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. A655979

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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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06/23/2011	Second Supplement to Defendants' Response to Plaintiffs' Motion for Clarification of Order (District Court Case Nos.: A533273 and A554970)	15	2805-2812
09/28/2009	Stipulation and Order for Extension of Time to Complete Discovery and to Continue Trial (Second Request) (District Court Case No.: A533273)	4	773-777
09/28/2009	Stipulation and Order for Extension of Time to Complete Discovery and to Continue Trial (Second Request)	4	778-782
03/24/2010	Stipulation and Order for Extension of Time to Complete Discovery (Third Request) (District Court Case No.: A533273)	9	1606-1611
04/27/2010	Stipulation and Order for Extension of Time to Complete Discovery (Third Request)	9	1616-1621
01/09/2007	Summons – Michelle Jacobs (District Court Case No.: A533273)	1	34-36
04/09/2007	Summons – Nevada Attorney General (District Court Case No.: A533273)	1	48-51
01/29/2008	Summons – Nevada Department of Taxation	2	281-282
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01/09/2007	Summons – Nevada Department of Taxation (District Court Case No.: A533273)	1	37-39
01/29/2008	Summons – Nevada State Board of Examiners	2	277-278
01/09/2007	Summons – Nevada State Board of Examiners (District Court Case No.: A533273)	1	43-45
01/29/2008	Summons – Nevada Tax Commission	2	279-280
01/09/2007	Summons – Nevada Tax Commission (District Court Case No.: A533273)	1	40-42
05/26/2011	Supplement to Defendants' Response to Plaintiffs' Motion for Clarification of Order (District Court Case Nos.: A533273 and A554970)	15	2758-2760
05/26/2011	Supplement to Defendants' Response to Plaintiffs' Motion for Clarification – Exhibit A *Southern California Edison* - Nevada Supreme Court Opinion (May 26, 2011)	15	2761-2776
04/29/2011	Supplement to Motion to Reconsider and to Clarify Order (District Court Case Nos.: A533273 and A554970)	15	2714-2718
04/29/2011	Supplement to Motion to Reconsider and to Clarify Order – Exhibit 1 Transcript of Hearing Held March 15, 2011	15	1719-2751
04/01/2010	Third Amended Order Setting Non-Jury Civil Trial (District Court Case Nos.: A533273)	9	1612-1613
11/13/2008	Transcript – Defendant's Motion for Summary Judgment – Entered 01/13/2012 (District Court Case No. A533273)	4	616-660
07/31/2008	Transcript – Defendants Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiners' Motion to Dismiss/and Motion for Preliminary Injunction – Entered 08/13/2008 (District Court Case No. A533273)	3	457-490
08/23/2011	Transcript – Hearing on Defendant's Motion for Partial Summary – Entered 10/24/2011 (District Court Case No.: A533273)	18	3519-3550
11/08/2011	Transcript – Hearing on Defendant's Motion	20	3844-3869

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03/15/2011	Transcript – Hearing on Motions – Entered 04/13/2011 (District Court Case No.: A533273)	14	2560-2591
12/28/2010	Transcript – Matters/Request of Court – Entered 01/13/2012 (District Court Case Nos. A533273 and A554970)	11	2002-2018
12/09/2010	Transcript - Plaintiff's Motion for Preliminary Injunction/Separation of Powers Issue, Discovery Issues; and Trial Scheduling Issues – Entered 02/25/2011 (District Court Case Nos.: A533273 and A554970)	10	1778-1843
08/12/2010	Transcript - Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendant / Nevada Department of Taxation's Opposition to Plaintiff's Objection to the Discovery Commissioner's Report and Recommendation Re: Plaintiffs' Motion to Compel Discovery of Defendants and Counter Motion to Strike – Entered 01/13/2012 (District Court Case No.: A533273)	10	1706-1769
01/13/2011	Transcript – Request of Court (Transferring Case to Judge Gonzalez) – Entered 02/25/2011 (District Court Case Nos. A533273 and A554970)	11	2026-2045
02/10/2011	Transcript – Status Check – Entered 02/22/2011	12	2138-2188
05/15/2007	Verification of D. Westwood (District Court Case No.: A533273)	1	109-111
05/15/2007	Verification of D.I. Food & Beverage (District Court Case No.: A533273)	1	121-123
05/15/2007	Verification of Daja Vu Showgirls (District Court Case No.: A533273)	1	106-108
05/15/2007	Verification of Don Krontz (District Court	1	118-120

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05/15/2007	Verification of K-Kel (District Court Case No.: A533273)	1	124-126
05/15/2007	Verification of Olympus Garden (District Court Case No.: A533273)	1	112-114
05/15/2007	Verification of Shac (District Court Case No.: A533273)	1	115-117
05/15/2007	Verification of the Power Company (District Court Case No.: A533273)	1	103-105
01/28/2009	Verified Amended Complaint (A533273) – Exhibit 1 Chapter 368A	4	704-720
01/28/2009	Verified Amended Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs (District Court Case No.: A533273)	4	689-703
12/19/2006	Verified Complaint (A533273) Exhibit A Chapter 368A	1	17-33
12/19/2006	Verified Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs (District Court Case No.: A533273)	1	1-16

Exhibit 5

AFFIDAVIT OF MATTHEW J. HOFFER

STATE OF MICHIGAN)
) ss.
COUNTY OF CLINTON)

MATTHEW J. HOFFER, being first duly sworn, deposes and says as follows:

1. That Affiant is an associate attorney of the law firm of SHAFER & ASSOCIATES, P.C., Counsel of record for Plaintiffs in this action, and has personal knowledge of the following.
2. That on September 1, 2009, Affiant contacted attorney Blake Doerr in "good faith" to resolve these matters pursuant to EDCR 2.34(d), after exchanging several emails regarding Defendants' discovery responses. Attorney Doerr stated that his office would not produce the unredacted documents requested by Plaintiffs, nor would his office produce documents for tax years other than 2004, and that our office should file a Motion to Compel.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 30th day of September, 2009

MATTHEW J. HOFFER, ESQ.

SUBSCRIBED and SWORN to before
me this 30th day of September 2009.

NOTARY PUBLIC
My Commission Expires Jan 31, 2013

Exhibit 6

DCRR
WILLIAM H. BROWN, ESQ.
Nevada Bar No.: 7623
SULLIVAN BROWN
330 South Third Street, Ste. 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 336-9371
Counsel for Plaintiffs

BRADLEY J. SHAFER,
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110
Telephone: (517) 886-6566
Facsimile: (517) 886-6565
Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

FILED
MAR 01 2010
BY:

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

Hearing Date: November 13, 2009
Hearing Time: 9:30 a.m.

Attorney for Plaintiff: William H. Brown, Esq. of SULLIVAN BROWN; and Bradley J. Shafer, Esq., of SHAFER & ASSOCIATES, P.C. (michigan counsel)

Attorney for Defendant: Blake A. Doerr, ~~Deputy Attorney General~~; Vivienne Rakowsky, Esq., ~~Deputy Attorney General~~, and David J. Pope, ~~Sr. Deputy Attorney General~~ of THE OFFICE OF THE ATTORNEY GENERAL

I.

FINDINGS

After review of the pleadings submitted regarding Plaintiffs' Motion to Compel Discovery of Defendants, and the arguments presented before me during the November 13, 2009, hearing, I find that the Defendants may not be compelled to produce confidential taxpayer information but must produce certain documents pursuant to my recommendations below.

II.

RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED that Plaintiff's Motion to Compel Answers to the Interrogatories and to produce un-redacted documents requested by the Plaintiffs be granted in part and denied in part.

IT IS FURTHER RECOMMENDED that within ten (10) days of the entry of the Court's order, the Nevada Department of Taxation shall provide a document that contains (for each tax year from 2003 until the present) a list of businesses that paid Live Entertainment Taxes, identified only by category, and the amount of Live Entertainment Tax each category of business paid. The categories should include, for purposes of illustration only: one time or annual events; sporting events; nightclubs; promoters; performing arts centers; raceways; and gentlemen's clubs. The document should identify whether each business paid the 5% or the 10% Live Entertainment Tax.

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

IT IS FURTHER RECOMMENDED that within ten (10) days of the entry of this Court's order, the Nevada Department of Taxation shall provide a document (for each tax year from 2003 until the present) identifying which percentage of the total Live Entertainment Tax collected by the Department of Taxation for that year was paid by gentlemen's clubs presenting adult entertainment. The document shall provide separate percentages for gentlemen's clubs paying the 5% and 10% Live Entertainment Tax. if agreed to by the parties as this was NOT part of the Recommendations at the hearing. BB

IT IS FURTHER RECOMMENDED that should any of the Plaintiffs wish to allow the Defendants to divulge any of their privileged and confidential taxpayer information, they must provide a written release to the Department which permits such disclosure.

IT IS FURTHER RECOMMENDED that no sanctions will be imposed in regard to Plaintiffs' motion, and the parties shall bear their own costs.

~~IT IS FURTHER RECOMMENDED that should Defendants comply with this Report and Recommendation, the Court should not strike any portion of their Opposition to Plaintiffs' Motion for Preliminary Injunction.~~ BB

~~IT IS FURTHER RECOMMENDED that the Court should not strike any portion of Plaintiffs' Motion to Compel.~~ BB

IT IS FURTHER RECOMMENDED that the remainder of Plaintiffs' Motion to Compel should be denied. Defendants' Countermotion to Strike was withdrawn. BB

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 22 day of February, 2010.

BB

DISCOVERY COMMISSIONER

However, the percentage of the LET tax paid by Adult entertainment groups must be disclosed, if this 5% or 10% tax is disclosed. BB

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

Submitted by:
SULLIVAN BROWN

WILLIAM H. BROWN, ESQ.
Nevada Bar No.: 7623
330 South Third Street, Ste. 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 336-9371
Counsel for Plaintiffs

Approved as to form and content by:
OFFICE OF THE ATTORNEY GENERAL

Blake A. Doerr, Deputy Attorney General

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

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Discovery Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the Clerk of the Court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.

A copy of the foregoing Discovery Commissioner's Report was:

X Mailed to the Plaintiffs/Defendants at the following address on the 23 day of Feb.

_____, 2010:

Blake A. Doerr, Esq.
Vivienne Rakowsky, Esq.
David J. Pope, Esq.
Office of the Attorney General
Deputy Attorney General
555 East Washington Ave., Ste. 3900
Las Vegas, NV 89135

WILLIAM H. BROWN, ESQ.
SULLIVAN BROWN
330 South Third Street, Ste. 860
Las Vegas, NV 89101

[redacted]

X Placed in the folder of Plaintiff's & Defendant's counsel in the Clerk's office on the 23 day of Feb, 2010.

STEVEN D. GRIERSON

By: Jennifer Lott
Deputy Clerk

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

Case Name: Deja Vu Showgirls of Las Vegas, LLC, et al. v. Nevada Department of Taxation, et al.

Case Number: A533273

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

___ The parties having waived the right to object thereto,

___ No timely objection having been received in the office of the Discovery Commissioner pursuant to E.D.C.R. 2.34(f),

___ Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

* * *

AND

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner (attached hereto).

___ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2010, at ___:___ a.m.

DATED this ___ day of _____, 2010.

_____
DISTRICT COURT JUDGE

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

Exhibit 7

NEVADA DEPARTMENT OF TAXATION

LIVE ENTERTAINMENT TAX RETURN - 200 TO 7499 OCCUPANCY NON-GAMING FACILITIES

TID No.:

MAIL ORIGINAL TO: NEVADA DEPARTMENT OF TAXATION
1550 COLLEGE PARKWAY SUITE 115
CARSON CITY NV 89706

For Department Use Only

Return for Month Ending:

Due on or Before:

If the name or address shown is incorrect, if the ownership or business location has changed, or if you are out of business, notify the Tax Examiner at 775-684-2130

IF POSTMARKED AFTER DUE DATE, PENALTY AND INTEREST WILL APPLY

A RETURN MUST BE FILED EVEN IF NO TAX LIABILITY EXISTS

1.	ADMISSION CHARGES	$
2.	SALES OF CONCESSIONS (NET OF ALL APPLICABLE SALES, USE & OTHER TAXES)	$
3.	TOTAL CALCULATED TAXABLE AMOUNT (LINE 1 + LINE 2)	$
4.	NET LIVE ENTERTAINMENT TAX (LINE 3 X 10%)	$
5.	PENALTY (SEE INSTRUCTIONS FOR RATE)	$
6.	INTEREST (LINE 4 X 1% X # MONTHS PAST DUE)	$
7.	PLUS LIABILITIES ESTABLISHED BY THE DEPARTMENT	$
8.	LESS CREDIT(S) APPROVED BY THE DEPARTMENT	$
9.	TOTAL AMOUNT DUE AND PAYABLE	$
10.	TOTAL AMOUNT REMITTED WITH RETURN	$

MAKE CHECKS PAYABLE TO:
NEVADA DEPARTMENT OF TAXATION

I HEREBY CERTIFY THAT THIS RETURN INCLUDING ANY ACCOMPANYING SCHEDULE AND STATEMENTS HAS BEEN EXAMINED BY ME AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IS A TRUE, CORRECT AND COMPLETE RETURN.
RETURN MUST BE SIGNED

SIGNATURE OF TAXPAYER OR AUTHORIZED AGENT | DATE | PHONE NUMBER (WITH AREA CODE)

TITLE | FEDERAL TAX ID NUMBER (EIN OR SSN)

PLEASE SUBMIT IN THE ENVELOPE PROVIDED

LET 200-7499
LET-1 RETURN
REVISED 4/13/07

LIVE ENTERTAINMENT TAX INSTRUCTIONS
NON-GAMING FACILITIES WITH OCCUPANCY OF 200 TO 7,499

CALCULATION OF ADMISSION CHARGES:

Taxable admission charges include, without limitation, any entertainment fees, cover charges, table reservation fees, or required minimum purchase of food, refreshment or merchandise paid to access a facility where live entertainment is provided.

LINE 1. Enter the total taxable admission charges for the month.

LINE 2. Enter the total sales amount of food, refreshment and merchandise sold during taxable live entertainment status (net of all applicable sales, use and other taxes).

LINE 3. Enter the total taxable amount (Line 1 + Line 2).

LINE 4. Enter the tax amount due (Line 3 x 10% (.10)).

LINE 5. If this return will not be submitted/postmarked and the taxes paid on or before the due date as shown on the face of this return, the amount of penalty due is a) For returns with Period(s) Ending prior to and including 3/31/07 the Penalty is 10%: b) For returns with Period(s) Ending 4/30/07 and after; the amount of penalty due is based on the number of days late the payment is made per NAC 360.395. The maximum penalty amount is 10%.

Number of days late	Penalty Percentage	Multiply by:
1 - 10	2%	0.02
11 - 15	4%	0.04
16 - 20	6%	0.06
21- 30	8%	0.08
31 +	10%	0.10

Determine the number of days late the payment is, and multiply the net tax owed by the appropriate rate based on the table above. The result is the amount of penalty that should be entered. For example, the taxes were due January 31, but not paid until February 15. The number of days late is 15 so the penalty is 4%.

LINE 6. If this return will not be postmarked and the taxes paid on or before the due date as shown on the face of this return, interest of 1% (.01) per month or fraction of a month late is due. The interest is calculated on the tax due (line 4).

LINE 7. Enter only those liabilities that have been established for prior months by the Department. Contact the Department to verify liabilities.

LINE 8. Enter only those credit(s) that have been approved by the Department. Contact the Department to verify before taking credit.

LINE 9. Total Lines 4, 5, 6, 7 and then subtract Line 8 and enter result.

LINE 10. Enter the amount remitted with return.

ADDITIONAL INFORMATION:

If the occupancy is more than 7499 please use the Live Entertainment Tax return for occupancy of 7500 or more, LET - 2 Return. If your location is licensed by the Gaming Control Board contact them as the tax is due to Gaming not the Department.

If you have questions concerning this return, please call the Live Entertainment Tax Examiner at 775-684-2130.
The Department of Taxation Carson City Office number is 775-684-2000.

LET 200-7499
LET -1 RETURN
REVISED 4/13/07

NEVADA DEPARTMENT OF TAXATION

LIVE ENTERTAINMENT TAX RETURN - 200 TO 7499 OCCUPANCY NON-GAMING FACILITIES

TID No.:

MAIL ORIGINAL TO: NEVADA DEPARTMENT OF TAXATION
1550 COLLEGE PARKWAY SUITE 115
CARSON CITY NV 89706

For Department Use Only

Return for Month Ending:

Due on or Before:

If the name or address shown is incorrect, if the ownership or business location has changed, or if you are out of business, notify the Tax Examiner at 775-684-2130

IF POSTMARKED AFTER DUE DATE, PENALTY AND INTEREST WILL APPLY

A RETURN MUST BE FILED EVEN IF NO TAX LIABILITY EXISTS

1.	ADMISSION CHARGES	$
2.	SALES OF CONCESSIONS (NET OF ALL APPLICABLE SALES, USE & OTHER TAXES)	$
3.	TOTAL CALCULATED TAXABLE AMOUNT (LINE 1 + LINE 2)	$
4.	NET LIVE ENTERTAINMENT TAX (LINE 3 X 10%)	$
5.	PENALTY (SEE INSTRUCTIONS FOR RATE)	$
6.	INTEREST (LINE 4 X 1% X # MONTHS PAST DUE)	$
7.	PLUS LIABILITIES ESTABLISHED BY THE DEPARTMENT	$
8.	LESS CREDIT(S) APPROVED BY THE DEPARTMENT	$
9.	TOTAL AMOUNT DUE AND PAYABLE	$
10.	TOTAL AMOUNT REMITTED WITH RETURN	$

MAKE CHECKS PAYABLE TO:
NEVADA DEPARTMENT OF TAXATION

I HEREBY CERTIFY THAT THIS RETURN INCLUDING ANY ACCOMPANYING SCHEDULE AND STATEMENTS HAS BEEN EXAMINED BY ME AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IS A TRUE, CORRECT AND COMPLETE RETURN.
RETURN MUST BE SIGNED

SIGNATURE OF TAXPAYER OR AUTHORIZED AGENT _____ DATE _____ PHONE NUMBER (WITH AREA CODE)

TITLE _____ FEDERAL TAX ID NUMBER (EIN OR SSN)

PLEASE SUBMIT IN THE ENVELOPE PROVIDED

LET 200-7499
LET -1 RETURN
REVISED 4/13/07

LIVE ENTERTAINMENT TAX INSTRUCTIONS
NON-GAMING FACILITIES WITH OCCUPANCY OF 200 TO 7,499

CALCULATION OF ADMISSION CHARGES:

Taxable admission charges include, without limitation, any entertainment fees, cover charges, table reservation fees, or required minimum purchase of food, refreshment or merchandise paid to access a facility where live entertainment is provided.

LINE 1. Enter the total taxable admission charges for the month.

LINE 2. Enter the total sales amount of food, refreshment and merchandise sold during taxable live entertainment status (net of all applicable sales, use and other taxes).

LINE 3. Enter the total taxable amount (Line 1 + Line 2).

LINE 4. Enter the tax amount due (Line 3 x 10% (.10)).

LINE 5. If this return will not be submitted/postmarked and the taxes paid on or before the due date as shown on the face of this return, the amount of penalty due is a) For returns with Period(s) Ending prior to and including 3/31/07 the Penalty is 10%: b) For returns with Period(s) Ending 4/30/07 and after; the amount of penalty due is based on the number of days late the payment is made per NAC 360.395. The maximum penalty amount is 10%.

Number of days late	Penalty Percentage	Multiply by:
1 - 10	2%	0.02
11 - 15	4%	0.04
16 - 20	6%	0.06
21 - 30	8%	0.08
31 +	10%	0.10

Determine the number of days late the payment is, and multiply the net tax owed by the appropriate rate based on the table above. The result is the amount of penalty that should be entered. For example, the taxes were due January 31, but not paid until February 15. The number of days late is 15 so the penalty is 4%.

LINE 6. If this return will not be postmarked and the taxes paid on or before the due date as shown on the face of this return, interest of 1% (.01) per month or fraction of a month late is due. The interest is calculated on the tax due (line 4).

LINE 7. Enter only those liabilities that have been established for prior months by the Department. Contact the Department to verify liabilities.

LINE 8. Enter only those credit(s) that have been approved by the Department. Contact the Department to verify before taking credit.

LINE 9. Total Lines 4, 5, 6, 7 and then subtract Line 8 and enter result.

LINE 10. Enter the amount remitted with return.

ADDITIONAL INFORMATION:

If the occupancy is more than 7499 please use the Live Entertainment Tax return for occupancy of 7500 or more, LET - 2 Return. If your location is licensed by the Gaming Control Board contact them as the tax is due to Gaming not the Department.

If you have questions concerning this return, please call the Live Entertainment Tax Examiner at 775-684-2130.
The Department of Taxation Carson City Office number is 775-684-2000.

LET 200-7499
LET -1 RETURN
REVISED 4/13/07

NEVADA DEPARTMENT OF TAXATION

LIVE ENTERTAINMENT TAX RETURN - 7500 OR MORE OCCUPANCY NON-GAMING FACILITIES

TID No.:

MAIL ORIGINAL TO: NEVADA DEPARTMENT OF TAXATION
1550 COLLEGE PARKWAY SUITE 115
CARSON CITY NV 89706

For Department Use Only

Return for Month Ending: _____

Due on or Before:

If the name or address shown is incorrect, if the ownership or business location has changed, or if you are out of business, notify the Tax Examiner at 775-684-2130

IF POSTMARKED AFTER DUE DATE, PENALTY AND INTEREST WILL APPLY

A RETURN MUST BE FILED EVEN IF NO TAX LIABILITY EXISTS

1.	ADMISSION CHARGES	$
2.	NET LIVE ENTERTAINMENT TAX (LINE 1 X 5%)	$
3.	PENALTY (SEE INSTRUCTIONS FOR RATE)	$
4.	INTEREST (LINE 2 X 1% X # MONTHS PAST DUE)	$
5.	PLUS LIABILITIES ESTABLISHED BY THE DEPARTMENT	$
6.	LESS CREDIT(S) APPROVED BY THE DEPARTMENT	$
7.	TOTAL AMOUNT DUE AND PAYABLE	$
8.	TOTAL AMOUNT REMITTED WITH RETURN	$

MAKE CHECKS PAYABLE TO:
NEVADA DEPARTMENT OF TAXATION

I HEREBY CERTIFY THAT THIS RETURN INCLUDING ANY ACCOMPANYING SCHEDULE AND STATEMENTS HAS BEEN EXAMINED BY ME AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IS A TRUE, CORRECT AND COMPLETE RETURN.
RETURN MUST BE SIGNED

SIGNATURE OF TAXPAYER OR AUTHORIZED AGENT _____ DATE _____ PHONE NUMBER (WITH AREA CODE)

TITLE _____ FEDERAL TAX ID NUMBER (EIN OR SSN)

PLEASE SUBMIT IN THE ENVELOPE PROVIDED

LET - 7500 or More
LET - 2 RETURN
REVISED 4/16/07

LIVE ENTERTAINMENT TAX INSTRUCTIONS
NON-GAMING FACILITIES WITH OCCUPANCY 7,500 OR MORE

CALCULATION OF ADMISSION CHARGES:

Taxable admission charges include, without limitation, any entertainment fees, cover charges, table reservation fees, or required minimum purchase of food, refreshment or merchandise paid to access a facility where live entertainment is provided.

LINE 1. Enter the total taxable admission charges for the month.

LINE 2. Enter the tax amount due (Line 1 x 5% (.05)).

LINE 3. If this return will not be submitted/postmarked and the taxes paid on or before the due date as shown on the face of this return, the amount of penalty due is a) For returns with Period(s) Ending prior to and including 3/31/07 the Penalty is 10%: b) For Returns with Period(s) Ending 4/30/07 and after; the amount of penalty due is based on the number of days late the payment is made per NAC 360.395. The maximum penalty amount is 10%.

Number of days late	Penalty Percentage	Multiply by:
1 - 10	2%	0.02
11 - 15	4%	0.04
16 - 20	6%	0.06
21- 30	8%	0.08
31 +	10%	0.10

Determine the number of days late the payment is, and multiply the net tax owed by the appropriate rate based on the table above. The result is the amount of penalty that should be entered. For example, the taxes were due January 31, but not paid until February 15. The number of days late is 15 so the penalty is 4%.

LINE 4. If this return will not be postmarked and the taxes paid on or before the due date as shown on the face of this return, interest of 1% (.01) per month or fraction of a month late is due. The interest is calculated on the tax due (line 2).

LINE 5. Enter only those liabilities that have been established for prior months by the Department. Contact the Department to verify liabilities.

LINE 6. Enter only those credit(s) that have been approved by the Department. Contact the Department to verify before taking credit.

LINE 7. Total Lines 2, 3, 4, 5, and then subtract Line 6 and enter the result.

LINE 8. Enter the amount remitted with return.

ADDITIONAL INFORMATION:

If the occupancy is less than 7500 please use the Live Entertainment Tax return for occupancy of 200 - 7499, LET - 1 return.

If your location is licensed by the Gaming Control Board contact them as the tax is due to Gaming not the Department.

If you have questions concerning this return, please call the Live Entertainment Tax Examiner at 775-684-2130.

The Department of Taxation Carson City Office number is 775-684-2000.

LET - 7500 or More
LET - 2 RETURN
REVISED 4/16/07

ROC
WILLIAM H. BROWN, ESQ.
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Counsel for Plaintiffs

BRADLEY J. SHAFER,
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DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJA 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

RECEIPT OF COPY

RECEIPT OF COPY of the **PLAINTIFFS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS** is hereby received and acknowledged this 4th day of March, 2010:

OFFICE OF THE ATTORNEY GENERAL
Catherine Cortez Masto, Attorney General

By _____
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Sr. Deputy Attorney General
Blake A. Doerr
Deputy Attorney General
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Attorneys for the Nevada Defendants

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DISTRICT COURT

CLARK COUNTY, 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 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, L.L.C., 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 **NEVADA DEPARTMENT OF TAXATION'S OPPOSITION TO PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS AND COUNTER MOTION TO STRIKE** Date of Hearing _____, 2010 Time of Hearing _____

NEVADA DEPARTMENT OF TAXATION'S OPPOSITION TO PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS AND COUNTER MOTION TO STRIKE

COMES NOW Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS by and through its attorney Catherine Cortez Masto, Attorney General, and Blake Doerr, Deputy

Attorney General's Office
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Attorney General, hereby submits its Opposition to Plaintiff's Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants [hereinafter "Plaintiffs' Objection"].

This Opposition to Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation and Counter Motion to Strike is made and based on all pleadings and papers on file herein, the attached memorandum of Points and Authorities, and any oral argument that this Honorable Court may allow at the time of the Hearing in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Plaintiff's are owners of a number of exotic dancing establishments allege that the Live Entertainment Tax (hereinafter "LET") established by Chapter 368A of the Nevada Revised Statutes is an impermissible state tax. The Defendants are various agencies of the State of Nevada which administer and collect the LET and approve refunds thereof.

The original Complaint was filed on or about December 19, 2006 (A533273), by eight Plaintiff gentlemen's clubs alleging that the LET violated both the State and Federal Constitution. A second almost identical Complaint (A554970) was filed on or about January 9, 2008 by six of the same plaintiffs. The cases have never been consolidated. Both Complaints have been answered by the Defendants. On or about January 29, 2009, the Plaintiffs amended the Complaints in both matters in order to assert that the LET tax violates the Plaintiffs' rights, both facially and as applied. On or about May 11, 2009, this Court Ordered that the Plaintiffs may file an Amended Complaint in A533273 to add a claim that the Nevada Tax Commission violated the Plaintiffs' due process rights by not affording a fair hearing. On or about May 13, 2009, the Court ordered that the Plaintiffs may amend the Complaint in A554970. From the time that the first case was filed in December 2006, and for two and one half years, until March 2009, no discovery had taken place. Based on the fact that this action was a facial challenge to the statute, the Department did not need to conduct any discovery.

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The Joint Case Conference Report was filed in both A554970 and A533273 on or about October 20, 2008. Although the cases have not been consolidated, the discovery deadlines are the same for both matters. On or about December 2, 2008, the discovery deadline was set at April 27, 2009. On or about March 27, 2009, exactly thirty days prior to the close of discovery, the Department received a Request for Production and the Plaintiff's first set of Interrogatories. *See* Exhibit 1 and Exhibit 2 to Plaintiffs' Objection. Both the interrogatories and requests for production were extremely comprehensive, and it became obvious from the outset that the Department would not be able to provide the responses nor the information within thirty days as required under the Rules, or by the April 27, 2009 close of discovery.

This issue was immediately brought to the Plaintiffs attention, and counsel for the Plaintiffs agreed to extend the time for the responses. In addition, on or about May 9, 2009, the parties entered into a stipulation to extend discovery due to Plaintiffs' counsel's pending knee surgery. At the time, the Plaintiffs' agreed to extend the time to respond to the Interrogatories and Requests for Production until July 3, 2009. Pursuant to a discovery conference that took place on June 17, 2009, the close of discovery was extended to September 30, 2009, and was extended again until February 26, 2010. The parties are in the process of preparing a stipulation to continue discovery pending the outcome of the Plaintiffs' Objections.

During the period between March 27, 2009, when the Plaintiff served its Interrogatories and Requests for Production, and the date that the responses and discovery were produced, counsel for the Department was in constant contact with counsel for the Plaintiffs to discuss discovery. The Plaintiffs accommodated the Department by granting additional time to gather and produce the documents. The Plaintiffs only concern was the time to review the documents prior to taking depositions. The Department responded that it will be very lenient with the notice requirements and dates for the depositions, and make any accommodations it can to promote a timely completion of discovery. Plaintiffs counsel repeatedly agreed to allow the

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Department time, and never once voiced any objection to the time it was taking to gather the documents and prepare the responses.

On or about August 15, 2009, the Department served its responses to the Interrogatories and to the Requests for Production. The Request for Production included 1,192 pages of documents, along with an index of the documents and a detailed privilege log describing the specific document and the statutory bases for asserting various privileges. *See* Index and Privilege Log, attached hereto as **Exhibit "A".**

Upon receipt of the discovery and responses, counsel for the Plaintiff contacted counsel for the Department and stated that he was not pleased with the amount of redaction on a number of the documents. Counsel for the Department explained that by law, the Department cannot divulge any information related to an individual taxpayer. *See* generally NRS 372.750, NRS 360.247. In fact, it is a misdemeanor to release this information, NRS 372.750. In addition to the above statutes, the amount of information that can be produced by the Department with regards to the LET tax is further statutorily constrained by NRS 368.180A, and the privileges contained in NRS 49.025, NRS 49.095 and NRS 49.105. With regard to the privileges contained in NRS 49.025, NRS 49.095 and 49.105, **these privileges belong to the taxpayer and not the Department**. NRS 49.105.

A review of the entire disclosure, instead of just the redacted portions that were produced by the Plaintiff as Exhibit 4 to the Objection will make it obvious that it took the efforts of quite a number of people and a considerable amount of time to gather, review, redact and prepare the documents requested by Plaintiffs for production. A great deal of time and effort went into the review of each request, including a determination of the documents that apply to the request, and specifically what information contained on each document can be disclosed. Based on the statutory constraints placed upon the Department, it is patently obvious that there is no intent to hide any discoverable information.

A number of discussions have taken place between counsel for the Plaintiffs and the Department since the disclosures. In fact, counsel for the Plaintiff stated that he performs

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work for other clients with regards to tax, and is fully aware that taxpayer information is confidential and privileged. Moreover, any attorney is aware that attorney - client information is privileged, and the privilege belongs to the client, not the attorney. Yet the Plaintiff is asking this Court to rule against public policy, and order the Department to violate statutes, ignore privileges, violate the public trust, and be sanctioned for properly and lawfully protecting confidential taxpayer information.

As history to the Plaintiffs' instant motion, on or about September 30, 2009, the Plaintiffs' filed a Motion to Compel Discovery of Defendants. The Defendants filed a timely Opposition, and oral argument was heard by the Discovery Commissioner on or about November 13, 2009. During the hearing on the matter, the Discovery Commissioner made in abundantly clear that she was not going to recommend that the Department of Taxation divulge confidential individual taxpayer information. In addition, because the question at issue here is whether gentlemen's clubs as a whole are being singled out for the LET tax, and not whether a specific individual gentlemen's club is being singled out, after listening to argument on the matter, the Discovery Commissioner stated that the Plaintiffs would have sufficient information if the Department would provide the following:

1. A list identifying the category of businesses, and the amount of LET tax that each category pays;

2. A list identifying the percentage of the total LET tax collected by the Department of Taxation for gentlemen's clubs for each year starting in 2003; and

3. Should any of the Plaintiffs wish to allow the Defendants to divulge any of their privileged and confidential taxpayer information, they are to provide a written release to the Department to permit such disclosure.

The balance of the Plaintiffs' Motion to Compel was denied, including, but not limited to the Plaintiffs' request for sanctions, the Plaintiffs' request to produce the documents in un-redacted form, and the Plaintiffs' request for costs. In return, the Defense withdrew its Counter Motion to Strike.

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The Plaintiffs' were asked to prepare the Report and Recommendation. After several reminders by the Defendants, the Plaintiffs' finally provided a proposed Report and Recommendation only days before the close of discovery. On or about, February 22, 2010, the Discovery Commissioner issued the Report and Recommendation, making some changes and eliminating a portion of the agreement which required the Department to separate the percentages for gentlemen's clubs paying the 5% and 10% LET, stating that this was not part of the recommendation at the hearing. *See* Report and Recommendation, attached hereto as **Exhibit "B".**

Pursuant to Local Rules of the Eighth Judicial District Court [EDCR], a party can file written objections to the discovery commissioner's report. EDCR 2.34(f). On March 3, 2010, Plaintiff's filed the instant Objection to the Discovery Commissioner's Report and Recommendation, which is nearly an identical copy of its September 30, 2009 Motion to Compel. In its Objection, the Plaintiffs again present nearly seven pages arguing the merits of its case.[1] (Page 3, lines 18 – 29, page 4, line – 11 through page 10, line 7). Plaintiffs' argument of facts and law which allegedly support its case is not relevant to the discovery matters at issue here. The Plaintiffs' arguments are inappropriate at this time in the litigation, and as a result, the Defense hereby renews its Motion to Strike the portion of the Plaintiffs' Objection to the Report and Recommendation Motion which argues the merits of its case, and respectfully request that this Court ignore the Plaintiffs' attempt to introduce collateral matters not related to the discovery issues in the Plaintiffs' Objection.

Furthermore, the Department hereby requests that the Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants be denied in its entirety because: 1) individual taxpayer's information cannot lawfully be disclosed by any member, employee or agent of the Department or Commission; and 2) sanctions should not be imposed because there was no willful attempt to withhold any lawful Discovery. Additionally, the District Court should not

[1] The Plaintiffs have even added to its argument on the merits.

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strike the portion of the Defendant's Opposition to the Plaintiffs' Motion for Preliminary Injunction as requested in the Plaintiffs' Motion (pages 21 and 22 of Plaintiffs' Motion to Compel), since the information provided in the Opposition Exhibits A & B of the Opposition to Motion for Preliminary Injunction are public documents gathered from the website of the Department of Taxation. *See* Governors Budget and Annual report 2007 – 2008 and http://tax.state.nv.us/ documents/annualreport2007, attached hereto as **Exhibit "C".**

ARGUMENT

The Discovery Commissioner has the Duty to First Hear All Discovery Disputes and Make a Report and Recommendation.

Pursuant to NRCP 16.1(d)(1) all discovery disputes, with limited exceptions, must first be heard by the Discovery Commissioner. After hearing the dispute, the Discovery Commissioner must file a report with the recommendations for resolution of each unresolved dispute. NRCP 16.1(d)(2), EDCR 2.34(f).

During the hearing on the matter, the Discovery Commissioner stated that she had reviewed the Plaintiffs' Motion to Compel and Exhibits, as well as the Defendants Opposition and exhibits, and immediately stated that she was not going to recommend that the Department of Taxation provide any individual taxpayer information or reports that are confidential and privileged pursuant to law.

The Discovery Commissioner's recommendation is correct. The Discovery Commissioner reviewed the pleadings and exhibits and wisely determined that if the Department prepares and provides a list of the type of businesses and the percentage of LET Tax that they pay, as well as the category of gentlemen's clubs and the percentage of LET tax paid by all gentlemen's clubs as a whole compared with all other types of businesses that pay LET tax, the Plaintiffs' would have the information they require. In its Objection, the Plaintiffs have failed to show how information related to individual taxpayers is relevant to its claim that

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gentlemen's clubs as a whole are unconstitutionally being singled out in order to chill their free expression.[2]

Because the Plaintiffs have filed a written Objection to the portion of the Report and Recommendation "denying the remainder of the Plaintiffs' Motion to Compel, and have moved this Court to Order" that the Defendants produce confidential taxpayer information in un-redacted form, that the Court Order the Defendants to be sanctioned, and that the Court strike portions of the Defendants Opposition to the Plaintiffs' Motion for Injunction, the Department of Taxation will address the specific issues raised in the Plaintiffs' Motion to Compel as well as the Plaintiffs' Opposition to the Discovery Commissioners Report and Recommendation.

I. Plaintiffs' Motion for Production of Documents

Plaintiffs seek information that cannot lawfully be provided. NRCP 26(b)(1) gives the parties the ability to "obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter....: NRCP 26(b)(1) (emphasis added). Here, the information the Plaintiffs have requested is both confidential and privileged, and most important, the Plaintiff has failed to show how information related to specific taxpayers, such as; individual business tax returns and reports (Requests No.'s 4, 5, 6, and 7), how much "individual payees" pay (Request No. 8), inquiries by specific taxpayers related to their scope of business (Request No 23), individual business entities who owe live entertainment tax (Request No. 25), and tax information regarding communications between the Department and individual taxpayers (Request No. 26), is "reasonably calculated to lead to the discovery of admissible evidence" to its claims that the LET tax is unconstitutional. Contrary to the request by the Plaintiffs, the Department cannot furnish information regarding the specific businesses that have not joined this lawsuit which have applied for exemptions, or are paying LET tax, as they have requested at page 19, lines 24 – 27 of the Plaintiffs' Objection, as this is just the type of confidential taxpayer information that the statutes require be kept confidential. NRS 368A.180, NRS

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[2] Which is as senseless as an argument that a tax on gaming unconstitutionally singles out gambling establishments and is an attempt to chill the freedom to gamble, or that a tax on mining unconstitutionally singles out mining in order to have a chilling effect on mining.

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49.025. Furthermore, the Department cannot furnish the names of businesses paying LET and how much individual businesses pay, as requested at Page 13, lines 26 - 28 and page 14, lines 1 -3 of the Plaintiffs' Objection because the Department cannot give information that will allow even the identification of a particular taxpayer or document. NRS 368A.180(2)(c) ("Publication of statistics so classified as to prevent the identification of a particular person or document.").

Moreover, the Plaintiffs' requests for production are extremely overbroad. For example, asking for "any and all" documents related to any payments of the LET tax seek reports and confidential information related to individual taxpayers. (*See e.g.* Requests No. 1 and 2). Furthermore, many of the documents requested were available from the Plaintiffs themselves, as there are eight[3] gentlemen's club Plaintiffs who should have filed LET tax returns for many years. It is noteworthy that while the Department is prohibited from divulging taxpayer information, the Plaintiffs are free to share their LET tax information with each other. With regards to taxpayers who have chosen not to join the instant lawsuit, contrary to the desire of the Plaintiffs to learn confidential information about similarly situated taxpayers, the "business name" and "type of business" of specifically "who" is paying LET and when it is paid as requested by the Plaintiffs at page 19, lines 1 - 8, is confidential and privileged pursuant to both NRS 368A.180 and NRS 49.025.

Furthermore, the Plaintiffs have asked the Department to provide, and the Department has provided, at great expense in both time and materials, information that is widely available on the internet or from the Legislative Counsel Bureau, which is a public, less burdensome and less expensive source. (Request No.'s 9, 10, 11, 12, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 22). With respect to the publically available documents, not only did the Department provide hard copies of these documents at the expense of the Department, but provided the websites where the Plaintiffs can get the information themselves.

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[3] Déjà vu Showgirls, Little Darlings, Spearmint Rhino, Olympic Garden, Sapphire, Crazy Horse Too, Treasures, and Scores.

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The Plaintiffs' suggestion of a protective order, at page 19, lines 9 – 25, does not apply in this case. Neither the statutes nor the regulations that apply to the information in the custody and control of the Department allow for a protective order. *See generally,* Chapter 368A. Simply stated, information related to individual taxpayers or taxpayer's reports cannot be divulged, even under a protective order since they are confidential and privileged by law, nor can any information related to specific documents be produced which would enable the information to be related back to specific taxpayers. NRS 368A.180. The United States Supreme Court has held that there is no right to any evidence from "persons protected by a constitutional, common-law or statutory privilege. U.S. v. Nixon, 419 U.S. 683, 709 (1974).

In fact, the Court in Tidvall v. Eighth Judicial Court, (the case law cited by the Plaintiff in its Objection to the Report and Recommendation) states:

> Our statute authorizing the exercise of privilege against disclosing government information is unequivocal and specific. In other jurisdictions such a privilege exists only if the interest in maintaining the secrecy of the information out-weighs due process considerations in the particular case. In those jurisdictions it becomes necessary for the trial judge to examine the information claimed to be privileged in order to balance the competing considerations and determine whether or not discloser of the information would be against public policy. **Here revelation of the information asserted to be privileged may not be compelled in order to determine whether or not it is privileged because the legislature has granted the privilege under the statutes relied upon by the petitioners.**

Tidvall v. Eighth Judicial District Court, 91 Nev. 520, 525, 539 P.2d 456, 459 (1975).

In other words, if the law makes the information privileged or confidential the matter ends there.

The Department has made every effort to comply with the Plaintiffs requests, but as will be shown below, the Department is statutorily prohibited from revealing all of the information on the Plaintiffs "wish list."

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A. The Department's hands are tied as far as divulging certain information.

The Department of Taxation is a state agency. As such, it must comply with the statutes and regulations which govern its powers. No agency, agent or employee of an agency can act outside its governing statutes and regulations. In fact, for public policy reasons, a state agency is held to a very high level of protecting confidential information, and if information statutorily deemed confidential is publicized, it would most assuredly have a harmful and chilling effect on the public trust.

It is not difficult to imagine that it would severely impair the ability for the agency charged with the collection and administration of the tax statutes to perform its duties if taxpayers feared that their confidential information would become public. As a result, with very limited and narrowly construed exceptions, nearly every public agency is prohibited from disclosure of information related to specific taxpayers. *See* NRS 368A.180. Not only is the Department prohibited from giving information related to specific taxpayers, but it is required that any statistical information be disguised so that it is not possible to identify either the document or the taxpayer. NRS 368A.180 (2)(c) ("Publication of statistics so classified as to prevent the identification of a particular person or document.").

As stated above, an agency cannot act outside of its governing statutes or regulations. Accordingly, there are a number of statutes which govern the disclosure of information by the Department and/or Commission.[4] The confidentiality statute governing the Department of Taxation and the Commission states regarding the LET tax states:

> **NRS 368A.180 Confidentiality of records and files of Board and Department**
> 1. Except as otherwise provided in this section and NRS 239.0115 and 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files **shall not disclose** any information obtained from the records or files of the Board or the Department or from any examination,

[4] This includes any employee, member, agent, or officer.

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investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Board and the Department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.

(c) Publication of statistics so classified as to prevent the identification of a particular person or document.

(d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

NRS 368A.180 (emphasis added)

The above statute is not a privilege statute which the Department may invoke, or the taxpayer may waive; it is a statutory prohibition, which cannot be violated. The confidentiality statute described above is based on and reflective of NRS 372.750, governing sales and use taxes, which, in relevant portions state:

NRS 372.750 Disclosure of information unlawful; exceptions.

1. Except as otherwise provided in this section or NRS 360.247, it is a misdemeanor for any member of the Tax Commission or officer, agent or employee of the Department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular

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> of them, set forth or disclosed in any return, or to permit any return or copy of a return, or any book containing any abstract or particulars of it to be seen or examined by any person not connected with the Department.

NRS 372.750

The State is no different than the Federal Government. The Federal Government must also keep taxpayer information confidential. Pursuant to 26 U.S.C. § 6103, the general rule of taxpayer confidentiality, the government may not divulge taxpayer information:

> **(a) General rule**
>
> Returns and return information shall be confidential, and except as authorized by this title—
>
> **(1)** no officer or employee of the United States,
>
> **(2)** no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104 (c), and
>
> **(3)** no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (12), (16), (19), or (20) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C. § 6103(a)

In addition to the statutes regarding taxpayer information, there are general rules of privilege. A statutory privilege is a pronouncement of public policy. Tidvall v. Eighth Judicial District Court, 91 Nev. 520, 522, 539 P.2d 456, 457 (1975). Privilege is different than the statutory prohibitions in that it can be waived by specific parties, but nonetheless, it must be observed and carefully guarded especially by those who cannot waive the privilege. Specifically, NRS 49.025 governs information contained in reports and returns.

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NRS 49.025 Required reports privileged by statute.

1. A person making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides.

2. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides.

3. No privilege exists under this section in actions involving false statements or fraud in the return or report or when the report is contained in health care records furnished in accordance with the provisions of NRS 629.061.(Added to NRS by 1971, 782; A 1977, 1314)

NRS 49.025.

The plain language of NRS 49.025 clearly states that information on a tax return or report is confidential and the privilege belongs to the person making the return. It also gives the agency the right to refuse to disclose the return information even if the law provides for disclosure—and in this case, NRCP 26(b)(1) specifically excludes discovery that is privileged by law. Although there are very limited times that taxpayer information is not privileged, such as in the case with fraud, as far as the information that the Plaintiff is requesting, the narrow exceptions do not apply. Moreover, the privilege is owned by the Taxpayer and not the Department!

Thus, the return information requested by the Plaintiffs in Request for Production Numbers 1, 2, 3, 4, 5, 6, 7 and 8 cannot be furnished by the Department, pursuant to NRS 368A.180 as well as NRS 49.025. *See* Privilege log furnished with the production of documents, attached hereto as **Exhibit "A".**

Not only are the Department of Taxation and its employees precluded from divulging taxpayer information, but its representative, the Attorney General's Office is likewise forbidden to furnish this information, and thus cannot be held responsible for redacting information privileged and confidential by law.

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With respect to the Attorney General's Office, in addition to return information, there are general rules of privilege which apply in this matter. Pursuant to Chapter 49 of the Nevada Revised Statutes, confidential communications are defined as:

> **NRS 49.055 "Confidential" defined.**
> A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

NRS 49.055

Additionally, there are general rules concerning privilege which define the privilege between a lawyer and its client. This privilege is extremely important to the profession, and as with most other privileges, it is owned by the client, not the lawyer.

> **NRS 49.095 General rule of privilege.**
> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
> 1. Between himself or his representative and his lawyer or his lawyer's representative.
> 2. Between his lawyer and the lawyer's representative.
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

NRS 49.095

> **NRS 49.105 who may claim privilege.**
> 1. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence.
> 2. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

NRS 49.105

In this instance, the Department of Taxation is the client, and pursuant to NRS 49.095 and NRS 49.105, the Attorney General's Office which represents the Department, does not own the privilege and cannot divulge the information that has been provided to it by its client,

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the Department of Taxation, as part of this litigation. Accordingly, both federal and state taxing entities and their counsel are prohibited from disclosing taxpayer information.

Nevertheless, in an effort to produce the documents that the Plaintiffs have requested, the Department carefully examined each document and made a determination as to which information violated NRS 368A.180 and which information was privileged pursuant to NRS 49.025, NRS 49.095 and NRS 49.105. After carefully reviewing each document, the documents were produced with the confidential and privileged information redacted. In addition, the Plaintiffs were provided with a privilege log delineating which statute or privilege applied. *See* **Exhibit "A".** Information requested by the Plaintiffs on Page 19, lines 3 -4 of the Plaintiffs' Objection, such as "the business name and what type of business, is paying what percentage of the non-gaming portion of the LET, and for which years.." is confidential taxpayer information pursuant to NRS 368A.180 and NRS 49.025 and cannot be disclosed.

Consequently, the Department acted within the statutory requirements when it complied with NRS 368A.180 and NRS 49.025 by redacting confidential and privileged taxpayer return information from the disclosures, and did not act in violation of Rule 37 when it produced documents "not privileged" pursuant to Rule 26(b) in its production of documents.

B. An agency cannot act outside its statutes and regulations.

A public agency cannot perform any function that is not included in its statutes and regulations. As one example, the Plaintiffs contend in both of the Complaints as well as in its Motion to Compel and Plaintiffs' Objection that they have paid the LET tax because they are "under threats of criminal prosecution and the imposition of fines..." *See* Plaintiffs' Objection at page 4 lines 7-8. Nothing can be further from the truth. The Plaintiffs do not have a basis for this statement in either law or fact, and it can only be assumed that this allegation has repeatedly been added to pleadings to impart sympathy on the part of the trier of fact.

The truth is that only when a taxpayer intentionally commits criminal fraud by making false statements or false entries in their records or books with "the intent to defraud the State" is he guilty of a gross misdemeanor. NRS 368A.350.

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NRS 368A.350 Prohibited acts; penalty.

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

NRS 368A.350

Even then, neither the Department nor the Commission can bring criminal charges because neither the statutes nor regulations give the Department and/or the Commission the power to bring criminal charges, prosecute a criminal case, or impose any fines. Therefore, contrary to the Plaintiffs' repeated assertions, there have not -- and have never been -- any threats of criminal prosecution or fines with regard to paying the LET. Conversely, if an agent, employee or member of the Department or Commission violates the confidentiality statutes, that person is subject to criminal prosecution.[5] NRS 372.750 ("is a misdemeanor for any member of the Tax Commission or officer, agent or employee of the Department to make known in any manner whatever...").

In this case, in order to be accommodating, the Department produced the documents requested[6], and carefully made every attempt to provide the Plaintiffs with the information they requested, including the preparation of the statistical analysis at the expense of the Department, recommended by the Discovery Commissioner, while still complying with NRS 368A.180, NRS 49.025, NRS 49.095, and NRS 49.105.

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[5] Even then, any criminal prosecution would be prosecuted by another agency, not the Department of Taxation.
[6] In redacted form to conceal privileged and confidential taxpayer information.

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C. The Department's discovery responses comply with the Nevada Rules of Civil Procedure and disclosed information from all years.

Nevada Rules of Civil Procedure 34 is limited to matters within the standards set by NRCP 26(b). NRCP 26(b) entitles parties to discovery of documents regarding any matter "not privileged." NRCP 26(b), *see also* Tidvall v. Eighth Judicial District Ct., 91, Nev. 520, 527, 539 P.2d 456, 460 (1975). Interestingly, the Plaintiffs cite only the portion of Rule 26 (b) which defines the scope of discovery in Rule 26(b) and intentionally leave off the portion of Rule 26 which places limitations on the discovery. Specifically, the Plaintiffs neglected to include Rule 26(b)(2) which states:

> **2) Limitations.** By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is **unreasonably cumulative or duplicative**, or **is obtainable from some other source that is more convenient, less burdensome, or less expensive**; (ii) the party seeking discovery has **had ample opportunity by discovery in the action to obtain the information sought**; or (iii) the discovery is **unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation**. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

Nev. R. Civ. P. 26(b)(2) (emphasis added) (Section (b)(1) is included on page 13 of the Plaintiffs' Objection).

In this case, the Department has complied with Rule 26(a) and (b). The documents produced by the Department include the non privileged information requested by the Plaintiffs pursuant to NRCP 25(b)(1), and include enough information to allow the Plaintiffs to pursue their constitutional claims pursuant to NRCP 26(b0(2). However, the Plaintiffs seek information that is cumulative, duplicative, and obtainable from other less burdensome and less expensive sources. Furthermore, the Plaintiffs waited over two years - until one month prior to the close of discovery to serve its discovery requests.

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Notwithstanding, pursuant to the Discovery Commissioner's Report and Recommendation, the Department of Taxation has prepared at its own expense in time and labor, the documents containing a list identifying the categories of businesses and the amount of LET tax that each category pays, and a list identifying the percentage of the total LET tax collected by the Department of Taxation for gentlemen's clubs for each year starting in 2003. The Plaintiff has failed to establish how a specific individual taxpayer's LET obligation is relevant to the claims in this litigation. Since the question is whether gentlemen's clubs as a whole are being singled out not whether a specific individual gentlemen's club is being singled out.

1. The information the Plaintiffs seek is obtainable from another source that is more convenient, less burdensome and less expensive.

A considerable amount of the information requested by the Plaintiffs is available from the Internet, from the Legislative Counsel Bureau, and from the Plaintiffs themselves. The Plaintiffs could have shared their tax return information as well as their seating capacities, paid admission and merchandising information with each other, which would give the Plaintiffs large amounts of the information requested in Requests No. 1, 2. 3, 4, 5, 6, 7, and 8. The Department's documents reflecting projected revenue in Requests No. 9. 10 is available on the Internet at the Department of Taxation's website for all tax revenue, and a chart was provided in the production of documents at Exhibit O, attached hereto as **Exhibit "D".**

The regulations were adopted through notice and comment at public workshops. The entire legislative history of the LET tax is available on line from the Legislative Counsel Bureau, and in order to aid the Plaintiffs, the Defense provided specific web sites in the responses along with hard copies of the legislative history and compact discs of the discussions that took place during the workshops. (Requests No. 10. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22). *See* National Advanced Systems v. U.S., 795 F. Supp. 1208, 1210 (1992) ("This Court will not order the government to do plaintiff's research for them which they are perfectly capable of doing themselves.").

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In fact, the same tables that the Plaintiffs are seeking to exclude in their Motion to Compel are public records which were gathered from the Department's web site. *See* Plaintiffs Objection at page 21 - 22, *see also* Exhibits A and B, the exhibits that the Plaintiffs are seeking to exclude, attached hereto as **Exhibit "C".**

In an effort to accommodate the Plaintiffs, the Department provided hard copies of these documents, and provided the websites where the information is available, at the Department's expense in both time and money.

2. The Plaintiffs have had over two and one half years to request information and failed to do so.

The first Complaint in this matter was filed in December 2006. The first request for production was not served until the end of March 2009, one month prior to the close of discovery. It is very telling that the Plaintiffs had nearly two and one half years to perform discovery and waited until one month prior to the close of discovery to make very broad, cumulative and duplicative requests for documents. The twenty-six very broad requests included "any and all" documents related to any payments and anticipated payments of the LET tax. *See* Plaintiffs Objection at page 15, line 8, *See also* Request for Production attached to Plaintiffs Objection at Exhibit 2.

The Plaintiff should not be able to use its dilatory tactics as an offensive tool to allege that the Department has failed to cooperate in the discovery process. The Plaintiffs should have started their requests in 2006 and not in 2009, and the Department should not be responsible for the Plaintiffs lack of diligence in performing discovery in a timely manner.

3. The Plaintiffs are requesting information that is unduly burdensome, expensive and not necessary to the issues in this case.

The information the Plaintiffs have requested is not relevant to the facial challenge to the statute. The facial challenge is to determine whether the statute is constitutional. The amount of tax paid by <u>any individual entity</u> is not relevant to a facial challenge. The names of the entities that pay the tax is not relevant to a facial challenge. The only information relevant

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would be the types of businesses that are subject to the LET tax, and that information has been produced. In addition, all of the information that the Plaintiffs need to pursue their facial challenge is available to the public.

With regards to the as applied challenge, the totals provided in the discovery are sufficient to show that gentlemen's clubs are not the only venues that are subject to the LET tax. The production of documents show the other venues that may be subject to the LET tax include sporting events, annual events, brothels, night clubs, bars, promoters, raceways, hotels, clubs, golf courses, and performing arts centers. *See* Exhibit H to production of documents, attached to Plaintiffs Objection Exhibit 4A, bates number DV000033-37, *see also* Exhibit L to the production of documents attached to Plaintiffs' Objection Exhibit 4B, bates numbers DV000059-115 which contains tables with the totals by year for admissions and food and merchandise for all years between 2004 and 2008. The information which will identify a specific taxpayer is redacted, pursuant to NRS 368A.180 and NRS 49.025, but the totals for specific categories are there. *See* Exhibit 4B to Plaintiffs' Objection, bates numbers DV000059-115. Exhibit O to the Department's production of documents contains an analysis of all taxes from 2005 through the present, and a projection through 2011. This chart compares all sources of tax revenue. *See* Exhibit O to the Department's production of documents, attached hereto as **Exhibit "D".** In other words, the information the Plaintiffs seek is available to them through the Department's production of documents, the Internet, and through the Plaintiffs themselves.

4. The information produced was responsive to the requests and concerned all years, not just 2004 as alleged.

The Department provided a total of 1192 pages of documents in the production of documents. All of the documents were indexed. *See* **Exhibit "A"**. The responses to the interrogatories included references to all documents because all of the requests for documents were duplicative and cumulative of each other, asked for "any and all" documents, and nearly all of the documents applied to all of the responses in one way or another.

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The Plaintiffs allegation that the responses and production were non responsive is misleading. The requests for production were forwarded to the Department, and although it may appear that much of the information provided was related to 2004, this is the information that was provided. If there were reports that were produced in a certain format in 2004, that does not indicate that the Department used the same program or format to prepare the reports in later years. In fact, it is entirely likely that certain data collected in 2003 or 2004 was not necessary years later.

The disclosure contains everything that was requested with regards to years after 2004. For example: 1) Exhibit "H" contains the different types of venues subject to LET (2005); 2) Exhibit "J" contains information related to the different seating capacities for the different venues; 3) Exhibit "K" contains correspondence from taxpayers dated 2003, 2005, 2007 and 2008; 4) Exhibit "L" contains a table of the LET tax for every year between 2004 and 2008 which includes totals for the admissions, food and merchandise, and totals for each category; 5) Exhibit "M" contains an analysis of 2007; 6) Exhibit "N" contains a monthly deposit report for June 2007; 7) Exhibit "N" contains the monthly analysis for 2009; 8) Exhibit "O" contains the General Fund Revenues for 2005 through 2008 with projections for 2009 through 2011; and 9) Exhibits "AA" and "BB" contains information related to the adoption of regulations in 2005 and 2006. Moreover, the disclosure contained an index of everything provided pursuant to Rule 34(b). *See* Index to Production of Documents, attached hereto as **Exhibit "A".**

Thus, it is disingenuous to state that the Department "primarily provided information for the tax year 2004." *See* Plaintiffs' Objection at page 15. Moreover, the discussions with Mr. Doerr were not as alleged in the Plaintiffs' Motion. *See* page 16, lines 3 – 5. The only discussion concerned the redaction of certain reports, and the redacted signature on one letter. *See* Affidavit of Blake Doerr, Esq., attached hereto as **Exhibit "E".** Mr. Doerr stated that he could probably provide the name of the person who signed the letter on behalf of the Department, and Plaintiffs' counsel was to provide the bates numbers of any other documents

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where he felt that the redaction was not necessary. Mr. Doerr stated that if Plaintiffs' counsel would provide the bates numbers, he would go through each questionable document and make a determination if the information could lawfully be provided. In fact, during the telephone conversation, Plaintiffs' counsel stated that he had not looked through all of the documents, and would get back with Mr. Doerr after he had. However, Plaintiffs' counsel did not contact Mr. Doerr further with regards to this issue and proceeded to file the motion to compel. *See* **Exhibit "E".**

"NRCP 34 is limited to matters within the scope of NRCP 26(b), which authorizes parties to obtain discovery regarding any matter not privileged." Tidvall, 91. Nev. at 527. Since statutory privileges apply, the Motion to Compel must be denied.

II. Plaintiffs' First Set of Interrogatories

The Plaintiffs served the first set of Interrogatories thirty days prior to the original close of discovery. Just as in the case of the Requests for Production discussed above, the information requested through the Interrogatories cannot be disclosed because the same confidentiality and privilege statutes apply to the Interrogatories as to the Production of documents. NRS 368A.180, NRS 49.026, NRS 40.095, NRS 49.105. *See* Interrogatory No.1 ("...identify each and every person or business entity that paid Live Entertainment Tax..." wanting specific taxpayer information regarding 5% and 10% LET and the amount each entity paid), Interrogatory No. 2 ("Identify each and every person or business entity subject that paid taxes under the original version of the Live Entertainment Tax ..." wanting information related to individual taxpayers who were not subject to LET after the regulations changed); Interrogatory No. 3 ("Identify each and every person or business entity..." wanting information related to entities that did not have to pay LET but did after the regulation changes); Interrogatory No. 15 (Identify each and every person or business entity that became subject to the LET" with regards to the changes to the statute); Interrogatory No. 19 (Identify each and every person, business entities, or classes of business entities" who have requested

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exemptions). None of this information can be shared with the Plaintiff because it would require disclosure of confidential taxpayer information as well as return and report information which would violate NRS 368A.180 as well as NRS 49.025.

In its Motion, the Plaintiffs have specifically objected to the Department's responses to Interrogatories No.'s 1, 2, 3, 15, 19, 20, and 24.

With regards to Interrogatory No. 24, Michele Jacobs, Tax Examiner II is the person most knowledgeable, but does not have the title of "live entertainment tax examiner." As stated in the response to the Interrogatory, no such title as "live entertainment tax examiner" exists within the Department. However, Ms. Jacobs, whose title is "Tax Examiner II" performed examinations of LET returns, and was available for questions regarding same. Ms. Jacobs has already been named as a person most knowledgeable for Interrogatory No. 11, and has been named as a Defendant in this action.

Interrogatories No. 1, 2, 3, 15, 19, and 20 specifically request the identity of each and every person or entity and/or specific taxpayers that have paid LET tax, or has been exempted from LET tax, or not subject to the original version of the LET tax, or has asked for an exemption from LET tax, from 2003 to the present. Besides being overly broad, as discussed under the "Production of Documents" section above, taxpayer information cannot be revealed pursuant to NRS 368A.180 and NRS 49.025.

Contrary to the arguments presented by the Plaintiffs, NRS 368A.180 is very specific in its prohibition of divulging taxpayer information. The language of the statute is plain and unambiguous. The "records and files of the Board and Department concerning the administration of [the LET tax] are both confidential and privileged." The privilege does not belong to the Department, and the Department does not have the power to waive the privilege of keeping taxpayer information confidential. NRS 49.025. The confidentiality of taxpayer records is statutory, and prohibits this information from disclosure except in narrow exceptions which do not apply here. NRS 368A.180. *See also* U.S. v. Nixon, 419 U.S. 683, 709 (1974).

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Furthermore, the statute clearly and unambiguously states that "[t]he Board, the Department and any employee of the Board or the Department may not be required to produce any of the record, files and information for the inspection of any person of for use in any action or proceeding." NRS 368A.180 (1). That is specifically what is taking place here; the Plaintiffs are attempting to gather personal taxpayer information to use in a proceeding, and pursuant to NRS 368A.180, the Department is not required to disclose this information.

The statute does, however, carve out some very narrow exceptions including that the documents are "not subject to privilege if they are requested during any proceeding pursuant to the provisions of this chapter and are **directly involved** in the action or proceeding" NRS 368A.180(2)(a) (emphasis added). Here, the Plaintiffs are asking for taxpayer information related to each and every person or entity that has paid LET tax, been exempted from LET tax or not subject to the original version of the LET tax, from 2003 to the present. This request does not fall under the exceptions as there are only eight Plaintiff taxpayer entities that are "directly involved" in this matter, and no others who are "directly involved." The eight Plaintiffs can share their LET taxpayer information with each other if they so choose, but apparently have decided not to.

The Federal Courts have looked at issues related to the confidentiality of taxpayer information pursuant to 26 U.S.C. § 6103. The general rule is that the government may not disclose a taxpayer's return information. *See* U.S. v. Northern Trust Co., 210 F. Supp. 2d 955, 957 (N.D. Ill. 2001). However, under certain circumstances, disclosure is permitted, such as in the event that the information contained in the third party's return is directly related to the resolution of the issue in the proceeding. **Id**. In Northern Trust, the defendants requested tax returns of persons who had interests in the shares of stock at issue, and the court determined that it would help to establish the Trust's ownership of the stock, which is an element of the claim. **Id**. The court made a point of stating that there was no competitive advantage at stake, and the taxpayer and third party were not business competitors, thus an *in camera* inspection of the records was not necessary. **Id**. at page 958.

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In Shell Petroleum v. U.S., 47 Fed. Cl. 812, (2000), the court allowed an in camera view of the un-redacted documents because the information concerning production techniques contained in the "Section 43" certificates of competitive oil companies was directly related to the type of tax credit Shell Petroleum was seeking. Shell, 47 Fed. Cl. at 815. However, all information that was not "directly related" was to be redacted if the court determined that the certificates had information directly related to the claims. Shell, 47 Fed. Cl. at 820. The case at bar is distinguishable from the above two cases since the gentlemen's clubs are in direct competition with each other, and should not be forced to share their personal taxpayer information if they choose not to.

Moreover, while the federal "directly related" standard is somewhat broad, Nevada has a much narrower exception to its confidentiality statute. Pursuant to NRS 368A.180, the third party must be "**directly involved**." NRS 368A.180. Here, there are only eight Plaintiffs who are directly involved with this lawsuit. Accordingly, other than the eight gentlemen's clubs that have signed on as Plaintiffs, no other entity subject to LET tax is "directly involved" and their taxpayer information must remain confidential. Therefore, this narrow exception does not apply to the Plaintiffs broad requests for information with regards to any and all information related to each and every person or entity that has paid LET tax, been exempted from LET tax, or not subject to the original version of the LET tax, from 2003 to the present.

The Plaintiffs have relied on the Tidvall v. Eighth Judicial District Court, for the proposition that bank examination information is more confidential and privileged than taxpayer information. *See* Plaintiffs' Objection at page 18 lines 5 – 8. In Tidvall, the Court did not order disclosure of customer information, ruling that the legislature has determined that the information gathered during a bank examination is confidential and privileged.

While Tidvall is still good law, the banking statutes applied in Tidvall have been significantly changed since 1975. NRS 665.055 and NRS 665.065 no longer exist, and NRS 665.075 has been changed, but regardless of the changes, the statute still requires that the

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banks copy of the examiner's report be kept confidential. However, NRS 665.133(2) now addresses the use of information for statistical purposes and states;

> "All the reports made available pursuant to this section remain the property of the Division of Financial Institutions, and no person, agency or authority to whom the reports are made available, or any officer, director or employee thereof, may disclose any of the reports or any information contained therein, except in published statistical material that does not disclose the affairs of any natural person or corporation." NRS 665.133(2)

A comparison of NRS 665.133(2) and NRS 368A.180(c) ("[p]ublication of statistics so classified as to prevent the identification of a particular person or document") shows that with regards to taxpayer information, not only must the person identity be hidden, but the source of the information must also be kept confidential with regards to confidentiality of LET tax information.

The Tidvall Court cited NRS 49.025, the same privilege statute operative in the instant matter, and stated "[h]ere we are not concerned with the balance between a public interest and the need for relevant evidence in civil litigation because the legislature has determined that the superintendent of banks making a report required by law has an absolute privilege to refuse to disclose the contents of that report and a duty to prevent others from disclosing the report." Tidvall, 91 Nev. at 525. Here, NRS 49.025 proscribes the disclosure of taxpayer's returns or report information. Since the legislature has determined that the information contained in the reports and returns is confidential, the Court cannot order the disclosure. Thus, in the instant matter, as in Tidvall, a statutory privilege takes priority over the Plaintiffs wish to know. *See* Tidvall, 91 Nev. at 527.

Accordingly, the Plaintiffs' Motion to Compel must be denied because the statutes governing confidentiality and privileges are clear. NRS 368A.180, NRS 49.025, NRS 49.095, NRS 49.105. The statutes were put in place by the Legislature for public policy reasons, and the Supreme Court in this state has recognized that statutory confidentiality and privilege outweigh disclosure.

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III. Sanctions do not apply because the Department substantially justified the reasons for redacting the disclosures.

Sanctions are not appropriate in this matter. The Department complied with the Plaintiffs discovery requests by producing all documents "not privileged." NRCP 26(b)(1). The Department properly redacted information that was confidential and privileged in conformance with NRS 368A.180, NRS 40.025, NRS 40.095 and NRS 49.105. In addition, the Department provided a privilege log citing the rule which applies to each redaction pursuant to NRCP 26(b)(5). **Exhibit "A".**

"Generally, sanctions may only be imposed where there has been willful noncompliance with a court order or where the adversary process has been halted by the actions of the unresponsive party." GNLV Corp. v. Service Control Corp., 111 Nev. 866, 900 P.2d 323 (Nev., 1995), Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). Additionally, fundamental notions of fairness require sanctions should only be imposed when the sanctions relate to the specific conduct at issue. **Id**. Thus, sanctions should only be imposed when the rules are willfully disregarded – which is not the case here.

The Department did not disregard any of the applicable discovery rules in this case, in fact, to the contrary, the Department took the time to locate and prepare the documents for production, examine each document, review the applicable rules favoring the production of documents, prepare applicable objections to production, statutory limits on the production, and privileges. Then each of more than 1,190 documents were individually reviewed for compliance with the statutes, indexed and produced. A privilege log was produced to inform the Plaintiffs the privilege or statute governing the particular document.

With regards to the Interrogatories, the Department took a great deal of time researching and providing the responses to the Interrogatories that would conform to Rule 33, and provide as much information as the Department could legally provide. The responses to the Requests for Production as well as the Interrogatories do not imply a willful disregard for the rules that could trigger sanctions.

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During the conversation which took place in late August 2009, Plaintiffs counsel stated that he was unhappy with the amount of redaction, but had not reviewed the documents in full. Counsel for the Plaintiff was to supply the bates numbers of the documents that he believed should not have been redacted, so that they could be reviewed. However, Plaintiffs counsel did not contact the attorney for the Department again with regards to this issue and complete the meet and confer process prior to filing the Motion to Compel. Thus, the Plaintiffs did not meet and confer in good faith, and are not entitled to sanctions.

Moreover, the Plaintiffs are not entitled to attorneys fees. Attorney fees should not be imposed when the alleged failure to comply with a discovery order is substantially justified. NRCP 37(b). Here, the Department made every attempt to produce what it can legally disclose while being compliant with NRCP 16.1, NRCP 26, NRCP 33, NRCP 34, NRS 368A.180, NRS 49.025, NRS 49.095 and NRS 49.105. A review of the production and privilege log will show that the Department's position is substantially justified, and as a result attorney fees should not be awarded to the Plaintiffs for bringing their Motion. *See* U.S. EEOC v. Caesars Entertainment, Inc., 237 F.R.D. 428, 435 (2006) (attorneys fees should not be awarded when the objection was substantially justified, and if reasonable people can differ on the matter in dispute).

Therefore, the Department is requesting that the Plaintiffs' Motion for sanctions and attorneys' fees be denied.

IV. The Plaintiffs' Motion to Strike Exhibits A and B to the Department's Opposition to Motion for Preliminary Injunction must fail.

Plaintiffs have moved to have Exhibits A and B to the Department's Opposition to the Plaintiffs' Motion for Preliminary Injunction stricken. *See* Plaintiffs' Objection at page 21 – 22. The Plaintiffs base their argument on a claim that the Department has refused to produce the same information that it produced as exhibits to the Opposition. First, the documents were produced in the Department's Opposition, and there is no reason to produce them a second time. Second, and more relevant, the documents were gathered from the Department's

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website and are public documents. *See* Governors Budget and Annual report 2007 – 2008 and http://tax.state.nv.us/ documents/annualreport2007. In addition, the documents at issue are admissible as public records pursuant to NRS 52.085, NRS 52.047 and NRS 52.065.

DEPARTMENT'S MOTION TO STRIKE

The purpose of a motion to compel is to apply for an order of disclosure and/or to resolve discovery issues. Nev. R. Civ. P. 37(a). The motion is heard by the Discovery Commissioner, whose role in the process is to rule on discovery issues and not on the merits of the moving party's case. Any Objection to the Report and Recommendation is to be filed with the District Court. EDCR 2.34(f). The Plaintiffs Objection contains nearly seven pages arguing the merits of their constitutional challenge of the LET tax. *See* Plaintiffs' Objection at page 3, lines 18 – 29, page 4 , line 11 through page 10 line 7. The merits of the case are to be decided by the District Court at the time of the trial in this matter and not during a discovery dispute. Therefore, since this is the improper time to argue the merits of Plaintiffs' constitutional challenge to the LET tax, the Department is moving to strike page 3, lines 18 – 29, page 4 , line 11 through page 10 line 7 of the Plaintiffs' Objection.

CONCLUSION

Based on the foregoing the Department of Taxation respectfully moves that this Honorable Court deny the Plaintiffs' Objection to the Report and Recommendation Regarding Plaintiffs' Motion to Compel in its entirety and find the following:

1) That the Plaintiffs are not entitled to individual taxpayer's information which cannot lawfully be disclosed by any member, employee or agent of the Department or Commission pursuant to NRS 368A.180 and NRS 49.025;

2) That a protective order does not apply because pursuant to Tidvall, the legislature has spoken as to the confidentiality and privileges associated with this type of information;

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3) That sanctions and attorneys fees will not be imposed because there was no willful attempt to withhold any lawful discovery, and the Department produced the documents and responses in conformance with Rules 26, 33 and 34;

4) That this Court will not strike the portion of the Defendant's Opposition to the Plaintiffs' Motion for Preliminary Injunction as requested in the Plaintiffs' Objection, since the information provided in the Opposition Exhibits A and B are public documents; and

5) This Court grants the Department's Counter Motion to Strike the portions of the Plaintiffs' Motion to Compel that present arguments on the merits of the case (page 3, lines 18 – 29, page 4, line 11 through page 10 line 7).

Respectfully submitted this 18th day of March 2010.

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CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake Doerr, #9001
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Attorneys for Nevada Department of Taxation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served the foregoing **NEVADA DEPARTMENT OF TAXATION'S OPPOSITION TO PLAINTIFFS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS AND COUNTER MOTION TO STRIKE** By causing to be delivered to Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

WILLIAM H. BROWN, ESQ.
Nevada Bar No.: 7623
SULLIVAN BROWN
330 South Third Street, Ste. 860
Las Vegas, NV 89101

BRADLEY J. SHAFER,
Michigan Bar No. P36604
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110

Dated this 18th day of March 2010.

Karen Plett
An employee of Office of Attorney General

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EXHIBIT A

PRODUCTION OF DOCUMENTS

Exhibit	Description	Bates Range
A	Memorandum - Analysis of Revenue Impact	DV000001 - 000003
B	Live Entertainment Tax by number of seats- 2004	DV000004 - 000006
C	Department of Taxation Update Request	DV000007 - 000010
D	Live Entertainment Tax Information and press releases (various dated and undated documents)	DV000011 - 000019
E	LET Updates, Southern Nevada, 7/19/04	DV000020 - 000021
F	Live Entertainment Tax- Seating Capacity 300-7400, January - December 2004	DV000022 - 000023
G	LET by venue (DV000028- blank page)	DV000024 - 000032
H	LET by category and venue	DV000033 - 000037
I	10% LET- Gentleman's Clubs	DV000038 - 000041
J	LET account summary (bates number DV000048 was changed to DV000041A)	DV000041A- 000047
K	Various Correspondence to and from taxpayers- December 10, 2003, December 12, 2003, May 17, 2005, April 2, 2007, January 3, 2008,	DV000049 - 000058
L	LET Tax received 2004 - 2008	DV000059 - 000115
M	LET Tax received fiscal year 2007	DV000116 - 000117
N	Monthly deposit report, prepared April 17 2009	DV000118 - 000126
O	General Fund Revenues, fiscal year 2005 - 2008, forecast 2009 -2011	DV000127 - 000128
P	SB 247 Bill History	DV000129 - 000132
Q	Department of Taxation - "What You Need to Know About Nevada's Live Entertainment Tax" 10/21/03, 7/6/05 and 8/15/05 and PowerPoint presentation	DV000132 - 000193
R	Seating capacity information by district	DV000194 - 000196
S	LET tax information for LCB	DV000197 - 000200
T	Memorandum regarding LET tax- 5/21/04	DV000201 - 000205
U	LET tax seating capacity 300 - 7400, January - September 2004	DV000206 - 000207
V	AB 281 Information regarding LET	DV000208 - 000209A
W	Draft Regulations for discussions 8/25/03	DV000210 - 000218
X	Changes effective July 2005	DV000219 - 000220
Y	Public Notice September 5, 2003, proposed regulations	DV000221 - 000272
Z	Memorandum and adopted regulations, December 7, 2003	DV000273 - 000344
AA	Regulation, LCB File No. R105-05, February 23, 2006	DV000345 - 000392
BB	Minutes of Senate Committee on Taxation June 5, 2005. (DV000418 -19-blank pages)	DV000393 - 000472
CC	LET PowerPoint presentation	DV000473 - 000483
DD	Public Notice September 26, 2003, proposed regulations	DV000484 - 000538
EE	Public Notice October 23,2003 for meeting dated October 30, 2003	DV000539 - 000627

PRODUCTION OF DOCUMENTS

FF	Public Notice October 24, 2003, proposed regulations	DV000628 - 000707
GG	Notice of Public Meeting and Transcript of Public Meeting November 25, 2003	DV000708 - 000751
HH	Nevada Tax Commission Meeting and Proposed Regulations- Posted November 19, 2003	DV000752 - 000833
II	LET reports	DV000834 - 000849
JJ	LET workshop- Compact Disc	DV000850 - 000850A
KK	Legislative History	DV000851 - 001192

Privilege log

Exhibit	Description	Bates Range	Privilege/Redaction
A	Memorandum - Analysis of Revenue Impact	DV000003	NRS368A.180(2)(C)
E	LET Updates, Southern Nevada, 7/19/04	DV000021	NRS368A.180(2)(C)
G	LET by venue (DV000028- blank page)	DV000025 - 26	NRS368A.180(2)(C)
H	LET by category and venue	DV000034 - 37	NRS368A.180(2)(C)
I	10% LET- Gentleman's Clubs	DV000039, 000041	NRS368A.180(2)(C)
J	LET account summary	DV000042- 000047	NRS368A.180(2)(C)
K	Various Correspondence to and from taxpayers- December 10, 2003, December 12, 2003, May 17, 2005, April 2, 2007, January 3, 2008,	DV000050 - 000058	NRS368A.180(2)(C)
L	LET Tax received 2004 - 2008	DV000060 - 000115	NRS 49.025 NRS368A.180(2)(C)
M	LET Tax received fiscal year 2007	DV 000117	NRS368A.180(2)(C)
N	Monthly deposit report, prepared April 17 2009	DV000119 -120, DV000122- 126	NRS368A.180(2)(C)
R	Seating capacity information by district	DV000195 - 000196	NRS368A.180(2)(C)
S	LET tax information for LCB	DV000198 - 000200	NRS 49.025 NRS368A.180(2)(C)
T	Memorandum regarding LET tax- 5/21/04	DV000203 - 000205	NRS368A.180(2)(C
Y	Public Notice September 5, 2003, proposed regulations	DV000230, DV000236, DV000238, 239, DV000242, DV000245- 247, DV000251- 252	NRS 49.095, NRS 49.105, NRS368A.180(2)(C)
DD	Public Notice September 26, 2003,proposed regulations	DV000499-503, DV000522, DV000524,	NRS368A.180(2)(C)

EE	Public Notice October 23,2003 for meeting dated October 30, 2003	DV000553, DV000554, DV000556, DV000557-558, DV000567, DV000573-574, DV000575-576, DV000581, DV000584-585, DV000587, DV000604, DV000551-552,	NRS 49.095, NRS 49.105, NRS368A.180(2)(C)
FF	Public Notice October 24, 2003, proposed regulations	DV000636, DV000643, DV000660-662, DV000667-671, DV000674, DV000675-676, DV000679-680, DV000677,	NRS 49.095, NRS 49.105, NRS368A.180(2)(C)
II	LET reports	DV000835 - 849	NRS368A.180(2)(C)

EXHIBIT B

DCRR
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Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

Hearing Date: November 13, 2009
Hearing Time: 9:30 a.m.

Attorney for Plaintiff: William H. Brown, Esq. of SULLIVAN BROWN; and Bradley J. Shafer, Esq., of SHAFER & ASSOCIATES, P.C. (Michigan counsel)

Attorney for Defendant: Blake A. Doerr, ~~Deputy Attorney General~~, Vivienne Rakowsky, Esq., ~~Deputy Attorney General~~, and David J. Pope, ~~Sr. Deputy Attorney General~~, of THE OFFICE OF THE ATTORNEY GENERAL

I.

FINDINGS

After review of the pleadings submitted regarding Plaintiffs' Motion to Compel Discovery of Defendants, and the arguments presented before me during the November 13, 2009, hearing, I find that the Defendants may not be compelled to produce confidential taxpayer information but must produce certain documents pursuant to my recommendations below.

II.

RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED that Plaintiff's Motion to Compel Answers to the Interrogatories and to produce un-redacted documents requested by the Plaintiffs be granted in part and denied in part.

IT IS FURTHER RECOMMENDED that within ten (10) days of the entry of the Court's order, the Nevada Department of Taxation shall provide a document that contains (for each tax year from 2003 until the present) a list of businesses that paid Live Entertainment Taxes, identified only by category, and the amount of Live Entertainment Tax each category of business paid. The categories should include, for purposes of illustration only: one time or annual events; sporting events; nightclubs; promoters; performing arts centers; raceways; and gentlemen's clubs. The document should identify whether each business paid the 5% or the 10% Live Entertainment Tax.

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

IT IS FURTHER RECOMMENDED that within ten (10) days of the entry of this Court's order, the Nevada Department of Taxation shall provide a document (for each tax year from 2003 until the present) identifying which percentage of the total Live Entertainment Tax collected by the Department of Taxation for that year was paid by gentlemen's clubs presenting adult entertainment. The document shall provide separate percentages for gentlemen's clubs paying the 5% and 10% Live Entertainment Tax. Agreed to by the parties as this was NOT part of the Recommendations at the hearing. BD

IT IS FURTHER RECOMMENDED that should any of the Plaintiffs wish to allow the Defendants to divulge any of their privileged and confidential taxpayer information, they must provide a written release to the Department which permits such disclosure.

IT IS FURTHER RECOMMENDED that no sanctions will be imposed in regard to Plaintiffs' motion, and the parties shall bear their own costs.

~~IT IS FURTHER RECOMMENDED that should Defendants comply with this Report and Recommendation, the Court should not strike any portion of their Opposition to Plaintiffs' Motion for Preliminary Injunction.~~ BD

~~IT IS FURTHER RECOMMENDED that the Court should not strike any portion of Plaintiffs' Motion to Compel.~~ BD

IT IS FURTHER RECOMMENDED that the remainder of Plaintiffs' Motion to Compel should be denied. Defendants' Countermotion to Strike was withdrawn. BD

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 22 day of February, 2010.

BD

DISCOVERY COMMISSIONER

However, the percentage of the fee paid by adult entertainment establishments shall be calculated at 4.5% of the tax [illegible]

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

Submitted by:
SULLIVAN BROWN

WILLIAM H. BROWN, ESQ.
Nevada Bar No.: 7623
330 South Third Street, Ste. 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
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Counsel for Plaintiffs

Approved as to form and content by:
OFFICE OF THE ATTORNEY GENERAL

Blake A. Doerr, Deputy Attorney General

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

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Discovery Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the Clerk of the Court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.

A copy of the foregoing Discovery Commissioner's Report was:

X Mailed to the Plaintiffs/Defendants at the following address on the 23 day of Feb.

_____, 2010:

Blake A. Doerr, Esq.
Vivienne Rakowsky, Esq.
David J. Pope, Esq.
Office of the Attorney General
Deputy Attorney General
555 East Washington Ave., Ste. 3900
Las Vegas, NV 89135

WILLIAM H. BROWN, ESQ.
SULLIVAN BROWN
330 South Third Street, Ste. 860
Las Vegas, NV 89101

Bradley J. Shafer
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110

X Placed in the folder of Plaintiff's & Defendant's counsel in the Clerk's office on the 23 day of Feb., 2010.

STEVEN D. GRIERSON

By: Jennifer Loti
Deputy Clerk

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

Case Name: Deja Vu Showgirls of Las Vegas, LLC, et al. v. Nevada Department of Taxation, et al.

Case Number: A533273

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

___ The parties having waived the right to object thereto,

___ No timely objection having been received in the office of the Discovery Commissioner pursuant to E.D.C.R. 2.34(f),

___ Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

* * *

AND

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner (attached hereto).

___ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2010, at ___:___ a.m.

DATED this ___ day of _____, 2010.

DISTRICT COURT JUDGE

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

EXHIBIT C

LET--Dept. Collections, FY 06	$8,688,864
LET—Dept. and GCB Collections, FY 06	$117,109,288
Percentage of total collections from non-gaming licensees, FY 06	7.41%

Sources: Governor's Budget, 2007-2009, Introduction, p. 5 and the Nevada Department of Taxation's Annual Report, 2005-2006

Revenues from LET

General Fund Revenue by Fiscal Year - History and Forecast

	FY 2003 ACTUAL	FY 2004 ACTUAL	FY 2005 ACTUAL	FY 2006 ACTUAL	Economic Forum Forecast November 30, 2006 FY 2007	FY 2008	FY 2009
Taxes							
Mining	$ 10,841,130	$ 18,817,827	$ 16,649,204	$ 19,661,991	$ 23,619,000	$ 24,122,000	$ 28,648,000
Sales and Use	$ 653,239,825	$ 764,092,647	$ 913,855,284	$ 1,005,054,246	$ 1,042,500,000	$1,208,028,000	$ 1,172,746,000
Gaming	$ 584,280,210	$ 714,852,573	$ 749,866,622	$ 838,084,298	$ 855,378,000	$ 919,452,700	$ 982,125,200
Casino / Live Entertainment	$ 70,212,815	$ 89,201,827	$ 107,894,337	$ 117,109,263	$ 125,329,000	$ 133,281,000	$ 144,718,000
Insurance Premium	$ 174,130,841	$ 194,457,038	$ 213,948,978	$ 236,827,999	$ 262,538,000	$ 280,827,000	$ 320,948,100
Liquor	$ 16,531,258	$ 33,025,941	$ 35,490,874	$ 37,247,240	$ 39,215,000	$ 40,979,000	$ 42,209,000
Cigarette	$ 44,019,989	$ 138,770,729	$ 113,282,664	$ 114,993,345	$ 113,200,000	$ 113,700,000	$ 118,200,000
Business License	$ 79,765,553	$ 34,068,252	$ 19,780,518	$ 22,329,031	$ 21,250,000	$ 24,800,000	$ 25,000,000
Modified Business Tax		$ 121,918,869	$ 226,923,503	$ 255,351,302	$ 266,870,000	$ 300,700,000	$ 340,495,000
Real Property Transfer		$ 55,014,709	$ 146,730,474	$ 164,541,226	$ 123,735,000	$ 126,155,000	$ 134,680,000
Other	$ 10,816,203	$ 13,436,668	$ 19,842,823	$ 16,897,905	$ 16,897,000	$ 17,347,000	$ 18,241,000
Sub-Total Taxes	$1,529,818,119	$ 1,940,787,748	$ 2,564,687,284	$ 2,828,208,904	$ 2,928,482,000	$3,126,340,700	$ 3,336,358,300
Licenses	$ 70,323,520	$ 91,875,229	$ 121,492,892	$ 120,710,693	$ 125,163,000	$ 130,833,400	$ 143,067,200
Fees and Fines	$ 27,736,842	$ 31,391,092	$ 33,970,812	$ 32,356,214	$ 37,737,000	$ 37,396,000	$ 38,928,700
Interest Income	$ 5,950,042	$ 9,328,203	$ 13,885,986	$ 32,833,362	$ 48,329,000	$ 56,702,900	$ 29,054,300
Other Revenue	$ 23,231,228	$ 23,102,530	$ 33,826,974	$ 28,754,729	$ 31,751,679	$ 31,503,968	$ 28,994,219
Sub-Total	$ 128,341,538	$ 161,288,168	$ 182,577,827	$ 229,794,998	$ 243,132,279	$ 258,436,268	$ 280,455,119
Total Revenue	$1,658,159,657	$ 2,102,075,916	$ 2,747,265,111	$ 3,058,003,902	$ 3,171,614,279	$3,384,776,968	$ 3,616,813,419
Dollar change		$ 443,916,259	$ 645,189,195	$ 310,738,791	$ 113,610,377	$ 213,162,689	$ 232,036,451
Percent change		26.8%	30.7%	11.3%	3.7%	6.7%	6.9%
Biennium Total			$ 4,849,455,006		$ 6,556,228,247		$ 7,001,590,370
Dollar change					$ 1,706,773,241		$ 445,362,123
Percent change					35.2%		6.8%

Source: Governor's Budget, 2007-2009

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

STATE OF NEVADA
DEPARTMENT OF TAXATION
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January 15, 2008

The Honorable Jim Gibbons
Governor of Nevada
Executive Chambers
Carson City, Nevada 89710

Dear Governor Gibbons:

Pursuant to the provisions of NRS 360.100, the Department of Taxation submits herewith the Annual Report for the fiscal year ending June 30, 2007. During 2006-07, gross revenues and distributions changed in the following amounts.

Revenues	2005 - 2006	2006 - 2007	Increase/ (Decrease)	Percent Change
Sales and Use Taxes	$ 985,035,972	$ 1,000,216,533	$ 15,180,561	1.54%
Local School Support Tax	1,089,384,723	1,106,359,747	16,975,024	1.56%
City/County Relief Tax	1,089,390,724	1,106,236,279	16,845,555	1.55%
Local Option Taxes	499,145,620	527,521,494	28,375,874	5.68%
Intoxicating Beverage Taxes	41,310,450	43,044,469	1,734,019	4.20%
Cigarette Tax and Fees	131,775,345	129,544,079	(2,231,266)	-1.69%
Other Tobacco Products	8,178,593	8,841,781	663,188	8.11%
Estate Tax	6,795,409	2,063,308	(4,732,100)	-69.64%
Lodging Tax	17,279,556	18,363,565	1,084,009	6.27%
Net Proceeds of Minerals Tax	44,524,830	62,178,511	17,653,681	39.65%
Centrally Assessed Property Tax	64,443,588	69,137,776	4,694,188	7.28%
Business Tax and Fees	431,986	239,466	(192,520)	-44.57%
Insurance Premium Tax	238,333,715	259,274,818	20,941,103	8.79%
Tire Tax	1,714,345	1,669,148	(45,197)	-2.64%
Government Services Fee	35,059,703	38,563,347	3,503,644	9.99%
Bank Excise Tax	2,818,210	3,029,997	210,787	7.48%
Business License Fee	21,897,095	19,997,653	(1,899,442)	-8.67%
Live Entertainment Tax	8,688,864	10,838,426	2,149,563	24.74%
Modified Business Tax	255,251,922	278,952,602	23,700,679	9.29%
Real Property Transfer Tax	164,841,506	120,374,961	(44,466,545)	-26.98%
Total	$ 4,706,303,156	$ 4,806,447,990	$ 100,144,804	2.13%

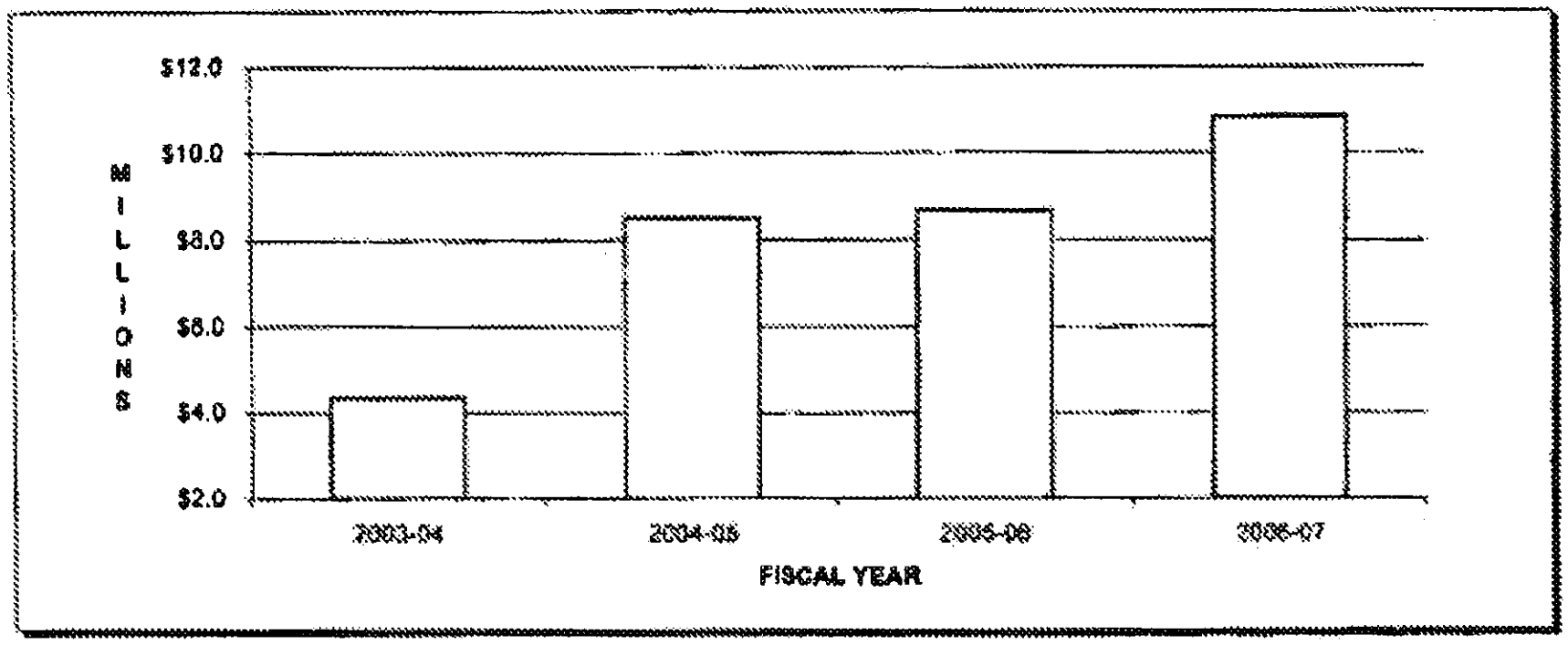
Source: Excerpts from annual report, 2006-2007,
http://tax.state.nv.us/documents/Annual Report 2007

Distributions	2005 - 2006	2006 - 2007	Increase/ (Decrease)	Percent Change
State General Fund	$ 1,903,859,244	$ 1,931,824,665	$ 27,965,420	1.47%
State Distributive School Fund	94,428,822	111,655,998	17,227,177	18.24%
Local Governments	2,674,865,272	2,733,038,247	58,172,975	2.17%
Other Distributions	21,102,872	21,717,431	614,558	2.91%
Estate Tax Reserve, Endowment and Trust Funds	6,751,949	2,063,308	(4,688,640)	-69.44%
State Debt Service Fund	5,294,997	6,148,312	853,315	16.12%
Total	$ 4,706,303,156	$ 4,806,447,960	$ 100,144,804	2.13%

Sincerely,

Dino DiCianno
Executive Director

LIVE ENTERTAINMENT TAX



FISCAL YEAR	LESS THAN 7500 SEATS	7500 SEATS OR GREATER	TOTAL COLLECTIONS	% CHANGE FROM PRIOR YEAR
2003-04	$ 3,228,404	$ 1,117,464	$ 4,345,868	N/A
2004-05	6,594,521	1,921,511	8,516,031	95.96%
2005-06	6,459,681	2,229,182	8,688,864	2.03%
2006-07	7,950,521	2,887,905	10,838,426	24.74%

LEGAL CITATION — Chapter 368A

IMPOSITION AND RATE — A tax imposed on any facility with 300 or more seats where live entertainment is provided and admission is charged. The Department of Taxation is only responsible for collecting this tax from non-gaming facilities. For facilities seating more than 300 and less than 7500 the rate is 10 percent of the admission charge plus 10 percent of any amount paid for food, refreshments and merchandise purchased at the facility. For facilities seating more than 7,500 the rate of tax is 5 percent of the admission charge.

CURRENT DISTRIBUTION OF REVENUE — State General Fund.

HISTORY

ORIGINALLY ENACTED — 2003 Session of the State Legislature, effective January 1, 2004.

AMENDMENTS — Amended by the 2005 Session of the State Legislature to reduce the minimum occupancy to 200 seats.

EXHIBIT D

Exhibit O

GENERAL FUND REVENUES - ECONOMIC FORUM DECEMBER 1, 2008 FORECAST
ACTUAL: FY 2005 THROUGH FY 2008 AND FORECAST: FY 2009 THROUGH FY 2011
ECONOMIC FORUM'S FORECAST FOR FY 2009, FY 2010, AND FY 2011 APPROVED AT THE DECEMBER 1, 2008 MEETING

December 1, 2008 - 4:00 PM

DESCRIPTION	FY 2005 ACTUAL	% Change	FY 2006 ACTUAL	% Change	FY 2007 ACTUAL	% Change	FY 2008 ACTUAL [a]	% Change	DECEMBER 1, 2008 ECONOMIC FORUM FORECAST FY 2009	% Change	FY 2010	% Change	FY 2011	% Change
TAXES														
TOTAL MINING TAXES	$16,449,304	-2.2%	$19,661,886	19.5%	$27,698,719	40.9%	$35,131,075	26.8%	$33,600,000	-4.4%	$28,100,000	-16.4%	$26,600,000	-5.3%
TOTAL SALES AND USE TAX [1-FY04]	$913,895,384	15.6%	$1,005,054,248	10.0%	$1,020,762,102	1.6%	$985,739,728	-3.4%	$900,951,000	-8.6%	$905,548,000	0.5%	$932,735,000	3.0%
TOTAL GAMING TAXES [2-FY04][3-FY04][1-FY06]	$749,655,822	4.9%	$838,094,296	11.8%	$858,640,751	2.5%	$803,946,125	-6.4%	$715,272,700	-11.0%	$738,886,700	3.3%	$767,472,900	3.9%
CASINO/LIVE ENTERTAINMENT TAX [4-FY04][4b-FY04][2-FY06]	$107,884,337	20.9%	$117,109,288	8.6%	$132,493,622	13.1%	$131,820,221	-0.5%	$125,927,000	-4.5%	$129,879,000	3.1%	$137,256,000	5.7%
INSURANCE PREMIUM TAX	$215,948,970	11.1%	$238,627,989	10.5%	$260,000,139	9.0%	$257,367,094	-1.0%	$252,822,400	-1.8%	$254,083,400	0.5%	$261,438,900	2.9%
LIQUOR TAX [5-FY04]	$35,490,874	7.5%	$37,347,240	5.2%	$38,911,094	4.2%	$39,434,816	1.3%	$39,279,000	-0.4%	$39,940,000	1.7%	$40,918,000	2.4%
CIGARETTE TAX [5-FY04]	$113,282,664	6.1%	$114,693,245	1.2%	$113,077,937	-1.4%	$110,418,286	-2.3%	$100,837,000	-8.7%	$102,329,000	1.5%	$102,329,000	
OTHER TOBACCO TAX [7-FY04]	$7,557,607	9.1%	$8,178,593	8.2%	$8,841,781	8.1%	$8,840,580	0.0%	$8,929,000	1.0%	$9,057,000	1.4%	$9,212,000	1.7%
LAETRILE & GEROVITAL MFG														
HECC TRANSFER	$5,000,000		$5,000,000		$5,000,000		$5,000,000		$5,000,000		$5,000,000		$5,000,000	
BUSINESS LICENSE FEE [5-FY04][3-FY06][4-FY06]	$14,486,315	22.2%	$21,897,095	51.2%	$19,997,653	-8.7%	$19,566,390	-2.2%	$19,883,000	1.6%	$19,617,000	-1.3%	$19,814,000	1.0%
BUSINESS LICENSE TAX [5-FY04]	$1,297,383	-84.2%	$431,986	-66.7%	$239,466	-44.6%	$13,683	-94.2%	$10,000		$7,500		$5,000	
MODIFIED BUSINESS TAX														
MBT-NONFINANCIAL [10-FY04][5-FY06][6-FY06]	$205,348,170	40.5%	$232,760,812	13.3%	$257,432,283	10.6%	$263,902,120	2.5%	$264,203,000	0.1%	$252,159,000	-4.6%	$260,733,000	3.4%
MBT-FINANCIAL [11-FY04][5-FY06]	$21,575,335	39.3%	$22,491,110	4.2%	$21,520,319	-4.3%	$20,698,297	-3.8%	$18,696,000	-9.7%	$17,374,000	-7.1%	$18,696,000	7.6%
BRANCH BANK EXCISE TAX [12-FY04][7-FY06]	$3,084,456	104.5%	$2,819,210	-8.6%	$3,029,997	7.5%	$3,142,650	3.7%	$3,219,000	2.4%	$3,178,000	-1.3%	$3,213,000	1.1%
REAL PROPERTY TRANSFER TAX [13-FY04][8-FY06]	$148,730,974	69.0%	$164,841,506	10.8%	$120,374,961	-27.0%	$85,882,799	-28.7%	$66,640,000	-22.4%	$72,100,000	8.2%	$72,100,000	0.0%
TOTAL TAXES	$2,559,687,394	14.1%	$2,829,068,504	10.5%	$2,888,014,822	2.1%	$2,770,904,166	-4.1%	$2,555,269,100	-7.8%	$2,575,150,600	0.8%	$2,657,522,800	3.2%
LICENSES														
INSURANCE LICENSES	$11,358,651	7.4%	$12,536,529	10.4%	$13,706,513	9.3%	$14,500,714	5.8%	$15,226,000	5.0%	$15,987,000	5.0%	$16,786,000	5.0%
BANKING LICENSES [16-FY04]	$599,890	0.9%	$559,974	-6.7%	$512,218	-8.5%	$490,094	-4.3%	$468,200	-4.5%	$441,900	-5.6%	$412,700	-6.6%
MARRIAGE LICENSES	$64,122,084	11.7%	$101,139,626	20.2%	$99,238,461	-1.9%	$100,565,232	1.3%	$96,580,000	-4.0%	$97,075,000	0.5%	$97,721,000	0.7%
TOTAL SECRETARY OF STATE [14-FY04]	$274,132	8.9%	$246,102	-10.2%	$249,129	1.2%	$217,403	-12.7%	$200,500	-7.8%	$212,000	5.7%	$225,000	6.1%
PRIVATE SCHOOL LICENSES	$18,700	-28.1%	$18,000	-3.7%	$18,300	1.7%	$18,700	2.2%	$16,000	-14.4%	$16,000		$16,000	
PRIVATE EMPLOYMENT AGENCY	$2,628,035	-1.0%	$3,167,643	20.5%	$3,160,580	-0.2%	$2,884,718	-8.7%	$2,795,500	-3.1%	$2,791,500	-0.1%	$2,875,530	3.0%
TOTAL REAL ESTATE [15-FY04][16-FY04]	$2,462,447	9.0%	$3,042,778	23.6%	$4,243,723	39.5%	$3,200,947	-24.6%	$3,100,000	-3.2%	$3,200,000	3.2%	$3,300,000	3.1%
TOTAL FINANCIAL INSTITUTIONS [16-FY04]	$101,463,939	10.7%	$120,710,653	19.0%	$121,178,924	0.4%	$121,677,809	0.4%	$118,386,200	-2.7%	$119,723,800	1.1%	$121,336,230	1.3%
ATHLETIC COMMISSION FEES	$845,362	11.3%	$901,094	6.6%	$990,077	9.9%	$979,552	-1.1%	$1,008,900	3.0%	$1,039,200	3.0%	$1,070,400	3.0%
TOTAL LICENSES	$208,010	1.2%	$211,146	1.5%	$201,846	-4.4%	$201,111	-0.4%	$201,200	0.0%	$200,800	-0.2%	$200,500	-0.1%
FEES AND FINES	$1,412,898	2.6%	$1,396,729	-1.1%	$1,445,950	3.5%	$1,530,101	5.8%	$1,572,400	2.8%	$1,635,700	4.0%	$1,698,900	3.9%
VITAL STATISTICS FEES [17-FY04]	$576,035	-7.7%	$1,370,097	137.8%	$682,643	-35.6%	$2,143,195	142.8%	$1,300,000	-39.3%	$688,000	-47.1%	$688,000	
DIVORCE FEES					$9,000		$12,000	33.3%	$16,000	33.3%	$17,500	9.4%	$19,000	8.6%
CIVIL ACTION FEES	$1,243,176	13.2%	$1,452,874	16.9%	$1,268,567	-14.7%	$957,184	-24.5%	$772,600	-19.3%	$706,450	-8.6%	$780,550	1.8
INSURANCE FEES	$26,793,014	4.5%	$26,659,712	-0.5%	$29,806,860	11.8%	$29,792,195	0.0%	$28,000,000	-6.0%	$28,700,000	2.5%	$30,135,000	5.0
MEDICAL PLAN DISCOUNT REGISTRATION FEES	$122,515	11.6%	$690,076	463.3%	$585,662	-15.1%	$482,325	-17.6%	$450,000	-6.7%	$475,000	5.6%	$475,000	
TOTAL REAL ESTATE FEES														
SHORT-TERM CAR LEASE	$2,077,432	22.3%	$2,249,185	8.3%	$2,165,724	-3.7%	$2,272,980	5.0%	$1,700,000	-25.2%	$1,700,000		$1,700,000	
ATHLETIC COMMISSION LICENSES/FINES	$208,203	-4.9%	$195,680	-6.0%	$218,285	11.6%	$220,335	0.9%	$225,200	2.2%	$230,900	2.5%	$238,300	3.2%
WATER PLANNING FEES	$404,199	85.2%	$1,269,520	162.2%	$2,831,518	107.3%	$2,400,455	-8.8%	$3,052,700	27.2%	$3,127,500	2.5%	$2,375,200	-11.7%
STATE ENGINEER SALES	$13,976,845	6.2%	$36,396,214	7.1%	$40,206,123	10.5%	$40,997,433	2.0%	$38,299,000	-6.6%	$37,588,600	-1.9%	$39,380,850	4.8%
SUPREME COURT FEES														
MISC. FINES/FORFEITURES	$2,100,078	4.5%	$2,200,892	4.8%	$2,905,765	32.0%	$5,145,659	77.1%	$4,016,543	-21.9%	$1,619,465	-59.7%	$1,145,006	-29.3%
TOTAL FEES AND FINES	$10,512		$10,664	1.4%	$10,512	-1.4%	$10,512		$10,512		$10,512		$9,185	-12.6%
USE OF MONEY AND PROPERTY	$12,685,869	202.2%	$32,933,368	140.6%	$52,915,782	60.7%	$56,326,346	6.5%	$16,913,800	-70.0%	$9,534,100	-43.6%	$12,060,200	26.5%
CLYDON COUNTY REPAYMENTS	$15,796,458	141.2%	$35,144,924	122.5%	$55,832,059	58.9%	$61,492,717	10.1%	$20,940,855	-65.9%	$11,183,677	-46.6%	$13,214,391	18.2%
OTHER REPAYMENTS [18-FY04]														
MARLETTE REPAYMENT	$300,000		$300,000		$300,000		$300,000		$300,000		$300,000		$300,000	
INTEREST INCOME	$1,428,335	58.9%	$3,834,335	175.4%	$5,031,331	27.9%	$2,383,105	-52.6%	$938,800	-60.6%	$956,300	1.9%	$953,500	-0.3%
TOTAL USE OF MONEY AND PROPERTY	$9,624,189	-0.9%	$10,458,762	8.7%	$10,455,487	0.0%	$7,139,068	-31.7%	$7,144,500	0.1%	$7,144,500		$7,144,500	
OTHER REVENUE	$582,201	4.3%	$580,469	-0.3%	$609,362	5.0%		-100.0%		#DIV/0!				
HOOVER DAM REVENUE	$11,811,060	1.0%	$14,458,762	22.4%	$23,464,527	62.3%	$49,179,534	109.6%	$36,000,000	-26.8%	$34,127,600	-5.2%	$34,305,000	0.5%
MISC. SALES AND REFUNDS	$11,746,364	2.1%	$37,543,164	18.3%	$39,860,707	6.2%	$59,001,767	48.0%	$44,383,300	-24.8%	$42,757,600	-3.7%	$42,703,000	-0.1%
COST RECOVERY PLAN														
PETROLEUM INSPECTION FEES	$2,746,665,221	14.1%	$3,058,403,459	11.3%	$3,145,082,636	2.8%	$3,054,567,511	-2.9%	$2,777,278,455	-9.1%	$2,734,557,500	-1.5%	$2,574,157,271	-5.9%
UNCLAIMED PROPERTY [9-FY06]														
TOTAL OTHER REVENUE														
TOTAL GENERAL FUND REVENUE														

DV000128

EXHIBIT E

AFFIDAVIT OF BLAKE A. DOERR

STATE OF NEVADA)
)
County of Clark)

BLAKE A. DOERR, being first duly sworn, deposes and says as follows:

1. Blake A. Doerr is licensed to practice law in the state of Nevada and is employed with the State of Nevada as Deputy Attorney General;
2. Upon receiving the Plaintiffs request for written discovery, I immediately contacted the Plaintiff's attorney, Mr. Matthew Hoffer and requested an extension of time to produce the requested discovery because the Plaintiff's request was extremely large and because the requests had been served just thirty days prior to the close of discovery.
3. Shortly thereafter, Mr. Hoffer contacted me and requested that the Department of Taxation stipulate to a continuation of discovery and a continuation of the trial date because Mr. Shafer was going to need to have a surgical procedure which would prevent him from traveling to Nevada to take depositions.
4. Mr. Hoffer and I agreed to the extension for production of the discovery (until July 3, 2009) and the continuation of the discovery dates and the trial. This was memorialized in the Stipulation and Order for Extension of Time to Complete Discovery (First Request).
5. Prior to July 3, 2009, I contacted Mr. Hoffer and again requested an extension of time to produce the requested documents. Mr. Hoffer agreed and expressed his concern that he needed the opportunity to review all of the documents before conducting any depositions. I assured Mr. Hoffer that I would allow him every leniency in conducting the depositions, that I would consider the original notice of depositions as the timely notice, that I would produce additional witnesses for depositions if upon review of the documents, he determined that other witnesses may have relevant information because he had allowed me every leniency in providing the documents.

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

6. Upon receiving the documents, Mr. Hoffer contacted me and communicated to me that he was disappointed with the extent of redaction that the documents contained.

7. Several phone calls took place between Mr. Hoffer and me before the Motion to Compel was filed.

8. In one of those conversations, Mr. Hoffer asked if it would be possible to enter into Protective Order whereby his firm would be allowed to review the unredacted documents but not provide them to his clients. After consultation with my client, I determined that the law does not provide for such a disclosure and advised Mr. Hoffer accordingly.

9. In another conversation, Mr. Hoffer and I discussed my position that I could not produce the unredacted documents without a court order. Mr. Hoffer expressed his concern about discovery concluding before he could thoroughly review the documents and take the appropriate depositions. Given the fact that Mr. Hoffer had been agreeable with me throughout these proceedings, I agreed to stipulate to continuing the close of discovery and trial date for the second time so that he could bring the instant Motion to Compel.

10. Since the original request for Production of Documents, Mr. Hoffer and I communicated regularly on the status of the production. The communications always ended up in an agreement and any request for extension on my behalf was always granted. In exchange, I expressed many times that I would do everything in my power to provide additional documents and provide for deposition of any relevant witnesses.

11. In the final conversation before this Motion was filed, Mr. Hoffer pointed out to me a document which contained the name of an employee of the Department which had been redacted. I agreed that the name should not have been redacted. Mr. Hoffer and I agreed that he would review the production thoroughly and that he would provide me with a list of what he believed should not have been redacted and I agreed to review his request and produce anything which was not privileged but had been inadvertently redacted. Mr. Hoffer never communicated with me after that time.

FURTHER AFFIANT SAYETH NAUGHT

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

Dated this 19th Day of October, 2009.

Blake A. Doerr

SUBSCRIBED AND SWORN

To before me this 19th day of October, 2009.

KAREN K. PLETT
Notary Public State of Nevada
No. 07-1614-1
My appt. exp. Jan. 11, 2011

Notary Public

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

SAO
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Co-Counsel for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, et al. Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION NEVADA TAX COMMISSION, et al., Defendants.	Case No. A533273 Dept No. 9

STIPULATION AND ORDER FOR EXTENSION OF TIME TO COMPLETE DISCOVERY (THIRD REQUEST)

IT IS HEREBY STIPULATED and agreed by and between Plaintiff(s), 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* (collectively referred to hereinafter as "Plaintiffs"), and Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS, (collectively referred to hereinafter as "Defendants") by and through their respective counsel of record, pursuant to EDCR 2.35, that the following discovery, motion, and trial deadlines in the previously filed Scheduling Order be extended as follows:

I.

DISCOVERY COMPLETED

The following discovery has been completed in this matter:

The parties have served their Early Case Conference Disclosure Statement pursuant to NRCP 16.1; a Joint Case Conference Report has been filed and served; Plaintiffs have served their First Set of Interrogatories and Requests for Production of Documents; Defendants have submitted Responses to First Set of Interrogatories and Responses to the Request for Production of Documents.

On September 30, 2010, Plaintiffs moved to compel discovery, contending that Defendants' discovery responses were incomplete.

On November 13, 2009, the Discovery Commissioner heard Plaintiff's motion. Plaintiffs submitted a proposed Report and Recommendation, which the Discovery Commissioner signed (with revisions) on February 22, 2010.

On March 3, 2010, Plaintiffs timely objected to the Report and Recommendation ("Plaintiff's Objection").

///

II.

DISCOVERY TO BE COMPLETED

After the Court resolves the discovery dispute, Defendants will provide appropriate responsive discovery and the parties will proceed with conducting depositions.

In the meantime, and thereafter, the parties will continue in their efforts to identify and obtain relevant and discoverable evidence and to supplement their respective Early Case Conference disclosures accordingly. Additionally, and as appropriate, the parties may propound additional written discovery, notice and conduct the depositions of the parties and/or their Person(s) Most Knowledgeable, notice and conduct the depositions of third parties, and perform any additional discovery necessary to fully litigate this matter.

III.

REASONS WHY DISCOVERY WAS NOT COMPLETE PRIOR TO THE TIME LIMITS SET FORTH WITHIN THE DISCOVERY SCHEDULING ORDER

In short, the parties have not been able to complete discovery because of the intervening discovery dispute. Nonetheless, the parties did timely stipulate to continue discovery deadlines to account for and accommodate this unanticipated event.

The parties submitted a Stipulation and Order Extending Discovery on February 24, 2010, before the close of discovery, on February 26, 2010. The parties did not include dates certain for discovery deadlines because resolution of the outstanding discovery dispute was a prerequisite for completing discovery and it was impossible to predict how quickly the outstanding discovery dispute would be resolved.

In other words, the time necessary to complete discovery depended on: (1) when the Court would ultimately enter an order regarding Plaintiff's Objection; (2) the substance of the Court's order; (3)

whether either or both parties would move for reconsideration of the Court's order; and (4) once the order was final, how quickly responsive discovery could be produced. Without knowing how long this process would take (and thus, when discovery could recommence), it was impossible to determine what appropriate dates certain would be to close discovery.

Therefore, the parties proposed deadlines based on resolution of the discovery dispute (e.g., depositions to be concluded 30 days after the Court rules on Plaintiff's Objection, close of discovery 30 days after last deposition is taken, etc.)

Now, the parties propose dates certain for discovery deadlines with the understanding that they may again be required to extend these dates depending on how, and how quickly, the underlying discovery dispute is resolved and in turn, how quickly discovery can recommence and conclude.

IV.

PROPOSED SCHEDULE FOR COMPLETING ALL REMAINING DISCOVERY

The parties propose the following dates:

1. Close of discovery: Tuesday, August 10, 2010.

2. Last day to file dispositive motions: Thursday, September 9, 2010.

~~3. Last day to hear dispositive motions: Monday, October 11, 2010.~~

V.

TRIAL DATE

The trial in this matter is currently set on a five (5) week stack beginning May 10, 2010. As such, the current trial date would need to be vacated in accordance with the aforementioned proposed schedule for completing discovery and a new trial date would need to be set by the Court.

The parties represent that this is the third request for an extension of the Scheduling Order deadlines made by any party to this litigation and that this Stipulation is entered into in good faith.

Dated : March 16, 2010

SULLIVAN BROWN

By: William Brown

William H. Brown, Esq.
Nevada Bar No.: 7623
330 South Third Street, Suite 860
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WBrown@SullivanBrown.com
(702) 366-9311
(702) 366-9371
Counsel for Plaintiffs

Dated: March 15, 2010

OFFICE OF THE ATTORNEY GENERAL

By: Blake Doerr

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bdoerr@ag.nv.gov
(702) 486-3095
(702) 486-3416
Counsel for Defendants

ORDER FOR EXTENSION OF TIME TO COMPLETE DISCOVERY (THIRD REQUEST)

Upon the request of counsel for the parties herein for the extension of time to complete Discovery and good cause appearing therefore:

IT IS HEREBY ORDERED the following discovery and motion deadlines in the above entitled matter by extended as follows:

1. Close of discovery: August 10, 2010.

2. Last day to file dispositive motions: September 9, 2010

3. ~~Last day to hear dispositive motions:~~ N/A

IT IS FURTHER ORDERED that the May 10, 2010 trial setting be vacated and continued pursuant to the foregoing deadlines. This case will now be ready for trial by October 25, 2010. ~~An amended Scheduling Order will be issued.~~

IT IS SO ORDERED.

DATED: March 19, 2010

DISCOVERY COMMISSIONER

Respectfully submitted by:

SULLIVANBROWN

By: William Brown

WILLIAM H. BROWN, ESQ.
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Las Vegas, Nevada 89101
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WBrown@SullivanBrown.com
Counsel for Plaintiffs

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DISTRICT COURT

CLERK OF THE COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, et al., Plaintiff/s, vs.	)	CASE NO.: A533273
	)	DEPT NO.: IX
NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, et al., Defendant/s.	)	

THIRD AMENDED ORDER SETTING NON-JURY CIVIL TRIAL

IT IS HEREBY ORDERED THAT:

A. The above-entitled case is set to be tried on a FIVE-week stack to begin, **MONDAY, JANUARY 3, 2011** at **10:30 AM.**

B. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held **ONLY UPON REQUEST.**

C. A calendar call will be held on **DECEMBER 16, 2010** at **9:15 AM.** ✓

Parties must have the following ready for trial:

(1) All exhibits marked by counsel for identification purposes;

(2) Typed exhibit lists with all stipulated exhibits marked as admitted;

(3) Original depositions;

(4) A list of equipment needed for trial; and

(5) Courtesy copies of legal briefs on trial issues.

MC

D. Pre-Trial Memorandums must be filed by **DECEMBER 17, 2010** ✓ with courtesy copy delivered to Dept. IX. All parties, (Attorneys and parties in proper person) **MUST** comply with **ALL REQUIREMENTS** of **EDCR 2.67**.

E. All discovery deadlines, deadlines for filing dispositive motions and motion to amend the pleadings or add parties are controlled by the previously issued Scheduling Order.

F. All other pre-trial motions, including motions in Limine, must be in writing and set for hearing no later than **DECEMBER 14, 2010.** ✓

G. Any pre-trial motion **MUST** be filed by 5:00 PM on **NOVEMBER 27, 2010**; ✓

Oppositions are to be filed by 5:00 PM **DECEMBER 2, 2010**; Replies thereto are to be filed by 5:00 PM **DECEMBER 7, 2010**. **Orders shortening time will not be signed except in extreme emergencies. (Request for trial continuance is not an emergency.)**

H. **Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action; (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.**

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. **A stipulation which terminates a case by dismissal must also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.**

DATED: this 24TH day of March, 2010.

JENNIFER P. TOGLIATTI
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on date filed, I mailed to the following proper persons or placed a copy of this Order in the attorneys' folder(s) in the Clerk's Office of the following:

William H. Brown, Esq. – SULLIVAN BROWN

Blake A. Doerr, Esq. – OFFICE OF THE ATTORNEY GENERAL

ROSE NAJERA
Judicial Executive Assistant

A533273

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CLERK OF THE COURT

0063

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al.,
Plaintiff/s,
vs.
NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, ET AL,
Defendant/s.

CASE NO.: A554970
DEPT NO.: IX

SECOND AMENDED ORDER SETTING NON-JURY CIVIL TRIAL

IT IS HEREBY ORDERED THAT:

A. The above-entitled case is set to be tried on a FIVE-week stack to begin, **MONDAY, MARCH 14, 2011** at **10:30 AM.**

B. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held **ONLY UPON REQUEST.**

C. A calendar call will be held on **MARCH 3, 2011** at **9:15 AM.**

Parties must have the following ready for trial:

(1) All exhibits marked by counsel for identification purposes;

(2) Typed exhibit lists with all stipulated exhibits marked as admitted;

(3) Original depositions;

(4) A list of equipment needed for trial; and

(5) Courtesy copies of legal briefs on trial issues.

D. Pre-Trial Memorandums must be filed by **MARCH 4, 2011** with courtesy copy delivered to Dept. IX. All parties, (Attorneys and parties in proper person) **MUST** comply with **ALL REQUIREMENTS** of **EDCR 2.67**.

E. All discovery deadlines, deadlines for filing dispositive motions and motion to amend the pleadings or add parties are controlled by the previously issued Scheduling Order.

F. All other pre-trial motions, including motions in Limine, must be in writing

JENNIFER P. TOGLIATTI
DISTRICT JUDGE
DEPARTMENT NINE

and set for hearing no later than **MARCH 1, 2011.**

G. Any pre-trial motion **MUST** be filed by 5:00 PM on **FEBRUARY 7, 2011**; Oppositions are to be filed by 5:00 PM **FEBRUARY 17, 2011**; Replies thereto are to be filed by 5:00 PM **FEBRUARY 22, 2011**. **Orders shortening time will not be signed except in extreme emergencies. (Request for trial continuance is not an emergency.)**

H. **Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action; (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.**

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. **A stipulation which terminates a case by dismissal must also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.**

DATED: this 20th day of April, 2010.

JENNIFER P. TOGLIATTI
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on date filed, I mailed to the following proper persons or placed a copy of this Order in the attorneys' folder(s) in the Clerk's Office of the following:

William H. Brown, Esq. – SULLIVAN BROWN

Blake A. Doerr, D.A.G. - OFFICE OF THE ATTORNEY GENERAL

ROSE NAJERA
Judicial Executive Assistant

A554970

SAO
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Co-Counsel for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, et al. Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION NEVADA TAX COMMISSION, et al., Defendants.	Case No. A554970 Dept 9

STIPULATION AND ORDER FOR EXTENSION OF TIME TO COMPLETE DISCOVERY (THIRD REQUEST)

IT IS HEREBY STIPULATED and agreed by and between Plaintiff(s), K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, DÉJÀ VU SHOWGIRLS OF LAS VEGAS. LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, LLC d/b/a *Little Darlings*, 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* (collectively referred to hereinafter as "Plaintiffs"), and Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS, (collectively referred to hereinafter as "Defendants") by and through their respective counsel of record, pursuant to EDCR 2.35, that the following discovery, motion, and trial deadlines in the previously filed Scheduling Order be extended as follows:

I.

DISCOVERY COMPLETED

The following discovery has been completed in this matter:

The parties have served their Early Case Conference Disclosure Statement pursuant to NRCP 16.1; a Joint Case Conference Report has been filed and served; Plaintiffs have served their First Set of Interrogatories and Requests for Production of Documents; Defendants have submitted Responses to First Set of Interrogatories and Responses to the Request for Production of Documents.

On September 30, 2010, Plaintiffs moved to compel discovery, contending that Defendants' discovery responses were incomplete.

On November 13, 2009, the Discovery Commissioner heard Plaintiff's motion. Plaintiffs submitted a proposed Report and Recommendation, which the Discovery Commissioner signed (with revisions) on February 22, 2010.

On March 3, 2010, Plaintiffs timely objected to the Report and Recommendation ("Plaintiff's Objection").

///

II.

DISCOVERY TO BE COMPLETED

After the Court resolves the discovery dispute, Defendants will provide appropriate responsive discovery and the parties will proceed with conducting depositions.

In the meantime, and thereafter, the parties will continue in their efforts to identify and obtain relevant and discoverable evidence and to supplement their respective Early Case Conference disclosures accordingly. Additionally, and as appropriate, the parties may propound additional written discovery, notice and conduct the depositions of the parties and/or their Person(s) Most Knowledgeable, notice and conduct the depositions of third parties, and perform any additional discovery necessary to fully litigate this matter.

III.

REASONS WHY DISCOVERY WAS NOT COMPLETE PRIOR TO THE TIME LIMITS SET FORTH WITHIN THE DISCOVERY SCHEDULING ORDER

In short, the parties have not been able to complete discovery because of the intervening discovery dispute. Nonetheless, the parties did timely stipulate to continue discovery deadlines to account for and accommodate this unanticipated event.

The parties submitted a Stipulation and Order Extending Discovery on February 24, 2010, before the close of discovery, on February 26, 2010. The parties did not include dates certain for discovery deadlines because resolution of the outstanding discovery dispute was a prerequisite for completing discovery and it was impossible to predict how quickly the outstanding discovery dispute would be resolved.

In other words, the time necessary to complete discovery depended on: (1) when the Court would ultimately enter an order regarding Plaintiff's Objection; (2) the substance of the Court's order; (3)

whether either or both parties would move for reconsideration of the Court's order; and (4) once the order was final, how quickly responsive discovery could be produced. Without knowing how long this process would take (and thus, when discovery could recommence), it was impossible to determine what appropriate dates certain would be to close discovery.

Therefore, the parties proposed deadlines based on resolution of the discovery dispute (e.g., depositions to be concluded 30 days after the Court rules on Plaintiff's Objection, close of discovery 30 days after last deposition is taken, etc.)

Now, the parties propose dates certain for discovery deadlines with the understanding that they may again be required to extend these dates depending on how, and how quickly, the underlying discovery dispute is resolved and in turn, how quickly discovery can recommence and conclude.

IV.

PROPOSED SCHEDULE FOR COMPLETING ALL REMAINING DISCOVERY

The parties propose the following dates:

1. Close of discovery: Tuesday, August 10, 2010.

2. Last day to file dispositive motions: Thursday, September 9, 2010.

3. Last day to hear dispositive motions: Monday, October 11, 2010 or as otherwise ordered by the Court or set by the Clerk's office. BB

V.

TRIAL DATE Date to be determined BB

The trial in this matter is currently set on a five (5) week stack beginning May 10, 2010. As such, the current trial date would need to be vacated in accordance with the aforementioned proposed schedule for completing discovery and a new trial date would need to be set by the Court.

The parties represent that this is the third request for an extension of the Scheduling Order deadlines made by any party to this litigation and that this Stipulation is entered into in good faith.

Dated : March 16, 2010

SULLIVAN BROWN

By: William Brown

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Dated: March 15, 2010

OFFICE OF THE ATTORNEY GENERAL

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ORDER FOR EXTENSION OF TIME TO COMPLETE DISCOVERY (THIRD REQUEST)

Upon the request of counsel for the parties herein for the extension of time to complete Discovery and good cause appearing therefore:

IT IS HEREBY ORDERED the following discovery and motion deadlines in the above entitled matter by extended as follows:

1. Close of discovery: August 10, 2010.
2. Last day to file dispositive motions: September 9, 2010
3. Last day to hear dispositive motions: to be determined BB

IT IS FURTHER ORDERED that the May 10, 2010 trial setting be vacated and continued pursuant to the foregoing deadlines. An amended Scheduling Order will NOT be issued, this Stipulation will take the place of an amended scheduling order, this case will now be ready for trial by October 25, 2010. BB

IT IS SO ORDERED.

DATED: March 22, 2010

BB

DISCOVERY COMMISSIONER

Respectfully submitted by:

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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

PLAINTIFFS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS

COME NOW Plaintiffs, by and through their attorneys of record, William H. Brown, Esq. of the LAW OFFICES OF WILLIAM H. BROWN, LTD., and Bradley J. Shafer, Esq. of the law firm of SHAFER & ASSOCIATES, P.C., and hereby submit their Objection to the Discovery Commissioner's Report and Recommendations dated in this matter on February 22, 2010. This Objection is made and based on the pleading papers on file herein, and any oral argument made at the hearing in this matter.

DATED: May 11, 2010

Respectfully submitted,

LAW OFFICES OF
WILLIAM H. BROWN, LTD.

By _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.
BACKGROUND

A. PLAINTIFFS' LAWSUIT.

Plaintiffs operate commercial entertainment establishments in Las Vegas offering live performance dance entertainment to the consenting adult public. Verified Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs ("Complaint") at ¶¶ 27-34. The entertainment presented by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by the First and Fourteenth Amendments to the United States Constitution,[1] as well as by Art. I, §§ 9 and 10 of the Nevada Constitution.[2] Complaint ¶ 36.

On December 19, 2006, Plaintiffs sued Defendants, arguing the Live Entertainment Tax ("LET" or the "tax") as mandated by NRS Chapter 368A ("Chapter 368A") is both illegal and unconstitutional because it unconstitutionally taxes expression protected by the Nevada and

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[1] Because 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)), the federal case law cited herein is applicable to Plaintiffs' Nevada constitutional challenges as well.

[2] 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 v. Glen Theatre, Inc.*, 501 U.S. 560, 565(1991) (nude dancing receives protections under the Constitution); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (same); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981) ("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.'").

United States Constitution. In addition and alternatively, Plaintiffs argued they are specifically exempted from paying the LET pursuant to the statutory exemptions and/or the exceptions in NRS 368A.200(5)(a). Complaint ¶¶ 38-39, 53. Further, Plaintiffs argued, as the LET is unconstitutional, Plaintiffs are not required to pay it and are also entitled to refunds for the amounts paid to date.

Nevertheless, under threats of criminal prosecution and the imposition of fines and other penalties against them, Plaintiffs have all, beginning at various times, paid the LET mandated by Chapter 368A. Complaint ¶ 38.

Plaintiffs' specific legal challenges to the LET are summarized below.

B. PLAINTIFFS' SPECIFIC LEGAL CHALLENGES.

As a preliminary matter, it is unconstitutional to directly tax First Amendment protected activities; as the Supreme Court has noted:

> It is one thing to impose a tax on the income or property of a preacher, it is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed [here] is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. ***The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.***"

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 112 (1943) (emphasis and clarification added).Stated somewhat differently:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. ***When the State imposes a generally applicable tax, there is little cause for concern. We need not fear 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.***
>
> * * *
>
> Further, ***differential treatment***, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is ***presumptively unconstitutional***.

Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 585 (1983) (emphasis added).

The reason for this is simple:

> ***We note that the general applicability of any burdensome tax law helps to 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.***

Leathers v. Medlock, 499 U.S. 439, 445 (1991) (emphasis added).

Generally, a tax may violate the First Amendment three ways: (1) by directly taxing First Amendment freedoms; (2) by targeting a narrowly defined group of speakers; or (3) by taxing speech based on content.

First, a direct tax specifically on First Amendment freedoms is unconstitutional.

> ***Freedom of speech***, freedom of the press, 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.***

Murdock, 319 U.S. at 108, 111 (emphasis added).

Second, a tax that targets a narrowly defined group of speakers is unconstitutional; as set forth by the Supreme Court:

> A tax is also suspect if it targets a small group of speakers.
>
> * * *
>
> The danger from a 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, 499 U.S. at 447-448.

Third, a content-based tax is unconstitutional. *Leathers*, 499 U.S at 447 ("Finally, for 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").

Here, the LET violates the First Amendment for all three of these reasons[3]; but the information Plaintiffs requested from the Department via discovery focused on the second and third reasons (i.e., targeting adult entertainment establishments; and being a content-based tax, respectively).

1. The LET Is An Impermissible Content-Based Tax.

With respect to being an impermissible content-based tax, the LET is a direct tax upon protected expression, and only upon one form of entertainment (applying only to that which is "live"). Moreover, it does not even tax that particular mode of expression in a unified and even fashion, as a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of the tax based upon the *content* of that entertainment.

Initially, the definition of "live entertainment" itself contains numerous exceptions. It ***excludes***, without limitation, certain specific activities (e.g., instrumental or vocal music, occasional performances, performers who stroll continuously throughout the facility, performances which enhance the theme of the establishment or attract patrons to the areas of the performances, broadcasts of live entertainment, entertainment by patrons, animal behaviors, and performances that provide ambience to the facility). N.R.S. § 368A.090(b).

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[3] The LET is unconstitutional under the first test in that it is a tax "laid specifically on the exercise of [First Amendment] freedoms" (i.e., live entertainment). *Murdock*, 319 U.S. at 108 (clarification added). In regard to the second test, the large number of exemptions from the LET demonstrate that the tax targets a "narrowly defined group of speakers," as will be demonstrated by the discussion of the third test below.

Chapter 368A also contains seventeen categories of exceptions to the LET (e.g., live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution, boxing, minor league baseball, or NASCAR events, trade show entertainment, performances by musicians who move through the audience, entertainment provided at shopping malls and amusement rides, outdoor concerts, or entertainment in restaurants which serves as ambience). NRS § 368A.200(5).

These exceptions/exemptions determine whether an entity or individual is subject to the tax based upon the content of the live entertainment; as such, the LET is a content-based tax and is subject to strict constitutional scrutiny.

In other words, these exceptions/exemptions have been gerrymandered in such a fashion to 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. And, if a facial reading of the LET leaves any doubt it was specifically intended to tax live adult entertainment, reviewing the legislative history clearly demonstrates such facial targeting.

2. The LET Impermissibly Targets Adult Entertainment Establishments.

It is constitutionally impermissible to apply a tax on protected expression in such a discriminatory, content-based manner. Where a tax was "not evenly applied to all magazines" and treated "some magazines less favorably than others" the Supreme Court held:

> Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: ***a magazine's tax status depends entirely on its content.*** Above all else, the First Amendment means the government has no power to restrict ***expression*** because of its message, its ideas, its subject matter, or its content. . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.

Arkansas Writers Project, 481 U.S. at 229 (citations omitted, emphasis in original and added).

Likewise, in December 2007, in *Pooh-Bah Enterprises, Inc. v. County of Cook et al.*, 378 Ill.App.3d 268, 317 Ill.Dec. 384, 881 N.E.2d 552 (2007), the Illinois Court of Appeals invalidated a similar tax aimed at adult entertainment based upon this very issue.

There, Chicago had adopted a "fine arts" or "small venue" exception to its tax, although that exclusion did not include "adult entertainment." 881 N.E.2d at 559-560. Like the LET here, the Chicago tax contained exceptions that exempted "favored" amusement from the tax. In a unanimous decision, the court of appeals declared Chicago's broadly worded "amusement" tax to be unconstitutional on its face. That is the case here.

More recently, in **Combs v. Texas Entertainment Association**, 287 S.W.3d 852 (Tex.App. 2009), the Court of Appeals of Texas found a tax against imposed on businesses that offer live, nude entertainment in the presence of alcohol to be unconstitutional. There, the court found that the tax was an unconstitutional content-based tax, holding:

> A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is "particularly repugnant to First Amendment principles." **Arkansas Writers' Project**, 481 U.S. at 229, 107 S.Ct. 1722. As a result, differential taxation based on content is subject to strict scrutiny. **Id.** at 231. A taxing statute is content-based if it "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." **Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.**, 502 U.S. 105, 106, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

Id. at 860. In **Combs**, there were other types of live nude entertainment that were not subject to the tax, such as the kind presented in comedy shows or theaters, and the court there held that:

> These examples reveal that the SOB tax is not imposed on all incidents where live nude entertainment occurs in the presence of alcohol, but only in those situations

> in which the taxing authority – the Comptroller – determines, after examining the content of the expression, that it represents the "essence" of live nude entertainment. This type of differential taxation based on content is precisely the type of restriction warranting strict scrutiny in **Arkansas Writers' Project**, **Minneapolis Star**, and **Simon & Schuster**.

Id. This mirrors the situation at issue here, where other businesses where live entertainment is presented are not taxed under the LET based on the content of the entertainment presented.

Here, the LET exempts a wide variety of "favored" live entertainment, but applies to adult entertainment. This demonstrates a preference for certain messages and speakers and in doing so makes the LET content-based and therefore subject to strict scrutiny. Further, under *Pooh-Bah* this sort of favoritism is fatal to a tax on live entertainment. 881 N.E.2d at 560.

Further, the United States Supreme Court has noted 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).

There, the court found an ordinance banning outdoor signs unconstitutional as being impermissibly content-based because the law included a variety of exceptions of signs that were nevertheless permitted.[4]

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[4] *See also*, *Church of Lukumi v. Hialeah*, 508 U.S. 520, 535-540 (1993) (Court found that exemptions to three city ordinances banning the killing of animals rendered the laws to be content-based, and therefore unconstitutional, as being directed at those practicing the Santeria religion, and that the "pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander); and *U.S. v. Eichman*, 495 U.S. 310, 317-19 (1990) (Court found the facially neutral Flag Protection Act content-based and therefore unconstitutional because although it prohibited burning of the flag, it exempted the burning of a "worn or soiled" flag as a means of disposal. The exception was an act "traditionally associated with patriotic respect for the flag," and demonstrated content targeting by preferring patriotic rather than disrespectful acts upon a flag).

Here, the numerous exemptions reveal that apart from casino entertainment, the LET is in fact targeted principally, if not exclusively, at adult entertainment facilities, which are protected by the First Amendment. Therefore, the LET is content specific; in turn, it is subject to strict scrutiny and it is invalid.

It is against this backdrop of constitutional scrutiny that Plaintiffs sent the Department discovery requests.

3. Plaintiffs' Discovery Requests and the Resulting Dispute.

On March 24, 2009, Plaintiffs served Plaintiffs' First Set of Interrogatories to Defendants (attached as Exhibit 1); on March 26, 2009, Plaintiffs served Plaintiffs' First Request for the Production of Documents and Things to Defendants (attached as Exhibit 2).

On August 17, 2009, ten days before depositions of Defendants' representatives were scheduled to be taken[5], Plaintiffs received the Department's Responses to Plaintiffs' First Set of Interrogatories (attached as Exhibit 3) and Responses to Plaintiffs' First Request for Production of Documents and Things (attached as Exhibit 4). The Department's discovery responses were deficient, and insufficient, as discussed more fully below.

Accordingly, Matthew Hoffer, on behalf of Plaintiff's counsel, held telephone conferences with Blake Doerr, counsel for Defendants, regarding the inadequacy of the discovery responses. In the course of discussions, Plaintiffs' counsel offered to allow responses pursuant to a protective order that would protect business information from the public and even from Plaintiffs themselves, but would allow Plaintiffs' counsel to conduct the necessary analysis to support their claims of unconstitutionality. Still, Defendants' counsel refused to produce the requested responses and documents.

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[5] Depositions of Defendants' representatives were scheduled for August 27 and 28, 2009.

Hence, on September 1, 2009, pursuant to NRCP 37(a)(1), and EDCR 2.34, Matthew Hoffer, of the office of Bradley Shafer, counsel for Plaintiffs, and Blake Doerr, counsel for Defendants, conferred regarding the information not contained in the discovery responses in an attempt to resolve this discovery dispute out of Court. The parties were unable to resolve their differences, thereby necessitating Plaintiffs' Motion to Compel. *See* Exhibit 5 hereto.

Now, Plaintiffs have been forced to incur expenses and costs solely as a result of Defendants' failure to provide adequate discovery and hence, seek appropriate relief from the Court. The Motion to Compel was heard by the Discovery Commissioner on November 13, 2009. A proposed Report and Recommendation was drafted by the parties and the Discovery Commissioner entered the Report and Recommendation (hereinafter simply the "R&R") on February 22, 2010. Exhibit 6 hereto.

The R&R granted in part and denied in part, Plaintiffs' Motion to Compel, only requiring the Defendants to produce a document that contains (for each tax year from 2003 until the present) a list of businesses that paid Live Entertainment Taxes, identified only by category, and the amount of Live Entertainment Tax each category of business paid. The categories are to include, for purposes of illustration only: one time or annual events; sporting events; nightclubs; promoters; performing arts centers; raceways; and gentlemen's clubs. The document should identify whether each business paid the 5% or the 10% Live Entertainment Tax.

The parties had thought that the Discovery Commissioner further recommended that within ten (10) days of the entry of this Court's order, the Nevada Department of Taxation shall provide a document (for each tax year from 2003 until the present) identifying which percentage of the total Live Entertainment Tax collected by the Department of Taxation for

that year was paid by gentlemen's clubs presenting adult entertainment. The document shall provide separate percentages for gentlemen's clubs paying the 5% and 10% Live Entertainment Tax. However, the Discovery Commissioner hand wrote changes onto the filed R&R, which counsel could not fully decipher, but appear to read: "if agreed to by the parties as this was NOT part of the Recommendations at the hearing. However, the percentage of the LET tax paid by Adult entertainment groups must be disclosed, if this is maintained as either a 5% or 10% tax this information must be disclosed." For purposes of these objections (which – in order to be timely - must be filed before clarification can be obtained), Plaintiffs will treat this as a denial of that aspect of the Motion to Compel. All other aspects of Plaintiffs' Motion to Compel were denied.

4. Requested Relief.

For the reasons discussed below, Plaintiffs object to the portion of the Report and Recommendation denying the remainder of Plaintiffs' Motion to Compel, and move this Honorable for an order:

(1) Compelling the Department to immediately submit to the Plaintiffs, within ten (10) days of the entry of this Court's order, the Department's answers to the below-described interrogatories, and to produce within that same time all the un-redacted items and documents requested by the below-described requests for production, all without objection;

(2) Sanctioning the Department for failing to comply with discovery, by awarding Plaintiffs their costs and attorney fees for having filed this motion; and, in addition and alternatively,

(3) Striking the portion of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction that relies upon information the Department now refuses to produce (attached to the Department's Opposition as Exhibits A and B).

II.
LAW AND ARGUMENT

A. THE DEPARTMENT'S DISCOVERY RESPONSES ARE DEFICIENT.

The Rules of Civil Procedure are designed to permit broad inquiry into any matter relevant to the pending action. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947). And the Nevada Rules of Civil Procedure allow for the discovery of all evidence which is relevant or which could lead to the discovery of relevant information; NRCP 26(b)(1) reads:

> **Parties may obtain discovery regarding any matter, not privileged, which is relevant** to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears **reasonably calculated to lead to the discovery of admissible evidence.**

NRCP 26(b)(1) (emphasis added).

Here, the Department's discovery responses are deficient in both substance (essential information is redacted) and temporal scope (responses are largely limited to 2004).

1. Substantively, the Department's Responses Are Meaningless Because Nearly All Relevant Information Is Redacted.

Substantively, the Department has so heavily redacted key information from many documents that they are worthless. Specifically, by way of redaction the Department will not identify (1) the name of the businesses paying the LET, (2) the type of live entertainment

provided at those establishments, or (3) how much tax those businesses pay. Even the document ordered by the Discovery Commissioner in the R&R only required the business category, and not the type of live entertainment provided at the establishment.

For example,

- the Department's Responses to Interrogatories 1, 2, 3, and 15 refer to documents that are redacted to the point of non-responsiveness (Exhibit 3);
- the Department's Response to Interrogatory 19 is non-responsive because it refuses to identify any entities, persons, businesses, or classes that have requested to be exempt from the LET (Exhibit 3); and
- the Department's Response to Interrogatory 20, references a non-existent Exhibit AAA, and incorporates Response 19 (Exhibit 3).

Also, the Department responded to all of Plaintiffs' 26 Requests for Documents by generally incorporating the entire packet of produced documents, stating, "See Exhibits A-KK." Such a blanket response lacks sufficient specificity to be meaningful.

Under NRCP 34(b),

> A party who produces documents for inspection shall produce them as they are kept in the usual course of business or ***shall organize and*** label them to correspond with the categories in the request.

NRCP 34(b) (Emphasis added).

Separating the documents into exhibits was pointless if the Department was simply going to refer broadly and generally to all the documents in response to every request. Further, as discussed above, many of the documents produced are redacted to the point of non-

responsiveness (those documents are Exhibit A, E, G, H, I, J, K, L, M, N, R, S, T, EE[6], FF[7], and II, attached hereto as Exhibit 4.

By redacting virtually all relevant information in the documents produced, the Department has failed to provide responses that are substantive or meaningful. Further, any otherwise meaningful response is nullified by the limited temporal scope.

2. Plaintiffs Requested Information from 2003 to 2008; the Department Primarily Produced Information for 2004.

Each of Plaintiffs' Requests for Documents asked for "any and all documents" since the LET has been in effect (i.e., since 2003). See Exhibit 2. In response, the Department primarily provided information for the tax year 2004 (referring to Exhibits B, E, F, I, S, T, U, and II). See Exhibit 4 hereto.

Further, where the Department did provide documents for years other than 2004, the documents were incomplete and/or heavily redacted. For example,

- Exhibits G and J have no dates listed and are heavily redacted;
- Exhibit L, in addition to being completely redacted except for the totals at the bottom, is missing data for 2003, July-December 2004, January-June 2005, and 2008 (although again, the data provided is useless because of the near complete redaction of information);
- Exhibit M contains only data for 2007; and
- Exhibit N appears to only contain (again redacted) data for February and March 2009. Exhibit 4 hereto.

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[6] Due to the size of this exhibit only Bate Stamp numbers DV000551, 552, 554, 556, 557, 558, 575-581, 584-587, and 604 are attached hereto as they are the redacted documents.

[7] Due to the size of this exhibit, only Bate Stamp numbers DV000660- 662, 667-671, 675, 676, and 678- 680, are attached hereto as they are the redacted documents.

The Department has been administering the LET since its inception in 2003. As such, it presumably possesses data from 2003 to 2008 (as Plaintiffs requested) and not (as the Department responded) for 2004. Yet when Mr. Hoffer spoke with Mr. Doerr regarding this curious omission, Mr. Doerr had no answer and did not offer to produce the missing documents.

Also, beyond failing to meaningfully respond, the Department ostensibly relies upon a privilege that does not apply here.

B. THE LEGISLATURE HAS DETERMINED THE PRIVILEGE THE DEPARTMENT RELIES UPON DOES NOT APPLY TO THIS CASE.

In its privilege log, the Department relies exclusively on NRS 368A.180(2)(C), which it also relies upon in its discovery responses in addition to NRS 49.025. Exhibit 4.

The Department's reliance on these statutes is misplaced.

The privilege under NRS Chapter 368A is expressly *not* applicable to this case because (1) this lawsuit is brought under the provisions of Chapter 368A; and (2) in any event, the Department may disclose the information in a manner that prevents identification of a particular person or document.

1. The Privilege Is Not Applicable Because this Case Is Brought Pursuant to NRS Chapter 386A.

The Department claims the information Plaintiffs requested is privileged under NRS 49.025 and NRS 368A.180(2)(c). Not so.

The Department's reliance on NRS 49.025 is misplaced because NRS 368A.180 does not render any documents unequivocally privileged and confidential and, in fact, specifically states exceptions—under which this lawsuit falls—permitting the disclosure of tax records and information.

Under NRS 49.025, a "public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report ***if the law requiring it to be made so provides***." Here, the law requiring the report to be made is Chapter 368A, which does provide that certain documents are privileged and confidential.

However, Chapter 368A also clearly states that documents are *not* subject to that privilege if they are requested during ***any action or proceeding pursuant to the provisions of this chapter and are directly involved in the action or proceeding.*** NRS 368A.180(2)(a) (emphasis supplied).

Here, this exception applies because this lawsuit is an action under Chapter 368A. The complaint specifically seeks declaratory judgment finding that Plaintiffs were exempt under NRS 368A.200(5)(a), and seeking a refund pursuant to NRS 368A.310. Complaint at 12-13, 15. Likewise, the companion case[8] is an actual appeal pursuant to the administrative process provided for in Chapter 368A. Complaint at 1.

Therefore, since the law requiring the payment of the LET does not provide for an absolute privilege, the Department cannot rely upon NRS 49.025 to refuse to provide properly discoverable information. Our Supreme Court's decision in *Tidvall v. Eighth Judicial District Court*, 91 Nev. 520 (1975), supports this conclusion.

In *Tidvall*, a statute granted the superintendent of banks the absolute right to exercise the privilege to keep all information obtained in bank examination reports confidential, without exception; as the court noted:

> The legislature did not empower the superintendent to place whatever information he might deem confidential beyond the reach of a court order. Instead, it has specifically declared all examination reports and all

[8] *Deja Vu Showgirls of Las Vegas, LLC, dba Deja Vu Showgirls, et al. v. Nevada Department of Taxation, et al.* (District Court Case No. A554970; Dept. 9).

> information obtained by the superintendent in conducting examinations of banks to be confidential and privileged information and has given the superintendent the absolute right to exercise the privilege of nondisclosure.
>
> *Id.* at 525.

The court in *Tidvall* cites NRS 49.025, which the Department now relies on. However, in *Tidvall*, unlike here, the underlying statutes (NRS 665.055, 665.065, and 665.075) granted the superintendent a non-discretionary privilege to keep *all* reports confidential.

Here, on the other hand, NRS 368A.180 specifically states that the privilege is ***not*** absolute and sets forth exceptions under which this lawsuit squarely falls, i.e., an action pursuant to Chapter 368A.

As such, based on the reasoning in *Tidvall*, and the plain language of NRS 368A.180(2)(a), the legislature has clearly decided the privilege the Department relies upon does not apply to this case.

2. The Privilege Is Also Not Applicable Here Because the Department May Produce Information In Statistical Form Without Identifying Individuals or Documents.

Additionally and alternatively, the Department could have produced the requested information pursuant to a second exception to the privilege, which allows for the production of statistical information. Under NRS 368A.180(2)(c),

> 2. The records and files of the Board and the Department concerning the administration of this chapter are *not* confidential and privileged in the following cases:
> ***
> (c) Publication of statistics so classified as to prevent identification of a particular person or document.
>
> NRS 368A.180(2)(c) (emphasis supplied).

Here, the Department could have produced the requested information in a statistical form that would prevent identification of a particular person or document. That is, the Department could have disclosed the business name, and what type of business, is paying what percentage of the non-gaming portion of the LET, and for which years, without identifying a particular person or document.

Plaintiffs are not asking to see actual tax returns or any confidential business information. They simply wish to know who is paying what portion of the LET and when. Finally, assuming *arguendo* a confidentiality issues exists, a protective order would provide adequate safeguards while allowing discovery.

3. The Protective Order Plaintiffs Offered Would Preserve Confidentiality While Allowing Discovery.

Finally, and although the privilege the Department relies upon is inapplicable, Plaintiffs' counsel even offered to allow the Department to respond pursuant to a stipulated protective order which would permit only the Court and the attorneys to see identifying information (other than the category of establishment) for the payers of the LET. This would prevent even the Plaintiffs from knowing which clubs paid how much money, but would permit Plaintiffs' counsel to prove their contention that the adult entertainment businesses are paying the majority of the LET. However, the Department refused to consider this option. The R&R only addressed this option in the context of obtaining further information regarding the ***Plaintiffs*** and not any other businesses. Of course, the Plaintiffs have access to any information regarding ***their*** LET forms, returns, and payments, they want to know what other types of businesses are paying the LET and which are exempt or have sought to be exempt.

4. Beyond the Exceptions to the Privilege, the Information Is Essential to Plaintiffs' Case.

In sum, there are two clear exceptions to the privilege the Department presumes to rely upon and thus, that privilege is not applicable. It is, however, essential to Plaintiffs' case. The requested information (who, and what type of business, is paying what percentage of the non-gaming portion of the LET, for which years) goes to the heart of Plaintiffs' argument: that the LET is unconstitutionally directed at adult entertainment establishments. Likewise, identifying what types of businesses are exempt from, or subject to, the LET is also essential to prove Plaintiffs' claims.

Yet this is the exact information the Department completely redacted, including the names of businesses, the type of businesses, and the amount of tax paid. Lastly, the Department redacted the names of employees and consultants on non-privileged communications regarding the LET.

C. THE DEPARTMENT SIMPLY FAILED TO PROVIDE REQUESTED INFORMATION.

Finally, the Department's response to Interrogatory 24, requesting the identity of the "Live Entertainment Tax Examiner," states that "no such title exists in the Department of Taxation." (Exhibit 3, p. 23). Such a title was identified multiple times in LET forms issued by the Department itself (attached as Exhibit 7), along with a phone number.

The Department did not state a reason for failing to disclose the identity of the Live Entertainment Tax Examiner, or for failing to produce the data that existed for the tax years 2003, 2005, 2006, 2007, 2008 and 2009, as set forth in Section IIA(2), above.

Under NRCP 37(a), the Court may issue orders compelling discovery when a party fails to respond to a request for inspection submitted under NRCP 34. *Fire Insurance Exchange v. Zenith Radio Corporation*, 103 Nev. 648, 651(1987).

As such, and considering there is no good faith basis for refusing to respond, the Court must now compel the Department's response. Additionally and alternatively, the Court should not allow the Department to rely upon information it now withholds.

D. THE DEPARTMENT CANNOT RELY ON PRIOR ARGUMENTS BASED ON INFORMATION IT NOW REFUSES TO PRODUCE

In Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (filed June 23, 2008), Defendants argued that:

> Additionally, the fact that PLAINTIFFS' industry generates more revenue from the tax than any other industry falling under the administration of the Department (n. 4) is simply irrelevant because it is merely a corollary with the number of those types of businesses which have been established in the state compared to other live entertainment establishments – nothing more.
>
> * * *
>
> n. 4 The LET is one tax administered by the Gaming Control Board and the Department of Taxation. NRS 368A.140. The Gaming Control Board collects the majority of the LET. See Exhibit A.

Defendants' Opposition at 13-14.

In support of this contention, the Department attached a table showing the percentage of non-gaming licensees who paid the LET in 2006. This is the exact information the Department now refuses to produce.

Plaintiffs sought data from the Defendants during discovery to establish not only who is paying the LET, but more importantly who is paying the *non-gaming* portion of the tax, the category under which Plaintiffs fall.

Further, Defendants argued that there was no irreparable harm to Plaintiffs' business because the "LET collections increased in 2005 and 2006 and were forecasted to increase in 2007, 2008 and 2009. See Exhibit B." Defendants' Opposition at 15. Those tables and charts attached as Exhibit B to Defendants' Opposition only showed *total* LET numbers, not broken down by type of establishment, or even into gaming and non-gaming categories.

Our Supreme Court has held that "Under NRCP 37(d), a court may strike a pleading of a party for his failure to answer interrogatories." *Havas v. Bank of Nevada*, 613 Nev. 567, 569-570 (1980). To the extent the Department relied on the unresponsive document production as its answers to Plaintiffs' interrogatories, the Department should not be able to rely on those charts and tables in this litigation if it is not going to produce the underlying data. The Discovery Commissioner did not address this concern in her ruling and subsequent R&R, instead denying the majority of Plaintiffs' Motion to Compel.

Therefore, if the Court is not inclined to compel the Department to produce information it relied upon, it should strike those portions of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction relying on those Exhibits.

E. PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES AND COSTS FOR HAVING TO BRING THIS MOTION.

If a party refuses to produce discovery or fails to respond to an opposing party's lawful discovery responses, the moving party is entitled to recover costs involved in bringing the motion to compel. Under NRCP 26(g),

> If a certification is made in ***violation of this rule***, the court, upon motion or upon its own initiative, ***shall impose upon the person*** who made the certification, the party on whose behalf the request, response, or objection was made, or both, ***an appropriate sanction***, which may include an order to pay the amount of the reasonable ***expenses incurred*** because of the violation, ***including a reasonable attorney's fee***.

NRCP Rule 26(g) (emphasis added).

Additionally, NRCP 37 and EDCR 2.34 allow for an appropriate sanction when one party must move to compel the other to comply with discovery. The relevant portion of NRCP 37 states:

> If the motion is granted, the court shall, . . . require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees . . .

NRCP 37(a)(4) (emphasis added).

The relevant provision of EDCR 2.34 states:

> If after request, responding counsel fails to participate in good faith in the conference or to answer discovery, the court may require such counsel to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

EDCR 2.34(d) (emphasis added).

Here, Plaintiffs sent lawful discovery demands to the Department and even after discussions and emails with Plaintiffs' counsel the Department refuses to answer the discovery fully, or to produce relevant, non-privileged information or documents. Further, the Department received the discovery requests in March. If it was going to raise these confidentiality issues, it should have done so before August, 10 days before depositions of Defendants' representatives were to be taken.

Since the R&R declined to do so, the Court should impose an appropriate sanction in the form of attorney's fees as compensation for the Department's blatant refusal to produce adequate, timely responses to Plaintiffs' interrogatories and request for production of documents.

III.
CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Report and Recommendation should be amended to by this Honorable Court, and that an order be entered:

(1) Compelling the Department to immediately submit to the Plaintiffs, within ten (10) days of the entry of this Court's order, the Department's answers to the above-described interrogatories, and to produce within that same time all the un-redacted items and documents requested by the above-described requests for production, all without objection;

(2) Sanctioning the Department for failing to comply with discovery, by awarding Plaintiffs their costs and attorney fees for having filed this motion; and, in addition and alternatively,

(3) Striking the portion of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction that relies upon information the Department now refuses to produce (attached to the Department's Opposition as Exhibits A and B).

DATED: May 11, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2010, the foregoing **PLAINTIFFS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS** 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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DISTRICT COURT

CLARK COUNTY, 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 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, L.L.C., 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 **NEVADA DEPARTMENT OF TAXATION'S OPPOSITION TO PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS AND COUNTER MOTION TO STRIKE** Date of Hearing _____, 2010 Time of Hearing _____

NEVADA DEPARTMENT OF TAXATION'S OPPOSITION TO PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS AND COUNTER MOTION TO STRIKE

COMES NOW Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS by and through its attorney Catherine Cortez Masto, Attorney General, and Blake Doerr, Deputy

Attorney General, hereby submits its Opposition to Plaintiff's Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants [hereinafter "Plaintiffs' Objection"].

This Opposition to Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation and Counter Motion to Strike is made and based on all pleadings and papers on file herein, the attached memorandum of Points and Authorities, and any oral argument that this Honorable Court may allow at the time of the Hearing in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Plaintiff's are owners of a number of exotic dancing establishments allege that the Live Entertainment Tax (hereinafter "LET") established by Chapter 368A of the Nevada Revised Statutes is an impermissible state tax. The Defendants are various agencies of the State of Nevada which administer and collect the LET and approve refunds thereof.

The original Complaint was filed on or about December 19, 2006 (A533273), by eight Plaintiff gentlemen's clubs alleging that the LET violated both the State and Federal Constitution. A second almost identical Complaint (A554970) was filed on or about January 9, 2008 by six of the same plaintiffs. The cases have never been consolidated. Both Complaints have been answered by the Defendants. On or about January 29, 2009, the Plaintiffs amended the Complaints in both matters in order to assert that the LET tax violates the Plaintiffs' rights, both facially and as applied. On or about May 11, 2009, this Court Ordered that the Plaintiffs may file an Amended Complaint in A533273 to add a claim that the Nevada Tax Commission violated the Plaintiffs' due process rights by not affording a fair hearing. On or about May 13, 2009, the Court ordered that the Plaintiffs may amend the Complaint in A554970. From the time that the first case was filed in December 2006, and for two and one half years, until March 2009, no discovery had taken place. Based on the fact that this action was a facial challenge to the statute, the Department did not need to conduct any discovery.

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The Joint Case Conference Report was filed in both A554970 and A533273 on or about October 20, 2008. Although the cases have not been consolidated, the discovery deadlines are the same for both matters. On or about December 2, 2008, the discovery deadline was set at April 27, 2009. On or about March 27, 2009, exactly thirty days prior to the close of discovery, the Department received a Request for Production and the Plaintiff's first set of Interrogatories. *See* Exhibit 1 and Exhibit 2 to Plaintiffs' Objection. Both the interrogatories and requests for production were extremely comprehensive, and it became obvious from the outset that the Department would not be able to provide the responses nor the information within thirty days as required under the Rules, or by the April 27, 2009 close of discovery.

This issue was immediately brought to the Plaintiffs attention, and counsel for the Plaintiffs agreed to extend the time for the responses. In addition, on or about May 9, 2009, the parties entered into a stipulation to extend discovery due to Plaintiffs' counsel's pending knee surgery. At the time, the Plaintiffs' agreed to extend the time to respond to the Interrogatories and Requests for Production until July 3, 2009. Pursuant to a discovery conference that took place on June 17, 2009, the close of discovery was extended to September 30, 2009, and was extended again until February 26, 2010. The parties are in the process of preparing a stipulation to continue discovery pending the outcome of the Plaintiffs' Objections.

During the period between March 27, 2009, when the Plaintiff served its Interrogatories and Requests for Production, and the date that the responses and discovery were produced, counsel for the Department was in constant contact with counsel for the Plaintiffs to discuss discovery. The Plaintiffs accommodated the Department by granting additional time to gather and produce the documents. The Plaintiffs only concern was the time to review the documents prior to taking depositions. The Department responded that it will be very lenient with the notice requirements and dates for the depositions, and make any accommodations it can to promote a timely completion of discovery. Plaintiffs counsel repeatedly agreed to allow the

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Department time, and never once voiced any objection to the time it was taking to gather the documents and prepare the responses.

On or about August 15, 2009, the Department served its responses to the Interrogatories and to the Requests for Production. The Request for Production included 1,192 pages of documents, along with an index of the documents and a detailed privilege log describing the specific document and the statutory bases for asserting various privileges. *See* Index and Privilege Log, attached hereto as **Exhibit "A".**

Upon receipt of the discovery and responses, counsel for the Plaintiff contacted counsel for the Department and stated that he was not pleased with the amount of redaction on a number of the documents. Counsel for the Department explained that by law, the Department cannot divulge any information related to an individual taxpayer. *See* generally NRS 372.750, NRS 360.247. In fact, it is a misdemeanor to release this information, NRS 372.750. In addition to the above statutes, the amount of information that can be produced by the Department with regards to the LET tax is further statutorily constrained by NRS 368.180A, and the privileges contained in NRS 49.025, NRS 49.095 and NRS 49.105. With regard to the privileges contained in NRS 49.025, NRS 49.095 and 49.105, **these privileges belong to the taxpayer and not the Department**. NRS 49.105.

A review of the entire disclosure, instead of just the redacted portions that were produced by the Plaintiff as Exhibit 4 to the Objection will make it obvious that it took the efforts of quite a number of people and a considerable amount of time to gather, review, redact and prepare the documents requested by Plaintiffs for production. A great deal of time and effort went into the review of each request, including a determination of the documents that apply to the request, and specifically what information contained on each document can be disclosed. Based on the statutory constraints placed upon the Department, it is patently obvious that there is no intent to hide any discoverable information.

A number of discussions have taken place between counsel for the Plaintiffs and the Department since the disclosures. In fact, counsel for the Plaintiff stated that he performs

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work for other clients with regards to tax, and is fully aware that taxpayer information is confidential and privileged. Moreover, any attorney is aware that attorney - client information is privileged, and the privilege belongs to the client, not the attorney. Yet the Plaintiff is asking this Court to rule against public policy, and order the Department to violate statutes, ignore privileges, violate the public trust, and be sanctioned for properly and lawfully protecting confidential taxpayer information.

As history to the Plaintiffs' instant motion, on or about September 30, 2009, the Plaintiffs' filed a Motion to Compel Discovery of Defendants. The Defendants filed a timely Opposition, and oral argument was heard by the Discovery Commissioner on or about November 13, 2009. During the hearing on the matter, the Discovery Commissioner made in abundantly clear that she was not going to recommend that the Department of Taxation divulge confidential individual taxpayer information. In addition, because the question at issue here is whether gentlemen's clubs as a whole are being singled out for the LET tax, and not whether a specific individual gentlemen's club is being singled out, after listening to argument on the matter, the Discovery Commissioner stated that the Plaintiffs would have sufficient information if the Department would provide the following:

1. A list identifying the category of businesses, and the amount of LET tax that each category pays;

2. A list identifying the percentage of the total LET tax collected by the Department of Taxation for gentlemen's clubs for each year starting in 2003; and

3. Should any of the Plaintiffs wish to allow the Defendants to divulge any of their privileged and confidential taxpayer information, they are to provide a written release to the Department to permit such disclosure.

The balance of the Plaintiffs' Motion to Compel was denied, including, but not limited to the Plaintiffs' request for sanctions, the Plaintiffs' request to produce the documents in un-redacted form, and the Plaintiffs' request for costs. In return, the Defense withdrew its Counter Motion to Strike.

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The Plaintiffs' were asked to prepare the Report and Recommendation. After several reminders by the Defendants, the Plaintiffs' finally provided a proposed Report and Recommendation only days before the close of discovery. On or about, February 22, 2010, the Discovery Commissioner issued the Report and Recommendation, making some changes and eliminating a portion of the agreement which required the Department to separate the percentages for gentlemen's clubs paying the 5% and 10% LET, stating that this was not part of the recommendation at the hearing. *See* Report and Recommendation, attached hereto as **Exhibit "B".**

Pursuant to Local Rules of the Eighth Judicial District Court [EDCR], a party can file written objections to the discovery commissioner's report. EDCR 2.34(f). On March 3, 2010, Plaintiff's filed the instant Objection to the Discovery Commissioner's Report and Recommendation, which is nearly an identical copy of its September 30, 2009 Motion to Compel. In its Objection, the Plaintiffs again present nearly seven pages arguing the merits of its case.[1] (Page 3, lines 18 – 29, page 4, line – 11 through page 10, line 7). Plaintiffs' argument of facts and law which allegedly support its case is not relevant to the discovery matters at issue here. The Plaintiffs' arguments are inappropriate at this time in the litigation, and as a result, the Defense hereby renews its Motion to Strike the portion of the Plaintiffs' Objection to the Report and Recommendation Motion which argues the merits of its case, and respectfully request that this Court ignore the Plaintiffs' attempt to introduce collateral matters not related to the discovery issues in the Plaintiffs' Objection.

Furthermore, the Department hereby requests that the Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants be denied in its entirety because: 1) individual taxpayer's information cannot lawfully be disclosed by any member, employee or agent of the Department or Commission; and 2) sanctions should not be imposed because there was no willful attempt to withhold any lawful Discovery. Additionally, the District Court should not

[1] The Plaintiffs have even added to its argument on the merits.

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strike the portion of the Defendant's Opposition to the Plaintiffs' Motion for Preliminary Injunction as requested in the Plaintiffs' Motion (pages 21 and 22 of Plaintiffs' Motion to Compel), since the information provided in the Opposition Exhibits A & B of the Opposition to Motion for Preliminary Injunction are public documents gathered from the website of the Department of Taxation. *See* Governors Budget and Annual report 2007 – 2008 and http://tax.state.nv.us/ documents/annualreport2007, attached hereto as **Exhibit "C".**

ARGUMENT

The Discovery Commissioner has the Duty to First Hear All Discovery Disputes and Make a Report and Recommendation.

Pursuant to NRCP 16.1(d)(1) all discovery disputes, with limited exceptions, must first be heard by the Discovery Commissioner. After hearing the dispute, the Discovery Commissioner must file a report with the recommendations for resolution of each unresolved dispute. NRCP 16.1(d)(2), EDCR 2.34(f).

During the hearing on the matter, the Discovery Commissioner stated that she had reviewed the Plaintiffs' Motion to Compel and Exhibits, as well as the Defendants Opposition and exhibits, and immediately stated that she was not going to recommend that the Department of Taxation provide any individual taxpayer information or reports that are confidential and privileged pursuant to law.

The Discovery Commissioner's recommendation is correct. The Discovery Commissioner reviewed the pleadings and exhibits and wisely determined that if the Department prepares and provides a list of the type of businesses and the percentage of LET Tax that they pay, as well as the category of gentlemen's clubs and the percentage of LET tax paid by all gentlemen's clubs as a whole compared with all other types of businesses that pay LET tax, the Plaintiffs' would have the information they require. In its Objection, the Plaintiffs have failed to show how information related to individual taxpayers is relevant to its claim that

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gentlemen's clubs as a whole are unconstitutionally being singled out in order to chill their free expression.[2]

Because the Plaintiffs have filed a written Objection to the portion of the Report and Recommendation "denying the remainder of the Plaintiffs' Motion to Compel, and have moved this Court to Order" that the Defendants produce confidential taxpayer information in un-redacted form, that the Court Order the Defendants to be sanctioned, and that the Court strike portions of the Defendants Opposition to the Plaintiffs' Motion for Injunction, the Department of Taxation will address the specific issues raised in the Plaintiffs' Motion to Compel as well as the Plaintiffs' Opposition to the Discovery Commissioners Report and Recommendation.

I. Plaintiffs' Motion for Production of Documents

Plaintiffs seek information that cannot lawfully be provided. NRCP 26(b)(1) gives the parties the ability to "obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter....: NRCP 26(b)(1) (emphasis added). Here, the information the Plaintiffs have requested is both confidential and privileged, and most important, the Plaintiff has failed to show how information related to specific taxpayers, such as; individual business tax returns and reports (Requests No.'s 4, 5, 6, and 7), how much "individual payees" pay (Request No. 8), inquiries by specific taxpayers related to their scope of business (Request No 23), individual business entities who owe live entertainment tax (Request No. 25), and tax information regarding communications between the Department and individual taxpayers (Request No. 26), is "reasonably calculated to lead to the discovery of admissible evidence" to its claims that the LET tax is unconstitutional. Contrary to the request by the Plaintiffs, the Department cannot furnish information regarding the specific businesses that have not joined this lawsuit which have applied for exemptions, or are paying LET tax, as they have requested at page 19, lines 24 – 27 of the Plaintiffs' Objection, as this is just the type of confidential taxpayer information that the statutes require be kept confidential. NRS 368A.180, NRS

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[2] Which is as senseless as an argument that a tax on gaming unconstitutionally singles out gambling establishments and is an attempt to chill the freedom to gamble, or that a tax on mining unconstitutionally singles out mining in order to have a chilling effect on mining.

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49.025. Furthermore, the Department cannot furnish the names of businesses paying LET and how much individual businesses pay, as requested at Page 13, lines 26 - 28 and page 14, lines 1 -3 of the Plaintiffs' Objection because the Department cannot give information that will allow even the identification of a particular taxpayer or document. NRS 368A.180(2)(c) ("Publication of statistics so classified as to prevent the identification of a particular person or document.").

Moreover, the Plaintiffs' requests for production are extremely overbroad. For example, asking for "any and all" documents related to any payments of the LET tax seek reports and confidential information related to individual taxpayers. (*See e.g.* Requests No. 1 and 2). Furthermore, many of the documents requested were available from the Plaintiffs themselves, as there are eight[3] gentlemen's club Plaintiffs who should have filed LET tax returns for many years. It is noteworthy that while the Department is prohibited from divulging taxpayer information, the Plaintiffs are free to share their LET tax information with each other. With regards to taxpayers who have chosen not to join the instant lawsuit, contrary to the desire of the Plaintiffs to learn confidential information about similarly situated taxpayers, the "business name" and "type of business" of specifically "who" is paying LET and when it is paid as requested by the Plaintiffs at page 19, lines 1 - 8, is confidential and privileged pursuant to both NRS 368A.180 and NRS 49.025.

Furthermore, the Plaintiffs have asked the Department to provide, and the Department has provided, at great expense in both time and materials, information that is widely available on the internet or from the Legislative Counsel Bureau, which is a public, less burdensome and less expensive source. (Request No.'s 9, 10, 11, 12, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 22). With respect to the publically available documents, not only did the Department provide hard copies of these documents at the expense of the Department, but provided the websites where the Plaintiffs can get the information themselves.

[3] Déjà vu Showgirls, Little Darlings, Spearmint Rhino, Olympic Garden, Sapphire, Crazy Horse Too, Treasures, and Scores.

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The Plaintiffs' suggestion of a protective order, at page 19, lines 9 – 25, does not apply in this case. Neither the statutes nor the regulations that apply to the information in the custody and control of the Department allow for a protective order. *See generally,* Chapter 368A. Simply stated, information related to individual taxpayers or taxpayer's reports cannot be divulged, even under a protective order since they are confidential and privileged by law, nor can any information related to specific documents be produced which would enable the information to be related back to specific taxpayers. NRS 368A.180. The United States Supreme Court has held that there is no right to any evidence from "persons protected by a constitutional, common-law or statutory privilege. U.S. v. Nixon, 419 U.S. 683, 709 (1974).

In fact, the Court in Tidvall v. Eighth Judicial Court, (the case law cited by the Plaintiff in its Objection to the Report and Recommendation) states:

> Our statute authorizing the exercise of privilege against disclosing government information is unequivocal and specific. In other jurisdictions such a privilege exists only if the interest in maintaining the secrecy of the information out-weighs due process considerations in the particular case. In those jurisdictions it becomes necessary for the trial judge to examine the information claimed to be privileged in order to balance the competing considerations and determine whether or not discloser of the information would be against public policy. **Here revelation of the information asserted to be privileged may not be compelled in order to determine whether or not it is privileged because the legislature has granted the privilege under the statutes relied upon by the petitioners.**

Tidvall v. Eighth Judicial District Court, 91 Nev. 520, 525, 539 P.2d 456, 459 (1975).

In other words, if the law makes the information privileged or confidential the matter ends there.

The Department has made every effort to comply with the Plaintiffs requests, but as will be shown below, the Department is statutorily prohibited from revealing all of the information on the Plaintiffs "wish list."

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A. The Department's hands are tied as far as divulging certain information.

The Department of Taxation is a state agency. As such, it must comply with the statutes and regulations which govern its powers. No agency, agent or employee of an agency can act outside its governing statutes and regulations. In fact, for public policy reasons, a state agency is held to a very high level of protecting confidential information, and if information statutorily deemed confidential is publicized, it would most assuredly have a harmful and chilling effect on the public trust.

It is not difficult to imagine that it would severely impair the ability for the agency charged with the collection and administration of the tax statutes to perform its duties if taxpayers feared that their confidential information would become public. As a result, with very limited and narrowly construed exceptions, nearly every public agency is prohibited from disclosure of information related to specific taxpayers. *See* NRS 368A.180. Not only is the Department prohibited from giving information related to specific taxpayers, but it is required that any statistical information be disguised so that it is not possible to identify either the document or the taxpayer. NRS 368A.180 (2)(c) ("Publication of statistics so classified as to prevent the identification of a particular person or document.").

As stated above, an agency cannot act outside of its governing statutes or regulations. Accordingly, there are a number of statutes which govern the disclosure of information by the Department and/or Commission.[4] The confidentiality statute governing the Department of Taxation and the Commission states regarding the LET tax states:

> **NRS 368A.180 Confidentiality of records and files of Board and Department**
> 1. Except as otherwise provided in this section and NRS 239.0115 and 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files **shall not disclose** any information obtained from the records or files of the Board or the Department or from any examination,

[4] This includes any employee, member, agent, or officer.

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investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Board and the Department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.

(c) Publication of statistics so classified as to prevent the identification of a particular person or document.

(d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

NRS 368A.180 (emphasis added)

The above statute is not a privilege statute which the Department may invoke, or the taxpayer may waive; it is a statutory prohibition, which cannot be violated. The confidentiality statute described above is based on and reflective of NRS 372.750, governing sales and use taxes, which, in relevant portions state:

NRS 372.750 Disclosure of information unlawful; exceptions.

1. Except as otherwise provided in this section or NRS 360.247, it is a misdemeanor for any member of the Tax Commission or officer, agent or employee of the Department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular

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> of them, set forth or disclosed in any return, or to permit any return or copy of a return, or any book containing any abstract or particulars of it to be seen or examined by any person not connected with the Department.

NRS 372.750

The State is no different than the Federal Government. The Federal Government must also keep taxpayer information confidential. Pursuant to 26 U.S.C. § 6103, the general rule of taxpayer confidentiality, the government may not divulge taxpayer information:

> **(a) General rule**
>
> Returns and return information shall be confidential, and except as authorized by this title—
>
> **(1)** no officer or employee of the United States,
>
> **(2)** no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104 (c), and
>
> **(3)** no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (12), (16), (19), or (20) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C. § 6103(a)

In addition to the statutes regarding taxpayer information, there are general rules of privilege. A statutory privilege is a pronouncement of public policy. Tidvall v. Eighth Judicial District Court, 91 Nev. 520, 522, 539 P.2d 456, 457 (1975). Privilege is different than the statutory prohibitions in that it can be waived by specific parties, but nonetheless, it must be observed and carefully guarded especially by those who cannot waive the privilege. Specifically, NRS 49.025 governs information contained in reports and returns.

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NRS 49.025 Required reports privileged by statute.

1. A person making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides.

2. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides.

3. No privilege exists under this section in actions involving false statements or fraud in the return or report or when the report is contained in health care records furnished in accordance with the provisions of NRS 629.061.(Added to NRS by 1971, 782; A 1977, 1314)

NRS 49.025.

The plain language of NRS 49.025 clearly states that information on a tax return or report is confidential and the privilege belongs to the person making the return. It also gives the agency the right to refuse to disclose the return information even if the law provides for disclosure—and in this case, NRCP 26(b)(1) specifically excludes discovery that is privileged by law. Although there are very limited times that taxpayer information is not privileged, such as in the case with fraud, as far as the information that the Plaintiff is requesting, the narrow exceptions do not apply. Moreover, the privilege is owned by the Taxpayer and not the Department!

Thus, the return information requested by the Plaintiffs in Request for Production Numbers 1, 2, 3, 4, 5, 6, 7 and 8 cannot be furnished by the Department, pursuant to NRS 368A.180 as well as NRS 49.025. *See* Privilege log furnished with the production of documents, attached hereto as **Exhibit "A".**

Not only are the Department of Taxation and its employees precluded from divulging taxpayer information, but its representative, the Attorney General's Office is likewise forbidden to furnish this information, and thus cannot be held responsible for redacting information privileged and confidential by law.

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With respect to the Attorney General's Office, in addition to return information, there are general rules of privilege which apply in this matter. Pursuant to Chapter 49 of the Nevada Revised Statutes, confidential communications are defined as:

> **NRS 49.055 "Confidential" defined.**
> A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

NRS 49.055

Additionally, there are general rules concerning privilege which define the privilege between a lawyer and its client. This privilege is extremely important to the profession, and as with most other privileges, it is owned by the client, not the lawyer.

> **NRS 49.095 General rule of privilege.**
> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
> 1. Between himself or his representative and his lawyer or his lawyer's representative.
> 2. Between his lawyer and the lawyer's representative.
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

NRS 49.095

> **NRS 49.105 who may claim privilege.**
> 1. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence.
> 2. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

NRS 49.105

In this instance, the Department of Taxation is the client, and pursuant to NRS 49.095 and NRS 49.105, the Attorney General's Office which represents the Department, does not own the privilege and cannot divulge the information that has been provided to it by its client,

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the Department of Taxation, as part of this litigation. Accordingly, both federal and state taxing entities and their counsel are prohibited from disclosing taxpayer information.

Nevertheless, in an effort to produce the documents that the Plaintiffs have requested, the Department carefully examined each document and made a determination as to which information violated NRS 368A.180 and which information was privileged pursuant to NRS 49.025, NRS 49.095 and NRS 49.105. After carefully reviewing each document, the documents were produced with the confidential and privileged information redacted. In addition, the Plaintiffs were provided with a privilege log delineating which statute or privilege applied. *See* **Exhibit "A".** Information requested by the Plaintiffs on Page 19, lines 3 -4 of the Plaintiffs' Objection, such as "the business name and what type of business, is paying what percentage of the non-gaming portion of the LET, and for which years.." is confidential taxpayer information pursuant to NRS 368A.180 and NRS 49.025 and cannot be disclosed.

Consequently, the Department acted within the statutory requirements when it complied with NRS 368A.180 and NRS 49.025 by redacting confidential and privileged taxpayer return information from the disclosures, and did not act in violation of Rule 37 when it produced documents "not privileged" pursuant to Rule 26(b) in its production of documents.

B. An agency cannot act outside its statutes and regulations.

A public agency cannot perform any function that is not included in its statutes and regulations. As one example, the Plaintiffs contend in both of the Complaints as well as in its Motion to Compel and Plaintiffs' Objection that they have paid the LET tax because they are "under threats of criminal prosecution and the imposition of fines..." *See* Plaintiffs' Objection at page 4 lines 7-8. Nothing can be further from the truth. The Plaintiffs do not have a basis for this statement in either law or fact, and it can only be assumed that this allegation has repeatedly been added to pleadings to impart sympathy on the part of the trier of fact.

The truth is that only when a taxpayer intentionally commits criminal fraud by making false statements or false entries in their records or books with "the intent to defraud the State" is he guilty of a gross misdemeanor. NRS 368A.350.

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NRS 368A.350 Prohibited acts; penalty.

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

NRS 368A.350

Even then, neither the Department nor the Commission can bring criminal charges because neither the statutes nor regulations give the Department and/or the Commission the power to bring criminal charges, prosecute a criminal case, or impose any fines. Therefore, contrary to the Plaintiffs' repeated assertions, there have not -- and have never been -- any threats of criminal prosecution or fines with regard to paying the LET. Conversely, if an agent, employee or member of the Department or Commission violates the confidentiality statutes, that person is subject to criminal prosecution.[5] NRS 372.750 ("is a misdemeanor for any member of the Tax Commission or officer, agent or employee of the Department to make known in any manner whatever...").

In this case, in order to be accommodating, the Department produced the documents requested[6], and carefully made every attempt to provide the Plaintiffs with the information they requested, including the preparation of the statistical analysis at the expense of the Department, recommended by the Discovery Commissioner, while still complying with NRS 368A.180, NRS 49.025, NRS 49.095, and NRS 49.105.

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[5] Even then, any criminal prosecution would be prosecuted by another agency, not the Department of Taxation.
[6] In redacted form to conceal privileged and confidential taxpayer information.

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C. The Department's discovery responses comply with the Nevada Rules of Civil Procedure and disclosed information from all years.

Nevada Rules of Civil Procedure 34 is limited to matters within the standards set by NRCP 26(b). NRCP 26(b) entitles parties to discovery of documents regarding any matter "not privileged." NRCP 26(b), *see also* Tidvall v. Eighth Judicial District Ct., 91, Nev. 520, 527, 539 P.2d 456, 460 (1975). Interestingly, the Plaintiffs cite only the portion of Rule 26 (b) which defines the scope of discovery in Rule 26(b) and intentionally leave off the portion of Rule 26 which places limitations on the discovery. Specifically, the Plaintiffs neglected to include Rule 26(b)(2) which states:

> **2) Limitations.** By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is **unreasonably cumulative or duplicative**, or **is obtainable from some other source that is more convenient, less burdensome, or less expensive**; (ii) the party seeking discovery has **had ample opportunity by discovery in the action to obtain the information sought**; or (iii) the discovery is **unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation**. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

Nev. R. Civ. P. 26(b)(2) (emphasis added) (Section (b)(1) is included on page 13 of the Plaintiffs' Objection).

In this case, the Department has complied with Rule 26(a) and (b). The documents produced by the Department include the non privileged information requested by the Plaintiffs pursuant to NRCP 25(b)(1), and include enough information to allow the Plaintiffs to pursue their constitutional claims pursuant to NRCP 26(b0(2). However, the Plaintiffs seek information that is cumulative, duplicative, and obtainable from other less burdensome and less expensive sources. Furthermore, the Plaintiffs waited over two years - until one month prior to the close of discovery to serve its discovery requests.

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Notwithstanding, pursuant to the Discovery Commissioner's Report and Recommendation, the Department of Taxation has prepared at its own expense in time and labor, the documents containing a list identifying the categories of businesses and the amount of LET tax that each category pays, and a list identifying the percentage of the total LET tax collected by the Department of Taxation for gentlemen's clubs for each year starting in 2003. The Plaintiff has failed to establish how a specific individual taxpayer's LET obligation is relevant to the claims in this litigation. Since the question is whether gentlemen's clubs as a whole are being singled out not whether a specific individual gentlemen's club is being singled out.

1. The information the Plaintiffs seek is obtainable from another source that is more convenient, less burdensome and less expensive.

A considerable amount of the information requested by the Plaintiffs is available from the Internet, from the Legislative Counsel Bureau, and from the Plaintiffs themselves. The Plaintiffs could have shared their tax return information as well as their seating capacities, paid admission and merchandising information with each other, which would give the Plaintiffs large amounts of the information requested in Requests No. 1, 2. 3, 4, 5, 6, 7, and 8. The Department's documents reflecting projected revenue in Requests No. 9. 10 is available on the Internet at the Department of Taxation's website for all tax revenue, and a chart was provided in the production of documents at Exhibit O, attached hereto as **Exhibit "D".**

The regulations were adopted through notice and comment at public workshops. The entire legislative history of the LET tax is available on line from the Legislative Counsel Bureau, and in order to aid the Plaintiffs, the Defense provided specific web sites in the responses along with hard copies of the legislative history and compact discs of the discussions that took place during the workshops. (Requests No. 10. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22). *See* National Advanced Systems v. U.S., 795 F. Supp. 1208, 1210 (1992) ("This Court will not order the government to do plaintiff's research for them which they are perfectly capable of doing themselves.").

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In fact, the same tables that the Plaintiffs are seeking to exclude in their Motion to Compel are public records which were gathered from the Department's web site. *See* Plaintiffs Objection at page 21 - 22, *see also* Exhibits A and B, the exhibits that the Plaintiffs are seeking to exclude, attached hereto as **Exhibit "C".**

In an effort to accommodate the Plaintiffs, the Department provided hard copies of these documents, and provided the websites where the information is available, at the Department's expense in both time and money.

2. The Plaintiffs have had over two and one half years to request information and failed to do so.

The first Complaint in this matter was filed in December 2006. The first request for production was not served until the end of March 2009, one month prior to the close of discovery. It is very telling that the Plaintiffs had nearly two and one half years to perform discovery and waited until one month prior to the close of discovery to make very broad, cumulative and duplicative requests for documents. The twenty-six very broad requests included "any and all" documents related to any payments and anticipated payments of the LET tax. *See* Plaintiffs Objection at page 15, line 8, *See also* Request for Production attached to Plaintiffs Objection at Exhibit 2.

The Plaintiff should not be able to use its dilatory tactics as an offensive tool to allege that the Department has failed to cooperate in the discovery process. The Plaintiffs should have started their requests in 2006 and not in 2009, and the Department should not be responsible for the Plaintiffs lack of diligence in performing discovery in a timely manner.

3. The Plaintiffs are requesting information that is unduly burdensome, expensive and not necessary to the issues in this case.

The information the Plaintiffs have requested is not relevant to the facial challenge to the statute. The facial challenge is to determine whether the statute is constitutional. The amount of tax paid by <u>any individual entity</u> is not relevant to a facial challenge. The names of the entities that pay the tax is not relevant to a facial challenge. The only information relevant

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would be the types of businesses that are subject to the LET tax, and that information has been produced. In addition, all of the information that the Plaintiffs need to pursue their facial challenge is available to the public.

With regards to the as applied challenge, the totals provided in the discovery are sufficient to show that gentlemen's clubs are not the only venues that are subject to the LET tax. The production of documents show the other venues that may be subject to the LET tax include sporting events, annual events, brothels, night clubs, bars, promoters, raceways, hotels, clubs, golf courses, and performing arts centers. *See* Exhibit H to production of documents, attached to Plaintiffs Objection Exhibit 4A, bates number DV000033-37, *see also* Exhibit L to the production of documents attached to Plaintiffs' Objection Exhibit 4B, bates numbers DV000059-115 which contains tables with the totals by year for admissions and food and merchandise for all years between 2004 and 2008. The information which will identify a specific taxpayer is redacted, pursuant to NRS 368A.180 and NRS 49.025, but the totals for specific categories are there. *See* Exhibit 4B to Plaintiffs' Objection, bates numbers DV000059-115. Exhibit O to the Department's production of documents contains an analysis of all taxes from 2005 through the present, and a projection through 2011. This chart compares all sources of tax revenue. *See* Exhibit O to the Department's production of documents, attached hereto as **Exhibit "D".** In other words, the information the Plaintiffs seek is available to them through the Department's production of documents, the Internet, and through the Plaintiffs themselves.

4. The information produced was responsive to the requests and concerned all years, not just 2004 as alleged.

The Department provided a total of 1192 pages of documents in the production of documents. All of the documents were indexed. *See* **Exhibit "A"**. The responses to the interrogatories included references to all documents because all of the requests for documents were duplicative and cumulative of each other, asked for "any and all" documents, and nearly all of the documents applied to all of the responses in one way or another.

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The Plaintiffs allegation that the responses and production were non responsive is misleading. The requests for production were forwarded to the Department, and although it may appear that much of the information provided was related to 2004, this is the information that was provided. If there were reports that were produced in a certain format in 2004, that does not indicate that the Department used the same program or format to prepare the reports in later years. In fact, it is entirely likely that certain data collected in 2003 or 2004 was not necessary years later.

The disclosure contains everything that was requested with regards to years after 2004. For example: 1) Exhibit "H" contains the different types of venues subject to LET (2005); 2) Exhibit "J" contains information related to the different seating capacities for the different venues; 3) Exhibit "K" contains correspondence from taxpayers dated 2003, 2005, 2007 and 2008; 4) Exhibit "L" contains a table of the LET tax for every year between 2004 and 2008 which includes totals for the admissions, food and merchandise, and totals for each category; 5) Exhibit "M" contains an analysis of 2007; 6) Exhibit "N" contains a monthly deposit report for June 2007; 7) Exhibit "N" contains the monthly analysis for 2009; 8) Exhibit "O" contains the General Fund Revenues for 2005 through 2008 with projections for 2009 through 2011; and 9) Exhibits "AA" and "BB" contains information related to the adoption of regulations in 2005 and 2006. Moreover, the disclosure contained an index of everything provided pursuant to Rule 34(b). *See* Index to Production of Documents, attached hereto as **Exhibit "A".**

Thus, it is disingenuous to state that the Department "primarily provided information for the tax year 2004." *See* Plaintiffs' Objection at page 15. Moreover, the discussions with Mr. Doerr were not as alleged in the Plaintiffs' Motion. *See* page 16, lines 3 – 5. The only discussion concerned the redaction of certain reports, and the redacted signature on one letter. *See* Affidavit of Blake Doerr, Esq., attached hereto as **Exhibit "E".** Mr. Doerr stated that he could probably provide the name of the person who signed the letter on behalf of the Department, and Plaintiffs' counsel was to provide the bates numbers of any other documents

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where he felt that the redaction was not necessary. Mr. Doerr stated that if Plaintiffs' counsel would provide the bates numbers, he would go through each questionable document and make a determination if the information could lawfully be provided. In fact, during the telephone conversation, Plaintiffs' counsel stated that he had not looked through all of the documents, and would get back with Mr. Doerr after he had. However, Plaintiffs' counsel did not contact Mr. Doerr further with regards to this issue and proceeded to file the motion to compel. *See* **Exhibit "E".**

"NRCP 34 is limited to matters within the scope of NRCP 26(b), which authorizes parties to obtain discovery regarding any matter not privileged." Tidvall, 91. Nev. at 527. Since statutory privileges apply, the Motion to Compel must be denied.

II. Plaintiffs' First Set of Interrogatories

The Plaintiffs served the first set of Interrogatories thirty days prior to the original close of discovery. Just as in the case of the Requests for Production discussed above, the information requested through the Interrogatories cannot be disclosed because the same confidentiality and privilege statutes apply to the Interrogatories as to the Production of documents. NRS 368A.180, NRS 49.026, NRS 40.095, NRS 49.105. *See* Interrogatory No.1 ("...identify each and every person or business entity that paid Live Entertainment Tax..." wanting specific taxpayer information regarding 5% and 10% LET and the amount each entity paid), Interrogatory No. 2 ("Identify each and every person or business entity subject that paid taxes under the original version of the Live Entertainment Tax ..." wanting information related to individual taxpayers who were not subject to LET after the regulations changed); Interrogatory No. 3 ("Identify each and every person or business entity..." wanting information related to entities that did not have to pay LET but did after the regulation changes); Interrogatory No. 15 (Identify each and every person or business entity that became subject to the LET" with regards to the changes to the statute); Interrogatory No. 19 (Identify each and every person, business entities, or classes of business entities" who have requested

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exemptions). None of this information can be shared with the Plaintiff because it would require disclosure of confidential taxpayer information as well as return and report information which would violate NRS 368A.180 as well as NRS 49.025.

In its Motion, the Plaintiffs have specifically objected to the Department's responses to Interrogatories No.'s 1, 2, 3, 15, 19, 20, and 24.

With regards to Interrogatory No. 24, Michele Jacobs, Tax Examiner II is the person most knowledgeable, but does not have the title of "live entertainment tax examiner." As stated in the response to the Interrogatory, no such title as "live entertainment tax examiner" exists within the Department. However, Ms. Jacobs, whose title is "Tax Examiner II" performed examinations of LET returns, and was available for questions regarding same. Ms. Jacobs has already been named as a person most knowledgeable for Interrogatory No. 11, and has been named as a Defendant in this action.

Interrogatories No. 1, 2, 3, 15, 19, and 20 specifically request the identity of each and every person or entity and/or specific taxpayers that have paid LET tax, or has been exempted from LET tax, or not subject to the original version of the LET tax, or has asked for an exemption from LET tax, from 2003 to the present. Besides being overly broad, as discussed under the "Production of Documents" section above, taxpayer information cannot be revealed pursuant to NRS 368A.180 and NRS 49.025.

Contrary to the arguments presented by the Plaintiffs, NRS 368A.180 is very specific in its prohibition of divulging taxpayer information. The language of the statute is plain and unambiguous. The "records and files of the Board and Department concerning the administration of [the LET tax] are both confidential and privileged." The privilege does not belong to the Department, and the Department does not have the power to waive the privilege of keeping taxpayer information confidential. NRS 49.025. The confidentiality of taxpayer records is statutory, and prohibits this information from disclosure except in narrow exceptions which do not apply here. NRS 368A.180. *See also* U.S. v. Nixon, 419 U.S. 683, 709 (1974).

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Furthermore, the statute clearly and unambiguously states that "[t]he Board, the Department and any employee of the Board or the Department may not be required to produce any of the record, files and information for the inspection of any person of for use in any action or proceeding." NRS 368A.180 (1). That is specifically what is taking place here; the Plaintiffs are attempting to gather personal taxpayer information to use in a proceeding, and pursuant to NRS 368A.180, the Department is not required to disclose this information.

The statute does, however, carve out some very narrow exceptions including that the documents are "not subject to privilege if they are requested during any proceeding pursuant to the provisions of this chapter and are **directly involved** in the action or proceeding" NRS 368A.180(2)(a) (emphasis added). Here, the Plaintiffs are asking for taxpayer information related to each and every person or entity that has paid LET tax, been exempted from LET tax or not subject to the original version of the LET tax, from 2003 to the present. This request does not fall under the exceptions as there are only eight Plaintiff taxpayer entities that are "directly involved" in this matter, and no others who are "directly involved." The eight Plaintiffs can share their LET taxpayer information with each other if they so choose, but apparently have decided not to.

The Federal Courts have looked at issues related to the confidentiality of taxpayer information pursuant to 26 U.S.C. § 6103. The general rule is that the government may not disclose a taxpayer's return information. *See* U.S. v. Northern Trust Co., 210 F. Supp. 2d 955, 957 (N.D. Ill. 2001). However, under certain circumstances, disclosure is permitted, such as in the event that the information contained in the third party's return is directly related to the resolution of the issue in the proceeding. **Id**. In Northern Trust, the defendants requested tax returns of persons who had interests in the shares of stock at issue, and the court determined that it would help to establish the Trust's ownership of the stock, which is an element of the claim. **Id**. The court made a point of stating that there was no competitive advantage at stake, and the taxpayer and third party were not business competitors, thus an *in camera* inspection of the records was not necessary. **Id**. at page 958.

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In Shell Petroleum v. U.S., 47 Fed. Cl. 812, (2000), the court allowed an in camera view of the un-redacted documents because the information concerning production techniques contained in the "Section 43" certificates of competitive oil companies was directly related to the type of tax credit Shell Petroleum was seeking. Shell, 47 Fed. Cl. at 815. However, all information that was not "directly related" was to be redacted if the court determined that the certificates had information directly related to the claims. Shell, 47 Fed. Cl. at 820. The case at bar is distinguishable from the above two cases since the gentlemen's clubs are in direct competition with each other, and should not be forced to share their personal taxpayer information if they choose not to.

Moreover, while the federal "directly related" standard is somewhat broad, Nevada has a much narrower exception to its confidentiality statute. Pursuant to NRS 368A.180, the third party must be "**directly involved**." NRS 368A.180. Here, there are only eight Plaintiffs who are directly involved with this lawsuit. Accordingly, other than the eight gentlemen's clubs that have signed on as Plaintiffs, no other entity subject to LET tax is "directly involved" and their taxpayer information must remain confidential. Therefore, this narrow exception does not apply to the Plaintiffs broad requests for information with regards to any and all information related to each and every person or entity that has paid LET tax, been exempted from LET tax, or not subject to the original version of the LET tax, from 2003 to the present.

The Plaintiffs have relied on the Tidvall v. Eighth Judicial District Court, for the proposition that bank examination information is more confidential and privileged than taxpayer information. *See* Plaintiffs' Objection at page 18 lines 5 – 8. In Tidvall, the Court did not order disclosure of customer information, ruling that the legislature has determined that the information gathered during a bank examination is confidential and privileged.

While Tidvall is still good law, the banking statutes applied in Tidvall have been significantly changed since 1975. NRS 665.055 and NRS 665.065 no longer exist, and NRS 665.075 has been changed, but regardless of the changes, the statute still requires that the

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banks copy of the examiner's report be kept confidential. However, NRS 665.133(2) now addresses the use of information for statistical purposes and states;

> "All the reports made available pursuant to this section remain the property of the Division of Financial Institutions, and no person, agency or authority to whom the reports are made available, or any officer, director or employee thereof, may disclose any of the reports or any information contained therein, except in published statistical material that does not disclose the affairs of any natural person or corporation." NRS 665.133(2)

A comparison of NRS 665.133(2) and NRS 368A.180(c) ("[p]ublication of statistics so classified as to prevent the identification of a particular person or document") shows that with regards to taxpayer information, not only must the person identity be hidden, but the source of the information must also be kept confidential with regards to confidentiality of LET tax information.

The Tidvall Court cited NRS 49.025, the same privilege statute operative in the instant matter, and stated "[h]ere we are not concerned with the balance between a public interest and the need for relevant evidence in civil litigation because the legislature has determined that the superintendent of banks making a report required by law has an absolute privilege to refuse to disclose the contents of that report and a duty to prevent others from disclosing the report." Tidvall, 91 Nev. at 525. Here, NRS 49.025 proscribes the disclosure of taxpayer's returns or report information. Since the legislature has determined that the information contained in the reports and returns is confidential, the Court cannot order the disclosure. Thus, in the instant matter, as in Tidvall, a statutory privilege takes priority over the Plaintiffs wish to know. *See* Tidvall, 91 Nev. at 527.

Accordingly, the Plaintiffs' Motion to Compel must be denied because the statutes governing confidentiality and privileges are clear. NRS 368A.180, NRS 49.025, NRS 49.095, NRS 49.105. The statutes were put in place by the Legislature for public policy reasons, and the Supreme Court in this state has recognized that statutory confidentiality and privilege outweigh disclosure.

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III. Sanctions do not apply because the Department substantially justified the reasons for redacting the disclosures.

Sanctions are not appropriate in this matter. The Department complied with the Plaintiffs discovery requests by producing all documents "not privileged." NRCP 26(b)(1). The Department properly redacted information that was confidential and privileged in conformance with NRS 368A.180, NRS 40.025, NRS 40.095 and NRS 49.105. In addition, the Department provided a privilege log citing the rule which applies to each redaction pursuant to NRCP 26(b)(5). **Exhibit "A".**

"Generally, sanctions may only be imposed where there has been willful noncompliance with a court order or where the adversary process has been halted by the actions of the unresponsive party." GNLV Corp. v. Service Control Corp., 111 Nev. 866, 900 P.2d 323 (Nev., 1995), Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). Additionally, fundamental notions of fairness require sanctions should only be imposed when the sanctions relate to the specific conduct at issue. **Id**. Thus, sanctions should only be imposed when the rules are willfully disregarded – which is not the case here.

The Department did not disregard any of the applicable discovery rules in this case, in fact, to the contrary, the Department took the time to locate and prepare the documents for production, examine each document, review the applicable rules favoring the production of documents, prepare applicable objections to production, statutory limits on the production, and privileges. Then each of more than 1,190 documents were individually reviewed for compliance with the statutes, indexed and produced. A privilege log was produced to inform the Plaintiffs the privilege or statute governing the particular document.

With regards to the Interrogatories, the Department took a great deal of time researching and providing the responses to the Interrogatories that would conform to Rule 33, and provide as much information as the Department could legally provide. The responses to the Requests for Production as well as the Interrogatories do not imply a willful disregard for the rules that could trigger sanctions.

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During the conversation which took place in late August 2009, Plaintiffs counsel stated that he was unhappy with the amount of redaction, but had not reviewed the documents in full. Counsel for the Plaintiff was to supply the bates numbers of the documents that he believed should not have been redacted, so that they could be reviewed. However, Plaintiffs counsel did not contact the attorney for the Department again with regards to this issue and complete the meet and confer process prior to filing the Motion to Compel. Thus, the Plaintiffs did not meet and confer in good faith, and are not entitled to sanctions.

Moreover, the Plaintiffs are not entitled to attorneys fees. Attorney fees should not be imposed when the alleged failure to comply with a discovery order is substantially justified. NRCP 37(b). Here, the Department made every attempt to produce what it can legally disclose while being compliant with NRCP 16.1, NRCP 26, NRCP 33, NRCP 34, NRS 368A.180, NRS 49.025, NRS 49.095 and NRS 49.105. A review of the production and privilege log will show that the Department's position is substantially justified, and as a result attorney fees should not be awarded to the Plaintiffs for bringing their Motion. *See* U.S. EEOC v. Caesars Entertainment, Inc., 237 F.R.D. 428, 435 (2006) (attorneys fees should not be awarded when the objection was substantially justified, and if reasonable people can differ on the matter in dispute).

Therefore, the Department is requesting that the Plaintiffs' Motion for sanctions and attorneys' fees be denied.

IV. The Plaintiffs' Motion to Strike Exhibits A and B to the Department's Opposition to Motion for Preliminary Injunction must fail.

Plaintiffs have moved to have Exhibits A and B to the Department's Opposition to the Plaintiffs' Motion for Preliminary Injunction stricken. *See* Plaintiffs' Objection at page 21 – 22. The Plaintiffs base their argument on a claim that the Department has refused to produce the same information that it produced as exhibits to the Opposition. First, the documents were produced in the Department's Opposition, and there is no reason to produce them a second time. Second, and more relevant, the documents were gathered from the Department's

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website and are public documents. *See* Governors Budget and Annual report 2007 – 2008 and http://tax.state.nv.us/ documents/annualreport2007. In addition, the documents at issue are admissible as public records pursuant to NRS 52.085, NRS 52.047 and NRS 52.065.

DEPARTMENT'S MOTION TO STRIKE

The purpose of a motion to compel is to apply for an order of disclosure and/or to resolve discovery issues. Nev. R. Civ. P. 37(a). The motion is heard by the Discovery Commissioner, whose role in the process is to rule on discovery issues and not on the merits of the moving party's case. Any Objection to the Report and Recommendation is to be filed with the District Court. EDCR 2.34(f). The Plaintiffs Objection contains nearly seven pages arguing the merits of their constitutional challenge of the LET tax. *See* Plaintiffs' Objection at page 3, lines 18 – 29, page 4 , line 11 through page 10 line 7. The merits of the case are to be decided by the District Court at the time of the trial in this matter and not during a discovery dispute. Therefore, since this is the improper time to argue the merits of Plaintiffs' constitutional challenge to the LET tax, the Department is moving to strike page 3, lines 18 – 29, page 4 , line 11 through page 10 line 7 of the Plaintiffs' Objection.

CONCLUSION

Based on the foregoing the Department of Taxation respectfully moves that this Honorable Court deny the Plaintiffs' Objection to the Report and Recommendation Regarding Plaintiffs' Motion to Compel in its entirety and find the following:

1) That the Plaintiffs are not entitled to individual taxpayer's information which cannot lawfully be disclosed by any member, employee or agent of the Department or Commission pursuant to NRS 368A.180 and NRS 49.025;

2) That a protective order does not apply because pursuant to Tidvall, the legislature has spoken as to the confidentiality and privileges associated with this type of information;

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3) That sanctions and attorneys fees will not be imposed because there was no willful attempt to withhold any lawful discovery, and the Department produced the documents and responses in conformance with Rules 26, 33 and 34;

4) That this Court will not strike the portion of the Defendant's Opposition to the Plaintiffs' Motion for Preliminary Injunction as requested in the Plaintiffs' Objection, since the information provided in the Opposition Exhibits A and B are public documents; and

5) This Court grants the Department's Counter Motion to Strike the portions of the Plaintiffs' Motion to Compel that present arguments on the merits of the case (page 3, lines 18 – 29, page 4, line 11 through page 10 line 7).

Respectfully submitted this 18th day of March 2010.

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

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake Doerr, #9001
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Attorneys for Nevada Department of Taxation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served the foregoing **NEVADA DEPARTMENT OF TAXATION'S OPPOSITION TO PLAINTIFFS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF DEFENDANTS AND COUNTER MOTION TO STRIKE** By causing to be delivered to Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

WILLIAM H. BROWN, ESQ.
Nevada Bar No.: 7623
SULLIVAN BROWN
330 South Third Street, Ste. 860
Las Vegas, NV 89101

BRADLEY J. SHAFER,
Michigan Bar No. P36604
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110

Dated this 18th day of March 2010.

Karen Plett
An employee of Office of Attorney General

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

DCRR
WILLIAM H. BROWN, ESQ.
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Counsel for Plaintiffs

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Facsimile: (517) 886-6565
Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

Date of Hearing: November 13, 2009
Time of Hearing: 9:30 a.m.

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

DISPUTE RESOLUTION CONFERENCE DATE:

November 13, 2009

APPEARANCES:

Plaintiffs: William H. Brown, Esq. of the LAW OFFICES OF WILLIAM H. BROWN, LTD.; and Bradley J. Shafer, Esq., of SHAFER & ASSOCIATES, P.C. (Michigan Counsel)

Defendants: Blake Doerr, Esq.; Vivienne Rakowsky, Esq.; and David J. Poper of the OFFICE OF THE ATTORNEY GENERAL

I.

FINDINGS

After review of the pleadings submitted regarding Plaintiffs' Motion to Compel Discovery of Defendants, and the arguments presented before me during the November 13, 2009, hearing, I find that the Defendants may not be compelled to produce confidential taxpayer information but must produce certain documents pursuant to my recommendations below.

II.

RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED that Plaintiff's Motion to Compel Answers to the Interrogatories and to produce un-redacted documents requested by the Plaintiffs be granted in part and denied in part.

IT IS FURTHER RECOMMENDED that within ten (10) days of the entry of this Court's order, the Nevada Department of Taxation shall provide a document that contains (for each tax year from 2003 until the present) a list of businesses that paid Live Entertainment

Taxes, identified only by category, and the amount of Live Entertainment Tax each category of business paid. The categories should include, for purposes of illustration only: one time or annual events; sporting events; nightclubs; promoters; performing arts centers; raceways; and gentlemen's clubs. The document should identify whether each business paid the 5% or the 10% Live Entertainment Tax.

IT IS FURTHER RECOMMENDED that within ten (10) days of the entry of this Court's order, the Nevada Department of Taxation shall provide a documents (for each tax year from 2003 until the present) identifying which percentage of the total Live Entertainment Tax collected by the Department of Taxation for that year was paid by gentlemen's clubs presenting adult entertainment. The document shall provide separate percentages for gentlemen's clubs paying the 5% and 10% Live Entertainment Tax if agreed to by the parties as this was not part of the recommendations at the hearing. However, the percentage of the Live Entertainment Tax paid by adult entertainment groups must be disclosed, if this is maintained as either a 5% or 10% tax, this information must be disclosed.

IT IS FURTHER RECOMMENDED that should any of the Plaintiffs wish to allow the Defendants to divulge any of their privileged and confidential taxpayer information, they must provide a written release to the Department which permits such disclosure.

IT IS FURTHER RECOMMENDED that no sanctions will be imposed in regard to Plaintiffs' motion, and the parties shall bear their own costs.

IT IF FURTHER RECOMMENDED that the remainder of Plaintiffs' Motion to Compel should be denied. Defendants' countermotion to strike was withdrawn.

. . .

. . .

The Discovery commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 4 day of May, 2010.

DISCOVERY COMMISSIONER

Submitted by:
LAW OFFICES OF WILLIAM H. BROWN, LTD.

By _____
WILLIAM H. BROWN, ESQ. (7623)
330 South Third Street, Ste. 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 336-9371
Counsel for Plaintiffs

Approved as to form and content by:
OFFICE OF THE ATTORNEY GENERAL

By _____
Blake A Doerr, Deputy Attorney General

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

Pursuant to E.D.C.R. 2.34(f), and objection must be filed and served no more than five (5) days after receipt of the Discovery Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the Clerk of the Court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.

A copy of the foregoing Discovery Commissioner's Report was:

X Mailed to the Plaintiffs/Defendants at the following address on the 6 day of May, 2010.

William H. Brown, Esq.
LAW OFFICES OF WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101

Bradley J. Shafer, Esq.
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110

Blake A. Doerr, Esq.
Vivienne Rakowsky, Esq.
David J. Pope, Esq.
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89135

X Placed in the folder of Plaintiffs'/Defendants' counsel in the Clerk's office on the 6 day of May, 2010.

STEVEN D. GRIERSON

By _____
Deputy Clerk

Case Name: Deja Vu Showgirls of Las Vegas, LLC, et al. v. Nevada Department of Taxation, et al.

Case Number: A533273

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

___ The parties having waived the right to object thereto,

X No timely objection having been received in the office of the Discovery Commissioner pursuant to E.D.C.R. 2.34(f),

___ Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

* * *

AND

X IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner (attached hereto).

___ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2010, at ___:___ a.m.

DATED this 19th day of May, 2010.

DISTRICT COURT JUDGE

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CLERK OF THE COURT

NOE

WILLIAM H. BROWN, ESQ.
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Counsel for Plaintiffs

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Lansing, Michigan 48906-2110
Telephone: (517) 886-6566
Facsimile: (517) 886-6565
Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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

NOTICE OF ENTRY OF ORDER

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order affirming and adopting the Discovery Commissioner's Report and Recommendations was entered on May 19, 2010, a copy of which is attached hereto as Exhibit 1.

DATED: June 10, 2010

LAW OFFICES OF
WILLIAM H. BROWN, LTD.

By _____
William H. Brown, Esq. (7623)
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby declares that she is an employee of the **LAW OFFICES OF WILLIAM H. BROWN, LTD.,** and that on June 10, 2010 she deposited a true and correct copy of the **NOTICE OF ENTRY OF ORDER** in the United States Mail, postage fully prepaid, addressed to the following:

Blake A. Doerr, Esq.
Vivienne Rakowsky, Esq.
David J. Pope, Esq.
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89135

Bonnie Bulla, Discovery Commissioner
OFFICE OF THE DISCOVERY COMMISSIONER
200 Lewis Avenue, 5th Floor
Las Vegas, NV 89115

By _____
An employee of the ~~LAW OFFICES OF~~ **WILLIAM H. BROWN, LTD.**

EXHIBIT 1

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CLERK OF THE COURT

DCRR

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Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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.

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Defendants.

Case No.: A533273
Dept. No.: IX

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

Date of Hearing: November 13, 2009
Time of Hearing: 9:30 a.m.

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

DISPUTE RESOLUTION CONFERENCE DATE:

November 13, 2009

APPEARANCES:

Plaintiffs: William H. Brown, Esq. of the LAW OFFICES OF WILLIAM H. BROWN, LTD.; and Bradley J. Shafer, Esq., of SHAFER & ASSOCIATES, P.C. (Michigan Counsel)

Defendants: Blake Doerr, Esq.; Vivienne Rakowsky, Esq.; and David J. Poper of the OFFICE OF THE ATTORNEY GENERAL

I.

FINDINGS

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IT IS FURTHER RECOMMENDED that should any of the Plaintiffs wish to allow the Defendants to divulge any of their privileged and confidential taxpayer information, they must provide a written release to the Department which permits such disclosure.

IT IS FURTHER RECOMMENDED that no sanctions will be imposed in regard to Plaintiffs' motion, and the parties shall bear their own costs.

IT IF FURTHER RECOMMENDED that the remainder of Plaintiffs' Motion to Compel should be denied. Defendants' countermotion to strike was withdrawn.

. . .

. . .

The Discovery commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 4 day of May, 2010.

DISCOVERY COMMISSIONER

Submitted by:
LAW OFFICES OF WILLIAM H. BROWN, LTD.

By _____
WILLIAM H. BROWN, ESQ. (7623)
330 South Third Street, Ste. 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 336-9371
Counsel for Plaintiffs

Approved as to form and content by:
OFFICE OF THE ATTORNEY GENERAL

By _____
Blake A Doerr, Deputy Attorney General

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

Pursuant to E.D.C.R. 2.34(f), and objection must be filed and served no more than five (5) days after receipt of the Discovery Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the Clerk of the Court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.

A copy of the foregoing Discovery Commissioner's Report was:

X Mailed to the Plaintiffs/Defendants at the following address on the 6 day of May, 2010.

William H. Brown, Esq.
LAW OFFICES OF WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101

Bradley J. Shafer, Esq.
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110

Blake A. Doerr, Esq.
Vivienne Rakowsky, Esq.
David J. Pope, Esq.
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89135

X Placed in the folder of Plaintiffs'/Defendants' counsel in the Clerk's office on the 6 day of May, 2010.

STEVEN D. GRIERSON

By _____
Deputy Clerk

Case Name: Deja Vu Showgirls of Las Vegas, LLC, et al. v. Nevada Department of Taxation, et al.

Case Number: A533273

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

___ The parties having waived the right to object thereto,

X No timely objection having been received in the office of the Discovery Commissioner pursuant to E.D.C.R. 2.34(f),

___ Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

* * *

AND

X IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner (attached hereto).

___ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2010, at ___:___ a.m.

DATED this 19th day of May, 2010.

DISTRICT COURT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	June 30, 2010

06A533273 Little Darlings Of Las Vegas LLC, K-Kel Inc, et al
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

June 30, 2010	9:00 AM	All Pending Motions	All Pending Motions (06/30/10)

HEARD BY: Gonzalez, Elizabeth COURTROOM: RJC Courtroom 14C

COURT CLERK: Kathy Klein

RECORDER: Jill Hawkins

PARTIES PRESENT:

Brown, William H.	Attorney for Plaintiff
Doerr, Blake A.	Attorney for Defendant
Pope, David J.	Attorney for Defendant
Rakowsky, Vivienne	Attorney for Defendant

JOURNAL ENTRIES

- Plaintiff's Motion to Vacate Order and Alternatively for Reconsideration...Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants

Court noted procedurally, This Court will be hearing these matters today for Dept. IX while Judge Togliatti is out. Counsel had no objection to today's motion being heard before Judge Gonzalez. Court stated its findings. Colloquy regarding Mr. Brown delivering a courtesy copy to discovery. COURT ORDERED, Motion to Vacate Order, GRANTED. COURT FURTHER ORDERED, Plaintiff's Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendants, to be SET before Judge Togliatti.

Upon Court's inquiry to Consolidate or Coordinate cases A533273 & A554970, Mr. Pope and Mr. Doerr had no objection to Coordinate the cases. COURT ORDERED, Cases COORDINATED for certain matters, under EDCR 2.50 and Court directed Counsel to draft an order. Court noted any issues they deem to be coordinated, Counsel is to list both cases in their captions on the motions and hearings set in both cases, Further Counsel is to notice all parties. Court encouraged Counsel to prepare a protective order and to work on a scheduling order regarding their production of

documents prior to returning to Dept. IX. Colloquy regarding discovery produced. COURT ORDERED, matter set for a status check to discuss the discovery production schedule.

08/05/10 9:00 AM PLAINTIFFS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFFS' MOTION TO COMPEL DISCOVERY...STATUS CHECK: DISCUSSIONS OF DISCOVERY PRODUCTION SCHEDULE

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	June 30, 2010

08A554970 K-Kel Inc
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

June 30, 2010	9:00 AM	Status Check	Status Check: Minute Order Regarding Coordination of Cases A533273 & A554970

HEARD BY: Gonzalez, Elizabeth COURTROOM: RJC Courtroom 14C

COURT CLERK: Kathy Klein

RECORDER: Jill Hawkins

PARTIES PRESENT:

Brown, William H.	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
Rakowsky, Vivienne	Attorney

JOURNAL ENTRIES

- Court noted procedurally, This Court will be hearing these matters today for Dept. IX while Judge Togliatti is out. Counsel had no objection to today's motion being heard before Judge Gonzalez. Upon Court's inquiry to Consolidate or Coordinate cases A533273 & A554970, Mr. Pope and Mr. Doerr had no objection to Coordinate the cases. COURT ORDERED, Cases COORDINATED for certain matters, under EDCR 2.50 and Court directed Counsel to draft an order. Court noted any issues Counsel deems to be coordinated, Counsel is to list both cases in their captions on the motions and hearings set in both cases, Further Counsel is to notice all parties.

Electronically Filed
08/04/2010 04:53:18 PM

CLERK OF THE COURT

ORDR
WILLIAM H. BROWN, ESQ.
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Telephone: (517) 886-6560
Facsimile: (517) 886-6565
Co-Counsel for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT
CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, et al.

Plaintiffs, vs.

NEVADA DEPARTMENT OF TAXATION NEVADA TAX COMMISSION, et al.,

Defendants.

Case No.: **A533273**
Dept. No.: **9**

ORDER VACATING PRIOR ORDER and COORDINATING CASES

Hearing Date: June 30, 2010
Hearing Time: 9:00 a.m.

Plaintiffs' Motion to Vacate Order and Alternatively, for Reconsideration (the "Motion") having come on for hearing before this Honorable Court on June 30, 2010, at the hour of 9:00 a.m.; the Court having read and considered the papers and pleadings on file herein, and the

arguments of counsel, the Court hereby orders as follows:

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion is hereby GRANTED.

IT IS FURTHER ORDERED that the Order entered May 28, 2010 adopting and affirming the Discovery Commissioner's Report and Recommendations (R&R) is hereby VACATED.

IT IS FURTHER ORDERED that the Court will hear argument on Plaintiffs' Objections to the R&R on August 5, 2010, at 9:00 a.m.

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IT IS FURTHER ORDERED that pursuant to EDCR 2.50(b) this case (District Court Case No. A533273; the "First Case") and District Court Case No. A554970 (the "Second Case") are hereby COORDINATED.

DATED this 29th day of July, 2010.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

for Judge Gonzalez

Respectfully submitted:

LAW OFFICES OF
WILLIAM H. BROWN, LTD.

By _____

WILLIAM H. BROWN, ESQ.
Nevada Bar No.: 7623
LAW OFFICES OF
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WBrown@SullivanBrown.com
Counsel for Plaintiffs

Approved as to form and content:

OFFICE OF THE ATTORNEY GENERAL
Catherine Cortez Masto, Attorney General

By _____

David J. Pope
Sr. Deputy Attorney General
Blake Doerr
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
BDoerr@ag.nv.gov

Attorney for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	August 12, 2010

06A533273 Little Darlings Of Las Vegas LLC, K-Kel Inc, et al
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

August 12, 2010 9:00 AM All Pending Motions

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Tia Everett

RECORDER: Yvette Lester

REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney

JOURNAL ENTRIES

- STATUS CHECK: DISCUSSIONS REGARDING DOCUMENT SCHEDULING...PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFF'S MOTION TO COMPEL DISCOVERY OF DEFENDANTS...NEVADA DEPARTMENT OF TAXATIONS'S OPPOSITION TO PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION REGARDING PLAINTIFF'S MOTION TO COMPEL DISCOVERY OF DEFENDANTS AND COUNTER MOTION TO STRIKE

APPEARANCES CONTINUED: Brad Shaffer Esq., Pro Hac Vice, present on behalf of Plaintiffs.

Colloquy regarding case. COURT ORDERED, Plaintiff's Objection GRANTED IN PART as follows; Defendants shall produce for an in camera review by the Court the names listed in exhibit "K" exemptions as well as any correspondence, document, and/or email which would have prompted a letter being sent to them; Objection DENIED in all other respects; Defendant's Counter Motion DENIED; and matter SET for Status Check. Court DIRECTED counsel to prepare and submit order

with all parties signing off as to form and content. COURT FURTHER ORDERED, all outstanding Summary Judgment Motion by any party are DENIED and counsel are to prepare and submit summary orders to such effect.

8/24/10 9:30 AM STATUS CHECK: DISCOVERY / IN CAMERA REVIEW...STATUS CHECK: INJUNCTIVE RELIEF

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	August 12, 2010

08A554970 K-Kel Inc
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

August 12, 2010 **9:00 AM** **Status Check**

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Tia Everett

RECORDER: Yvette Lester

REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney

JOURNAL ENTRIES

- Colloquy regarding case. COURT ORDERED, matter Set for Status Check.

8/24/10 9:30 AM STATUS CHECK: DISCOVERY / IN CAMERA REVIEW...STATUS CHECK: INJUNCTIVE RELIEF