all other cabarets including the PLAINTIFFS'. Pursuant to NRS 368A.200, the LET is imposed on admission to any facility in the state of Nevada where live entertainment is provided regardless of the content of that entertainment and, therefore, the LET is content-neutral.

f. Taxing Statutes Which Contain Exemptions and Exceptions are Not Per Se Invalid

The United States Supreme Court has stated, "[i]nherent in the power to tax is the power to discriminate in taxation." *Leathers*, 499 U.S. at 451. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." Id. (citations omitted). In *Madden*, 309 U.S. at 87-88, 60 S.Ct. at 408, the United States Supreme Court announced the following rule:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized...[T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

(citations omitted). There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. The rule announced in *Leathers* is, "differential taxation of speakers . . . does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Id.* at 453. The LET, on its face, is not directed at, nor does it present

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the danger of, suppressing particular ideas. Nevada's LET was enacted to raise revenues. It cannot be argued that the LET limits the ability of exotic dancers, or for that matter any other entertainers, to express themselves.

The lower tax rate for larger capacities appears to be an expansion of the cabaret and casino entertainment taxes, which completely exempted facilities with larger capacities. See AGO 85-17 (Casino Entertainment Tax, based on history of cabaret tax, not intended to cover large venues).

With regard to the exemptions, the Nevada Legislature has chosen simply to exclude or exempt certain live entertainment from the LET. Nothing about the choice to exempt certain live entertainment from the tax suggests an interest in censoring the expressive activities of either nude dancing or clothed entertainment. *See Leathers v. Medlock,* 499 U.S. 439, 453, 111 S.Ct. 1438, 1447 (1991) ("[t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax"). Rather, indications are that the minimum seating capacity of 300 in SB 8 was set so as not to do economic harm to smaller entertainment arenas, not to differentiate based on content. *See Minutes of Assembly Committee on Commerce and Labor,* 73rd Session, April 13, 2005, p. 4, attached hereto as Exhibit A.

With respect to NASCAR events, there is an obvious, non-content basis for the exemption—the economic activity generated by the race series. *Nascar weekend draws $198 million to area,* Las Vegas Review Journal, May 11, 2007, http://www.lvrj.com/sports/7458307.html.

PLAINTIFFS may argue that because the statute contains an exemption for boxing events that their activities are targeted. See NRS 368A.200(5)(c). However, boxing events were excluded because those events are already subject to tax pursuant to NRS 467.107(1) which requires promoters of boxing contests to pay tax in an amount equal to four percent of the total gross receipts from admission fees. In addition, the promoters must pay three percent of the first $1,000,000 and one percent of the next $2,000,000 of the total gross receipts from the sale, lease or other exploitation of

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broadcasting, television and motion picture rights for the particular contest. *Id.* Pursuant to NRS 467.108, the promoter must pay an additional $1.00 or $ .50, depending on the amount of the gross receipts from the admission fees. This is likely an example of the Legislature fitting the taxing scheme to the local needs and usages in order to achieve an equitable distribution of the tax burden. See *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940).

There is no evidence to suggest that the content-neutral LET is likely to stifle the free exchange of ideas or is aimed at suppressing particular ideas. The LET is content neutral as it does not tax the expression of nude dancing but rather the privilege of entering an establishment where any form of live entertainment is performed.

g. Nevada's LET Classifications Are Not Unconstitutionally Overbroad or Vague

A statute is void for vagueness and therefore in violation of the Due Process Clause of the Fourteenth Amendment if it "(1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited and (2) authorizes or encourages arbitrary and discriminatory enforcement." *City of Las Vegas v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 122 Nev. 1041, 146 P.3d 240, 245 (2006).

The LET does not regulate conduct and, therefore it cannot be argued that the taxing statute is void for vagueness. Nor does the LET authorize or encourage arbitrary or discriminatory enforcement. In fact, part of the reason it was enacted was because establishments located in casinos were being taxed while PLAINTIFFS' businesses were not taxed even though the same or very similar dancing was being performed.

A law is overbroad and void on its face if it:

> sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protected First Amendment rights. When a law regulates arguably expressive conduct, such as erotic dancing, the scope of the [law] does not render it unconstitutional unless its overbreadth is not

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only 'real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep. *Id.* at 247. (internal quotes omitted)

The LET simply taxes the admission to the facility and in no way inhibits or prohibits a First Amendment activity.

III.

CONCLUSION

The record below reflects that the PLAINTIFFS are asking this Court to do what no other Court has done: apply strict scrutiny standards to a generally applicable taxing statute. This result defies common sense because by this standard no tax could ever be levied that generated any more revenue than the cost of the administration of the statute. There is no blanket prohibition against taxing the business activity or property even where that business activity involves constitutionally-protected activity. The LET is a content-neutral taxing measure legislated for the purpose of generating revenue for the state. The LET in no way restricts the PLAINTIFFS from performing any of their business activity nor does it give the DEFENDANTS any authority to do anything other than administer the tax.

Based on the foregoing reasons, the DEFENDANT'S Motion for Summary Judgment should be granted.

Respectfully submitted this 17th day of September 2008.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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Exhibit A

questions about how we would feel about this and what the tax might bring in. We talked about a bill draft request that would be similar to the one that is before you today. I felt that the Governor's tax package included us because of its broad definition of live entertainment. It did include us right up to the very end, when the 300-seat threshold was brought in to the bill at the request of Senator Neil to protect some of the small arenas in the North Las Vegas area. He felt they would be impacted by having to charge an admissions fee. That 300-seat threshold not only amended us out of the bill, but it amended out a big percentage of the other sexually related businesses, particularly in Clark County, which was not the intention.

[George Flint, continued.) Before you today is an amendment (Exhibit B), which is needed by my group. It changes the last two lines of page 1 of the bill and the first two lines from page 2. The old language had an industry-specific tax on what could be 30 percent of what the brothel operators receive, which would be devastating. This would be similar to raising the gross receipts tax on the casinos from 7 percent to almost 30 percent. It was not the language that we agreed to. It originally appeared in one of the special session bills in an attempt to bring in the out-call services in Las Vegas. Chairman Parks of Taxation worked with me to bring this language back in. I don't know how it landed in this bill. It was too late to change it before it was presented to you.

Were the bill to pass in its present form, it would be prohibitive, particularly in light of the fact that we already pay a tremendous amount of money to the local government. Brothels in Lyon County pay approximately $95,000 a year in business license taxes. It is similar in Nye County.

This bill would create around $1.6 million per year, or $3.2 million per biennium. Only a small portion of that is based on the admissions fee. Once a client decides to go to that area of the brothel where the live entertainment takes place, there would be an admissions fee in the $20 range, which would have a 10 percent tax on it. That is only a small part of the tax. A bigger part of the tax would be a 17 percent tax on alcohol or the bar tax. We have a new phenomenon in our industry—the sale of food and souvenirs. All food, alcohol, and souvenirs will be contributing up to 17 percent, as well as the 10 percent tax on admissions.

I hope that the Committee will give this bill serious consideration. I think that it is better to tax us and get some benefit from us, than to not. I think this tax will give us some added acceptability. It will probably become money that the state will be able to use and appreciate. I was told yesterday that there was $1.6 million need for a particular area of health care that has been left out of the Governor's budget. I am sure that you will find a place for this money.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2008, the foregoing MOTION FOR SUMMARY JUDGMENT was served on the party(ies) by mailing of same in the United States mail, postage prepaid thereon, addressed to:

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CIVIL COURT MINUTES

06-A-533273-C Deja Vu Showgirls Of Las Vegas vs Nevada Dept Of Taxation

CONTINUED FROM PAGE: 003

09/18/08 ??:?? ?M 01 STATUS CHECK: TRANSCRIPT/DECISION PENDING MOTIONS

HEARD BY: Jennifer Togliatti, Judge; Dept. 9

OFFICERS: Alan Paul Castle, Court Clerk

PARTIES: NO PARTIES PRESENT

COURT ORDERED, matter CONTINUED 30 Days for further consideration.

CLERK'S NOTE: The above Minute Order has been distributed to: Ghanem & Sullivan; Catherine Cortez Masto, Attorney General (David J. Pope, Senior Deputy Attorney General).

CONTINUED TO: 10/16/08 ??:?? ?M 02

CIVIL COURT MINUTES

06-A-533273-C Deja Vu Showgirls Of Las Vegas vs Nevada Dept Of Taxation

CONTINUED FROM PAGE: 004

10/16/08 ??:?? ?M 02 STATUS CHECK: TRANSCRIPT/DECISION PENDING MOTIONS

HEARD BY: Jennifer Togliatti, Judge; Dept. 9

OFFICERS: Alan Paul Castle, Court Clerk

PARTIES: NO PARTIES PRESENT

COURT ORDERED, CONTINUED.

CONTINUED TO: 11/06/08 ??:?? ?M 03

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FILED
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *Deja Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *Little Darlings*, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, L.L.C. d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*,

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her Official Capacity Only,

Defendants.

Case No.: A533273
Dept. No.: IX
Docket

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date of Hearing: November 13, 2008
Time of Hearing: 9:00 a.m.

RECEIVED
OCT 23 2008
CLERK OF THE COURT

COME NOW Plaintiffs, by and through their attorneys of record, Diana L. Sullivan, Esq. of the law firm of GHANEM & SULLIVAN, LLP, and Bradley J. Shafer, Esq. of the law firm of SHAFER & ASSOCIATES, P.C., and hereby file this Opposition to the Defendants' Motion for Summary Judgment. This Opposition is made and based upon the following Points and Authorities, the exhibits attached thereto, the underlying pleadings and their exhibits, all of the pleadings on file herein, and the argument of counsel at the time of the hearing.

DATED this 22nd day of October, 2008

GHANEM & SULLIVAN, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND AND FACTS

Plaintiffs operate commercial establishments in Las Vegas which present live exotic performance dance entertainment to the consenting adult public. This entertainment constitutes speech, expression, and a form of assembly protected not only by Article I, §§ 9 and 10 of the Nevada Constitution, but the First and Fourteenth Amendments to the United States Constitution as well. Defendants have taken the position that Plaintiffs' establishments are subject to N.R.S. Chapter 368A, which imposes a tax on live entertainment. Plaintiffs contend that the Live Entertainment Tax (hereinafter sometimes simply the "LET") is facially unconstitutional in that it is violative of the constitutional protections enumerated above. In order to safeguard those rights from being trampled, Plaintiffs filed this instant lawsuit, in addition to the other administrative and judicial proceedings.

II. POINTS AND AUTHORITIES

A. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED OR STAYED TO ALLOW PLAINTIFFS TO COMPLETE DISCOVERY

1. STANDARDS FOR GRANTING RULE 56(F) RELIEF

Summary judgment is not appropriate at this early time. The parties only recently began the discovery process. There remain a number of important factual issues that must be fully vetted through discovery before the Court summarily rules on Plaintiffs' claims. Plaintiffs respectfully request this Court deny summary judgment pursuant to Rule 56(f) of the Nevada Rules of Civil Procedure to allow Plaintiffs a full opportunity to develop the necessary facts to support their claims. In the alternative, Plaintiffs request a continuance or stay to allow

them the opportunity to secure the necessary facts before the Court rules on Defendants' motion for summary judgment.

NRCP 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In applying this rule, the Nevada Supreme Court has declared that, "summary judgment is improper when a party seeks additional time to conduct discovery to compile facts to oppose the motion." **Aviation Ventures,** 121 Nev. at 118. The courts have typically looked to two guideposts in determining whether to deny or stay a motion for summary judgment in order to allow the non-moving party additional time to muster facts in opposition to the motion.

First, the Court looks to whether the party requesting NRCP 56(f) relief has identified a need for further discovery. **Aviation Ventures**, 121 Nev. at 119, 110 P.3d at 63 ("Vision clearly enunciated how discovery would allow it to develop the record in order to properly oppose LVTB's motion"); **Summerfield v. Coca Cola Bottling Company of the Southwest**, 113 Nev. 1291, 1295, 948 P.2d 704, 706 (1997) ("Roitman had affirmed that should a continuance be granted, Summerfield would be able to procure an expert to testify as to proximate cause"); and **Harrison v. Falcon Products, Inc.**, 103 Nev. 558, 560, 746 P.2d 642, 643 (1987) ("From Harrison's affidavit it is apparent that she had not yet been able to gather enough information to support her claims").

Once it is palpable that further discovery would allow the nonmoving party to more fully oppose a motion for summary judgment, the court looks to whether the nonmoving party has been dilatory in pursuing discovery. **Aviation Ventures**, 121 Nev. at 118-119, 110 P.3d at

62-63. The decision whether to grant NRCP 56(f) relief is within the discretion of the trial court. **Id**. However, the Nevada Supreme Court has customarily held the denial of such relief to be an abuse of discretion where the matter has been pending for less than two years and the nonmoving party was not dilatory in pursuing discovery:

> Preliminarily, we note that not even two years had passed since the filing of the complaint until the time summary judgment was granted. The harsh result of granting summary judgment is obvious when had a motion to dismiss been before the district court, the court would not have had the power to dismiss the action. *See* NRCP 41(e).

Harrison, 103 Nev. at 560, 746 P.2d at 642.

In **Summerfield**, 113 Nev. at 1294-1295, 948 P.2d 705-706, the Court (citing Harrison, *supra*) again found the district court's denial of NRCP 56(f) relief to be an abuse of discretion when the matter had been filed less than two years previous and the nonmoving party was not dilatory. The Court explained, ". . . in both **Harrison** and the present case, the award of a motion for summary judgment and the concurrent denial of a request to continue operated to fatally limit the plaintiffs' abilities to conduct discovery." **Id**.

The same is true here. As explained more fully below, there are several factual matters Plaintiffs need to more fully investigate in order to oppose Defendants' motion for summary judgment. In addition, discovery has just begun, and the parties' efforts to date have been concentrated on litigation Defendants' motion to dismiss, Plaintiffs' motion for preliminary injunction, and now Defendants' motion for summary judgment.

2. PLAINTIFFS NEED TO CONDUCT FURTHER DISCOVERY TO BE ABLE TO FULLY OPPOSE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

There exist at least four issues that require further factual development for Plaintiffs to be able to adequately oppose Defendants' motion for summary judgment. These issues

include: (1) whether the LET operates to disproportionately burden First Amendment activity or a particular message; (2) whether the LET was enacted and/or subsequently amended with the purpose or intent of burdening certain forms of First Amendment activity; (3) whether there exists an adequate factual predicate supporting the purposes for the discriminatory tax; and (4) whether the LET is impermissibly vague or overbroad.

First, as further explained below, the LET is constitutionally suspect, and subject to strict scrutiny, if it targets only a small group of speakers. *See* Section II (D)(1), *infra.* Although Defendants attempt to argue that the LET is broad in nature, they submit no facts, which demonstrate that the LET ***operates*** broadly and in a nondiscriminatory manner. In fact the limited available legislative history suggests just the opposite – that venues such as Plaintiffs' are paying the vast majority of the taxes. *See* Section II(D)(8), *infra.*

However, at present, Plaintiffs do not yet have the hard tax data to show precisely which business are (and are not) paying the LET, and in what proportion. *See* Affidavit of Diana L. Sullivan, Exhibit 1, ¶ 5. Plaintiffs seek to demonstrate that – as the legislative history suggests – exotic dance establishments pay a disproportionately large share of the LET. Affidavit, Exhibit 1, ¶ 5. To do so, Plaintiffs will need to ascertain through discovery the identity of each payer of the LET as well as the amount of taxes paid by each. Affidavit, Exhibit 1, ¶ 5. Although the Nevada Department of Taxation provides a limited amount of tax data online (http://tax.state.nv.us/), that data does not provide the level of specificity required by Plaintiffs. Affidavit, Exhibit 1, ¶ 5.

If the tax data confirms Plaintiffs' allegation, that the LET disproportionately burdens exotic dance establishment, the LET will be undeniably unconstitutional. The Federal Constitution will not tolerate such discriminatory taxation of a small group of speakers.

Arkansas Writers' Project v. Medlock, 481 U.S. 221 at 228 (1987) ("**AWP**"). Instead, such "speaker-based or content-based taxes, absent a compelling governmental interest, will be struck down as a form of censorship." **Pooh Bah Enterprises, Inc, v. County of Cook**, 881 N.E.2d 552, 558 (Ill. App. 2007) (also noting "defendants' adult entertainment cabaret exceptions are content-based and the content of the performances featured at such cabarets differs systematically in its erotic message from that communicated by the exempt fine art venues." **Id**. at 560).

Indeed, in **United Artist Communications v. City of Montclair**,209 Cal.App.3d 245, Cal Rptr. 124 (1989) the court found that a broadly worded amusement tax violated the First Amendment under the principles of **Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue**, 460 U.S. 575 (1983) because of the disproportionate tax burden it created on businesses engaged in protected speech. 209 Cal. App.3d at 252 ("Here, just as in **Minneapolis Star** and **Festival Enterprises**,[1] the tax in question appears to apply to a broad range of businesses, but in reality its burden falls disproportionately upon businesses engaged in protected speech: two theaters and two adult book stores with viewing booths"). The **United Artist** court specifically noted that even though the tax also applied to a few other businesses, "this difference alone cannot save the tax from the stigma of unconstitutionality." **Id**. *See also*, **Festival Enterprises, Inc. v. City of Pleasant Hill**, 182 Cal. App.3d 960, 227 Cal. Rptr. 601 (Cal. App. 1986) (court declared broad admissions tax to be unconstitutional under Minneapolis Star analysis, where the tax, in practice applied only to plaintiff's theaters). Here, of course, as alleged, the tax cannot even be said to be "broadly worded" due to its many

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[1] **Festival Enterprises, Inc. v. City of Pleasant Hill**, 182 Cal. App.3d 960, 227 Cal. Rptr. 601 (Cal. App. 1986).

exception for favored speech and expression. And, discovery should be permitted in order to allow Plaintiffs the opportunity to ***prove*** that the tax burden generated by the LET falls exclusively on First Amendment activity and disproportionately on exotic dance establishments.

The **United Artists** court also emphasized that Supreme Court precedent required it to analyze the tax based on the relative tax burdens it created. **Id**. A tax is subject to strict scrutiny where it has "the ***effect*** of singling out" First Amendment actors. **Id**. (emphasis added), *quoting* **Acara v. Cloud Books, Inc.**, 478 U.S. 697, 704 (1986). *See also* **Acara**, 478 U.S. at 706-707 ("Rather, we have subjected such restrictions to scrutiny . . . where a statute based on nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in **Minneapolis Star**").

This remains true even where a municipality attempts to cloak its discrimination through laws that facially appear to be broad in scope:

> "Indeed, despite its broadly-worded applicability, the tax falls almost entirely upon only four businesses, *all* of which are engaged in protected speech. As has been pointed out by the United States Supreme Court on numerous occasions, a statute challenged under the First Amendment 'must be tested by its *operation and effect.*'"

United Artist Communication, 209 Cal. App. at 252-253 (emphasis in original), *citing* **Near v. Minnesota**, 283 U.S. 697, 708(1931); **Schneider v. State**, 308 U.S. 147, 161 (1939); and **Schad v. Borough of Mount Ephraim**, 452 U.S. 61, 68 (1981).

Or, as the Court itself stated:

> "With respect to these contentions it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, ***the statute must be tested by its operation and effect.*** [citations omitted] That operation and effect we think is clearly ***shown by the record in this case.***"

Near, 283 U.S. at 708-709, *citing* **Henderson v. Mayor**, 92 U.S. 259, 268 (1875); **Bailey v. Alabama**, 219 U.S. 219, 244 (1911); **United States v. Reynolds**, 235 U.S. 133, 148 (1914); **St. Louis Southwestern Railway Co. v. Arkansas**, 235 U.S. 350, 362 (1914); and **Mountain Timber Co. v. Washington**, 243 U.S. 219, 237 (1917). Here, of course, it is quite a stretch to contend that the LET is broadly worded. Still, Plaintiffs should be permitted to develop such a "record" of the "operation and effect" of the LET before their claims are fully adjudicated by this Honorable Court.

Next, Plaintiffs should be permitted further discovery in furtherance of their claims that the LET is the product of discriminatory intent. In **Minneapolis Star**, the Court made clear that taxes enacted to target First Amendment activities are unconstitutional. There, the Court stated that its previous decision in **Grosjean v. American Press Co.**, 297 U.S. 233 (1936), exemplified this point. **Minneapolis Star**, 460 U.S. at 579-580. In **Grosjean**:

> "Both the brief and the argument of the publishers in this Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. [] All but one of the large papers subject to the tax had 'ganged up' on Senator Huey Long, and a circular distributed by Long and the governor to each member of the state legislature described 'lying newspapers' as conducting 'a vicious campaign' and the tax as 'a tax on lying.'
>
> * * *
>
> Commentators have generally viewed Grosjean as dependent on the improper censorial goals of the legislature. [] We think that the result in Grosjean may have been attributable in part to the perception on the part of the Court that the state imposed the tax with an intent to penalize a selected group of newspapers."

Minneapolis Star, 460 U.S. at 579-580.

Thus far, Plaintiffs have been unable to secure the complete legislative history of the LET. As originally proposed, the LET was to be a 5% across the board tax on live entertainment:

[Chairman McGinness:]

The Governor had a number of exemptions and proposals that came as a result of what the task force provided. This would be a live entertainment tax, page 4 (Exhibit D), 5 percent across the board, regardless of where it is held or what the venue. If it were live entertainment, it would be taxed. This excludes bowling, movies, video rentals, golf, and includes all venues on gaming properties as well as any other venue for live purposes.

* * *

Senator Neal:
Is the Live Entertainment Tax a 5 percent increase across the board?

Senator Townsend:
It would be a 5 percent tax across the board, not an increase. The current casino entertainment tax would be reduced to 5 percent and spread to all live entertainment.

Minutes of the Senate Committee on Taxation, Seventy-second Session, May 19, 2003 (Discussing Assembly Bill 516), Exhibit 2.

However that was not the tax which was eventually passed by the legislature via Senate Bill 8 of the 20th Special Session in 2003. Nevertheless, Plaintiffs have been unable to uncover the legislative or other history that would explain the transformation of the LET from a "5% across the board tax" to the very limited 10% tax enacted by Senate Bill 8 in 2003. In fact, Plaintiffs have been able to uncover little legislative history for the Senate Bill that actually enacted the LET.

The LET was then subsequently amended in 2005 by Assembly Bill 554 to exclude a whole host of categories of entertainment.[2] The LET was again modified in 2005 to replace

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[2] Specifically, Assembly Bill 554 in 2005 modified NRS 368A.200 to exclude:
"(k) Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction. For the purposes of this paragraph, live entertainment shall be deemed to be incidental to an amusement ride, a motion

the phrase "seating capacity" in NRS 368A.200 to "occupancy" via Senate Bill 3 of the 22nd special session in 2005. Plaintiffs' research has uncovered legislative history which suggests that the LET was gerrymandered throughout its enactment and modification with the illicit intent of targeting Plaintiffs' establishments. *See* Section II (D)(7), *infra*. *See also* News Article entitled "Live Entertainment Tax Revisited," Las Vegas Review-Journal, May 17, 2005 (Senator Titus explains that the 300 seat requirement was reduced to better target the "strip clubs"), Exhibit 3. However, that legislative history is likely only the "tip of the iceburg," and Plaintiffs should be afforded a more complete opportunity to discover the entire legislative record relating to the LET.

Plaintiffs intend to conduct discovery in furtherance of their claims that the LET was enacted and subsequently modified with the discriminatory intent of specifically targeting exotic dance establishments for taxation. Affidavit, Exhibit 1, ¶ 10. Specifically, Plaintiff will

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simulator or a similar digital, electronic, mechanical or electromechanical attraction if the live entertainment is:

(1) Not the predominant element of the attraction; and.
(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

(l) Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise.

(m) An outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.

(n) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the National Association for Stock Car Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.

(o) Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment."

seek to discover the full legislative history of all the various bills leading up to the enactment of the LET in 2003. This will include the minutes and/or audio recordings of the various committees that discussed the bills, as well as all legislative research and analysis conducted by those committees or any "task forces." Affidavit, Exhibit 1, ¶ 7. This discovery will be directly aimed at discovering evidence that will further support Plaintiffs claims that the LET was enacted and modified with the intent of discriminating against exotic dance establishments. This evidence is necessary to develop a full record upon which to adjudicate Plaintiffs' claims and is in Defendants' possession.

Third and somewhat related, it is necessary for Plaintiffs to take discovery on the factual predicates for the enactment of and amendments to the LET. It is well settled that it is the government's burden to demonstrate that its tax on First Amendment activity is necessary "to achieve an overriding governmental interest." **Minneapolis Star**, 460 U.S. 582. This is because if the tax cannot be justified by some particular aspect of the activity taxed, it can be fairly assumed that ". . . the goal of the regulation in not unrelated to the suppression of expression . . . ." **Id**. at 585.

For example, in **Acorn Investments, Inc. v. City of Seattle**, the City levied various licensing fees on certain coin-operated adult video machines, or "panoramas." 887 F.2d 219, 220 (9th Cir. 1989). A panorama operator filed suit claiming that the city was discriminating against them "in violation of the First Amendment by taxing and licensing the machines differently than other coin-operated amusements." **Id**. at 221. In response, the City argued that the differential fees were "justified by a special characteristic of the panorama booths . . ." because "the fees were used to offset the cost of increased police surveillance . . . ." **Id**. Ultimately, the court concluded that the City's asserted interest was "not support by the City's

own evidence ***at trial***." **Id**. at 224 (emphasis added). *See also* **Id**. at 224 n. 7 ("Had the City attempted to make this more general "secondary effects on the community" argument, it would have had to explain why it does not impose special taxes or fees on other businesses on "the Block" for their contribution to criminal activity taking place in the neighborhood").

Finally, as explained below (Section II(D)(9)), it is necessary for Plaintiffs to take discovery relating to the administration of the LET to fully flesh out their claims that the LET is unconstitutionally vague and overbroad, including taking the depositions of the individuals responsible for administering and enforcing the LET.

It will be necessary for the Defendants to explain their rational for treating Plaintiffs' business differently from each and every business that it specifically exempts from the tax (which businesses remain to be identified through discovery). Thus far, Defendants have not identified any such purpose. However, Plaintiffs are entitled to discovery what, if any, rational the Defendants intend to assert as well as the factual underpinnings for making such assertions.

3. DISCOVERY HAS JUST BEGUN AND PLAINTIFFS HAVE NOT BEEN DILATORY IN PURSUING DISCOVERY.

This suit is still in the early stages of litigation. The parties conducted their early case conference on July 31, 2008. The parties' joint case conference report was submitted on October 20, 2008. Thus far the parties have been enmeshed in litigating Defendants' motion to dismiss, Plaintiffs' motion for preliminary injunction, and now Defendants' motion for summary judgment. In fact, Defendants submitted their current motion for summary judgment before the Court has even has the opportunity to rule on any of the motions to date. That being the case, it cannot be said that Plaintiffs have been dilatory in pursuing discovery.

Therefore it is clear that summary judgment is not appropriate at this early juncture. There is a demonstrable need for full discovery before Plaintiffs' claims could be summarily

adjudicated. For these reasons, Plaintiffs respectfully request this Honorable Court deny Defendants motion pursuant to NRCP 56(f) to allow Plaintiffs a fair opportunity to complete necessary discovery.

B. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate only where the movant can "demonstrate that no genuine issue of material fact exists, and the moving party in entitled to judgment as a matter of law." **Wood v. Safeway, Inc.**, 121 New. 724, 731, 121 P.3d 1026, 1031(2005).

> Summary judgment is a drastic remedy, therefore, all evidence favorable to the party against who such summary judgment was rendered will be accepted as true. All favorable inferences will be drawn in favor of the party.

Ottenheimer v. Real Estate Division of the Nevada Department of Commerce, 91 Nev. 338, 342, 535 P.2d 1284, 1286 (1975) (reversing the district court where "summary judgment was granted without an opportunity for full discovery, and [plaintiff] had no opportunity to demonstrate that the legislation in question fails to meet constitutional standards") (clarification added). *See also* **Weiner v. Beatty**, 121 Nev. 243, 246, 116 P.3d 829, 830 (2005) ("In determining whether summary judgment is proper, the non moving party in entitled to have all the evidence and all reasonable inferences accepted as true.") (citation omitted) and **Butler v. Bogdanovich**, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985) (". . . pleadings and documentary evidence should be construed in a posture which is most favorable to the party against whom the motion of summary judgment is directed.") (citation omitted).

Summary judgment is not appropriate here. Defendants have failed to meet their burden demonstrate that the LET is wholly consistent with the First and Fourteenth Amendments of the United States Constitutions and Article I, §§ 9 and 10 of the Constitution of the State of Nevada.

In addition and as explained in greater detail below, the evidence available at this early time, with all reasonable inferences drawn in Plaintiffs favor, demonstrates that the LET was enacted and subsequently modified with the illicit intent of impermissibly targeting First Amendment activity in general, especially the type of First Amendment activity presented at Plaintiffs' businesses. Also, the legislative history suggests that the LET operates to disproportionably burden protected speech and expression in general as well as First Amendment activity with a particular and identifiable message. For these reasons, Plaintiffs' respectfully request this Honorable Court deny summary judgment at this time and allow the matter to proceed so that full discovery may be taken.

C. LEGISLATION IS PRESUMED TO BE UNCONSTITUTIONAL WHEN IT IMPACTS CONSTITUTIONALLY PROTECTED FREEDOMS.

The Defendants contend that the LET is presumed valid until the contrary is clearly established. Defendants' Memorandum of Points and Authorities ("Def.Br."), p. 6. In response to this, Plaintiffs start by pointing out to the Court that there is no doubt that this speech and expression is presumptively protected by the First Amendment[3] from state suppression.

> "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. **Joseph Burstyn, Inc. v. Wilson**, 343 U.S. 495 [] (1952); **Schacht v. United States**, 398 U.S.

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[3] Defendants have only raised issues in this particular motion under the Federal Constitution. Plaintiffs have alleged violations under both the Nevada and Federal Constitution. Complaint, ¶¶ 1, 52, 53. Since Defendants have not addressed the constitutionality of the LET under the Nevada Constitution, Plaintiffs will not discuss this issue in this response except to assert that the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (*see* **S.O.C., Inc. v. Mirage Casino-Hotel**, 117 Nev. 403, 414, 23 P.3d 243 (2001)), and Nevada provides further protections via the Taxpayers Bill of Rights which grants taxpayers rights ***in addition*** to those granted by the Federal Constitution.

58, [] (1970); **Jenkins v. Georgia**, 418 U.S. 153 [] (1974); **Southeastern Promotions, Ltd. v. Conrad**, 420 U.S. 546, [] (1975); **Erznoznik v. City of Jacksonville**, 422 U.S. 205 [] (1975); **Doran v. Salem Inn, Inc.**, 422 U.S. 922 [] (1975). See also **California v. LaRue**, 409 U.S. 109 [] (1972); **Young v. American Mini Theatres, Inc.**, 427 U.S. 50 []. Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. **Jenkins v. Georgia**, *supra*, 418 U.S., at 161 []. **Southeastern Promotions, Ltd. v. Conrad**, *supra;* **Erznoznik v. City of Jacksonville**, *supra*, 422 U.S., at 211-212, 213, []."

Schad, 452 U.S.at 65-66.

In addition, sexual expression, even that which may be considered to be "indecent," is nevertheless protected by the First Amendment. **Sable Communications v. FCC**, 492 U.S. 115, 126 (1989). And, the Supreme Court has reiterated its position set forth in **Schad** that nude performance dance is protected expression. **City of Erie v. Pap's A.M.**, 529 U.S. 277 (2000); and **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560, 565-66 (1991). In fact, entertainment, in-and-of-itself, is considered protected expression under the First Amendment. **Winters v. New York**, 333 U.S. 507, 510 (1947).

Further, when considering the constitutionality of laws such as this, a number of important factors must be kept in mind. First, it has long been held that because of the recognized preferred position of First Amendment rights, there is no general presumption of constitutionality that would normally attach to other legislative enactments, contrary to the Defendants' assertion otherwise:

> "While state supreme court regulations and legislative and congressional acts are generally entitled to a presumption of constitutionality, [FN12] the preferred position of the first amendment greatly weakens such a presumption involving that amendment. See, e.g., **Turchick v. United States**, 561 F.2d 719, 724 (8th Cir. 1977); **United States v. Dellinger**, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). See generally, Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956). It is also inappropriate to apply such a presumption [of constitutionality] where the practical effect of doing so would be to greatly reduce the burden of proof on the part of the state in justifying its speech restrictions."

FN12. However, the Supreme Court has recognized that enactments are subject to different presumptions of validity. **Parham v. Hughes**, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed. 269, 274 (1979)"

Durham v. Brock, 498 F. Supp. 213, 221 (M.D. Tenn. 1980), *aff'd*, 698 F.2d 1218 (6th Cir. 1982).

Instead, it is clear under established Supreme Court precedent that laws such as the Live Entertainment Tax are subject to strict constitutional scrutiny, and it is the government's "*heavy burden*" to attempt to justify the validity of such regulations. "***When First Amendment compliance is the point to be proved, the risk of nonpersuasion*** – operative in all trials – ***must rest with the Government***, not with the citizen." **United States v. Playboy Entertainment Group, Inc.**, 529 U.S. 803, 818 (2000) (emphasis added), *quoting* **Speiser v. Randall**, 357 U.S. 513, 526 (1958). *See also* **Clark v. City of Lakewood**, 259 F.3d 996, 1004 (9th Cir. 2001) ("The level of constitutional protection and the type of analysis we apply to nude dancing regulations differs depending on the type and purpose of the restriction. ***In all situations, however, the government has the burden of proof to justify burdening freedom of expression.***") (emphasis added). Thus, when laws such as the LET raise First Amendment concerns, "the ***usual presumption of constitutionality*** afforded [legislative] enactments ***is reversed***." **Playboy**, 529 U.S. at 818 (emphasis added). It is the government's ***general*** burden to substantiate the constitutionality of the infringement upon protected speech and expression rights, and not on the taxpayers as the Department contends. **Perry Education Ass'n. v. Perry Local Educator's Ass'n.**, 460 U.S. 37, 45 (1983) (direct infringement required strict scrutiny); and **Widmar v. Vincent**, 454 U.S. 263, 270 (1981) (incidental infringement required intermediate scrutiny).

Additionally, the State of Nevada has a Taxpayers Bill of Rights, which states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto ***construed in favor of the taxpayer*** if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable." N.R.S. § 360.291(1)(o) (emphasis added). The Plaintiffs have made sufficient allegations of the invalidity of the LET, and there is no specific statutory provision that applies to First Amendment protected entertainment, since the interpretation of the exemption for "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitution," N.R.S. § 368A.200(5)(a), brings the Plaintiffs' entertainment out of the realm of the LET.

Neither of the cases cited by the Defendants in arguing that LET enjoys a presumption of constitutionality - - unless the ***Plaintiffs*** prove otherwise - - even involve First Amendment protected expression. It is clear that the implications on First Amendment speech modify the general burden threshold asserted by the Defendants, and the Defendants have not established otherwise.

D. THE LIVE ENTERTAINMENT TAX IS UNCONSTITUTIONAL.

1. THE TAX CAN BE FOUND UNCONSTITUTIONAL FOR FOUR REASONS.

Taxes on First Amendment activities can be unconstitutional for several reasons. First, a direct tax specifically on First Amendment freedoms is unconstitutional. "Freedom of speech, freedom of the press, and freedom of religion are available to all, not merely to those who can pay their own way. . . ***.[I]t could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional.*** Yet the license tax proposed by this

ordinance is in substance just that." **Murdock v. Commonwealth of Pennsylvania**, 319 U.S. 105, 111, 108 (1943) (emphasis added).

Second, a tax that targets a narrowly defined group of speakers is unconstitutional. "The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from a content-based regulation: It will distort the market for ideas." **Leathers v. Medlock**, 499 U.S. 439, 448 (1991).[4] Of course, whether a tax impermissibly burdens a small or narrowly defined group of speaker can be determined either by the form of the law or by its operation and effect. *See, e.g.*, **Near**, 283 U.S. at 708-709.

Third, a content-based tax is unconstitutional. ". . .[F]or reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech." **Leathers**, 499 U.S. at 447.

In addition, a tax on First Amendment activities will be held to be unconstitutional where the government is unable to assert and factually sustain a governmental interest that can only be achieved by differential taxation. **Minneapolis Star**, 460 U.S. at 585; **Festival Enterprises**, 182 Cal. App.3d 960.

2. THE PRIOR CABARET ENTERTAINMENT TAXES DO NOT RENDER THE LIVE ENTERTAINMENT TAX CONSTITUTIONAL.

Defendants attempt to argue that because constitutionally protected live entertainment that was performed in casinos in the past was taxed, that the LET is not unconstitutional.

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[4] *See also* **Leathers**, 499 U.S. at 445 ("We note that the general applicability of any burdensome tax law helps ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from this political constraint").

Def.Br., pp. 7-8. Specifically, Defendants claim "the enactment of the LET was a measure to generate revenue by extending the cabaret taxes to ***all establishments where live entertainment was being performed*** but not taxed under the cabaret law." Def.Br., p. 8 (emphasis added). That, of course, is a factual argument that is not yet settled. Still, he numerous exemptions and exceptions to the LET - - discussed more fully below - - demonstrate that this argument is meritless.

In addition, as set forth above (*see* Section II(A)(2)), the LET hardly resembles the "5 percent across the board" tax originally proposed. Defendants provide no argument that the structure of the LET is identical to the old federal cabaret tax or that such tax would pass constitutional muster in the face of the challenges advanced here.

3. TAXING THE ADMISSION TO PLAINTIFFS' ESTABLISHMENT CONSTITUTES TAXATION ON PROTECTED EXPRESSION AND IS EXEMPT FROM TAXATION PURSUANT TO NRS 368A.200(5).

The Plaintiffs have demonstrated in prior briefing to this Court,[5] and will again demonstrate below, that federal law holds that states are not permitted to impermissibly tax First Amendment protected expression. The case cited by Defendants involved fuel oil, not constitutionally protected activity, and also stated "the one claiming exemption must demonstrate clearly an intent to exempt." **Sierra Pacific Power Company v. Department of**

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[5] Plaintiffs apologize to this Honorable Court for the length of this opposition, however, they were not sure if the record would be sufficiently protected if Plaintiffs simply incorporated briefing previously submitted to this Court. In an abundance of caution, particularly since this Honorable Court has not yet ruled on the two other pending motions, and in the interest of vigorously representing Plaintiffs' claims, counsel has reproduced certain briefing herein that has been previously submitted to this Court. Plaintiffs hereby also incorporate all the other briefing they have submitted in this litigation, but have only reproduced herein those sections absolutely necessary for this opposition, although there are other arguments that have been made by Plaintiffs in prior briefing that could preclude summary judgment at this juncture.

Taxation, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980). Def.Br. p. 9. The Defendants ***admit*** that NRS 368A.200(5) exempts taxation of live entertainment that is protected from taxation under the Constitution of Nevada and the United States. Def.Br., pp. 8-9. The Defendants do not state specifically why the Taxpayers' entertainment, which is clearly protected by the United States and Nevada Constitutions, is not exempt under N.R.S. § 368A.200(5)(a).

4. LIVE ENTERTAINMENT, EVEN NUDE DANCING, IS EXPRESSLY PROTECTED BY THE CONSTITUTION.

First and foremost, Defendants fail to acknowledge that this is a tax on live entertainment, and entertainment, in-and-of-itself, is considered protected expression under the First Amendment. **Winters**, 333 U.S. at 510. As discussed above, "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and ***live entertainment***, such as musical and dramatic works fall within the First Amendment guarantee." **Schad**, 452 U.S. at 65-66 (emphasis added). *See also* **Ward v. Rock Against Racism**, 529 U.S. 781, 790 (1989) (Rock music protected); **Zacchini v. Scripts-Howard Broadcasting Co.**, 433 U.S. 562, 578 (1977) (held live human cannonball performance to be protected, holding ". . . entertainment itself can be important news."). As this is a tax on live entertainment, and Plaintiffs' establishments present such absolutely protected live entertainment, the LET is subject to strict scrutiny.

Even though the LET has been gerrymandered to apply principally to the type of performance presented at Plaintiffs' establishments, the level of scrutiny does not change due to the nature of the entertainment. Defendants attempt to argue that because exotic dancing is "low value" speech it is not entitled to constitutional protection. Def.Br., pp. 9-10. While it

may not be popular expression, exotic dancing, in the form of clothed, "topless," and even fully nude entertainment, falls within the scope of the liberties, including the right to free expressive association, afforded by the First Amendment. *See, e.g.*, **Barnes**, 501 U.S. at 565 (1991) (nude dancing receives protections under the Constitution); **City of Erie**, 529 U.S. at 289 (same); **Schad**, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections form official regulation"); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 396 (6th Cir. 2001), *citing* **Roberts v. United States Jaycees**, 468 U.S. 609, 622 (1984) (Court held that "the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a 'collective effort on behalf of shared goals.'").

Further, Defendants argue that the cases they cite to somehow prove exotic dancing is not worthy of full constitutional protection involve laws "whose purpose is to modify behavior and not merely to tax." Def.Br., p. 10. Cases involving the taxation of just this type of protected expression have acknowledged that exotic dancing should be afforded full constitutional protection. **Pooh-Bah Enterprises, Inc. v. County of Cook**, 378 Ill.App.3d 268, 272, 881 N.W.2d 552, 557 (2007) (erotic dancing "enjoys constitutional protection as expressive conduct") and **Texas Entertainment Association, Inc. et al v. Comptroller of Public Accounts of the State of Texas et al**, Cause No. D-1-GN-07-004179 (Travis Co. Tex., March 28, 2008), Judgment, pp. 1-2 (exotic dancing involved "expression that, while politically unpopular, is nevertheless protected by the First Amendment). Exhibit 4. Despite

Defendants' attempt to demonstrate how unpopular this type of expression is, they have not shown that exotic dancing is not protected by the Nevada and United States Constitutions, and therefore less protected when faced with impermissible taxation.

5. THE LIVE ENTERTAINMENT TAX IS INVALID REGARDLESS OF THE FACT THAT IT IS A TAX AND NOT A REGULATORY STATUTE.

Defendants erroneously claim that Plaintiffs "are urging this Court to take the position that the LET is a regulation and then to apply the standards of review relevant to regulations that are enacted to modify behavior." Def.Br., pp. 10-11. Plaintiffs have set forth below, and in their previous briefings to this Court, why this ***tax*** on constitutionally protected expression is invalid. At no point in this litigation have Plaintiffs attempted to argue to this Court that the LET is a mere regulation on exotic dancing. Any cases involving licensing fees have independent relevance to this litigation.

Plaintiffs have referenced cases involving fees levied against adult businesses to explain to this Court that if a licensing fee exceeds the reasonable cost of administration, it ceases being a "fee" and is considered a blatant tax on constitutionally protected expression. This bolsters Plaintiffs' contention that the LET, which is not a mere licensing fee, but an ***actual*** tax aimed at specific protected expression is most certainly unconstitutional. This section of Defendants' brief is disingenuous.

Further, the case cited by Defendants demonstrates the unconstitutionality of the LET. The court in **Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg**, 667 A.2d 21 (Pa Cmwlth. Ct. 1995), in holding that particular tax constitutional stated:

> "Here, there is nothing in the record or in the Ordinance suggesting that the tax was directed at suppressing any particular ideas or that it is likely to stifle the free exchange of opinions. In fact, the reasons advanced by the Borough for the Ordinance are to the

contrary: to off-set the costs associated with increased traffic, to enhance aesthetic values, and to improve vehicular safety. Moreover, because ***that tax was imposed upon all off-premises signs, it does not single out one small group of off-premises signs while exempting others from taxation***. Under the reasoning of *Leathers,* therefore, the tax cannot be deemed to be unconstitutional."

Id. at 26 (emphasis added). Here, the LET does not apply to ***all*** businesses which charge admission. It applies only to live entertainment that is clearly protected by the First Amendment and it singles out mainly exotic dancing, while "exempting others from taxation."

6. AFTER CONDUCTING DISCOVERY, PLAINTIFFS WILL BE ABLE TO ESTABLISH THAT THE LIVE ENTERTAINMENT TAX IS NOT CONTENT NEUTRAL AND IS A FACIALLY UNCONSTITUTIONAL DIRECT TAX ON THE EXERCISE OF CONSTITUTIONAL FREEDOMS.

The LET is a direct tax upon protected expression, and only upon one form of entertainment (applying only to that which is "live"). It does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment," based upon the ***content*** of that entertainment, is specifically and statutorily ***exempted*** from the scope of the tax.

Initially, the definition of "live entertainment" itself contains numerous ***exceptions***. It:

Excludes, without limitation, any one or more of the following activities:

(1) ***Instrumental or vocal music***, which may or may not be supplemented with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;

(2) ***Occasional performances*** by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6

games, or any combination of slot machines and games within those respective limits, as long as the ***performers stroll continuously throughout the facility***;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, which ***enhance the theme of the establishment or attract patrons to the areas of the performances,*** as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) ***Entertainment provided by a patron*** or patrons, including, without limitation, singing by patrons or dancing by or between patrons;

(7) ***Animal behaviors*** induced by animal trainers or caretakers primarily for the purpose of education and scientific research; and

(8) An occasional activity, including, without limitation, dancing, that:

(I) Does not constitute a performance;
(II) Is not advertised as entertainment to the public;
(III) ***Primarily serves to provide ambience to the facility***; and
(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

N.R.S. § 368A.090(b) (emphasis added).

Then, the ***exemptions*** contained in N.R.S. § 368A.200(5) apply to:

(a) Live entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.[6]

(b) Live entertainment that is provided by or entirely for the benefit of a ***nonprofit religious, charitable, fraternal or other organization*** that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or

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[6] Once it is determined that Defendants cannot specifically tax Plaintiffs' protected activities, this exemption will be triggered.

a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

(c) Any ***boxing contest*** or exhibition governed by the provisions of chapter 467 of NRS.

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(f) Merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.

(g) Live entertainment that is provided at a ***trade show***.

(h) Music performed by ***musicians who move constantly through the audience*** if no other form of live entertainment is afforded to the patron

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

(j) Live entertainment that is provided in the common area of a shopping mall, unless the entertainment is provided in a facility located within the mall.

(k) ***Food and product demonstrations*** provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.

(l) ***Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction.*** For the purposes of this paragraph, live entertainment shall be deemed to be incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction if the live entertainment is:

(1) Not the predominant element of the attraction; and
(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

(m) Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise.

(n) An ***outdoor concert***, unless the concert is provided on the premises of a licensed gaming establishment.

(o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the ***National Association for Stock Car Auto Racing Nextel Cup Series***, or its successor racing series, and all races associated therewith.

(p) Beginning July 1, 2007, a ***baseball contest***, event or exhibition conducted by professional minor league baseball players at a stadium in this State.

(q) Live entertainment provided in a ***restaurant*** which is incidental to any other activities conducted in the restaurant or which only serves as ***ambience*** so long as there is no charge to the patrons for that entertainment.

N.R.S. § 368A.200(5) (emphasis added).

Because many of these exceptions/exemptions determine whether an entity or individual is subject to the tax based upon the ***content*** of the live entertainment, it is clear that the LET is a content-based tax and is subject to strict constitutional scrutiny. More specifically, these exceptions/exemptions have been gerrymandered in such a fashion to basically ensure that with the exception of casino entertainment (which was already subject to tax pursuant to the prior casino entertainment tax), virtually the only remaining live entertainment that is subject to the tax is adult entertainment. If there is any doubt from a facial reading of the Statute that it was meant to specifically tax live adult entertainment, any such doubt is quickly eradicated by reviewing the legislative history, discussed *infra*, which clearly demonstrates such facial targeting.

Defendants' misguided attempt to turn this entire area of law on its head is best exemplified by their citation to **Grosjean** for the statement that "[i]t is settled that speech can be effectively limited by the taxing power." Defendants' Memorandum, p. 12. This statement, torn (without citation) from its context in **Speiser**, 357 U.S. at 518, is obviously meant to be an admonition against selective use of the power of taxation and not the grant of authority Defendants represent it to be. Placing this statement back into its proper context removes all doubt:

> It is settled that speech can be effectively limited by the exercise of the taxing power. **Grosjean v. American Press Co.**, 297 U.S. 233 []. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech.

Speiser, 357 U.S. at 518

The Defendants attempt to distinguish the Plaintiffs' reliance on **Murdock**, with reference to **Jimmy Swaggart Ministries v. Board of Equalization**, 493 U.S. 378, 385 (1990). Def.Br., pp. 12-13. First of all, it should be noted that in **Swaggart**, the taxpayer wanted an exemption from "a ***generally applicable*** sales and use tax" which "applies neutrally to ***all*** retail sales of tangible personal property made in California," for the religious materials distributed by his religious ministry. **Id.** at 389 (emphasis added). Here, the Plaintiffs assert the unconstitutionality of a **limited** tax which is solely restricted to expression protected by the First Amendment. Also, in the case before this Court, the Plaintiffs are arguing that they fall under a particular exemption to a law that is ***specifically directed*** at activity protected under the First Amendment. N.R.S. § 368A.200(5)(a).

In addition, while reaffirming its holding in **Murdock** that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment," **Swaggart**, at 386, the Supreme Court nevertheless upheld the California general sales and use tax, citing to its decision in **Follett v. Town of McCormick**, 321 U.S. 573 (1944):

> "We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities . . .a preacher is not 'free from all financial burdens of government, including taxes on income or property' and, 'like other citizens, may be subject to *general* taxation."

Swaggart, at 386-87, *citing* to **Murdock** and **Follett** (internal citations omitted) (emphasis in original). Here, the LET is most certainly ***not*** a generally applicable tax, is not a tax on income of an individual or a tax on property, nor is it a general tax applied to other citizens, as discussed by the Supreme Court. Plaintiffs make no argument that they are exempt from general sales, property, and income tax. If that were the Plaintiffs' argument, **Swaggart** would be applicable. Here, directly to the contrary, this Court is asked to review a unique tax ***only*** applied to First Amendment protected activity.

The Defendants then attempt to discredit the Plaintiffs' prior reliance upon **Minneapolis Star**, by stating the case is inapplicable because it "only applies to the protections of the institution of the press, not to the more general protections of freedom of expression that Plaintiffs would have this Court believe." Def.Br., p. 13. In support of this, the Defendants reference a quote from Justice Potter Stewart not actually contained in the **Minneapolis Star** opinion, which the Defendants contend demonstrates the Framers' preference towards protecting press over "general freedom of speech." The Plaintiffs aver in response that this Court should hear from Thomas Jefferson himself regarding the importance of free speech ***and*** press to the Framers:

> '(The First Amendment) thereby guard(s) in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. . . .' 8 The Works of Thomas Jefferson 464-465 (Ford ed. 1904)

Gertz v. Robert Welch, Inc., 418 U.S. 323, 357 (1974) (clarification in original).

Further, in the context of the taxation of First Amendments freedoms, the Court itself has made clear:

> That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this Court . . . .

Grosjean, 297 U.S. at 244 (string citation omitted).

Moreover, at least one court has directly addressed and rejected the Defendants' argument that strict scrutiny only applies to selective taxation of the press. **Vermont Society of Association Executives v. Milne**, 779 A.2d 20, 23 (Vt. 2001) ("Because the State questions the general notion of applying heightened scrutiny to a tax directed at lobbyists, as opposed to the press, we first consider the status of lobbying as a protected First Amendment interest"). After determining that the act of lobbying was protected by the First Amendment speech guarantee, the court had no trouble concluding that the Supreme Court precedent clearly established that all taxes singling out First Amendment rights were subject to strict scrutiny:

> "The Court in **Grosjean** [297 U.S. 233 (1936)] emphasized, however, that a tax singling out interests protected by the First Amendment cannot stand. **Id**. at 244, 250, 56 S.Ct. 444 (it is settled law that freedoms of speech and press 'are rights of the same fundamental character' safeguarded against abridgment by state legislation). . . . Accordingly, the Court concluded that the abridgment clause prohibited not only laws that directly censored First Amendment interests, but also laws that singled out those interests for special taxation. **Id**. at 248-250, 56 S.Ct. 444.
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> * * *

> The United States Supreme Court has consistently adhered to this principle of disallowing special taxes that single out and burden First Amendment interests. For example, in **Minneapolis Star** [460 U.S. at 592], the Court Struck down, on two independent grounds, a special use tax imposed on paper and ink products consumed in the production of publications. The first ground, the one most relevant to the instant case, was that the tax singled out a First Amendment interest for special treatment. While acknowledging that the government can subject First Amendment interests to 'generally applicable' economic regulation without creating constitutional problems, the Court rejected the State's claim that the paper and ink tax was a substitute for the sales tax and thus part of a general scheme of taxation. **Id**. at 581, 103 S.Ct. 1365. The Court noted that its previous cases approving such economic regulation 'emphasized the *general applicability* of the challenged regulation *to all businesses*.' **Id**. at 583, 103 S.Ct. 1365 (emphasis added). The court reasoned that there is less concern that 'a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. **Id**. at 585, 103 S.Ct. 1365. When the tax singles out a select group, however, the political constraint is absent, and 'the threat of burdensome taxes becomes acute." **Id**.

779 A.2d at 25-26 (emphasis in original) (parentheticals in original) (clarification added).

Further, the United Supreme Court has identified that even adult entertainment - - and not simply free press as the Department contends - - is entitled to the same protection from financial disincentives and economic hardship. In the Supreme Court's most recent foray into "adult" entertainment jurisprudence, Justice Kennedy, in his critical concurring opinion, observed that: ". . .a city may not regulate the secondary effects of speech by suppressing the speech itself. ***A city may not, for example, impose a content- based fee or tax***." **City of Los Angeles v. Alameda Books**, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring) (emphasis added). *See also* **Acorn Invs. Inc.**, 887 F.2d at 222 (invalidating a discriminatory licensing tax involving adult businesses where the tax was not proved to be related to the costs of regulating such businesses); **TK's Video, Inc. v. Denton County**, 24 F.3d 705, 710 (5th Cir. 1994) (***"Government cannot tax First Amendment rights***, but it can exact narrowly tailored fees to defray administrative cost of regulation.").

Justice Kennedy's concurrence in **Alameda Books** is critical because most courts have noted that opinion to be the constitutional "holding" of that plurality decision of the Court pursuant to **Marks v. United States**, 430 U.S. 188 (1977).[7]

Of course, the most obvious reason why Defendants' contention the Plaintiffs' freedoms may be suppressed is flat wrong, is the recent flood of decisions invalidating attempted taxes on sexual expression. *See, e.g.*, **Pooh-Bah**, supra (Content-based tax on live entertainment held invalid); **Texas Entertainment Association, Inc. v. Combs**, Cause No. D-1-GN-07-004179 (Travis Co. Tex., March 28, 2008) (Tax on "Sexually Oriented Businesses" declared content-based and invalid), Exhibit 4; State of Tennessee Attorney General Opinion No. 08-78 (April 2, 2008) ("The proposed state privilege tax to be imposed only on adult-oriented establishments ***for each entry by a customer*** would likely be held unconstitutional") (emphasis added), Exhibit 5; and, most recently, **BigHatBooks v. Blackford County**

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[7] **Marks** is the case which describes how to discern the precedence of a plurality decision (the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"). 430 U.S. at 193, *citing* **Gregg v. Georgia**, 428 U.S. 153, 169 n.15 (1976). Since the ruling in **Alameda Books**, courts have consistently held Justice Kennedy's concurring opinion to in fact be the holding of that decision. *See, e.g.*, **Ben's Bar v. Village of Somerset**, 316 F.3d 701, 721-22 (7th Cir. 2003) (challenging ordinance prohibiting the sale, use or consumption of alcohol on premises of "Sexually Oriented Businesses"); **SOB, Inc. v. County of Benton**, 317 F.3d 856, 861-62 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003) (challenging public indecency ordinance); **Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County**, 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) (Justice Kennedy's concurrence applied to both zoning and public nudity ordinances); **G.M. Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d 631, 637-38 (7th Cir. 2003), *cert. denied*, 125 S.Ct. 49 (2004) (the Justice's concurring opinion applying to, among other things, a dancer/patron "buffer zone" such as the one found in Chapter 6.54); and **World Wide Video of Washington, Inc. v. City of Spokane**, 368 F.3d 1186, 1193 (9th Cir. 2004) (challenging a zoning ordinance). *Cf.*, **Center for Fair Public Policy v. Maricopa County**, 336 F.3d 1153, 1163-64 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004) (a divided Ninth Circuit concluding that Justice Kennedy's "proportionality" test was not relevant to an hours-of-operation restriction), *cert. denied*, 541 U.S. 973 (2004).

Prosecutor, 565 F.Supp.2d 981(S.D.Ind. 2008) (Fee to sell "sexually explicit materials" content-based and invalid).

Although the decisions above are relatively recent, this understanding of the law is nothing new. *See*, **United Artists**, 209 Cal.App.3d 252-253 (court applied **Minneapolis Star** to strike down broadly worded admissions tax) and **Festival Enterprises**, 182 Cal.App.3d 964-965 (same, citing **Minnepolis Star** for the statement that "special deference must be paid to businesses engage in protected speech, and such activities may not be singled out for discriminatory tax treatment, unless the state asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation") Nevertheless, despite case after case applying **Minneapolis Star** to entertainment in general and "adult" entertainment specifically, Defendants are unable to cite to a single case supporting its specious contention that discriminatory taxes are only unconstitutional when the press is the target.

As noted above, and in their prior briefing to this Court, the Plaintiffs' activities (and the activities of any other taxpayer who presents live entertainment) are forms of expression protected by the First Amendment. In regard to these protections, it makes absolutely no difference that N.R.A. § 368A.200(5) limits the tax's application to for-profit entertainment. "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive." **Cammarano v. U.S.**, 358 U.S. 498, 514 (1959). In fact, protecting one's ability to turn a profit from First Amendment activity benefits free expression, as can be readily cognized in the publication realm. *See* **Pacific Gas and Elec. Co. v. Public Utilities Com'n of California**, 475 U.S. 1, 32 (1986) ("...protection of an author's profit incentive furthers

rather than inhibits expression. . ."), *citing* **Harper & Row Publishers, Inc. v. Nation Enterprises**, 471 U.S. 539, 555-59 (1985).

Further, as a basic legal premise, a state may not impose a charge upon the exercise of a constitutional right. **Murdock**, 319 U.S. at 113. Nevertheless, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant.***" **Broadway Books v. Roberts**, 642 F.Supp. 486, 493 (E.D. Tenn. 1986). The fee should be as minimal as necessary to meet the cost to the city. **Id.** The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is as potent as the power of censorship." **Murdock**, 319 U.S. at 113 (clarification added). "Speech cannot be ***financially burdened***, any more than it can be punished or banned, simply because it might" result in some problems to society. **Forsythe County v. Nationalists Movement**, 505 U.S. 123, 135 (1992) (emphasis added). And, "tax based on the content of speech does not become more constitutional because it is a small tax." **Id.** at 136.

The Defendants are certainly imposing more than a minimal fee on constitutionally protected live entertainment based on content, and have not set forth their rationale for laying that significant burden on protected expression. The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme ***lies with the licensing authority***. *See, e.g.,* **Ellwest Stereo Theater, Inc. v. Boner**, 718 F.Supp. 1553, 1574 (M.D.Tenn. 1989); **Fly Fish, Inc. v. City of Cocoa Beach**, 337 F.3d 1301, 1315 (11th Cir. 2003) (". . . it is the City's burden to establish that its licensing fee is justified by the cost of processing the application"); and **Kentucky Restaurant Concepts, Inc. v. City of Louisville**, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down ordinance fees, the district

court noted that the "principles governing whether a licensing fee is permissible are ***well-established*** . . ," and that the "municipality bears the burden of presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme") (emphasis added), *citing* **Bright Lights, Inc. v. City of Newport**, 830 F.Supp. 378, 385 (E.D. Ky. 1993), in turn *citing* **Ellwest Stereo Theatre**, 718 F.Supp. at 1574.

If the government does not fulfill this burden, the fee is void. *See, e.g.,* **Acorn Investments, Inc.**, 887 F.2d 219 (Court of Appeals invalidated a $650.00 fee); **Sentinel Communications Co. v. Watts**, 936 F.2d 1189 (11th Cir. 1991) (evidence as to reasonableness of fee was insufficient); **AAK, Inc. v. City of Woonsocket**, 830 F. Supp. 99 (D.R.I. 1993) (fees for adult entertainment establishments struck down as unconstitutional). In addition, where protected speech is singled out for regulation, a heavy burden of justification is placed upon the licensing agency because "differential treatment. . . suggests that the goal of the regulation is not unrelated to suppression of expression and such a goal is presumptively unconstitutional." **Minneapolis Star**, 460 U.S. at 585.

This doctrine goes beyond the written word. As succinctly put by the United States Court of Appeals for the Fourth Circuit, "it is obvious that the First Amendment sets limit on the economic burdens that can be imposed upon the dissemination of protected materials," even against a store that "sold both books and films emphasizing sexual matters." **Hart Bookstores, Inc. v. Edminsten**, 612 F.2d 821, 827, 824 (4th Cir. 1979), ***cert. denied***, 447 U.S. 929 (1980).[8] The U.S. Supreme Court addressed the issue of economic impact on the First

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[8] *See also*, **United States v. National Treasury Employees Union**, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive towards more expression" by artists, "by denying respondents that incentive, the honoraria ban induces them to curtail their expression" and therefore "unquestionably imposes a significant burden on

Amendment in **Simon & Schuster v. Crime Victims Board**, 502 U.S. 105 (1991), where it ruled unconstitutional the "Son of Sam" law which prohibited a criminal from earning a profit on books written about his or her criminal activity. The Supreme Court noted that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."**Id.** at 611. *See also* **Seres v. Lerner**, 120 Nev. 928, 937, 102 P.3d 91 (2004) (expressly following **Simon & Schuster** and stating that placing a "financial burden only on speech with a specified and particular content" is "a content-based restriction on speech, [which] must pass a strict scrutiny level of review, in line with the relevant case authority." Just as the state may not simply ban expression it dislikes, it cannot use financial disincentives and economic hardship to drive disfavored expression from the market.

More recently, the Supreme Court, in **Playboy Entertainment Group, Inc.**, considered the constitutionality of a law which restricted the availability of certain cable television stations to broadcast adult material prior to 10:00 p.m. In finding the regulations unconstitutional, the Court noted that "the result was a significant restriction of communication, ***with a corresponding reduction in Playboy's revenues***." **Id.** 529 U.S. at 809.

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expressive activity"); **Turner Broadcasting System, Inc. v. F.C.C.**, 520 U.S. 180 (1977) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable t.v. broadcasters, and found that – in validating the regulation – an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); and **Erznoznik v. City of Jacksonville**, 422 U.S. 205, 211 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theatres when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity;" that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs; that this could result in individuals being unable to see such films; and that the ordinance was therefore unconstitutional in that it was a "restraint on free expression").

(emphasis added). Even the four-member dissent (while noting that the constitutional analysis may not be the same as an absolute ban) stated that "laws that burden speech, say, ***by making speech less profitable, may create serious First Amendment issues*** . . ." **Id.** at 838 (emphasis added). This case obviously does not involve the press, yet flies directly in the face of the Defendants' argument.

Through Chapter 368A, the exercise of these constitutional rights is *conditioned upon* and burdened by the payment of a substantial fee in the form of a tax. If the Plaintiffs are unable to pay the tax imposed by Chapter 368A, they cannot then engage in the First Amendment activities encompassed by the regulations. Even though the tax is not due before the speech can be presented (a classic prior restraint situation) if the tax is high enough, it will prevent taxpayers from engaging in speech because they will be unable to make money. In light of the above jurisprudence, even free speech that is outside the realm of "free press" - - which the Department feels is the only type of "speech" that should be protected from such taxation - - is still not subject to impermissible taxation such as Chapter 368A.

7. PLAINTIFFS WILL BE ABLE TO ESTABLISH, WITH APPROPRIATE DISCOVERY, THAT THE LIVE ENTERTAINMENT TAX VIOLATES THE CONSTITUTION BY TAXING DIFFERENTLY BASED UPON CONTENT.

The Defendants' reliance on **Leathers** is misplaced and must be rejected. The Defendants attempt to utilize **Leathers** to support the proposition that all tax legislation enjoys a presumption of validity and that legislatures have broad discretion to differential among speakers within those statutes however they may choose. **Leathers** does not support these propositions.

A proper understanding of **Leathers** begins with its context. **Leathers** is a continuation of **Arkansas Writers' Project**, 481 U.S. 221 (1987) ("**AWP**"), also relied upon

by Defendants, and answers a very narrow question left open by **AWP**. Specifically, the **AWP** Court stated:

> "Because we hold today that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid, our ruling eliminates the differential treatment of newspapers and magazines. Accordingly, we need not decide whether a distinction between different types of periodicals presents ***an additional basis*** for invalidating the sales tax, as applied to the press."

481 U.S. **at 223** (emphasis added).

Leathers simply answers this question left open by **AWP**. To be sure, the **Leathers** Court began its analysis by distinguishing the case at hand from **Grojean v. American Press Co.**, 297 U.S. 233 (1936), **Minneapolis Star**, 460 U.S. 575 (1983), and **AWP**, *supra*. 439 U.S. 444-449. In this regard, the Court explained, "This is not a tax structure that resembles a penalty for ***particular speakers*** or particular ideas." **Id**. at 449. Hence, the Court determined that the only possible basis to deem the ***generally applicable sales tax***[9] scheme unconstitutional would be via the "additional basis" left unexplored by **AWP**:

> "Because the Arkansas sales tax presents none of the First Amendment difficulties that have lead us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents '***an additional basis***' for concluding that the State has violated petitioner' First Amendment rights. See **Arkansas Writers'**, *supra*, 481 U.S. **at 233**...."

499 U.S. at 449 (emphasis added) (quotation in original).

Defendants' reliance on **Leathers** should also be rejected for the reasons stated in **Pooh-Bah**, where the court explained:

> Defendants are not aided by their citation to **Leathers**, where the Supreme Court found that an Arkansas statute extending the generally applicable sales tax to cable services (but not satellite services), while maintaining existing exemptions for magazines and newspapers, did not raise first amendment concerns. **Leathers**, 499 U.S. at 453, [

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[9] This is why that case is not subject to the general doctrine that laws directed at First Amendment protected rights are ***presumed*** unconstitutional.

]. There, the Court determined that the Arkansas sale tax was not content-based because nothing in the statute referred to the content of mass media communications. Moreover, cable television offered subscribers a mixture of news, information and entertainment and there was no record evidence that such material differed systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines. **Leathers**, 499 U.S. at 449, [ ]. Here, in contrast, defendants' adult entertainment cabaret exclusions are content-based and the content of the performances featured at such cabarets differs systematically in its erotic message from that communicated by the exempt fine arts venues.

881 N.E.2d at 560.

In **Turner Broadcasting System, Inc. v. Federal Communications Commission**, 512 U.S. 622 (1994), the Court clarified that whether strict scrutiny applies to a tax targeting a certain medium of speech depends on the structure of the tax. **Id**. at 660. Taxes which are structured like those in **Minneapolis Star** and **AWP** to target a certain medium receive strict scrutiny, even where there is no evidence of illicit motive. **Id**. On the other hand, generally applicable taxes that incidentally burden speech receive rational basis review, unless there is evidence of an illicit motive. **Id**. In this regard the Court stated:

> "It would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applied to one medium but not others. In **Leathers v. Medlock**, 499 U.S. 439 (1991) for example, we upheld against First Amendment challenge the application of a ***general state tax*** to cable television services, even though the print media and scrambled satellite broadcast television services were exempted from taxation. As **Leathers** illustrates, the fact a law singles out a certain medium, or even the press as a whole, 'is insufficient by itself to raise First Amendment concerns.' **Id**., at 444. Rather, laws of this nature are 'constitutionally suspect only in certain circumstances.' **Id**., at 444. The taxes invalidated in **Minneapolis Star** and **Arkansas Writers' Project**, for example targeted a small number of speakers, and thus threatened to 'distort the market for ideas." 499 U.S., at 448. Although there was no evidence that an illicit governmental motive was behind either of the taxes, both were ***structured in a manner that raised suspicions*** that their objective was, in fact, the suppression of certain ideas. See **Arkansas Writers' Project**, *supra*, 481 U.S., at 228-229; **Minneapolis Star**, 460 U.S., at 585."

Turner Broadcasting, 512 U.S. at 660 (emphasis added).

The decisive question is thus whether the LET is "differential ***or*** content based on [its] face, such that improper intent could be inferred" or whether "the tax is generally applicable ***and*** content neutral on its face" **Id**. There can be no doubt that the LET is differential on its face like the tax in **Minneapolis Star** and not a generally applicable tax, like the one in **Leathers**, that happens to extend to live entertainment, but not other mediums of speech. A comparison of the LET to the taxes in **Minneapolis Star** and **Leathers** removes all doubt. **Leathers** involved a challenge to an Arkansas sales "tax of general applicability." **Leathers**, 199 U.S. at 447. Specifically, "Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services."[10] **Id**. at 441. Nevada has a similar sales and use tax, which is set forth in Chapters 360B and 372 of the Nevada Code. The taxpayers have not protested the payment of that sale and use tax and are not challenging it. Instead, the Taxpayers are challenging the LET which impermissibly ***singles out live entertainment for a special tax scheme***.

The LET is differential on its face. It singles out a single medium of speech for taxation like the tax in **Minneapolis Star**. The tax in **Minneapolis Star** was held "unconstitutional for two reasons." **Leathers**, 499 U.S. at 445. One of these reasons was that it singled out "a narrowly defined group to bear the full burden of the tax" – the press. **Id**. at 445-446 (*quoting*, **Minneapolis Star**, 460 U.S. at 592). The LET does the same, it singles out live entertainment for special taxation. This renders the tax constitutionally suspect and

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[10] "Among the services on which the tax is imposed are natural gas, electricity, water, ice, and team utility services; telephone, telecommunications and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing replacement, and repair services; printing of all kinds; ticket for admission to places of amusement or athletic entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities." **Leathers**, 499 U.S. at 447.

subjects it to strict scrutiny. There is no need to show even a scintilla of improper motive on the legislature's behalf. "**Minneapolis Star** resolved any doubts about whether direct evidence of improper censorial motive is required to invalidate a differential tax on First Amendment grounds: 'illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" **Id**. at 445 (*quoting*, **Minneapolis Star**, 460 U.S. at 592 (also stating, "We need not and do not impugn the motives of the Minnesota legislature....")). Therefore, since the structure of the LET renders it constitutionally suspect for singling out live entertainment, the LET is subject to strict scrutiny without any need for the Taxpayers to show discriminatory intent.

The LET is unconstitutional for two reasons. First, it is a specific tax - - not a general sales, income, property, or usage tax - - directed particularly at First Amendment rights. Second, by exempting out the vast majority of live entertainment, the LET is basically only aimed at a particular group of First Amendment actors. The forms of live entertainment that are actually subject to the LET and not limited are very limited. The LET is not a broadly or generally applicable tax that enjoys even a limited amount of freedom in its classifications. It is a narrow tax laid exclusively on protected live entertainment, and additionally targets expression of a specified and identifiable type. Further, the Defendants have failed to attempt to justify or even address the numerous other exemptions to the LET besides boxing and NASCAR.

8. THE LIVE ENTERTAINMENT TAX IS INVALID BY VIRTUE OF ITS EXEMPTIONS AND EXCEPTIONS.

Assuming, *arguendo*, that it is necessary for the Plaintiffs to show discriminatory intent, such intent is clear and overwhelming in light of the numerous types of live entertainment that are exempt from the tax (as set forth in Section II(D)(6) above), leaving

adult entertainment as the primary and near only taxpayer. If any doubt could remain, it is eradicated by the legislative intent, which demonstrates that this was exactly what the legislature meant to accomplish.[11]

The Supreme Court has stated that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risk of view point and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." **City of Ladue v. Gilleo**, 512 U.S. 43, 52 (1994). In this case, the LET by definition only applies to constitutionally protected live entertainment and then the numerous exemptions reveal that the LET is in fact targeted principally, if not only, at adult entertainment facilities. The LET is therefore content specific; it is subject to strict scrutiny; and it is unconstitutional.

There was a similar pattern of exceptions in the case of **Church of Lukumi v. Hialeah**, 508 U.S. 520 (1993). The Church of Lukumi was a church that practiced the Santeria religion, which has animal sacrifice as one of the principle tenets of its belief system. One of the city ordinances in question was, on its face, a broad prohibition against "[W]hoever . . .unnecessarily. . . kills any animal." **Id.** at 573. It was determined, however, with both textual and as applied exceptions that the city deemed "hunting, slaughtering of animals for food, eradication of insects and pests, and euthanasia as necessary." **Id.** at 537. The city justified the exceptions because it believed that "animal sacrifice is 'different' from the animal killings that are permitted by law []. According to the city, it is 'self-evident' that killing animals for food is 'important'; the eradication of insects and pests is 'obviously justified'; and that euthanasia

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[11] As mentioned above, this issue is going to require discovery before it can be fully resolve, therefore summary judgment at this stage is inappropriate.

of excess animals 'makes sense'." **Id.** at 544. The Supreme Court determined that the city, by this pattern of exceptions, devalued the reasons given for precluding the killing of animals in a First Amendment (religious) context. **Id.** at 537-538. Thus, the ordinances in question, the Court determined, had "every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself." **Id.** at 545 (internal cite omitted). *See also* **U.S. v. Eichman**, 495 U.S. 310 (1990).

Just as in the **Lukumi** case, the Defendants exempt numerous forms of live entertainment from the LET, including but not limited to: live entertainment at trade shows, shopping malls, restaurants, and amusement rides; music performed by musicians who move constantly through the audience; outdoor concerts; many performances at casinos; and vocal and instrumental music in a restaurant or lounge if the music doesn't interfere with conversation or cause patrons to watch.

Yet the adult entertainment establishments are still required to pay the tax. Thus, the LET has every appearance of a prohibition that society is prepared to impose upon people engaged in erotic expression, but not upon itself. The Supreme Court established in **Lukumi** that such distinctions rendered a regulation unconstitutional:

> "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is ***not compelling. It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."***

Id. at 546-547 (emphasis added, citations omitted).

Instead, the LET almost exclusively applies to live entertainment that is in fact fully protected by the First Amendment particularly upon entertainment of the nature presented by Plaintiffs. As is the case in **Lukumi**, such a tax must fail to pass constitutional scrutiny. It is

also the case that such a tax "simply cannot be defended on the ground that partial prohibitions may affect partial relief." **Florida Star v. B.J.F.**, 491 U.S. 524, 540 (1989).

Also, the Defendants only attempt to addresses two of the many exemptions set forth by the LET, boxing and NASCAR, without even discussing why the other forms of live entertainment are exempted. The Defendants cite the large amount of revenue brought in by the NASCAR races, however, no consideration is given to the amount of revenue and taxes live entertainment establishments are ***already*** paying in sales and income tax on top of the LET or the amount of the revenue generated for the local economy. The argument made by the Defendants is that the LET is simply a revenue generating measure, but even the legislative history of this tax demonstrates that the tax burden was simply shifted from the casinos (which are not protected activity under the Constitution) to the providers of live entertainment, which ***are*** protected by the First Amendment.

Furthermore, should any doubt remain, the legislative history unequivocally bears out the discriminatory intent of the legislature when it enacted the content-based LET. A salient example of this is the "Minutes of the Meeting of the Assembly Committee on Commerce and Labor" recorded during the 73rd Congressional Session on May 16, 2005, attached hereto as Exhibit 6.[12] This was the committee meeting where it was debated whether to use the language "adult live entertainment" to better capture adult clubs in the amended version or whether that would make the target of the LET too obvious to the courts:

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[12] The Plaintiffs duly recognize that the legislative history reflects debate on how the 2003 legislation should be modified rather than on the original enactment of the 2003 legislation. However, this does not detract from the fact the history unequivocally demonstrates that the 2003 legislation's tax burden befell live adult entertainment in a greatly disproportionate manner. Indeed, the discussion indicates that the tax failed to bring in the intended revenue because the 300-seat requirement, in action, excluded many of the adult clubs that were intended as a revenue source.

Chairwoman Buckley:

My biggest concern with the bill is its constitutionality. . . . I'm concerned that if we just put ["]live adult entertainment,["] that might be held unconstitutional. I wonder if a better approach might be to pick out a few more things like the racetrack and sporting events, but to delineate all those separate ones and leave it like that. We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than put into our statute the phrase "adult entertainment." which puts a big red flag on it for the courts. What are your thoughts on that?

Senator Titus:

At one time the brothels were included, so that would be broader. You can make the argument that this is a special kind of business that poses special kinds of social problems and therefore you can attach them. It's worth doing, and if an elected court in the state wants to challenge it, that's fine. None of the parts of the Constitution are absolute and they're all subject to interpretation. They interpreted the property tax we recently passed as maybe constitutional, and we can see how flexible the Constitution is in Nevada. I think its worth the chance to put it in there.

ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16, 2005) (clarification added), Exhibit 6.

The Minutes also elucidate that the intent behind the tax was to further ratchet up the tax burden on adult entertainment, even though adult entertainment was already paying the vast majority of the existing tax:

Senator Dina Titus, Clark County Senatorial District No. 7:

The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada.

* * *

It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement.

* * *

Certainly the intent of the live entertainment tax was not to get nudist colonies, but ***to get striptease clubs***.

* * *

Chairwoman Buckley:

I wonder if we could do it in a way that's a little broader but gets at the problems so we could avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at $1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their $6 million.

Id. at 17-19 (names bolded in original) (emphasis added), Exhibit 6.

This legislative history also explains that NASCAR racing and other sporting events were exempted from the bill because they were believed to be "family oriented" and not because of the "prodigious economic activity" that the Department has asserted as a pretext:

Senator Dina Titus, Clark County Senatorial District No. 7:

This eliminates seating requirements, which were problematic I the original bill. It eliminates sporting events, which are family oriented. We believe those are attended by local families, and eliminating this would help to get a second NASCAR race, an all-star basketball game, and a baseball team. . . .

* * *

Senator Titus:

I agree with that. The 300-seat requirement has kept a lot of those clubs from paying. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The fiscal Division in the Senate argued that if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue.

Id.

The 300-person seating requirement was, in fact, lowered to a 200-person seating requirement, even though adult entertainment was already paying four-times more in taxes that

the next contributor under the LET. N.R.S. § 368A.200(5)(d),(e). The next largest contributor under the previous scheme was racetracks. Now racetracks are eliminated via the NASCAR exception and via the exception for all "[l]ive entertainment that is provided to the public in the outdoor area. . . ." N.R.S. § 368A.200(5)(o),(m). Now, in the Committee's own words, the taxes paid by any remaining providers of live entertainment that the legislature forgot to exempt "pale in comparison" to the amounts paid by adult entertainment establishments. ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16, 2005), Exhibit 6.[13]

Hence, the department cannot genuinely argue that this is not a content-based regulation that targets certain speech. Every path of analysis leads the LET directly to strict scrutiny.[14]

And, of course, the LET cannot survive strict scrutiny because the Defendants have failed to present a compelling governmental interest the tax promotes outside of raising revenues:

> "The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same

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[13] These quotes from the limited legislative history obtained by Plaintiffs are mere examples of the intent of the legislature in enacting the LET and its amendments. As mentioned above, there is very little publicly available legislative history for Senate Bill 8 of the 20th Special Session in 2003, and Plaintiffs will require further discovery, including, but not limited to, committee hearing transcripts, audio and/or video recordings, and reports, subcommittee hearing transcripts, audio and/or video recordings, and legislative research, reports and any studies and/or testimony relied upon by the committees or subcommittees in enacting the LET and any amendments.

[14] This section as a whole also further addresses the Defendants' quizzical argument that the "LET classifications are not unconstitutionally overbroad," (Def. Br., pp. 17-18) which merits no further discussion.

interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally. . . ."

Minneapolis Star, 460 U.S. at 586. Since the Defendants have not even attempted to assert a compelling interest in taxing constitutionally protected live entertainment differently from businesses generally, the LET fails strict scrutiny and must be declared unconstitutional under the First Amendment and the correlating provisions of the Nevada Constitution.

9. THE LIVE ENTERTAINMENT CLASSIFICATIONS ARE UNCONSTITUTIONALLY OVERBROAD OR VAGUE.

Statutes which are vague, and which are not subject to reasonable interpretation by common men, inherently deny due process and are therefore unconstitutional. **Grayned v. City of Rockford**, 408 U.S. 104, 108 (1972). To be constitutional, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." **Grayned**, 408 U.S., at 108; **Kolender v. Lawson**, 461 U.S. 352, 358 (1983). More importantly here, as the Supreme Court has noted, constitutional concerns are heightened when a vague statute "abuts upon sensitive areas of basic First Amendment freedoms" **Grayned**, 408 U.S., at 109.

Hence, "[a] stringent vagueness test applies to a law that interferes with the right of free speech." **Video Software Dealers Ass. v. Webster**, 968 F.2d 684, 689-690 (8th Cir. 1992). The evils engendered by a vague law are "particularly pronounced" here, "where the expression is sought to be subjected to licensing." **Interstate Circuit, Inc., v. City of Dallas**, 390 U.S. 676, 683 (1968).

In identifying and explaining these evils, the Court has stated:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, Vague laws may trap the innocent by not providing fair warning.

> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standard for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Grayned, 408 U.S. at 108-109 (ellipsis in original).

To avoid these faults, ***precision in draftsmanship*** is the touchstone of constitutionality for a regulation which impacts upon First Amendment rights. *See, e.g.*, **Keyishian v. Board of Regents**, 385 U.S. 589, 603-04 (1967); **N.A.A.C.P. v. Button**, 371 U.S. 415, 432-33(1963); and **Smith v. Goguen**, 415 U.S. 566, 573 (1974). However the LET fails to provide the "explicit standards" necessary to survive a vagueness challenge. **Video Software Dealers,** 968 F.2d at 689.

Defendants argue that the LET does not authorize or encourage arbitrary or discriminatory enforcement. At the same time Defendants attempt to summarily preclude Plaintiffs from developing a factual record of exactly how the LET is administered. Between the exclusions in NRS §§ 368A.200(5) and 368A.090(2)(b) the live entertainment tax excludes no less that twenty-five (25) types of businesses or forms of live entertainment that would otherwise be subject to the tax. Many of these exclusions are impermissibly subjective or otherwise unclear as to the type of entertainment that is to be excluded.

For example, even though the LET applies to "food, refreshments and merchandise," NRS § 368A.200(1)(a), it exempts "live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment." NRS § 368A.200(5)(q). It is unclear how the Department determines whether the entertainment is "incidental" or "only

serves as ambience." Discovery would permit Plaintiffs to inquire as to exactly how this subjective determination is made and what businesses have been excluded as a result.

Other exemptions include, *inter alia*: "occasional" performances, NRS § 368A.090(b)(2); performances where "the performers stroll continuously throughout the facility," NRS § 368A.090(b)(3); music where "musicians move constantly throughout the audience," NRS § 368A.200(5)(h); entertainment where "the purpose of the event is not primarily for entertainment," NRS § 368A.200(5)(i); or musical performances where "such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen," NRS § 368A.090(b)(1). Clearly these provisions are subjective in nature and impermissibly subject to a large degree of discretion in their administration. It is not immediately apparent exactly what these provisions exclude or how the provisions are implemented by the Department of Taxation and the Gaming Board. *See* NRS 368A.140. It is also yet to be determined whether the Department and Board administer these provisions in a consistent manner. **Id**. Yet, all of these otherwise taxable forms of entertainment are exempt from the LET while Plaintiffs' businesses are left paying the tax.

In order for the taxation of entertainment that (by the administration of the LET) does not fall within these exclusion to pass constitutional muster, the LET must provide standards which do not leave the imposition of the tax up to the personal predilections of the enforcing officials. As the Tennessee Supreme Court explained in **City of Knoxville v. Entertainment Resources, LLC.**, 166 S.W.3d 650 (2005) the manner in which a law is enforced can readily expose vagueness in the provisions being enforced:

> As the Court of Appeals correctly held, however, here the witnesses' testimony illustrates the issue at the very heart of the vagueness challenge: enforcement of

> the ordinance was left to the 'personal predilections' of the police. **Smith** [**v. Goguen**] 415 U.S. [566,] 575, []. The officers' confusion demonstrates that the ordinance fails to provide ascertainable standards for law enforcement.

Id. at 657.

Plaintiffs should be allowed explore, through deposition of the enforcing officials or otherwise, how these exemptions are administered and precisely what businesses and forms of entertainment are excluded as a result. Until this discovery is complete, Plaintiffs' vagueness and overbreadth challenges should not be discharged. To do so would unfairly limit Plaintiffs' ability to prosecute their claims by demonstrating by example the vagueness and overbreadth of the LET.

III. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that this Honorable Court deny Defendants' motion for summary judgment in its entirety.

DATED this 22nd day of October, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2008, the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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EXHIBIT 1

AFFIDAVIT OF DIANA L. SULLIVAN, ESQ.

State of Nevada)
) : ss
County of Clark)

I, DIANA L. SULLIVAN, ESQ., being first duly sworn deposes and says:

1. This Affidavit is in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, and pursuant to NRCP 56(f).

2. Plaintiffs request that this Honorable Court deny Defendants' Motion for Summary Judgment because further discovery is needed to properly oppose the motion, and Plaintiffs have not been dilatory in pursuing discovery.

3. The Joint Case Conference Report in this matter was just filed on October 20, 2008. Pursuant to NRCP 26(a), no party can begin to conduct discovery until after the filing of the Joint Case Conference Report. Thus, discovery has not even *commenced* in this case. The Plaintiffs are definitely entitled to conduct discovery before opposing a motion for summary judgment.

4. Upon consultation with our clients and co-counsel in this matter, Bradley J. Shafer, we have determined that there exist at least four issues that require further factual development for Plaintiffs to be able to fully oppose Defendants' motion for summary judgment. These issues include: (1) whether the Live Entertainment Tax "LET" operates to disproportionately burden First Amendment activity or a particular message; (2) whether the LET was enacted and/or subsequently amended with the purpose or intent of burdening certain forms of First Amendment activity; (3) whether there exists an adequate factual predicate supporting the reasons for the enactment of the discriminatory tax; and (4) whether the LET is unconstitutionally overbroad or vague.

. . .

5. First, the LET is constitutionally suspect, and subject to strict scrutiny, if it targets only a small group of speakers. Plaintiffs do not have yet have the hard tax data to show precisely which businesses are (and are not) paying the LET, and in what proportion. Plaintiffs seek to demonstrate that – as the legislative history suggests – exotic dance establishments pay a disproportionately large share of the LET. To do so, Plaintiffs will need to ascertain through discovery the identity of each payer of the LET as well as the amount of taxes paid by each.

6. The Nevada Department of Taxation provides a limited amount of tax data online (http://tax.state.nv.us/), however, that data does not provide the level of specificity required by Plaintiffs.

7. Second, Plaintiffs should be permitted further discovery in furtherance of their claims that the LET is the product of discriminatory intent. Thus far, Plaintiffs have been unable to secure the complete legislative history of the LET, including, but not limited to, committee hearing transcripts, audio and/or video recordings, and reports, subcommittee hearing transcripts, audio and/or video recordings, and legislative research, reports and any studies and/or testimony relied upon by the committees or subcommittees in enacting the LET and any amendments.

8. The LET was enacted via Senate Bill 8 of the 20th Special Session in 2003. Nevertheless, Plaintiffs have been unable to uncover the legislative or other history that would explain the transformation of the LET from a "5% across the board tax" to the very limited 10% tax enacted by Senate Bill 8 in 2003. In fact, Plaintiffs have been able to uncover little legislative history for the Senate Bill that actually enacted the LET.

9. The few examples of legislative history cited in Plaintiffs' opposition to Defendants' Motion for Summary Judgment is likely only the "tip of the iceberg," and Plaintiffs should be afforded an opportunity to discover the entire legislative record relating to the LET.

10. Plaintiffs intend to conduct discovery in furtherance of their claims that the LET was enacted and subsequently modified with the discriminatory intent of specifically targeting or singling out exotic dance establishments for taxation.

11. This discovery will be directly aimed at discovering evidence that will further support Plaintiffs' claims that the LET was enacted and modified with the purpose and/or intent of discriminating against exotic dance establishments. This evidence is necessary to develop a full record upon which to adjudicate Plaintiffs' claims and is in Defendants' possession.

12. Third and somewhat related, it is necessary for Plaintiffs to conduct discovery on the factual predicates for the enactment of and amendments to the LET. In order to adequately respond to Defendants' instant motion, it will be necessary for the Defendants to explain their rational for treating Plaintiffs' businesses differently from each and every business that it specifically exempts from the LET (which businesses remain to be identified through discovery). Thus far, Defendants have not identified any such purpose. However, Plaintiffs are entitled to discovery regarding what, if any, rationale the Defendants intend to assert, as well as the factual underpinnings for making such assertions.

13. Finally, it will also be necessary for Plaintiffs to take discovery to further support their claims that the LET is impermissibly vague and overbroad. Between the exclusions in NRS §§ 368A.200(5) and 368A.090(2)(b) the LET excludes no less that twenty-five (25) types of businesses or forms of live entertainment that would otherwise be subject to the tax. On their face these exemptions lack specificity and contain many terms phrases that are subjective in nature. In furtherance of Plaintiffs' claims that these terms are subject to arbitrary enforcement, it will be beneficial for Plaintiffs to take discovery on the following areas: (1) obtaining the detailed records showing the payers and, by exclusion, the non-payers of the tax will further illuminate whether the tax has been implemented in a

manner that is either subjective or not consistent with the terms of the LET; (2) obtaining requests for refunds submitted to the Department of Taxation or Gaming Board, records of the adjudications of those requests, and other documents regarding the administration of the LET will further illuminate whether the tax has been implemented in a manner that is either subjective or not consistent with the terms of the LET; (3) deposition of administering officials regarding the implementation and enforcement of LET will further illuminate whether the tax has been implemented in a manner that is either subjective or not consistent with the terms of the LET, and will determine whether those responsible for administering and enforcing the LET are able to discern which businesses are or are not subject to the tax.

14. Plaintiffs have not been dilatory in pursuing discovery. This suit is still in the early stages of litigation. The parties conducted their early case conference on July 31, 2008, and the joint case conference report was only just submitted on October 20, 2008. Thus far the parties have been enmeshed in litigating Defendants' motion to dismiss, Plaintiffs' motion for preliminary injunction, and now Defendants' motion for summary judgment and have not even commenced formal discovery. In fact, Defendants submitted their current motion for summary judgment before the Court has even has the opportunity to rule on any of the pending motions to date.

15. Therefore, pursuant to NRCP 56(f), the Plaintiffs respectfully contend to this Honorable Court that discovery is needed in order for the Plaintiffs to be able to adequately respond to Defendants'

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Motion for Summary Judgment.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 22nd day of October, 2008.

DIANA L. SULLIVAN, ESQ.

JENNIFER M. CLARK
Notary Public State of Nevada
No. 06-107780-1
My appt. exp. July 13, 2010

SUBSCRIBED AND SWORN to before me
this 22nd day of October, 2008.

NOTARY PUBLIC
in and for said County and State.

EXHIBIT 2

MINUTES OF THE

SENATE Committee on Taxation

Seventy-second Session

May 19, 2003

Chairman McGinness:

I will close the hearing on A.B. 516. Senator Townsend has some proposals to present to the committee.

Senator Townsend, Washoe County Senatorial District No. 4:

I will provide the committee with a handout (Exhibit D) for your information and discussion. There was a discussion at our last meeting about the business license tax (BLT) commonly referred to as the "BAT tax." In the Governor's proposal it was $300 the first 2 years, and then it was rolled back to $140 as the gross receipts tax was implemented. Medicaid and Temporary Relief to Needy Families budgets raise the expense side of the equation, especially in difficult times. The proposal would be to raise the BLT from $100 up for those individuals. In the current structure, there is a full-time equivalent (FTE) or 468 hours to define one individual. If you would count heads and tax BLT on every head and not just on FTEs, you would have an additional $11 million. This would be onerous on the smaller businesses. It would be a proposal to increase the BLT on those who do not provide health care to their employees. Based on our current estimates, approximately 22 percent of those employed do not have health care in this State. No matter what the BLT was, it would be $400 additional dollars. This would encourage employers to provide health insurance for their employees. If the employer does not do so, then the employer will pay a premium to the State to offset some of the costs.

The Governor had a number of exemptions and proposals that came as a result of what the task force provided. This would be a live entertainment tax, page 4 (Exhibit D), 5 percent across the board, regardless of where it is held or what the venue. If it were live entertainment, it would be taxed. This excludes bowling, movies, video rentals, golf, and includes all venues on gaming properties as well as any other venue for live purposes. As previously defined, the casino entertainment tax would be collected by the State Gaming Control Board, and the live entertainment tax would be collected by the Department of Taxation. Charitable events and trade shows would be excluded as well. This would raise approximately $24 to $25 million in the first year.

The next component for discussion and analysis is the Business Licenses Surcharge, page 2 (Exhibit D). This concept would use the employer's quarterly contribution and wage report, which is submitted to the Employment Security Division. Using line 5 from the report, the tax would be 1 percent per employee, capped at the annual 21.5 percent. This revenue increases with growth and it is a tax that directly reflects the actual economic activity in the State's economy.

Senator Neal:

What would be capped at 21.5 percent?

Senator Townsend:

The capped amount would be 22.5 percent for companies with 25 or more FTEs. The assessment is applied to 4900 companies. This will raise $90 million in the first year. There would be a

separate charge using the identical situation, called the Finance Industry Surcharge, page 3 (Exhibit D). Using the identical situation this would be assessed in the same way at 5 percent in 2004 on all financial services, and would raise $24 million.

The unified business tax (UBT) is a tax addressing revenues of businesses with the ability to do one of two things: the business would look at the lowest number between gross and removal of deductions; or, what has been proposed in a gross receipts tax. The business could make the choice as to whichever is lower. Based on analysis by the Department of Taxation and the Legislative Counsel Bureau (LCB) staff, this would raise $75 million in the first year and $140 million in the next year. I have offered the committee five components to debate what would be in the best interest of this State.

Senator Tiffany:

How much would the business license surcharge generate?

Senator Townsend:

The business license surcharge would yield $90 million the first year.

Senator Neal:

I do not believe our constitution would permit an unequal tax as you have described in the Business License Surcharge. We are required to base these taxes on equality for everyone. Based on this proposal, it would not be equitable. It is questionable as to whether this tax would pass constitutional muster. This would be challenged in court and overruled.

Senator Townsend:

When this was analyzed, the first reaction was to place everyone at over $400 and allow someone to come forward and declare they have health care and therefore, should be exempted. Theoretically under our proposal, this could be done and would retain constitutionality.

Senator Neal:

Have you received a legal opinion from the LCB on this issue?

Senator Townsend:

No.

Senator Neal:

Is the Live Entertainment Tax a 5 percent increase across the board?

Senator Townsend:

It would be a 5 percent tax across the board, not an increase. The current casino entertainment tax would be reduced to 5 percent and spread to all live entertainment.

Senator Neal:

What would be the exclusions?

Senator Townsend:

Bowling, movies, video rentals, and golf would be excluded.

Senator Neal:

Why would these be excluded?

Senator Townsend:

Nevadans participate more in these activities. Every proposal I have brought forward is aimed at giving the average Nevadan some relief.

Senator Neal:

Does the term "live entertainment" include the big shows? Does it include boxing?

Senator Townsend:

It includes the big shows. It does not include boxing because it is a competitive environment. It does include wrestling, truck pulls, and all entertainment which is called curb-to-curb in an unlicensed gaming property, on or off the property.

Senator Neal:

What is meant by all venues of gaming properties?

Senator Townsend:

All venues of gaming properties would include outdoor concerts, concerts at their beach facilities or venues that are put up or are not attached to the gaming property. If an unrestricted licensee would promote an event off the property, it would be taxed, all would be taxed equally. The State Gaming Control Board already audits those functions and would continue to do so with the least amount of impact.

Senator Neal:

Why are the trade shows exempt?

Senator Townsend:

I will give you an example. A well-known performer could be hired to sing commercials for a trade show, the performance would be considered under the auspices of the trade show.

Senator O'Connell:

Would there be a tax if there were no admission fee with live entertainment?

Senator Townsend:

We are still working on that component. If there were an admission fee, it would be taxed.

Senator O'Connell:

My concern was drinks could be substituted in place of an admission fee.

Senator Townsend:

I agree with you. Admission fees are used as deterrents, so people do not wander into your property. While we are waiting for a legal opinion, I brought the proposal forward in this fashion to get as many issues discussed as possible.

Senator Tiffany:

Are banks and investment firms included in the finance industry surcharge?

Senator Townsend:

In the Employer's Contribution and Wage Report, there is a definition in codes known as the *North American Industry Classification System--United States, 2002* (NAICS) manual, which is used by the Employment Security Division. It would include all financial services.

Senator Tiffany:

Would it be possible for a small start-up financial industry, with 26 employees and no health care, that falls under the finance industry's surcharge, the gross receipts tax, and if they had a gentleman's club, to be affected by every tax on the list?

Senator Townsend:

Yes.

Senator Tiffany:

Are you saying, they would be responsible for $400; plus the broad base, which is 1 percent of line 5, 5 percent on all their services, and the gross receipts tax?

Senator Townsend:

The proposal is not being offered as a group to simply raise revenue. These are additional options for the purpose of debate from which you can choose, including options the committee has discussed previously. It must be looked at in the larger context. Senators Schneider, Care, Amodei, Neal, and the Governor, plus others have made various options available. I am offering these proposals to continue the dialog to reach a resolution.

Senator Coffin:

Your handout (Exhibit D) seems to be a continuing work sheet. I noticed you have made changes to what the committee has voted on. Are you proposing to change the committee actions?

Senator Townsend:

Yes. I am making other suggestions, page 1 (Exhibit D): the cigarette stamp fee has been reduced to 0.5 percent; the liquor tax allowance to zero; State/local school support tax, sales tax collection allowance was reduced to zero; restricted slots was increased to $10 million; and the business license surcharge, finance industry surcharge, satellite broadcasters, and the live entertainment tax all are suggestions for consideration.

Senator Coffin:

Is the Department of Taxation prepared to talk about the administration costs? Are these figures net of the administration costs?

Senator Townsend:

Under the business license surcharge, it is estimated by the Employment Security Division that the cost of administration would be $2.8 million in 2004 and $1.4 million in 2005.

Senator Coffin:

Is that just in the finance industry?

Senator Townsend:

It is for the entire business license surcharge, which raises $90 million dollars.

Senator Coffin:

Did you remove the tax on services?

Senator Townsend:

Anything the committee has voted on should be included in my proposal.

Senator Coffin:

Some of the tax concepts voted on last week would need adjusting. I am looking at the number that showed a biennium total of $730 million in tax revenues and your proposal shows a total of $760 million. Do you think the services should be replaced in your proposal?

Senator Townsend:

If all of these proposals were adopted, there would be $605 million in tax revenues in 2004, and $760 million in 2005. You are referring to having $730 million for both years. We copied the committee's format.

Senator Coffin:

Is the percentage increase for the restricted slots the change yielding $10 million a year? The yield is four times greater than the previous proposal. Is the satellite broadcasters' fee the same yield as mentioned in the handout (Exhibit D)? Are all slots considered the same?

Senator Townsend:

Yes. There would be a 33 percent increase, taking the revenue figure to $2.3 million, which is an 87 percent increase when you look at the current unrestricted license requirements, the 6.25 percent gross on unrestricted licensees, plus what they pay in a slot fee. I was trying to equate an equivalent type of taxation. A slot is the same whether it is in a casino or gas station.

Chairman McGinness:

How would you define health care on your proposal?

Senator Townsend:

Currently, there is a credit for those who provide child care. We considered that structure and applied it to the statute to provide "70 percent of its employees with health care benefits, then the employer would qualify for not having the additional $400 fee."

Senator Neal:

Would the restricted slots include all slot machines?

Senator Townsend:

I considered the way unrestricted licensees are taxed and tried to apply that formula. I arrived at an approximation of $10 million.

Senator Neal:

Would this include slot machines in places such as Caesars Palace or the Mirage Hotel and Casino?

Senator Townsend:

The way this proposal is structured, this pertains to restricted licensees.

Senator Neal:

How much would the business license surcharge bring in revenues?

Senator Townsend:

The business license surcharge, would yield $90 million in 2004 and $95 million in 2005.

Senator Neal:

Is your proposal to exclude businesses with less than 25 employees? Would you explain your concept on financial services?

Senator Townsend:

When a person looks at the financial industry and what is currently generated, there seems to be a disproportionate paying ability compared to what they remove from this state. In looking at taxing their assets or deposits in some manner, those are things that can be moved quickly; therefore, we considered their financial health in numerous ways. Their growth is dependant on individuals who work there. We added to the individual tax that was going to be put on the business surcharge. Doing it in this manner would not require additional manpower or computer technology. All of these proposals are based on the ability to collect taxes with the existing collection mechanism.

Senator Neal:

Is it safe to assume all these taxes being proposed would be pass-through?

Senator Townsend:

Almost any tax can be a pass-through. The business tax, finance industry charge, and business license surcharge would ultimately be passed on to consumers. It would depend on how a person perceives how taxes are applied.

Senator Neal:

My understanding of these proposals is the public will ultimately pay the taxes.

Senator Townsend:

These proposals are not offered as a package, but are different options from which the committee can choose as to how these taxes can be applied. There are many considerations: how broad-based the tax is, its stability, and the collection expense. Some taxes could be perceived as a direct pass-through, such as the live entertainment tax, which is a discretionary tax. The UBT would not be a direct pass-through, but when we consume goods and services, we pick up the costs.

Chairman McGinness:

Your handout (Exhibit D) does not include the UBT.

Senator Townsend:

It was supposed to include a narrative on the UBT, but it was omitted.

Senator Coffin:

In the second year of the biennium, how much would the share of future growth and property tax through S.B. 308, the leaders bill, yield?

SENATE BILL 308: Revises manner in which revenue from property taxes is distributed. (BDR 32-704)

Senator Townsend:

It would yield $52 million in 2005. The number has been reworked. First, we took Washoe County and went all the way down to the general improvement district level to get a hard number. The other thing it did was to clarify the State would not share in any taxes local government decided to add; those revenues would stay at the local level. In the first year, it would be an additional $52 million to the State.

Senator Coffin:

Was a vote ever taken on S.B. 308?

Senator Townsend:

No. These are all options that have been discussed and put together for the committee's consideration.

Senator Coffin:

There was an objection to the distribution of funds to the State, particularly in Clark County. Are there any other taxes that could be included?

Senator Townsend:

We attempted to take the format given to us by staff and assemble all the proposals into one format to make it easier for the committee.

Senator Coffin:

Why did you decide to exempt golf from the live entertainment tax? The green fees would be easy to calculate a tax on, but what about membership dues?

Senator Townsend:

Under the Governor's proposal, this was another $20 million in the first year. One concern was how to get to the private clubs. Another was the amount of retirement communities in our state, which is where the retirees play golf. If golf were included, there would be an instant $20 million in revenues. I worked from the Governor's sheet. The 7.3 percent admissions and action tax yielded another $21 million in the first year. If the tax were included at 5 percent, the yield would be $18 million or $19 million in the first year.

Senator Neal:

There are certain exemptions listed under the business license surcharge. Why are health care providers, public utilities, and gaming exempt?

Senator Townsend:

Health care services are necessary for people to stay alive. I could understand taxing elective or cosmetic surgeries. Everything with the public utilities is a pass-through and is written on your bill. Gaming pays an extensive amount in the arena of the BLT and the gross gaming tax, which under the committee's proposal increased to $35 million.

Senator Neal:

Is there a good reason for exempting gaming?

Senator Townsend:

You could debate whether they pay enough. They would not have been exempted, but the new tier came in at $35 million.

Senator Neal:

If you are charging a gross gaming tax of 6.25 percent on $135,000 gross per month, and if you add a fourth tier of $1 million and that is raised to 6.25 percent, that 6.25 percent calculates to 0.5 percent more than would have been paid, but since you are adding $1 million that 0.5 percent becomes less than 0.5 percent.

Rick Combs, Fiscal Analyst:

If I understand what you are saying, the gaming industry on the whole is not being raised by 0.05 percent. Is that what you mean?

Senator Neal:

That is exactly what I am saying.

Mr. Combs:

I would point out, your 0.5 percent increase from 6.25 percent to 6.75 percent is an 8 percent increase. The 0.5 divided by 6.25 percent would be an increase of 8 percent.

Senator Neal:

What if you added 0.5 percent to the 6.25 percent at $135,000 per month? Would you say it would be more than $35 million?

Mr. Combs:

Yes, that would be a fair assessment.

Senator Townsend:

I offer the proposals for the committee's consideration and discussion.

Senator Neal:

I would like the committee staff to add the 0.5 percent to the 6.25 percent at $135,000 and get a total.

Chairman McGinness:

We will not be voting on these issues today. Senator Schneider will be giving a presentation using charts. There is a proposed amendment to S.B. 238 (Exhibit E. Original is on file in the Research Library.).

EXHIBIT 3

reviewjournal.com PRINT THIS

Tuesday, May 17, 2005

Live entertainment tax revisited

Constitutionality of bill questioned

By ED VOGEL
REVIEW-JOURNAL CAPITAL BUREAU

CARSON CITY -- A Senate-approved bill to create a special live entertainment tax for strip clubs was referred to the Assembly Ways and Means Committee on Monday, despite its constitutionality being questioned.

Majority Leader Barbara Buckley, D-Las Vegas, said Senate Bill 247 in its current state sends up a "red flag for the courts" to declare it unconstitutional. "If ... it just applies to adult entertainment it may be found unconstitutional," said Buckley, a lawyer and chairwoman of the Assembly Commerce and Labor Committee.

American Civil Liberties Union lawyer Allen Lichtenstein argued strip tease dancing is a constitutionally protected form of expression and any attempt to single it out would be found unconstitutional.

But Senate Minority Leader Dina Titus said during an Assembly Commerce and Labor Committee hearing that strip clubs are not paying their fair share of taxes and the Legislature should risk a court challenge.

"You can make the argument that it is a special kind of business that poses special problems," said Titus, D-Las Vegas. "If they want to challenge it in front of an elected court, that's fine."

Referring a bill to the Ways and Means Committee often is a convenient way for Assembly members to let bills die.

Buckley, however, said the Ways and Means Committee is considering another live entertainment tax bill and the two proposals might be combined into a single measure.

Titus' bill revamps the live entertainment tax law approved two years ago by the Legislature. Strip clubs pay about $6 million a year in taxes under that law, although legislators had anticipated it would

generate $75 million.

"This is about fixing a problem, not about getting credit," Titus said of Buckley's proposals to alter the measure. "I don't play those games. It's a disservice to the taxpayers of Nevada when the Assembly does."

Under current law, most businesses, including strip clubs, pay a 10 percent live entertainment tax. But businesses with fewer than 300 seats are exempt.

This exemption, according to Titus, freed most strip clubs from paying the tax. Her bill takes out the seating exemption.

Titus also noted that the current tax law caused problems for piano players, musicians in local bars and restaurants. Her bill would free these types of businesses from the tax, along with sporting events and car races at the Las Vegas Motor Speedway.

The new tax, called an adult entertainment tax, would apply only to strip clubs.

Find this article at:
http://www.reviewjournal.com/lvrj_home/2005/May-17-Tue-2005/news/26536070.html

Check the box to include the list of links referenced in the article.

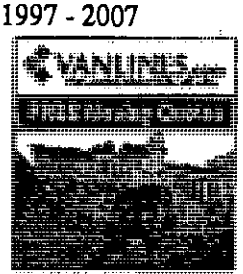

EXHIBIT 4

CAUSE NO. D-1-GN-07-004179

TEXAS ENTERTAINMENT ASSOCIATION, INC. AND KARPOD, INC. Plaintiffs, vs. SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS, Defendants.	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 345TH JUDICIAL DISTRICT

JUDGMENT

From March 3, 2008 to March 6, 2008, the Court heard the trial of this cause. After considering the pleadings, the evidence, the arguments of counsel, and the applicable legal authorities, the Court decides as follows:

The Court DENIES Plaintiffs' motions to exclude the opinions of Defendants' experts, Dr. Bell and Dr. Georges.

The Court holds that Subchapter B of Chapter 47 of the Texas Business and Commerce Code, while furthering laudable goals, violates the First Amendment to the United States Constitution and is therefore invalid.

This subchapter probably must be reviewed as a content-based tax, using strict scrutiny, either because it is "aimed" at what are arguably the primary effects of protected speech, i.e., the effect on the audience of watching nude erotic dancing, or because its "aim," as determined by the use of the bulk of the funds raised by the tax for the Texas health opportunity pool, is to address lack of adequate health insurance, a statewide problem, by singling out business activity

involving expression that, while politically unpopular, is nevertheless protected by the First Amendment. Subchapter B does not pass muster under this standard because Defendants failed to—and conceded that they cannot—meet their burden to show that it is necessary to serve a compelling state interest and narrowly tailored for that purpose.

Even if the subchapter were analyzed as a content-neutral measure aimed at the secondary effects of protected speech, using intermediate scrutiny, it must be held unconstitutional.

If reliance by the Legislature on some pre-enactment evidence of links between the secondary effects addressed by the programs funded by the subchapter's tax and the business activity subject to the tax is a constitutional requirement (as is suggested, but not expressly held, by Supreme Court caselaw), Subchapter B must be held unconstitutional because no evidence indicating that any legislators actually considered any evidence of such links was presented at trial. Tori Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

If pre-enactment evidence is not required, the subchapter must still be held unconstitutional because Defendants, while presenting persuasive trial evidence supporting a link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund, presented no evidence supporting a link between the business activity subject to the tax and the alleged secondary effects addressed by the Texas health opportunity pool. There is no evidence that combining alcohol with nude erotic dancing causes dancers to be uninsured, that any dancer is in fact uninsured, or that any uninsured dancer could qualify for assistance from the fund.

Subchapter B also fails to pass muster under intermediate scrutiny because it is not narrowly tailored. First, only one of the two alleged secondary effects was ever shown to be possibly connected to the combination of nude erotic dancing and the consumption of alcohol. Second, no evidence was presented to show that the amount of the tax is related in any way to the degree to which the taxed business activity contributes to the alleged secondary effects or to the financial cost of that contribution.

For the foregoing reasons, the Court DECLARES that sections 47.051–.056 of the Texas Business and Commerce Code are unconstitutional and invalid. It is therefore unnecessary to reach Plaintiffs' state constitutional claims.

The Court ORDERS that Defendants are PERMANENTLY ENJOINED from assessing or collecting the tax imposed by sections 47.051–.056.

The Court ORDERS, pursuant to section 37.009 of the Texas Civil Practice and Remedies Code and 42 U.S.C. § 1988, that Plaintiffs recover from Defendants their reasonable and necessary attorneys' fees in an amount to be determined by the Court after receiving letters from Plaintiffs and Defendants on this issue. The letters must contain no more than three pages and be filed by April 4, 2008.

SIGNED this 28th day of March, 2008.

SCOTT H. JENKINS
JUDGE PRESIDING

Vernon's Texas Statutes and Codes Annotated Currentness
Business and Commerce Code (Refs & Annos)
Title 4. Miscellaneous Commercial Provisions (Refs & Annos)
Chapter 47. Sexually Oriented Businesses (Refs & Annos)
Subchapter B. Fee Imposed on Certain Sexually Oriented Businesses
§ 47.051. Definitions

In this subchapter:

(1) "Nude" means:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(2) "Sexually oriented business" means a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

§ 47.052. Fee Based on Admissions; Records

(a) A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business.

(b) A sexually oriented business shall record daily in the manner required by the comptroller the number of customers admitted to the business. The business shall maintain the records for the period required by the comptroller and make the records available for inspection and audit on request by the comptroller.

(c) This section does not require a sexually oriented business to impose a fee on a customer of the business. A business has discretion to determine the manner in which the business derives the money required to pay the fee imposed under this section.

§ 47.053. Remission of Fee; Submission of Reports

Each quarter, a sexually oriented business shall:

(1) remit the fee imposed by Section 47.052 to the comptroller in the manner prescribed by the comptroller;

and

(2) file a report with the comptroller in the manner and containing the information required by the comptroller.

§ 47.054. Allocation of Certain Revenue for Sexual Assault Programs

The comptroller shall deposit the first $25 million received from the fee imposed under this subchapter in a state fiscal biennium to the credit of the sexual assault program fund.

§ 47.055. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first $25 million in a state fiscal biennium in the Texas health opportunity pool established under Subchapter N, Chapter 531, Government Code. Money deposited in the pool under this section may be used only to provide health benefits coverage premium payment assistance to low-income persons through a premium payment assistance program developed under that subchapter.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, becomes law and the Texas health opportunity pool is established under that Act. If that Act does not become law, or that Act becomes law but the pool is not established, this section has no effect, and the revenue is deposited as provided by Section 47.0551.

§ 47.0551. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first $25 million in a state fiscal biennium to the credit of the premium payment assistance account. The premium payment assistance account is an account in the general revenue fund that may be appropriated to the Health and Human Services Commission only to provide health benefits coverage premium payment assistance to low-income persons through a program developed by the commission.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, does not become law, or that Act becomes law, but the Texas health opportunity pool is not established under that Act. If that Act becomes law and the pool is established, this section has no effect, and the revenue is deposited as provided by Section 47.055.

§ 47.056. Administration, Collection, and Enforcement

The provisions of Subtitle B, Title 2, Tax Code, apply to the administration, payment, collection, and enforcement of the fee imposed by this chapter.

END OF DOCUMENT

EXHIBIT 5

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 2, 2008

Opinion No. 08-78

Legality of Privilege Tax On Entry of Customers into Adult-Oriented Establishments

QUESTION

Is proposed legislation, House Bill 2676, which would impose a state privilege tax only on adult-oriented establishments for each entry by a customer, defensible in court?

OPINION

The proposed state privilege tax to be imposed only on adult-oriented establishments for each entry by a customer would likely be held unconstitutional.

ANALYSIS

The opinion of this Office has been requested as to the legality of proposed legislation, House Bill 2676, which would amend the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, to impose a "five dollar ($5.00) [state] privilege tax . . . for each entry by each customer admitted to adult cabarets or adult[-]oriented establishments." HB 2676, Section 2(a). "Such tax shall be in addition to all other taxes imposed on any such customer." *Id.* The businesses would be required to record daily the number of customers admitted and remit the tax quarterly to the adult-oriented establishment boards[1] for their respective counties. *Id.*, Sections 2(b) and 3(a). The incidence of the tax would be on the adult-oriented establishment, not the customer, since the businesses would not be required to impose the tax directly on the customers, but would have discretion to determine the manner in which each business derives the money required to pay the tax. *Id.*, Section 2(c). The county adult-oriented establishment boards would remit the tax proceeds to the Treasurer for deposit into a special account created in the State General Fund. *Id.*, Sections 3(b) and 5. "Moneys from such account shall be appropriated solely for the purpose of making grants to public and private agencies for the victims of sexual abuse and victims of domestic violence." *Id.*, Section 5. These grants would be administered by the Division of Resource Development and Support in the Department of Finance and Administration. *Id.*

[1] Typically a county does not have an adult-oriented establishment board unless it has voted, pursuant to Tenn. Code Ann. § 7-51-1120, to make the separate Tennessee Adult-Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101, *et seq.*, operative in that county. The Registration Act is effective in a particular county only "upon the contingency of a two-thirds (2/3) vote of the county legislative body. By contrast, the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, applies in all counties.

Courts recognize that non-obscene adult-oriented entertainment falls marginally within the scope of free speech protection. The United States Supreme Court has explained:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. [2]

Young v. American Mini Theaters, Inc., 427 U.S. 50, 70-71, 96 S.Ct. 2440, 2452 (1976), *rehearing denied* (subjecting the commercial exploitation of sexually-oriented material to zoning requirements found to be a constitutionally valid time, place or manner regulation under the First Amendment). Further, as noted, *in City of Erie, et al. v. Pap's A.M. d/b/a Kandyland*, 529 U.S. 277, 289, 120 S. Ct. 1382 (2000)(plurality opinion),

> Being " in a state of nudity" is not an inherently expressive condition.. . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think it falls within the outer ambit of the First Amendment's protection.

Traditionally, a governmental regulation of adult-oriented entertainment (which is intended to address generally recognized deleterious secondary effects) is analyzed under intermediate scrutiny to ensure it does not unduly impair the exercise of First Amendment rights. "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673 (1968). To withstand constitutional scrutiny, then, (1) the [Act or] Ordinance must have been enacted within [the government's] constitutional power; (2) the [Act or] Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech[3]; and (4) the [Act or] Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998)(upheld constitutionality of Tennessee's Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.)* (citing *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673); *see Deja Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County, Tenn.* 274 F.3d 377, 391-92 (6th Cir. 2001)(applied intermediate scrutiny test in addressing

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[2]Voltaire, referring to a suggestion that the violent overthrow of tyranny might be legitimate, said: "I disapprove of what you say, but I will defend to the death your right to say it."

[3] The Sixth Circuit recognizes that ordinances aimed at regulating adult entertainment businesses may constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998).

constitutionality of Nashville adult-oriented establishment licensing ordinance).[4]

"[A]n ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity. [Such a fee is not excessive, even if it is more than nominal, so long as it is] reasonably related to the expenses incident to the administration of the ordinance." *Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 105 F.3d 1107, 1109-10 (6th Cir.1997); *quoted in Deja Vu of Nashville*, 274 F.3d at 395-96. The license and permit fees in Tennessee's Adult-Oriented Establishment Registration Act, at Tenn. Code Ann.§ 7- 51-1118, have been found reasonably related to the cost of administering and enforcing that law and were deemed constitutionally valid.[5]

The proposed state privilege tax that is the subject of this Opinion, however, differs from these constitutionally valid license fees associated with otherwise valid regulations intended to address deleterious secondary effects generally recognized as associated with adult-oriented establishments. The United States Supreme Court has stated that "[i]t could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional." *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 108, 63 S. Ct. 870 (1943); *see also Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 105 F.3d 1107, 1109 (6th Cir. 1997) ("It is equally clear that while the government may not tax the exercise of constitutionally protected activities, it may restrict the exercise of such activities by 'reasonable time, place, and manner regulations . . . .'"). In *Murdock,* an ordinance which required a religious group to pay a flat license fee as a condition to conducting its distribution activities was struck down as unconstitutional because the flat license fee was essentially "a flat tax imposed on the exercise of a privilege granted by the 'Bill of Rights.'" 319 U.S. at 113, 63 S. Ct. at 875. "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Id.* The flat license tax in *Murdock* was

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[4] *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728 (2002)(O'Connor, J.)(applied the intermediate scrutiny test to address validity of a City of Los Angeles zoning provision prohibiting two adult uses per authorized location); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289-302, 120 S. Ct. 1382, 1391-98 (2000) (O'Connor, J., with three justices joining, and two justices concurring in the judgment)(applied the *O'Brien* intermediate scrutiny test for constitutional validity when upholding a City of Erie Public Indecency Ordinance, which had the effect of requiring exotic dancers to wear pasties and g-strings); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456 (1991)(plurality); 501 U.S. at 582, 111 S.Ct. at 2468 (Souter, J., concurring)(applied the *O'Brien* intermediate scrutiny test in rejecting a challenge to the constitutionality of Indiana's public indecency statute, which had the effect of requiring dancers at adult-oriented entertainment establishments to wear pasties and a g-string),

[5] *See Angela Kaye Belew, et al. v. Giles County Adult-Oriented Establishment Board, et al.,* No. 1-01-0139 (M.D. Tenn. Sept. 30, 2005); *Paul Friedman, et al. v. Giles County Adult-Oriented Establishment Board, et al,* No. 1-00-0065 (M.D. Tenn., Sept. 29, 2005)(Judge Higgins)(upheld state Registration Act in substantial part); *Herbert L. Odle, d/b/a Sports Club, Inc., et al. v. Decatur County, Tennessee, et al.,* No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Judge Todd) (Order granting Defendants' Motion for Summary Judgment), *aff'd in part*, 421 F. 3d 386, 387-92 (6th Cir.2005) (upheld constitutionality of state Registration Act, while striking local ordinance).

fixed in amount and was unrelated to defraying the expenses of policing the activities in question. *Id.*, 319 U.S. at 113-14, 63 S.Ct. at 875. Noting that "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," the United States Supreme Court has rejected the justification of raising revenue for police services, which is "undoubtedly . . . an important government responsibility," as a justification for a content-based permit fee. *Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. 123, 135-36, 112 S. Ct. 2395, 2404 (1992). Moreover, "[a] tax based on the content of speech does not become more constitutional because it is a small tax." *Id.,* 505 U.S. at 136, 112 S.Ct. at 2405.

Notably, the First Amendment would not prohibit subjecting the patrons of these establishments to generally applicable taxes without creating constitutional problems. *See generally Minneapolis Star and Tribute Company v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 581, 103 S. Ct. 1365, 1369 (1983). For example, while the State may tax newspapers, magazines, and books, it may not differentiate among them based on their content. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722 (1987); *see also Leathers v. Medlock,* 499 U.S. 439, 447-48, 111 S.Ct. 1438, 1443-44 (1991)("a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech . . . [in light of] the danger of censorship"). Thus, the State could not impose a tax only on books containing sexually-oriented content. Similarly, while the State may tax all places of amusement, it may not tax only venues that feature adult-oriented entertainment, such as erotic dancing.

In the present case, the privilege tax would apply only to patrons of adult-oriented establishments and is not a generally applicable tax, such as a state or local sales tax. The proposed legislation would not create a fee to be utilized for defraying the cost of administrating the Adult-Oriented Establishment Act. Instead it would impose a tax limited to the exercise of First Amendment rights and based on the content of the expression. In light of the foregoing authorities, it is our opinion that a court would find this state privilege tax imposed only on adult-oriented establishments for the entry of each customer to be unconstitutional.

ROBERT E. COOPER, JR.
Attorney General and Reporter

CHARLES L. LEWIS
Deputy Attorney General

STEVEN A. HART
Special Counsel

Requested by:

The Honorable Mike Turner
State Representative
37 Legislative Plaza
Nashville, TN 37243-0151

EXHIBIT 6

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Third Session
May 16, 2005

The Committee on Commerce and Labor was called to order at 2:09 p.m., on Monday, May 16, 2005. Chairwoman Barbara Buckley presided in Room 4100 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4406 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Ms. Barbara Buckley, Chairwoman
Mr. John Oceguera, Vice Chairman
Ms. Francis Allen
Mr. Bernie Anderson
Mr. Morse Arberry Jr.
Mr. Marcus Conklin
Mrs. Heidi S. Gansert
Ms. Chris Giunchigliani
Mr. Lynn Hettrick
Ms. Kathy McClain
Mr. David Parks
Mr. Richard Perkins
Mr. Bob Seale
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Michael Schneider, Clark County Senatorial District No. 11
Senator Dennis Nolan, Clark County Senatorial District No. 9
Senator Dean Rhoads, Northern Nevada Senatorial District
Senator Dina Titus, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Brenda J. Erdoes, Legislative Counsel
Diane Thornton, Committee Policy Analyst
Russell Guindon, Deputy Fiscal Analyst
Vanessa Brown, Committee Attaché

OTHERS PRESENT:

Dino DiCianno, Deputy Director, Nevada Department of Taxation
Bobbette Bond, M.P.H., Government and Community Affairs Manager, Culinary Workers Health Fund
Jack Jeffrey, Legislative Advocate, representing Southern Nevada Building and Construction Trades Council
Bob Ostrovsky, Legislative Advocate, representing Employers Insurance Company of Nevada
Nancyann Leeder, Nevada Attorney for Injured Workers, Nevada Department of Business and Industry
Valerie Rosalin, Director, Consumer Health Assistance, Office of the Governor
Robin Drew, Private Citizen, Las Vegas, Nevada
Jim Nadeau, Legislative Advocate, representing the Nevada Association of Realtors
Charlie Mack, Owner and Broker, Mack Realty Commercial Specialists, Las Vegas, Nevada; and President, Nevada Real Estate Commission
Buffy Dreiling, Legal Counsel, Nevada Association of Realtors, Reno, Nevada
Gail Anderson, Administrator, Real Estate Division, Nevada Department of Business and Industry
Joseph Johnson, Legislative Advocate, representing Independent Power Corporation, Reno, Nevada; and representing the Toiyabe Chapter of the Sierra Club
Bill Bible, President, Nevada Resort Association, Las Vegas, Nevada
Denis Neilander, Chairman, Nevada State Gaming Control Board
Terry Graves, Legislative Advocate, representing The Beach Night Club, Las Vegas, Nevada
Don Logan, President and General Manager, Las Vegas 51s Baseball Club, Las Vegas, Nevada
Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada
Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada
Taylor Dew, Magical Hula Girls, Las Vegas, Nevada
Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada
Richard Clauser, Naturist Society and The Naturist Action Committee
Sabra Smith-Newby, Legislative Advocate, representing The City of Las Vegas, Las Vegas, Nevada
Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada
Don Soderberg, Chairman, Public Utilities Commission of Nevada
Jon Wellinghoff, Legislative Advocate, representing MGM/Mirage, Power Light Corporation, and Freus Corporation, Las Vegas, Nevada
Michael Yackira, Executive Vice President and Chief National Officer, Sierra Pacific Resources, Nevada Power, and Sierra Pacific Power Company, Nevada
Adriana Escobar-Chanos, Consumer Advocate and Chief Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General, State of Nevada
Mark Russell, Chairman, Nevada Renewable Energy and Conservation Task Force
Tim Carlson, Member, Renewable Energy Task Force
Fred Schmidt, Legislative Advocate, representing ORMAT, Sparks, Nevada
Dan Schochet, Vice President, ORMAT, Sparks, Nevada; and Geothermal Member, Nevada Renewable Energy Task Force
Robert Tretiak, Business Development Officer, International Energy Conservation, Las Vegas, Nevada

Chairwoman Buckley:
[Called the meeting to order. Roll called.] I'll open the hearing on S.B. 483.

Senate Bill 483: Establishes joint and severable liability for payment of certain taxes, interest and penalties administered by Department of Taxation. (BDR 32-394)

Dino DiCianno, Deputy Director, Nevada Department of Taxation:
Senate Bill 483 is brought to you on behalf of the Department of Taxation. The bill moves the provisions with respect to responsible party determinations from the sales tax provisions found in S.B. 372 and S.B. 374, and includes them into NRS [*Nevada Revised Statutes*] 360, which are the general administrative

Assemblyman Seale:
Are there other states on the West Coast that have an exemption on this kind of equipment as well?

Senator Rhoads:
I'm sure there are, but LCB [Legislative Counsel Bureau] staff would have to tell you that.

Chairwoman Buckley:
Thanks for that. We'll close the public hearing on S.B. 398 and open the hearing on S.B. 247.

Senate Bill 247 (1st Reprint): Revises provisions governing tax on live entertainment. (BDR 32-680)

Senator Dina Titus, Clark County Senatorial District No. 7:
The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada. It did, however, introduce us to the touring hula girls who are constantly before us and were helpful in bringing some of the problems with the original bill to our attention. For those reasons, I've introduced S.B. 247 as a reform of the entertainment tax.

The amended bill sets up parallel entertainment taxes, a live entertainment tax, and an adult entertainment tax. The live entertainment tax applies only to non-restricted gaming facilities. It's administered by the Gaming Control Board and exempts sporting events that occur in non-restricted gaming facilities, keeping the same tax that was in place before, at 10 percent on admission, drinks, food, and souvenirs.

The adult entertainment tax in Section 11 provides a tax at 10 percent on everything in non-restricted gaming and non-gaming facilities that offer live adult entertainment, which is defined in Section 8 of the statute. It would be administered by the Department of Taxation and it does not include houses of prostitution.

This eliminates seating requirements, which were problematic in the original bill. It eliminates sporting events, which are family oriented. We believe those are attended by local families, and eliminating this would help to get a second

NASCAR race, an all-star basketball game, and a baseball team. It also eliminates taverns and restaurants that have occasional entertainment on weekends such as a piano player or a small band. It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement. This is an industry that should pay its fair share because it does put additional burdens on society in terms of law enforcement and alcohol regulation. Because these people don't pay workers' comp or any benefits, their employees often become a burden on social services of the state, so it's only fair they should contribute.

[Senator Titus, continued.] An amendment (Exhibit D) is being brought forward by the Nevada Resort Association and others who would like us to put in statute the regulations that have worked over the last 18 months. The Tax Commission did a good job of working those out, so we don't want to start that process all over again. I support putting those regulations in the statute; it's a good amendment. There's also an amendment (Exhibit E) to clarify that mechanical rides like you find in the "*Star Trek* Experience" would not be considered live entertainment. I don't have any problem with that amendment, either.

There was some testimony on the Senate side by a group of naturists. I thought that meant people who hiked and picked flowers, but in the old days you called them nudist colonies. Certainly the intent of the live entertainment tax was not to get nudist colonies, but to get striptease clubs. If there's some way you can accommodate them, that is fine too.

If you are going to consider amendments to this bill, you might also consider amending the provision that's the severability clause. The clause says that if some part of this is found to be unconstitutional, it goes back to the old entertainment tax. We don't want that to happen, so it should be written to say if something is found unconstitutional the other part of the tax in this new bill would stand.

Chairwoman Buckley:
My biggest concern with the bill is its constitutionality. We already had an Assembly bill we passed that exempts the *Star Trek* ride. Now someone is claiming the free pens they give you at a convention should be taxed, so we put that in there. We clarified the strolling and the hula girls, and I don't think anyone opposes the Resort Association language (Exhibit D). We can clarify that wasn't the intent and everyone supports that. A lot of that was already in the Assembly bill that we sent to Ways and Means. I'm concerned that if we just put live adult entertainment, that might be held unconstitutional. I wonder if a better approach might be to pick out a few more things like the racetrack and

sporting events, but to delineate all those separate ones and leave it like that. We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than to put into our statute the phrase "adult entertainment," which puts a big red flag on it for the courts. What are your thoughts on that?

Senator Titus:
At one time, the brothels were included, so that would be broader. You can make the argument that this is a special kind of business that poses special kinds of social problems and therefore you can attach them. It's worth doing, and if an elected court in the state wants to challenge it, that's fine. None of the parts of the *Constitution* are absolute and they're all subject to interpretation. They interpreted the property tax we recently passed as maybe constitutional, and we can see how flexible the *Constitution* is in Nevada. I think it's worth the chance to put it in there.

Chairwoman Buckley:
I wonder if we could do it in a way that's a little broader but gets at the problems so we would avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at $1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their $6 million. Perhaps with the severability clause, but I hate to bring back anything we might want to fix now in terms of getting them excluded from the bill. It sounds like the goals are pretty much the same.

Senator Titus:
I agree with that. The 300-seat requirement has kept a lot of those clubs from paying. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The Fiscal Division in the Senate argued that if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue.

Chairwoman Buckley:
Could staff obtain the fiscal information on the live entertainment tax for the Committee members? It can't be by business, but it can be by group and you can distribute that to the entire Committee. Senator Titus, we thank you for your testimony. We don't have a problem with the *Star Trek* amendment (Exhibit E); we already approved codifying the definitions.

Bill Bible, President, Nevada Resort Association [NRA], Las Vegas, Nevada:
You've seen the proposed amendment (Exhibit D) which codifies some of the existing regulations resolved in a lot of work between the Department of Taxation, the Tax Commission, the Gaming Control Board, and the Nevada Gaming Commission to resolve the less-than-perfect bill that emerged from the 2003 Legislative Session. We had a concern if S.B. 247 included or excluded it from taxation, and it doesn't exclude them, but we have a problem in outdoor venues in Laughlin and northern Nevada. Clearly in an outdoor venue, if you have some type of entertainment function that would be subject to the live entertainment tax and you pay a live admission fee, that becomes a taxable event. You also have a number of activities that take place with a band where there's no admission charge. Typically, those events have been excluded from taxation through some of the regulatory structure, but it would be helpful if we had a specific amendment that indicated that in an outdoor venue there would be no applicability of tax unless there's actually an admission charge. This created a two-part threshold which is an admission charge, and the other being live entertainment present.

Chairwoman Buckley:
That's current law?

Bill Bible:
That's current law through interpretation. This was a very complicated bill and we spent a lot of time debating and refining the various points of the various regulatory bodies, which is why we want to codify some of those existing regulations. That would at least provide additional clarity, principally in northern Nevada, but to some extent in Laughlin, where we have outdoor events on a seasonal basis.

Denis Neilander, Chairman, Nevada State Gaming Control Board:
There are a number of exemptions we've created through the rule-making process, and if the Committee chooses to codify those, that would be appropriate. Mr. Bible mentioned the situation with outdoor venues, and most of them have been excluded from the tax because they fit under one of these other exemptions in the amendment. There is no one particular provision that just addresses outdoor venues and there could be an open question about whether or not it's a taxable event even if you don't have an admission charge. The intent has been to focus on venues where there are no admission charges, and that would be an appropriate amendment. There are amendments that are currently in S.B. 392, which hasn't come over yet, but if you choose to process this legislation, the Board would be able to provide you with those amendments.

[Denis Neilander, continued.] The original legislation housed the regulation authority with the Board instead of the Nevada Gaming Commission, and that was an oversight. While the Board adopted the regulations, we did it together with the Commission and the Nevada Tax Commission, so that would go back to the way we do rulemaking, which is to say the Nevada Gaming Commission does it.

There is a provision in the existing law that requires you to place funds in a certain trust account and you'll hear from the Department of Taxation and us. That's not necessary, we've never required it before, and it would be a simple repeal of that provision.

You can read certain provisions that require the taxes be paid on a cash basis within the month they're collected, but it's probably more appropriate to give licensees the option of paying on either an accrual or cash basis. Right now, we do allow licensees to pay some of those taxes on an accrual basis, so we give them the option.

Assemblyman Anderson:
I can think of several events that take place outside in my community because of the redevelopment agency. Are you saying within an outdoor area you have one part of it with a separate entry which requires an admission fee, compared to something that is provided free of charge to everyone who's at the event? If it's part of Reno's ArtTown and if you had to come into Idylwild Park to see the entertainment show, you'd have to pay for it, but if you stand on the river, you don't have to pay for it? So if you can stand outside and see it, you don't have to pay for it, but if you enter into a special area where you have designated seating, you do have to pay for it, and therefore it's subject to the entertainment tax?

Bill Bible:
That's correct. In outdoor venues, mostly in northern Nevada or Laughlin, there has been some difficulty in the interpretation of the statute. If you conceptualize with the Rib Cook-Off, you have a "village" sponsored by the Sparks Nugget, and maybe two other licensees. In order to get into that village, you have to go through a gate to control access and pay an admission fee. There is live entertainment present, so that is subject to tax. In a different situation in the parking lot of the Hilton during Hot August Nights, there are vending stands, a bandstand, and sales of food and beverages. There was an argument that this would be subject to an entertainment tax because you could hear and see the live entertainment even though you did not pay an admission fee. Because of the way the existing regulations were interpreted by the Nevada State Gaming Control Board, they did not choose to apply the tax, but it was their legal

construction of some of the language that was adopted through the rule-making process, so we want to codify it to make it clear that in an outdoor venue, unless there's restricted access and someone is charged an admission price, there is no applicability of the tax.

Assemblyman Anderson:
If we were to take the Candy Dance in Genoa and it had music and there was an admission charge, then it would—

Bill Bible:
Under this proposal, the Candy Dance will no longer be a valid example because that's not a licensed gaming premise. If that was a licensed gaming premise, if you had to pay an admission fee and there was live entertainment, everything from the food, beverages, merchandise, and the admission fee would be subject to the entertainment tax.

Assemblyman Anderson:
The Rib Cook-Off, because it's put on by the Nugget, fits into the scenario, as does the Big Easy, which is put on by the Silver Club. But Hot August Nights doesn't because it's not put on by a casino?

Bill Bible:
It's not necessarily who sponsors, but who has control of the property and what are considered the premises of the establishment. With the Rib Cook-Off, part of that is done within the property controlled by the City of Sparks, but they've agreed to allow the Nugget and the sponsoring entities control over that particular property. It becomes a technical issue as to the applicability of the tax. If you think about them within the parking lot of the Hilton, or the parking lot of the Atlantis across Virginia Street, those are considered part of the premises of licensed gaming establishments, even though they're not within the confines of the buildings.

Assemblyman Anderson:
This bill doesn't change when we are taxing those entertainments and when we aren't?

Bill Bible:
This will clarify the existing tax and make it abundantly clear that those outdoor venues, unless there is an admission charge and live entertainment, don't have applicability with the tax.

Chairwoman Buckley:
I'm going to ask our staff to do a comprehensive document combining these proposed amendments, the ones we already approved, the clarifications on further exempting some of the folks from the live entertainment tax, and prepare it for our Ways and Means staff. We should not just say only the adult entertainment tax, but look at all the ones we want to exempt and pass it out that way. We really get into constitutional trouble. I don't have a problem with any of these amendments, including the one from the nudist colony (Exhibit D). I don't think the current term was intended to sweep into this. If we could list all the exemptions, we can re-refer this to Ways and Means, which has our other live entertainment bill. The Chairman of Ways and Means can identify fiscal impact. Most of these things we've identified are de minimus and can be passed. At some point with the larger ticket items, there might be a concern, but we should list and price them all and re-refer it to Ways and Means and have all the bills in one Committee. Is this exempted, Brenda?

Brenda Erdoes:
I don't believe it is exempted at this time. We might need to ask Mark [Stevens, Fiscal Division] if he's going to declare this eligible for exemption.

Chairwoman Buckley:
What about the other bill that Mr. Parks presented testimony on? That's definitely exempted, so maybe we can exempt this one, too, if Mark is willing to look at it. The same issues are with the Assembly committee bill, so we could combine them all after we price them all and figure out which way we're going to go. Why don't we refer without recommendation, get the complete list, and then we'll see those members in Ways and Means or on the Floor as we put them all together so we don't delay it.

Assemblywoman Giunchigliani:
I'll email Mark to see if this will qualify for an exemption at the same time.

Assemblyman Anderson:
I appreciate the fact that we want to move with some speed and dispatch, but if we don't have it exempt ahead of time, we'll have a problem, and we need at least a couple of the amendments for clarity.

Chairwoman Buckley:
We'll hold it to Wednesday or Friday, but in the meantime I'd ask staff to go ahead and work on that list.

Assemblyman Perkins:
If there's a problem with an exemption, you can always refer it back to Committee, and if you hold onto it until Wednesday or Friday and you can't get the exemption, then we'll have other issues. As Ways and Means looks at the bills collectively to see what we want to do with the live entertainment tax in the state, it's best to remove that without recommendation. If it's not exemptible, then we can refer it back to Commerce and Labor and we'll deal with it here.

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO RE-REFER SENATE BILL 247 TO THE ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

Senator Titus:
There are a number of people who made a special trip up here to testify in favor of the bill. Would you let them come forward and put it on the record to make their trip worthwhile?

Chairwoman Buckley:
Of course.

Terry Graves, Legislative Advocate, representing The Beach Night Club, Las Vegas, Nevada:
We participated extensively during the interim hearings with the Tax Commission and the Gaming Commission on formulating the regulations. I did not have a chance to see what NRA [Nevada Resort Association] was proposing in that amendment (Exhibit D), but we certainly helped craft that. On the Senate side, we were supportive of Senator Titus's bill to try to clean up the live entertainment tax, and we appreciated her efforts.

Don Logan, President and General Manager, Las Vegas 51s Baseball Club, Las Vegas, Nevada:
We're the only professional team that's survived in Las Vegas for 23 years. We do provide the best fun, family-oriented entertainment in southern Nevada. The explosive growth and changes that have taken place down there make it more and more difficult each year, and the entertainment tax is one added burden that fell in our lap inadvertently last time. Unfortunately, we've had to pay the bill, and not having to do it would make it that much easier. Our margins

continue to shrink, and for us to provide entertainment with something real and wholesome in Las Vegas, it would help us.

Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada:
In my 40 years practicing law in Las Vegas, the term "entertainment capital" has been based on bringing tourists to Nevada and attracting them any way possible. We then get taxes from them by room taxes, sales taxes, gasoline taxes, gaming taxes, and every other way you can take money from their wallets. A few years ago, some people invested millions of dollars in a speedway and it's not the largest event in Nevada every year.

Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada:
I'm here in support of S.B. 247. The Las Vegas Motor Speedway provides an enormous contribution to Nevada's economy. The implementation of the live entertainment tax has proven to be unduly burdensome to our business. The passage of S.B. 247 not only will enhance our business, but it will put us back on an equal playing field with other speedways in an increasingly competitive environment. We've not yet received comparable numbers for the 2005 NASCAR Weekend; the 2004 Weekend put more than $142 million into Nevada's economy. That's a one-time expenditure that did not just affect Las Vegas Motor Speedway, but also gaming, hotels, restaurants, taxicabs, and retail shops. Furthermore, we employ roughly 2,500 people during the course of the weekend in March.

NASCAR's growth over the years has been astounding. These events routinely draw 100,000 to 175,000 people at various events across the country. Several members of the Legislature were in attendance at our March event. In the past year, speedways in the Los Angeles and Phoenix markets have been awarded with a second annual NASCAR event, an event that has put millions of dollars into their communities. A second date in Las Vegas, possibly in the fall, would be worth hundreds of millions of dollars to our state each year and would yield much more to our economy than the current live entertainment tax.

Occasionally we have issues where an event might get rained out, yet we've already paid the tax on it. As we sit here right now, there are ticket agents at the speedway who are putting numbers into computers, selling tickets, and entering in renewals for next year's event. If one day gets rained out and we have to refund money, the tax we are paying for next March's event is being paid at the end of this quarter, so it gets unwieldy. A lot of our tickets are tied to food, so the food is not taxed, but the ticket is. Another issue is a ticket may say $49, but because of our ticketing system, a $49 ticket has to be advertised

at the total price of $51.45, which is above that $50 threshold that any retailer wants to be below.

Chairwoman Buckley:
Could you tell us if the other states where other tracks are have any sort of tax?

Chris Powell:
The two markets that in the last 12 months have been awarded second NASCAR dates per year are in California in Arizona. They don't have an admissions tax.

Chairwoman Buckley:
What about ones with the first race? How does it compare to any one? Are there other places?

Chris Powell:
I'm just speaking to states whose speedways have recently been given second dates.

Chairwoman Buckley:
What other states have speedways with a tax?

Chris Powell:
Texas has some type of tax, but it's not just an admissions tax, it's everything involved in that category.

Chairwoman Buckley:
So it's more extensive than ours. The most convincing thing is last year it raised $1.5 million?

Chris Powell:
According to the Las Vegas Convention and Visitors Authority, which intercepts customers throughout the course of the event weekend, those three days in March pumped $142.5 million into the economy.

Chairwoman Buckley:
I'm saying that last year, the tax only rose. What you paid was relatively small, which means it doesn't affect the budget much; so I'm trying to make a point for you.

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada:
I appreciate your comments regarding the *Star Trek* amendment (Exhibit E). If this bill is processed in this fashion with regard to the effective date, it might make sense to make these exemptions that are being added effective upon passage and approval so they would be part of the chapter as it exists on June 30, 2005, if in fact there is any ruling on the unconstitutionality.

Chairwoman Buckley:
Let's move to Las Vegas.

Taylor Dew, Magical Hula Girls, Las Vegas, Nevada:
Lines 21 through 24 state "this bill provides that if the provisions of this bill concerning the tax on adult entertainment are held to be unconstitutional, the tax and all forms of live entertainment will be reinstated as currently set forth in provisions in NRS 368A." If this is removed, I'm in favor of this bill.

Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada:
If you think the Speedway had a relatively small total in tax, wait until you hear about ours. Don Logan of the 51s was right when he said that they are the only franchise in Las Vegas to make it in 20 years. We're relatively new at two years old, going into our third season. That's a factor that we looked at when we decided to put a minor league hockey team in Las Vegas. That history in Las Vegas has been very difficult.

Our business in minor league sports tends to be fragile. In hockey, we only have 36 dates, which means we're effectively closed 11 months out of the season, so we have to capture our revenues in order to survive in a brief period of time. We only have 36 three-hour opportunities to do that. Most of our customers are families who want affordable entertainment. That's how we thrive and that's why we're fragile as a business. The tax last year meant we had to charge and pass that tax on to our customers. Oftentimes, families buy four to six season tickets at $144 for a family of four, and one season ticket holder told me last season when the tax was applied, "That's basically an electric bill for me for one month." We're here to represent our contingency of families in Las Vegas who are looking for something to do with quality time with their kids, friends, and families, to preserve that and increase our chances of surviving.

Chairwoman Buckley:
Thank you, and good luck with the Wranglers. For those of us with children who want more options, we do appreciate you, so thanks very much.

Richard Clauser, Naturist Society and The Naturist Action Committee:
We've changed the terms of what we call ourselves. "Colonies" doesn't fit anymore, so we call ourselves resorts and groups. We are not opposed to the adult entertainment tax. If you look at nudist people, probably 95 percent wouldn't go to an adult entertainment place. Our concern is that the definition of "adult entertainment" is so broad that it would encompass a lot of activities of a nudist group or resort. Our activities are family-oriented and are no different than if you went to a clothed resort; our patrons simply don't have clothes on. Our concern is that it's so broad that we need to better define what constitutes "adult entertainment." I realize there are constitutional issues if you narrow it down too much, but it's so broad it could be onerous on some of these small groups, and some are trying to help and doing good things. The Tahoe area naturists are always out there helping with causes around the Lake, and if they have a fundraiser this could conceivably apply, and that's what our concern is.

Sabra Smith-Newby, Legislative Advocate, representing the City of Las Vegas, Nevada:
I'm in support of this bill.

Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada:
We're here to talk about the lack of constitutionality in this bill. This isn't a new issue for the courts. I dealt with an issue similar to this about 10 years ago as it related to a Clark County ordinance. The adult entertainment tax specifies a particular type of expressive content, and the courts have been very reluctant to allow that. It doesn't mean that adult entertainment venues are free from a general applicability tax, but taxing one particular type of content is not acceptable, and the courts have been clear about that. One possible exception in that is if taxes or fees can be specifically related to administrative costs for checking working cards, et cetera. This is not a revenue-neutral tax. It is not to relieve the state of certain burdens; the only exception might be to cover administrative costs. There is ample case law that proves this.

If this is passed in its current form, someone will challenge it. We at the ACLU [American Civil Liberties Union] don't involve ourselves in adult entertainment, but we would certainly lend our hand in opposing this. If it is dressed up differently, the impact is still to burden one particular type of business involving one type of content. That fact would weigh on the federal court, which would likely turn it down. The federal courts have dealt with these issues before, and we're sure this would fall as it has in other states.

Chairwoman Buckley:
I'll close the public hearing on S.B. 247. This bill is eligible for an exemption. I'd like to have the opportunity to work out the language of NRS 545, some more

exemptions, and have our Fiscal staff price it out. There are a lot of changes that will cost the state relatively little. Some changes will cost nothing at all, and that has to be part of the discussions of the money Committees.

ASSEMBLYMAN ANDERSON MOVED TO RE-REFER SENATE BILL 247 WITHOUT RECOMMENDATION TO THE ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYWOMAN GIUNCHIGLIANI SECONDED THE MOTION.

THE MOTION CARRIED. (Mr. Arberry and Mr. Perkins were not present for the vote.)

Chairwoman Buckley:
We'll open the hearing on S.B. 188.

Senate Bill 188 (1st Reprint): Makes various changes relating to energy. (BDR 58-364)

Don Soderberg, Chairman, Public Utilities Commission of Nevada (PUC):
Senate Bill 188 is a product of discussions that have gone on for 11 months, bringing together people involved in Nevada's energy business, energy regulation, and people with overall interest in how we are doing things. We weren't going to get together and talk about a number of regulatory issues, but we wanted to proactively address some of our bigger problems. One individual who participated in this group from the beginning was the late Richard Burdett, who was the Governor's Energy Advisor. Prior to that, he worked with us at the Commission. Mr. Burdett continually reminded us that we are spending about $3 billion a year in fossil fuels. This $3 billion for the most part is going out of the state. We kept asking ourselves what we can do about that, and we looked at the renewable portfolio standard, which was put together by the Legislature in past sessions, to reduce our dependence on fossil fuel to generate electricity. In Nevada, we're not doing a very good job of conservation.

We are called the Saudi Arabia of renewable energy in Nevada. Unfortunately, the Western United States, in which we are a leader when it comes to growth, is also the Saudi Arabia of energy waste, because over the last 25 years since the last oil crisis, we've lost the art of conserving. It's not something that is part of our daily lives and it's looked at from a dollar-and-cents point of view in

CIVIL COURT MINUTES

06-A-533273-C Deja Vu Showgirls Of Las Vegas vs Nevada Dept Of Taxation

CONTINUED FROM PAGE: 005

11/06/08 ??:?? ?M 03 STATUS CHECK: TRANSCRIPT/DECISION PENDING MOTIONS

HEARD BY: Jennifer Togliatti, Judge; Dept. 9

OFFICERS: Alan Paul Castle, Court Clerk

PARTIES: NO PARTIES PRESENT

COURT ORDERED, matter CONTINUED.

CLERK'S NOTE: Pursuant to 11/13/08 hearing, status check CONTINUED. ac/11/13/08

CONTINUED TO: 11/20/08 ??:?? ?M 04

CIVIL COURT MINUTES

06-A-533273-C Deja Vu Showgirls Of Las Vegas vs Nevada Dept Of Taxation

CONTINUED FROM PAGE: 006

11/13/08 09:00 AM 02 DEFT'S MOTION FOR SUMMARY JUDGMENT /6

HEARD BY: Jennifer Togliatti, Judge; Dept. 9

OFFICERS: Alan Paul Castle, Court Clerk
Yvette Lester, Reporter/Recorder

PARTIES:		
0001 P1	Deja Vu Showgirls Of Las Vegas LLC	N
004701	Sullivan, Diana L.	Y
??????	## Unknown ##	Y

Bradley Shafer, Esq., Plaintiff's counsel in Pro Hac Vice, also present. Colloquy regarding pending decision on motion to dismiss complaint. Parties to provide Court with binders referencing points highlighted in the pleadings. Arguments by counsel on motion for summary judgment. COURT ORDERED, matter continued to chambers for decision. Parties to be notified of decision by way of Minute Order.