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. A658870

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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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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

LITTLE DARLINGS OF LAS VEGAS, LLC, K-KEL, INC., et al.,	CASE NO. A-533273
Plaintiffs,	DEPT. NO. IX
vs.	
NEVADA DEPT. OF TAXATION, OLYMPUS GARDEN, INC., et al.,	**Transcript of Proceedings**
Defendants.	

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

STATUS CHECK: DISCUSSIONS REGARDING DOCUMENT SCHEDULING/SETTLING HEARING

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

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

THURSDAY, AUGUST 12, 2010

COURT RECORDER:	TRANSCRIPTION BY:
YVETTE SISON-BRITT District Court	VERBATIM DIGITAL REPORTING, LLC Englewood, CO 80110 (303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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Transcript of Proceedings
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APPEARANCES:

FOR THE PLAINTIFF:	WILLIAM H. BROWN, ESQ. BRAD SHAFER, ESQ.
FOR NEVADA DEPARTMENT OF TAXATION:	VIVIENNE RAKOWSKY, ESQ. BLAKE A. DOERR, ESQ. DAVID POPE, ESQ. *Attorney General's Office*

LAS VEGAS, NEVADA, THURSDAY, AUGUST 12, 2010, 9:00 A.M.

THE COURT: Deja Vu Showgirls of Las Vegas, A533273. And for the purposes of today's proceedings, Little Darlings of Las Vegas -- I'm sorry, wrong paper. There we go, 554970 and 533273. Those are the two case numbers for the record. Counsel, can everyone state their appearances?

MR. SHAFER: Your Honor, Brad Shafer appearing on behalf of the plaintiffs.

MR. BROWN: William Brown for the plaintiffs, Your Honor.

MS. RAKOWSKY: Vivienne Rakowsky from the Attorney General's Office on behalf of the Department of Taxation.

MR. DOERR: Blake Doerr on behalf of the Department of Taxation.

MR. POPE: David Pope also with the Attorney General's Office on behalf of the Department of Taxation and other defendants.

THE COURT: Okay. I guess, Judge Gonzalez was kind enough to handle my calendar when I was out of the jurisdiction and you appeared before her. I told her that there's, I mean, somewhat of a tortured history here such that -- that there were preliminary motions brought before the court, the court's original plan was to issue written decisions on those motions that came before.

As time has passed, and I have -- have read, you

know, I've been reading the cases that were provided in the insane number of volumes of -- of just -- of -- of authority that you've provided me, certain things have happened. Because, you know, the longer you're a judge, the more you learn, and the more you -- the more appeals you have, and the more decisions from the Supreme Court you get back, and the more you learn what they anticipate from the District Court.

And in this case my view of this case has kind of changes over time. Originally -- somewhat changed, somewhat not changed. I had intimated to you that you would need to do discovery, and you've been doing discovery, and I believe I suggested that at the hearing that you're going to need to go forth and do discover.

I'm even more convinced, based upon a recent case and some other experiences, while not exactly on point, I had a matter that -- where the constitutionality of a statute was being challenged. And rather than just decide something as a matter of law, as a knee jerk reaction yes or no, I required certain things to occur in this case. And at the end of the day, I actually took a different tact than I would have at the beginning of the case and I was affirmed.

Now, does that mean that that's on point with this? No. What that means is I just want to make sure that I have all the information, all the arguments and any and all evidence because what -- what this case was at the beginning,

perhaps from my perspective, might be different depending on what -- what you all present to me as far as specific evidence, and maybe it won't. But the point is this is too important, in my view, and based upon my experience, you know, I'm sorry, if it costs more money, I'm sorry if it costs more time, but, you know, if you get -- if I get affirmed, then you're done. If I don't get affirmed, then you come back and you do it anyway.

So let's just do it once. And so, you know, not easy to put that in an order and have it make any sense. And so, you know, you've been waiting, I'm sure, for a written decision. And then my thoughts were well, I'm going to do a detailed legal analysis, when at the end of the day when I make the decision in this case, I'm going to have to do a legal detailed analysis, and so why -- why am I pre-analyzing? And so what I had planned to do was address this to you.

I apologize that it's taken to long to specifically have this conversation with you. But at some point I knew you were doing discovery and I knew -- I knew you were off to the races, so to speak. And so I am disinclined to do what I originally planned to do because I don't want to do it twice, and I don't -- I don't want to do a detailed specific findings of fact and conclusions of law and all of these things when, quite frankly, I would like to have an entire and a complete record and then make a decision and not do findings for the

preliminary injunction, which by the way, has been practically and de facto denied and the -- and the summary judgment motions because at some point I will be duplicating the work, and I may be convinced that a different -- different analysis is required.

And so I apologize that you all have been waiting and wondering gee, I'm sure she's very busy, but I want you to understand that there's been kind of a -- a transformation of how I believe I should handle this from the time I first saw you and what I planned to do and how you've given me an incredible briefing, an incredible amount of authority and, you know, couldn't possibly make it any easier for a district court judge to make a decision other than, you know, feeding it -- it to me with a spoon, but that's not the issue.

The real issue is I want to know at the end of the day what evidence, if any, might have been relevant to this analysis. And I don't want to -- I don't want to have a knee jerk decision that turned out to be something I would have done different. And I've learned that from experience recently, so -- and I was affirmed.

And, you know, you want to do all this, and then hopefully I make the right decision and you're not coming back.

MR. SHAFER: Could I make one comment or possible request in regard to that?

THE COURT: Sure.

MR. SHAFER: I've got no problem in the substantive matters of the constitutionality of a statute. If you may remember when we were arguing the preliminary injunction to years ago, there were really two issues. One was the constitutionality of the statute. One was the constitutionality of the statutory provision that prohibited you from granting injunctive relief. And I argued to you that because there was a violation of a separation of powers, that provision in itself was unconstitutional.

You indicated to us that you would be entering -- you were disinclined to preclude courts from granting injunctive relief and then you were going to give us a minute order in regard to that aspect of it. And because the scope of relief, I think would be relevant to what we are doing and any remedies we are seeking if the court could at least give an order on that because I don't think there's -- I think opposing counsel would agree, there's no factual development in regard to whether there's a violation of separation of powers on a provision that precludes you from granting injunctive relief.

MR. DOERR: In all honesty, Your Honor --

THE COURT: Let me just say, that this might weigh into it and it may not. Maybe I'm the only one that's thinking about this. But as I was reading case after case

after case, and the more time I've spent -- even though you haven't spent two hours in here with me with these folks, okay, I've actually spent a lot more time on your case.

And the thing is I'm, to an extent, do a disservice if you -- anyone wanted to take up a writ on some of these sub -- I mean, I don't know that they're big issues, but sub issues than the big issue. And -- and actually I hadn't given that -- I -- I apologize for that. That just hadn't weighed into the -- to the -- to my concerns about your issues. Does that -- I mean, I guess, what I'm trying to say is I have no problem issuing summary denials.

But, if it's going to be, you know, where it's going to be hard for anybody to take up a writ on I find there's material issues of fact exist or 56(f), okay, that's not hard, and I don't know what anyone could do with that on -- on a writ.

But this particular issue is different and maybe -- maybe I was remiss in not recognizing that that could be a writable, appealable decision.

MR. DOERR: I -- I was just going to represent that I really -- it's been too long, and I didn't remember that that was something you had said. And if -- if -- if you're asking for a response, I would just like an opportunity to review that.

THE COURT: Sure. Has it --

MR. DOERR: Sorry.

THE COURT: -- been two years? It hasn't been two years.

MR. DOERR: Well, I think it's been a year and a half.

THE COURT: I did tell you to do discovery.

MR. DOERR: And, your --

THE COURT: I said you can anticipate that you'll be doing discovery, i.e. I'm going to deny your motion, do a really great order. Only I didn't do the really great order because the more I thought about it, the more I realized that that would probably be a mistake on my part in case I -- as happened in the other case recently where constitutionality of something was challenged -- ended up changing my mind. Do you understand what I'm getting at?

MR. DOERR: Well, we have no problem with doing the discovery and having a full factual record before a decision is made.

THE COURT: Okay.

MR. DOERR: In fact --

THE COURT: So can we get a --

MR. DOERR: -- as we waited, we anticipated that that's what was happening, so we don't have an issue with that.

THE COURT: I have your arguments on CD. I've

listened to you since. We've been together in absentia. And so I can get you -- I'll burn you a disk of it. Actually, that's -- that's, you know, in all the list of issues of problems in this case as far as things that I've been thinking that hasn't been one of the -- and I've been remiss.

I mean, that's an important issue that you arguable could writ up. I don't know how you're going to take up summary judgment or -- but injunctive relief or restraining order, anything like that, is clearly something that can be pursued, and I apologize to you, but I would like to give counsel the opportunity to check the disk.

I would hate for you to have to pay -- you wouldn't have to pay, so if you want a transcript you can have one. But you can also get the disk and (indiscernible) entity. Get the disk and it's pretty convenient to be able to go back and forth and zoom around and find -- find what you want. And then if you need a transcript later, fine. But it will take -- that was -- that was a significant hearing, so it would take her awhile.

So it's up to you. If you want a transcript just so -- because quite frankly, if you are going to take up a writ, anyone, I mean, I -- I don't know what the State's position would be, but at some point if I didn't grant injunctive relief, but I find I'm -- that I am able to consider that with the inherent power of the courts, if you'd want to writ that,

I don't know. I don't know what you're -- I don't know what you're -- unless at the end of the day there's a permanent injunction.

You don't have any damages. You have no finding against you. You just have a -- but I mean, that's -- the other thing is under 3130 you are the AG. Are you not having notice of that particular statutory provision being -- do you understand what I'm getting at?

MR. DOERR: The -- the issue is so far away and today was about discovery. I'm really -- it -- if you're looking just through --

THE COURT: He's like, I know you've been thinking about it, but I --

MR. SHAFER: My co-counsel's --

THE COURT: -- I gave up.

MR. SHAFER: Judge, it's been so -- my co-counsel then is now a judge it's been so long.

THE COURT: I know, but you've been working on the case.

MR. SHAFER: Yes.

THE COURT: And I wasn't -- I'm not giving you injunctive relief. You're not surprised, right?

MR. SHAFER: No, I'm not.

THE COURT: Okay.

MR. SHAFER: But -- but it does make a difference,

Your Honor, if I do want to take up a preliminary writ --

THE COURT: Yes.

MR. SHAFER: -- if you rule that you cannot give injunctive relief because if you rule that now and then I win on the merits and you're not going to enjoin the statute, you know, my client is then damaged, so.

THE COURT: All right, let's do this --

MR. SHAFER: Yes.

THE COURT: -- you have my -- we're going to have some -- I'd like you to come in on this issue. What I'd like to do is, I'd like to burn you a CD, a CD so that you can have the argument. If you want a transcript, fine. It doesn't matter to me. I'm just trying to make it quicker, it's easy to do to use this.

I have one, so I mean, you can, I think, as officers of the court cite to the CD. And then if it ends up someone wants a transcript for the Supreme Court, because they would require one, fine. But I'm not going to require one. I've practically got the thing memorized.

So I just don't remember that particular issue what I exactly said. That being said, I'd also like you to look at 31.130 and figure out if there's anyone under that statute that isn't already here, okay, in relation to this specific issue. Because clearly, we have the Department of Taxation here. We have 30.130 covered on the live entertainment tax.

This is a significantly less specific issue, really. And I'm not sure, I haven't given any thought to 30.130, but I'd like you to look at it and give me some input. So if I got you a CD, I have you look at 30.130. I will do -- I will literally rule from the bench that day so that you can do an order because that's not something that's going to change over time with evidence, as you point out.

Then you can do whatever you need to do with it. But, I mean, I think that's a, you know, a request in -- in all my thoughts about this case and how this case could evolve and how my final decision could be different depending on how I see the case when I have a full record, experience having dictated this exact same kind of metamorphosis over time on a -- on a case where the constitutionality of something was challenged. I am inclined to handle it that way and then just have you come back in two weeks, a week, ten days, whatever you want. You have my attention.

MR. DOERR: I think, Mr. Shafer's going to be --

MR. SHAFER: I --

MR. DOERR: -- here in two weeks again.

MR. SHAFER: Yeah, I -- you may not remember, I'm not a member of the bar here.

THE COURT: Yes, I remember.

MR. SHAFER: Okay. I will be back here the week after next.

THE COURT: Great, can you come in?

MR. SHAFER: Yes. And any time except for Wednesday between like 11:00 and 1:00 o'clock.

THE COURT: Okay, so I know that you probably appear before a lot of courts and particularly, you know, not here, but I only will hear this case Tuesdays or Thursdays because I won't have you sitting around while people are in handcuffs and I'm doing something completely different. So Tuesday, Thursday is your civil options. Any Tuesday or Thursday in the reasonably near future I will -- I need the date of that -- I will have my -- hold on one second.

It's not easier for her to copy mine. She has to actually burn it from the -- but she can do it today, right? So she'll do it -- you can leave here with it today and then come back on a Tuesday or Thursday. Let me just check what's -- so we're talking about the week of the 23rd, yes?

MR. SHAFER: Yes, Your Honor.

THE COURT: Okay.

MS. RAKOWSKY: Your Honor, you wouldn't want it briefed by a certain date?

THE COURT: Well, they had a rather exhaustive briefing the first time around.

MR. SHAFER: I have nothing to add.

MS. RAKOWSKY: With respect to that issue, and I'm not sure what the issue is as I'm standing here right now.

THE COURT: Yeah, here's what I would ask. If -- if either side watches the video, reads the briefs and wants to get any kind of supplement before the court on this specific issue, knowing you're finally going to get some final decision on one thing, so it's -- you know, it's actually invigorating, exciting and you're anticipating that, and I know it's important, then if you could agree to some kind of -- you know, you've waited so long, I'm not going to limit anything.

But you can have -- I'm not going anywhere between now and December 31st. I'm here. I can handle this case any Tuesday or Thursday on this issue. So if I give you a date right now and it turns out you'd like to do something supplemental specifically on this one issue, then if you can agree to something reasonable, I could -- I can get you in any Tuesday or Thursday in the next 30 days and then nobody's been shorted their desire to fully address it with the court. I would ask, though, that you obviously, you might want to reply if they do it a supplemental opposition just to you can -- so I'll set something tentative.

If you agree after you've looked at everything that you want a little bit more time and you can agree to another date to come back on a Tuesday or a Thursday, that you run by my department first, then I'll sign an order and we'll just bump it. Is that yes?

MR. SHAFER: Yes.

THE COURT: Okay. So right now how about I error on the side of more time and do --

MR. SHAFER: 26th.

THE COURT: How about -- did you say you're here the week of the 23rd?

MR. SHAFER: Yeah.

THE COURT: How about the -- I actually do need to do the 24th that day, if that's possible.

(Pause in the proceedings).

THE COURT: Now, here's what I'd like to do. I'd like to set it at 9:30 so I can handle more summary matters first. You know, I'm trying to stagger a little bit so we're not wasting a lot of time. And if you have any other appearances, then you could make those first.

Okay, so the minutes should reflect regarding the issue of the court's ability to consider injunctive relief as to that issue only, the matter is set for June 24th, 9:30 for argument by counsel and a decision of the court, unless the parties stipulate to extend that time for supplemental briefing by agreement.

MR. SHAFER: August, Your Honor.

THE COURT: August. That's what I meant, sorry. It already feels like September. Okay, so that is -- that issue is its own -- now we're going to what we're here today, which is discovery disputes.

MR. SHAFER: Yes, Your Honor.

THE COURT: Okay.

MS. RAKOWSKY: Excuse me, Your Honor, as a preliminary matter.

THE COURT: Oh, I'm sorry, yes.

MS. RAKOWSKY: I'd like to move to strike the reply brief. It was not submitted five days prior as required by the Eighth Judicial District Court Rule 2.20, which specifically says that it must be filed within five days of the hearing. And it was filed on August the 9th, which is basically three to four days before the hearing.

MR. BROWN: Your Honor, that's -- that's my -- I had surgery on Thursday, and it -- Brad got the -- he got it to me in time the day or the day before I had the surgery. If -- you know, if there's any repercussions that belongs to me. I apologize. I think we certainly got it to them in a timely manner and I know we cc'd the court.

MS. RAKOWSKY: Your Honor, according to the rule, they're not supposed to submit earlier -- you know, later than five days before without leave of the court. And as far as I know, I -- I've never -- I didn't see a motion come -- asking of the leave of the court to file it at an early -- you know, an earlier date.

THE COURT: Well, you're absolutely right, it's late. And technically, if there are medical or -- or

personal considerations of counsel that can sometimes be -- affect dates, usually you give the other side an opportunity to extend you a courtesy. And it appears that you didn't ask for that courtesy because it makes it a lot easier to deny this when you say you conveyed that in advance, got no response or no agreement and then I -- I look at Counsel and I say courtesies are expected in the Eighth Judicial District Court. It makes it a lot easier for me.

That being said, clearly, it wasn't conveyed to you in advance because sometimes matters of that type are not anticipatory as to what the complications will be or how long it's going to take or anything like that. So he's an officer of the court. He represented to me that -- that there was an actual physical surgery that occurred that resulted in the late reply and I'm not going to strike it.

MS. RAKOWSKY: Thank you, Your Honor.

THE COURT: But in the future, I would strongly encourage you to have your staff notify opposing counsel of your -- sometimes I know that's hard to share your personal life and --

MR. BROWN: No, I expected to be back the next day. It's just that --

THE COURT: It didn't.

MR. BROWN: Yeah, I -- and candidly, replies are frequently filed, and I never object to them being filed as

long as I get a timely copy. But I just didn't expect them to, quite honestly to, but --

THE COURT: Okay.

MR. BROWN: -- in the future that's what I'll do.

THE COURT: Take my word for it, a lot of lawyers object to the untimely reply. So -- but I'm sure -- you know, I'm sure you understand me extending the courtesy in light of his unexpected late return to the office.

MS. RAKOWSKY: That's fine, Your Honor.

THE COURT: I would do the same for you.

MS. RAKOWSKY: I appreciate that.

THE COURT: Okay. So you ready?

MR. SHAFER: In light of that, then, I hate -- I hate to ask this, but they -- after we got the Discovery Commissioner's ruling, they did give us one additional document. I thought when they submitted it to Mr. Brown, they also filed it with the court so that I could talk about it today. And I talked to Mr. Doerr today and it wasn't. And I was wondering if I could submit this to the court? It's -- it's a cover letter and a single page.

THE COURT: Now, you have to file this as a supplement if you're going to ask me to consider it.

MR. SHAFER: Okay.

THE COURT: Like after court, at some point somebody files this as a supplemental exhibit so --

MR. BROWN: Well, I -- you know, it's a discovery document, which is why it was not filed. It was a document produced in response to discovery. There may be information on there that should not be filed publicly. I would have to look at it.

MR. DOERR: Your Honor, that's the document that we were ordered to produce by the Discovery Commissioner, pursuant to this motion to compel.

THE COURT: Okay, so let me ask you this. Regarding the record for what I ordered and what I didn't order, when I'm relying upon on exhibit that isn't in the record, then the parties have to agree that the court can reference the June 17th, 2010 letter with production, one page attached, and be able to prepare in the appendix for the Supreme Court and have it. Because if you're not going to file it, that's fine, but there has to be some way that I can reference it for the record and know that you're all keeping track of -- of this and would present it if needed at some future date, which it way or may not be.

And we would all agree that there's no other June 17th, 2010 letter ordered to be produced with the attached one page summary, table summary.

MR. DOERR: We stipulate to its admission however we need to do it.

THE COURT: Okay.

MR. DOERR: We -- we -- we think you need it to consider today's motion.

THE COURT: You agree it contains --

MS. RAKOWSKY: We agree that it contains --

THE COURT: -- information that should not be public?

MS. RAKOWSKY: -- non -- I'm sorry, non-confidential information and it's information that could be given to the opposing side without any problem with confidentiality.

THE COURT: So what about whether it -- but, I mean, if it's filed, then it's subject to public examination.

MR. DOERR: It --

THE COURT: Everything you have here any random stranger can go in and look up on Odyssey by going to the Clerk's Office. So the question becomes is this -- can they file this? Does the Department of Taxation have any objection to this being filed or do -- I don't know what your objection would be, but do you have any objection?

MR. DOERR: Well, I -- in looking at it it does have the taxpayer's name on it, and so that would be -- you know, obviously that exact issue is what's at the heart of the --

THE COURT: Right.

MR. DOERR: -- dispute today, so --

THE COURT: So we can't file it.

MR. DOERR: -- I actually believe that it would be something with a taxpayer's name and perhaps in redacted form.

THE COURT: Okay.

MR. DOERR: Unless they would agree to -- it is the name of the case as well, contained in the name of the case, so however -- I think we can agree on something.

MR. SHAFER: Yes. Whether it's not filed so that just I can illustrate something to you, that's all I want to do.

THE COURT: Fine. We've all agreed that we will refer to it as the one page letter and production as ordered by the Discovery Commissioner with the names of taxpayers, and therefore it was not filed. If later you think you need it, I can do an order sealing, pursuant to the Supreme Court requirement, delineate the factors that I considered about the public's right to know versus -- and public interest versus taxpayer privacy rights. And I'll do that order if we really need to. So -- so -- but I'm going to put the onus on you, your responsibility to make the best record you can for your client whether if you think it needs to be filed, then I would file it under seal and I need an order of findings.

There's a Supreme Court order that requires that

you make detailed findings every time I seal a document.

MR. SHAFER: Okay.

THE COURT: Okay? And there's factors I must weigh and consider that in this case are a no-brainer that favor sealing.

MR. SHAFER: Right. And that's probably a going to be a lot of what we're going to be talking to you about.

THE COURT: Right.

MR. SHAFER: So --

THE COURT: So any other preliminary matters?

MS. RAKOWSKY: No, Your Honor.

MR. DOERR: Just to -- just to clarify, the only taxpayer's name on here is the plaintiff's as well as the defendant's name. These are the groups of taxpayers, categories of taxpayers, which is what the Discovery Commissioner order we produce that we compile groups of taxpayers and provide them a list of the amounts that were paid for the fiscal years. So they're -- the only name is actually the plaintiff's and the department's.

THE COURT: Okay. So I'm going to leave it to the parties to discuss whether it should be filed or not. It doesn't even sound like it's really -- I mean, it's -- I'll let you give it more thought, and if you can agree to a stipulation, you just want -- I just want the parties to agree whether it gets filed, filed under seal or not filed, I

would like the -- this seems like a very simple matter that you could probably agree on outside the court.

MR. DOERR: I agree.

MR. SHAFER: Yes, Your Honor.

THE COURT: Okay. Objection. Objection, opposition, reply.

MR. SHAFER: And a quasi supplement.

THE COURT: Yes. And I'm ready.

MR. SHAFER: Thank you, Your Honor. We were -- at your direction, we were conducting discovery. I had set up a number of depositions that were representatives of the defendants. We also requested certain documents. The documents came in shortly before the depositions. And they -- you have the book, they primarily look like this.

Now, while I enjoy aeronautical engineering, I'm not asking for the building plans of the F22 Raptor Stealth fighter. I'm just asking for information concerning the live entertainment tax, who's paid it, categories, whose asked for exemptions and any exemptions that were granted.

Because as the court recalls during both of our previous oral arguments -- and I think the court made the specific reference of the second oral argument -- the question really is, is this an artifice? You know, is this purportedly a neutral law of general applicability, a general applicable tax, but then it is gerrymandered in such a

fashion that the bulk of the tax is really falling on my clients who are engaged in First Amendment protected activity. And so we're trying to find this information.

Now, I'm an officer of the court. We're all officers of the court. As I pointed out to the Discovery Commissioner and I pointed out to -- in our pleadings to you, I am happy with any type of protective order you want. I will prepare findings of fact and conclusions of law of why things need to be sealed. I will not disclose any information to my clients that I get here. I will not file any document publicly. You know, will file documents under seal. I will take depositions under seal.

But I need to know this information of who's paying and who isn't and why not. And Your Honor, if you take a look at Exhibit C on their -- on their response to our opposition, you will -- you may recall both in response to -- sure.

THE COURT: I mean, I've looked at it, but I need to listen to you in context.

MR. SHAFER: Okay.

THE COURT: Please. Yes.

MR. SHAFER: Okay. There's this -- this was part of their Power Point demonstration. This was -- this was attached as one of the exhibits in -- well this is in their reply to the opposition to defendant's motion for summary

judgment. It's their Exhibit B there. It was attached as a response to our motion for preliminary injunction.

And what this was, this was a chart of just kind of raw data. It's, I think, one, two, three, four, basically five pages of data that they were trying to say this is all the information we need in order to determine, or for the court to rule that this is a broad scope tax and therefore, it's not a gerrymander tax to go after First Amendment expression. Now.

Now, Your Honor, again, in -- in the various document requests, you know, we basically get this. And then pursuant to the Discovery Commissioner's request, we get this one page chart. And Your Honor, what -- what I can tell the court and I can go through examples if you want, but I do have -- I do have a 2:00 o'clock flight, but --

THE COURT: Please. Oh, you're so going to make it.

MR. SHAFER: -- the numbers on --

THE COURT: Don't worry about anything.

MR. SHAFER: -- this chart, Your Honor, don't jive with the documents that were produced by the State both in response to the motion for preliminary injunction and the motion for summary judgment.

Now, I'm not making any -- you know, I'm not casting any dispersions on defense counsel whatsoever. This

is just information that they've gotten from their clients. But the fact remains the numbers don't match what has been previously submitted to the court. I don't know why they don't match, and I can't ask anybody in a deposition why they don't match and what they mean because I'm not entitled to see the documents that underlie all of these calculations that were made.

And, you know, just as an example, Your Honor, if you take a look at their Exhibit C for the year 2003 --

THE COURT: Hold on. Exhibit C.

MR. SHAFER: I really wish I would have brought some reading glasses.

THE COURT: Yes.

MR. SHAFER: And if you go to this page, which is Page 2, and I'll just give you one example, but I can show you about ten of them. And you go to where it says, "Casino," I think it says just -- oh, casino live entertainment and you'll see 2003, there's a figure in there of, I don't know, 70 million; 70 -- 70,000 or something.

THE COURT: Is that where the arrow is?

MR. SHAFER: Correct, yes. I didn't put the arrow, that's how I got the document.

THE COURT: Well, that's actually the only thing I could see.

MR. SHAFER: Okay. If you go to the right, the

first column is 2003.

THE COURT: Yes.

MR. SHAFER: And there's a number 70,212 point something or other.

THE COURT: Yes.

MR. SHAFER: And then if you go to this chart that I gave you today and you go to 2003, the number 74,651 point -- I guess it's 74,651,265. And if you go number by number, none of them match.

MR. DOERR: Your Honor, I'll just direct your attention to one line above the 74,000,000 and will point out to you that that is the gaming total of $70,212,815, the exact same number.

THE COURT: Hold on.

MS. RAKOWSKY: Your Honor, may I approach with this?

MR. DOERR: It's a larger version.

THE COURT: Yeah, I can't even see this.

MR. SHAFER: Yeah.

THE COURT: Do you have that?

MR. DOERR: We -- we apologize.

MR. SHAFER: I don't have a big one. I've got this little one that --

MS. RAKOWSKY: We blew this up in my office yesterday because I wasn't able to read it myself, so.

THE COURT: Okay. So -- oh, this is much better. You have to get one of these.

MR. DOERR: And Your Honor, I think it's --

THE COURT: You definitely have to get one of these, Counsel. You can fit it in the overhead bin at 2:00 o'clock.

MR. SHAFER: Oh, cool.

MR. DOERR: Your Honor, what he's referred to is the gaming portion of that, which the -- the Department of Taxation does not administer that portion. It's a lump sum and it appears right on that page.

THE COURT: And your comment as to this -- have you seen this? I mean, I don't -- there's no way --

MR. SHAFER: Your Honor, no, I --

THE COURT: -- you can see it in that tiny little --

MR. SHAFER: No, I -- I can't read it, but -- I don't think that's what they represented here. This says casino live entertainment.

MR. DOERR: That's the gaming portion of it. Anything that happens in a casino is administered by the -- it's administered by the Gaming Control Board and not the Department of Taxation.

THE COURT: Do you have reason to question that part of it?

MR. SHAFER: No.

THE COURT: Okay.

MR. SHAFER: Okay, Your Honor, could you go to then this. Maybe they have an explanation for this one as well.

THE COURT: Okay, hold on. What exhibit number?

MR. SHAFER: It's also part of Exhibit C.

THE COURT: All right. You might have to come up here because we're all hovering around your list and it's --

MR. DOERR: If --

THE COURT: -- slightly awkward when you're not here. Awkward for me if you two aren't here, or three.

MR. SHAFER: All right.

THE COURT: Yes, this is great.

MR. SHAFER: Sorry, Your Honor. Going to I think Page 3 of the exhibit, and it says 2005, 2006. You go down to live entertainment tax it says, 8,688,664.

MR. DOERR: What year?

MR. SHAFER: Well, this says '05, '06.

THE COURT: Yeah, show me where you are on the page.

MR. SHAFER: Right here, Your Honor.

THE COURT: Thank you.

MR. SHAFER: And then --

THE COURT: Eight six --

MR. SHAFER: -- so I'm assuming that means

department total collecting and I'm getting 9,343,639 in your chart. There's over a million dollar discrepancy there.

MR. DOERR: I didn't prepare that one. I prepared this one.

THE COURT: Hold on. Have you seen this, what he's referencing the two differences?

MR. DOERR: I know that I asked the Department to give me the collection total for the years. There could be a reconciliation since that document was prepared. I can't --

THE COURT: When was this prepared?

MR. DOERR: I believe, it's dated --

THE COURT: Excerpts from annual --

MR. DOERR: -- 2008.

THE COURT: -- annual report.

MR. DOERR: Maybe -- maybe one's based on reporting and one's based on collections. And -- and you go over to the following column, Your Honor, 2006 to 2007, there's -- there's another million dollar discrepancy there. 10,000,000 versus 11,000,000. I'm just giving round numbers.

MS. RAKOWSKY: (Indiscernible).

THE COURT: I'm sorry, could you --

MS. RAKOWSKY: (Indiscernible) not collected the year before.

THE COURT: But, I mean, he needs to know.

MS. RAKOWSKY: But, let him --

MR. DOERR: Why does he need to know those, though if he has this top row that gives the amount that they collect, their industry collects. And it's compared to the total collective by the Department as well as by the Gaming Control Board. Why do they need to know this -- that minute --

THE COURT: No, no, no, I just want to --

MR. DOERR: -- specific amount?

THE COURT: I don't know, but when you start arguing, you're definitely going to go back to the table. Right now we're just trying to talk about numbers and then when you --

MS. RAKOWSKY: Your Honor --

THE COURT: Yes.

MS. RAKOWSKY: -- all you have to do is call us and say there's a discrepancy. I will go back to my client and say, listen, why is this number different, and why is this number different. And then my client would provide an explanation that I would -- you know, that I would, you know, convey. As I'm standing here --

THE COURT: Well, I'd like to hear the explanation so that I can --

MS. RAKOWSKY: Okay, then I'll be happy to --

THE COURT: -- consider that in the decision.

MS. RAKOWSKY: And I'll be happy to find out.

THE COURT: Okay.

MS. RAKOWSKY: But (indiscernible).

MR. DOERR: If the questions are posed to us in advance, maybe we can resolve them on our own.

MS. RAKOWSKY: Without having to, you know, come (indiscernible).

THE COURT: I thought you've done pretty well for 18 months, actually.

MR. SHAFER: (Indiscernible) a lot?

THE COURT: No. Compared to most.

MR. SHAFER: No, Mr. Doerr and my assistant Mr. Hoffer [phonetic] have spent a lot of time trying to, you know, limit this down to, you know, what we're disputing. It's not as if they didn't give us anything additional that we were fighting about. We worked some things out.

THE COURT: Now -- now, let me -- let me ask you --

MR. SHAFER: Yes, Your Honor.

THE COURT: -- a silly question.

MR. SHAFER: Okay.

THE COURT: Just hypothetically speaking, they've done everything but give you -- I don't know --

MR. DOERR: Names and the numbers. Essentially they look like this.

THE COURT: Because -- and my question to you is other than the idea that you couldn't verify that the -- the

type of business that they say it is, it is, what is the problem with some kind of John Doe disclosure? John Doe, Inc. Meaning, as long as it's -- it -- it -- I mean, are you challenging the representations that it's actually a gentlemen's club or it's actually arena that these businesses engage in that activity?

MR. SHAFER: Well, Your Honor, there's a couple of categories in particular like drinking establishments that there may be -- and there's like novelty shops. I don't know where live entertainment tax is coming from novelty shops, but I can take a guess, and it's probably --

THE COURT: I -- I don't want to guess. I know what you're saying.

MR. SHAFER: Okay. It's -- it's probably --

THE COURT: I do that on Mondays and Wednesdays.

MR. SHAFER: Okay. It's -- it's probably -- it's probably the adult bookstores that are attached (indiscernible).

THE COURT: I don't mean I go to adult bookstores on Monday and Wednesdays. I mean that criminal events that occur at these type of establishments where VICE goes in, comes to my department on. Oh, my God, I need a better record on that. Okay, so yes, novelty stores, yes, some --

MR. SHAFER: Right. But unless I -- unless I see in the drinking establishments, some of those may well be or

have been prior to the 2005 amendments, the gentlemen's clubs. And the reason for that is, Your Honor, and we presented you with a legislative history, that the 2005 amendments were meant to get to what are referred to as the juice bars that -- because they were smaller in size, they had been exempted from the 2003 version of the tax.

And so that's why we reduced the seating capacity to -- was it 300 to 200 or something like that -- to bring those in. So some of these categories may actually be adult businesses, I don't know. And I can't ask anybody because they're not going to be allowed to, you know, look at documents and show me anything.

THE COURT: When you say ask anybody, you mean?

MR. SHAFER: I mean the representatives of the Department of Taxation. Again, Your Honor, we canceled the depositions after I got back the totally redacted documents. So I haven't taken the depositions yet. I want to move forward with the depositions, but I feel I can't have adequate --

THE COURT: I mean, you're not suggesting that you should be given a list of all of these subtypes so that you can go out and determine whether electronic shopping is included in the --

MR. SHAFER: No.

MR. DOERR: We don't know what else they'll be

asking for.

THE COURT: Which specific -- which specific -- you -- you highlight for me on your supplement which line items you are really asking that I -- I say that they must produce.

MR. SHAFER: The ones in red.

THE COURT: The ones in red.

MR. SHAFER: I wish I could -- you know, I had -- I took my contacts out.

THE COURT: Cosmetics, beauty supplies and perfume stores?

MR. SHAFER: That -- that could be in a, you know, an adult boutique, I don't know. But -- but where does the cosmetic store --

THE COURT: Can I have this and you take that one?

MR. SHAFER: Sure.

THE COURT: Take your post-it.

MR. SHAFER: Okay.

THE COURT: But I -- I need to focus on what he's -- want to look at that real quick? I assume you understand that that's what he's --

MR. DOERR: I -- I created it. And in fact, I said if there are items that you think you want that maybe I've overlooked, call me. Let's see if we can agree on something. You know, we're -- we think it's pretty clear that we can't provide the taxpayer names. I'm not exactly sure how we --

how we do what we he's suggesting without giving them a name.

If I would know what he was looking for, maybe there is something we could do.

MR. SHAFER: But --

MR. DOERR: And let me just represent that -- that the -- the categories that we provided are linked to the taxpayer's NAICS code, which is North American Commercial -- NAICS. There's a number and those numbers have categories that are standardized across the country. And -- and that's how I came up with the categories.

THE COURT: And so perhaps I didn't glean this from all of the -- but how they -- how they are designated is based upon the commission's assessment of the business or their own honesty or what?

MR. DOERR: Well, specifically what happens is is they come in and say well, we sell food. And the tax examiner and the Department employee, there's a form that is linked to a database that has that category of business.

THE COURT: And so it's all subject to the penalties of perjury and all that and -- and --

MR. DOERR: Unless they've been audited before and it's been verified.

THE COURT: Okay. You say unless -- unless -- okay. Because part of my question is, you know, the -- it seems to -- to the court that it's -- it's just

self-reporting as far as what these people say they do, so -- so really --

MR. DOERR: Well, you're correct.

THE COURT: -- why do you need specific names as opposed to a Doe.

MR. SHAFER: Because if some of them are adult, they go into the one percentage versus a different percentage.

THE COURT: So you would send out an investigator to go check out all these businesses? I mean, I'm trying to get at they -- they accept these -- these descriptions on face value unless there's an audit.

MR. SHAFER: I would probably know the ones that are adult, but some of those may well be adult businesses. But here's the whole -- here's the other issue, Your Honor, and the statute we pointed out to the court, the statute allows people --

THE COURT: So why not -- I'm interrupting you because you've got a 2:00 o'clock flight.

MR. SHAFER: That's fine, Your Honor.

THE COURT: Why not a blind submission camera to me only and you give me a list of every -- you believe it to be a gentlemen's club in Clark County, I go through the list. And if they dispute that one of them is a gentlemen's club on that list -- but, my mean, why does everybody on the list --

I mean, you said you'll know who they are. Then give me a list.

MR. SHAFER: Okay.

MR. DOERR: Your Honor, if he believes it's a gentlemen's club and it's here as a bookstore, he can give me the name, I can see if it's included in bookstore, and we may be able to -- I may be able to say --

THE COURT: But the difference by doing an in camera production --

MR. DOERR: Um-h'm.

THE COURT: -- and -- and -- and me looking at it is he doesn't have to take your word for it.

MR. DOERR: Okay.

THE COURT: You know, he doesn't have to take the fox in the hen house. I mean, at the end of the day you're the enemy. Now, I know that a lot of times the government lawyers are not like civil lawyers and they'll just give it to you because they know I might order it anyway, so is it really something to go to Supreme Court about.

MR. DOERR: And we've demonstrated that exact thing.

THE COURT: But, I mean, if he wants --

MR. DOERR: (Indiscernible).

THE COURT: -- if he wants --

MR. DOERR: We have no problem --

THE COURT: -- a preliminary threshold review by someone other than the opposing counsel, that would be me.

MR. DOERR: We're willing to --

THE COURT: You're going to give me a list of all the perfume stores and you're going to give me a list of all these places. It's just me.

MR. DOERR: I can do that.

MR. SHAFER: I have no problem with that, but there's a total separate issue. And the total --

THE COURT: But I'm going one nugget at a time.

MR. SHAFER: Okay.

THE COURT: So let me ask you just -- just right for this purposes --

MR. SHAFER: Sure.

THE COURT: -- to do a just a preliminary threshold examination for the -- you know, the -- you know, if five of these are the perfumeries at the Fashion Show, and I've lived her for 32 years, okay, 32 long years I've lived here, and I'm going to be able to summarily dismiss a lot of the stuff on this list.

And so if it got -- I mean, we could narrow down things that I've never heard of and -- and perhaps having a closed session and, I mean, there's things that I can do to -- and then order a protective order and all these things where we are protecting as much as possible taxpayers who

have absolutely nothing to do with this and you have no right to have their name.

MR. SHAFER: That's fine.

MR. DOERR: Just a list of the names, Your Honor?

THE COURT: Well, that's -- well, I want to hear a second issue. But I mean, to me this would -- where's my little red list.

MR. POPE: May I approach and just offer something on that list, Your Honor?

THE COURT: Yes.

MR. POPE: These top three are information that the department would have. The bottom three is information that Gaming would have.

THE COURT: Well, you can't get the Gaming Control Board.

MR. SHAFER: Okay.

MR. POPE: And if you look at these amounts, these are small annual amounts. I don't know how they could think that that is a (indiscernible).

THE COURT: Is it being applied uniformly? I mean, you know, I don't think it matters that they're small or not.

MR. SHAFER: I don't know what I don't know is the problem.

THE COURT: And I'm trying to find a way to give you what you don't know without --

MR. SHAFER: Yes, and I --

THE COURT: -- violating people's privacy.

MR. SHAFER: And I have no problem with you acting as a mediary [phonetic].

MR. DOERR: Your Honor, I'll just point out on this chart --

THE COURT: But, I mean, drinking places is a big one. That's -- that's really the one. You know, the perfume, you'd have to have someone just outright, you know, representing an adult store as a, quote, gift, novelty or souvenir store or a cosmetic, beauty supply and perfume store. But if -- I think he's entitled to it.

MR. DOERR: Your Honor, I know that --

THE COURT: Not the name.

MR. DOERR: -- some of those have separate --

THE COURT: But a review.

MR. DOERR: -- business entities. One might be the gift shop that has a separate entrance where you could go into the club. I don't know that.

THE COURT: Okay.

MR. DOERR: I don't know that. And -- and I may be willing and able to -- to give him that information without giving the name and say this has a separate bookstore, let me know, I can go back and look, provide it to you, or provide you what I have and let you review it. I'm -- we're happy to

do eat of those.

MR. SHAFER: We'd be happy to --

MR. DOERR: We've never said -- we've never said we wouldn't do that.

MR. SHAFER: I'm happy to have you look at the list and figure out what this stuff is.

THE COURT: I have a question, and this just is completely has nothing to do with anything, except the other taxpayers. Were there to become some information to light, are you going to Chinese wall off from enforcement and -- or what?

MS. RAKOWSKY: It's going to be -- it's going to be a problem for the Department because of the statute. And the statute clearly does not allow us to give out those names. That information belongs to the taxpayer. We would technically have to get a waiver from every one of those taxpayers to let them know that this stuff is being asked for.

THE COURT: I'm not giving it. I'm -- giving it to me is not just giving it.

MS. RAKOWSKY: But even in camera if you look at U.S. v. Nixon and if you looked at (indiscernible) those cases very clearly say if the statute has provided that this is confidential the inquiry has to stop there. The legislature has determined that this information cannot be

given out. We cannot give out any information from the reports or from the files under 368(a). And, you know, the judge's order is fine, but the legislature has spoken on this.

THE COURT: I understand.

MS. RAKOWSKY: So we'd be violating -- we would be violating the statute.

MR. SHAFER: And Your Honor, you pointed out in our brief --

THE COURT: Well, with respect, if the legislature passed an unconstitutional statute, you know, the idea that -- that -- and I'm not saying they did. This is not -- but the idea that they clamp it down so that no discovery could be done to determine whether, in fact -- and I'm not saying that -- that it's not proper to protect the taxpayers. And as a matter of fact, I'm proposing this as -- and you -- you can take up a writ, that's okay because you know what, this will be done much more quickly if I require an in camera production. Take up a writ. I invite you. I beg you. I plead of you go to the Supreme Court because it's fine with me.

And if they say you know what, Togliatti, you're way off base and the legislature will decide what discovery will occur in the inherent authority of the court, great, great. I'm -- I'm out of here. No in camera review. I'll

be going home. I'll be going to the perfumery --

MR. DOERR: Are you praying this gets transferred, as well?

MS. RAKOWSKY: (Indiscernible).

MR. BROWN: This isn't get transferred, right? Is this subordinated?

THE COURT: Because I've moved so fastidiously in all the decisions I'm sure -- I don't know.

MR. DOERR: I mean, Your Honor, the case is notwithstanding. I mean, we're prepared to comply with your order. If you believe an in camera review, we're comfortable with that --

THE COURT: I just want to get this case moving along.

MR. DOERR: -- is appropriate and you can -- you can decide what they're asking for is what we produce or we can arrange them in a different way.

THE COURT: I mean, because that's the other thing.

MR. DOERR: We're happy to do that.

MR. BROWN: The legislature also provided an express exception that describes this case exactly (indiscernible) information can be produced. But I don't think they've ever addressed why the exception doesn't apply.

MR. SHAFER: But -- but more importantly --

THE COURT: I've already -- I'm already at the

production. So we need to get to your second issue because I --

MR. SHAFER: Okay, my second --

THE COURT: -- invite them to take up a writ if they want to. I'm okay, with it, believe me.

MR. SHAFER: My second issue is the statute provides for people to file a request to be exempted out of the statute and I wanted to know who was exempted and I want to know why they were exempted? And the reason for that is, Your Honor, I presented you with the legislative history of the 2005 amendments as to why they exempted out NASCAR and they specifically said it was a family oriented form of entertainment.

Apparently, as opposed to my client's form of entertainment. And I think I'm entitled to that. If there are people that just willy nilly because somebody is getting involved in this -- in this tax, and really -- the whole idea of this tax was to go after the adult entertainment, but somebody else is getting bootstrapped into it, and all they have to do is file exception, a request for exception and you're excepted out, I think I'm entitled to that information.

And my clients have told me that they know other business owners that don't own adult businesses that have filed for exemptions and have been exempted.

THE COURT: So let me ask you this --

MR. SHAFER: Yes.

THE COURT: -- has an -- I'm sorry in the -- in the plethora of things, information that you gave me, remind me what, if anything, was there a number given or just any -- anything about the exemptions? Just even just a general number. Like there were a hundred exemptions, no names, no amounts, just --

MR. DOERR: Well, we don't -- it's -- some of those we -- requests come into the department on telephone asking them hey, this is what we do, are we exempt from live entertainment tax? We don't -- the Department would not necessarily have a record of that.

The letters, what they asked for in request for production was letters that we received. We provided them those to him everything that we had redacted and redacted names on it.

THE COURT: So is the process that -- I mean, is there -- there's no formal process that says, you know, that someone either exempts out of this or fills out a form arrest --

MR. DOERR: Essentially it's the statute. Do -- they will come in and explain, you know, we train seals and have a show, do we -- or do we -- are we subject to live entertainment tax? And a tax examiner, which are the front

line Department of Taxation employees would pull out the statute and see if they can find where it would be exempt, if they can. It's just a question and answer. There may not be something, a document created for that.

MS. RAKOWSKY: And if they're not exempt they can petition it, they can petition it to the commission and (indiscernible).

THE COURT: How many of those have there been? How many of those have there been? I understand you can't -- I mean, you can't produce what you don't have. You can't produce phone calls or a log or anything else. I do think you -- I mean, you -- this has been discussed.

MR. DOERR: We've given them what we have. Would have just redacted the names.

THE COURT: But I mean, the fact that these -- these things are done over the phone. This has been -- I don't recall the over-the-phone conversation, but in your response to the interrogatories was that information shared?

MR. DOERR: It -- it was a request for a document.

MR. SHAFER: No, there was also two interrogatories as well as. If you go to the summary in our reply towards the end, we specifically included those interrogatories that asked for the exemptions.

MR. DOERR: We don't know.

THE COURT: How many positions challenging the

exemption exist and is that information known? That would be something that's a formal -- slightly more formal than a phone call, I would presume.

MR. POPE: Petitions -- Petitions for (indiscernible). They're in confidential hearings. Nothing's public until it (indiscernible) before the commissioner.

THE COURT: Right, and I'm not saying it would be public. I'm saying how many of those have happened.

MR. DOERR: I don't think --

MR. BROWN: I'm not sure.

MR. DOERR: -- any -- I don't think any hearings.

THE COURT: How about just requests that have been documented other than a phone call?

MR. DOERR: We have provided that.

MS. RAKOWSKY: We provided that.

THE COURT: How many?

MS. RAKOWSKY: It's Exhibit K.

MR. DOERR: There aren't many.

THE COURT: 45 you say?

MS. RAKOWSKY: Four -- four or five.

MR. DOERR: Four or five.

THE COURT: Exhibit K? How -- I just want to see how it was produced.

MR. DOERR: I don't -- I'm not sure you have that

exhibit K in the (indiscernible)

THE COURT: That's okay.

MR. DOERR: It's in the larger production.

MR. POPE: Exemptions are statutory. Tax exemptions are statutory.

THE COURT: Right. I just --

MR. POPE: So --

THE COURT: How are they -- how are they --

MR. POPE: Somebody's gotta lobby for it. So that would be in the(Indiscernible) legislative history.

MR. DOERR: I don't think there's been any change to the law.

THE COURT: No, no, I meant -- I mean, how does --

MS. RAKOWSKY: Here they are.

MR. DOERR: I mean, with regard -- with regard to major groups or industries trying to get an exemption, that would be -- that should be in the legislative history. Somebody coming forward and saying, we should be exempt from this tax.

THE COURT: Oh, well, I think he's talking -- I mean, he -- he can do that. He's talking about your specific, if there's anything in the Department of Taxation that -- thank you, Exhibit K.

MS. RAKOWSKY: This is the only letters that were provided to us. And that was provided in our original

production.

THE COURT: Okay, so one, two.

MS. RAKOWSKY: It's over a period of several years, so I assume that's all they have.

THE COURT: So they did give you some of what you're looking for. I think the problem is they do it over the phone.

MR. SHAFER: Also, I don't know who's being exempted. I mean, you know, some of this stuff is just citing the statute. If you take a look at the letters --

THE COURT: Okay, but this really -- I mean, contrary to how you started your argument, I don't think this is particularly different than what I just ordered. I'll order them to produce the names to me.

MR. SHAFER: Okay.

THE COURT: And, you know, I didn't just fall off the turnip truck. The name tells a lot.

MR. SHAFER: That's fine.

THE COURT: If it's a DBA or some T & R Trust, LLC, you know, something like that, then -- then I might require an in camera production of what prompted this letter because clearly something is being described to the Department of Taxation that is being commented upon, based upon our review, it's a minimum occupants, so you'd have to give me something more.

But, I mean, I can -- I can do that in a two-part analysis.

MR. DOERR: We're prepared to provide what -- what you order.

THE COURT: In camera.

MR. DOERR: Yes.

THE COURT: And then you can take up a writ. Take up a writ. Take up a writ.

MR. DOERR: We're looking for an answer as well. I mean --

MS. RAKOWSKY: If we have a court order, the court order is fine.

THE COURT: Yeah, I know. So that's what I'm going to do.

MR. SHAFER: That's fine.

THE COURT: Okay. So --

MR. SHAFER: Now, we're -- oh, I'm sorry, Your Honor. I didn't mean to interrupt.

THE COURT: -- I would like to have you get together and see if you can set up a time frame for this and then be prepared to address it on the 23rd --

MR. SHAFER: All right.

THE COURT: -- as to where you stand on what I'm ordering. And then who is going to prepare the order of the stream of consciousness of what I've just said? Basically,

everything's going to be produced in camera. I want the list under the -- I want you to take the red paper.

And for the record, cosmetic, beauty supply and perfume stores, drinking places, parentheses, alcoholic beverages --

MR. DOERR: Hold on, hold on. Can you start over? I'm sorry.

MS. RAKOWSKY: Um-hum, places, cosmetics --

THE COURT: Cosmetics, beauty supplies and perfume stores.

MR. DOERR: Okay.

THE COURT: Drinking places, parentheses alcoholic beverages, that's your second.

MR. DOERR: Um-h'm.

THE COURT: And gift, novelty and souvenir stores.

MR. DOERR: Um-h'm.

THE COURT: This is under taxpayer groups. I'm going to ask for an in camera production of the list of the names and all the -- you know, however it's -- however you compile it, I would expect it to be as -- as paid, the entity as paid. If that's a DBA , then it's a DBA for now. I don't know how -- I don't know how the Tax Commission requires. Do you require the actual --

MR. DOERR: (Indiscernible).

THE COURT: I mean, in court there's no DBA as a

party. I wouldn't think that you can get away with that, but I'm not sure.

MS. RAKOWSKY: We'll give you the information we have.

THE COURT: Okay. With regard to your request for the five percent LET payers, the request is denied.

MR. DOERR: We've included that on here.

THE COURT: I know, but I mean, he wants names, and you're not in a position to --

MR. DOERR: Provide names.

THE COURT: -- provide names. That's the gaming control. And so -- so you're off the hook as far as the five percent LET payers and he has to if and serve a different government entity and -- and fight a new battle on the same exact issue, maybe with different lawyers, maybe with the same lawyers and a different lawyer, who knows.

So -- so am I -- I'm denying it as to the five percent LET payers without prejudice. Well, I guess, I'd just be denying it because it's the objection to the Discovery Commissioner's report. I would require and let the gaming control be heard on that.

I'm granting it in part as to an in camera production of names in the first instance. And in the second instance an in camera production of the names associated with Exhibit K's exemptions, and also the -- any correspondence,

document, e-mail, writing, phone message or anything you can come up with that prompted the letters that you -- that are in Exhibit K so that I'm not, you know, looking into a crystal ball off of a name and trying to determine.

And then when I have -- you know, I have the context of what you're looking for, I will balance the privacy rights against whether I'm going to give any names. If I do, or I want to discuss a particular entity without using the name before I decide whether I'm going to give the name, I would close the courtroom, I would seal the transcript. I would do everything humanly possible to product that payer. That's the plan.

MR. SHAFER: And we're willing to abide by all of that and we don't object to anything.

MR. DOERR: I'm just going to --

THE COURT: Can I -- I want to keep this for now.

MR. DOERR: I'm going to make one clarification.

THE COURT: What? Which one's yours? Yes.

MS. RAKOWSKY: That one. [Inaudible].

THE COURT: Yes, your work product is attached.

MR. DOERR: The -- the -- we've listed the ten percent versus the five percent payers, which is on the size.

THE COURT: Right.

MR. DOERR: And we have the categories as ten percent and five percent separated out. We're -- I'm willing

to provide you with the names of both categories. It's gaming is a separate number on a separate line. This is -- these are -- this is all that the Department administers.

MR. SHAFER: Oh, it is? The percentage I think is based on seat capacity --

MR. DOERR: That's correct.

MR. SHAFER: -- (indiscernible) not whether you have liquor -- or not whether you have gaming or not.

MR. DOERR: That's right. It's based on --

THE COURT: So the Gaming Control Board does what with this -- these five percent LET payers?

MR. DOERR: Well -- well, gaming is all included in a line at the bottom. And they make a separate determination on the venue and the seating capacity. So the gaming could be a five or ten. The Gaming Control Board doesn't -- they get a combined return. So those returns don't have that it came from ten entities. They just get a billing for casino x --

THE COURT: Right.

MR. DOERR: -- the total amount. So they don't keep statistics on five versus the ten. What's on this chart are the -- the non-gaming taxpayers. So I -- I think that they could, in theory, be included in here. Although, I don't think there are any bookstores that have 7,500 seating capacity. It's just a guess, though. Or a perfume store.

MR. SHAFER: I think that's pretty -- pretty safe guess.

MR. DOERR: (Indiscernible) stores.

THE COURT: Well, since the Kindle came out, they've taken a big hit. So anyway, so --

MR. DOERR: So anyway, I can provide that. We --

THE COURT: Okay. So what about the -- what about the -- so there would be no five percent LET Exhibit K letters, correct, because --

MS. RAKOWSKY: I don't know (indiscernible) --

THE COURT: -- doesn't that go through the gaming --

MR. DOERR: No.

MR. POPE: I misspoke, Your Honor, I apologize.

THE COURT: Okay.

MR. DOERR: There's -- the Department can have ten percent and five percent taxpayers, as well as the gaming can have ten percent and five percent. The venue, the specific location where the -- the LET is collected determines whether it's ten percent or five percent.

THE COURT: Okay. Then you can produce --

MR. DOERR: I can.

THE COURT: -- the --

MR. DOERR: I'm just saying I'm willing to.

THE COURT: Just -- we'll just mirror the order for

the five percent. So -- so take -- this poor lady is trying to --

MR. DOERR: I mean, I think it's going to be clear that the five percent cannot be one of those.

THE COURT: You have to immediately prepare an order because the minutes are going to say colloquy and court's ruling.

MR. SHAFER: Okay.

THE COURT: Okay, because it's not fair to her to sit here and -- the minutia of this is insane.

MR. DOERR: It's complicated. We -- we appreciate the complexity of it. And we'll prepare the --

MS. RAKOWSKY: So we will -- we will produce the names of all those that the Department of Taxation administers.

THE COURT: Fine.

MS. RAKOWSKY: We will not produce anything that the Gaming Control Board administers.

THE COURT: And then you can -- I would suggest, Counsel, you wait and see what results from that and we can go from there. That's what I would propose to you. I'm not stopping you from doing anything you want to do outside of that, but.

MR. SHAFER: I'm also going to talk to Blake and try to figure out the discrepancies of the chart versus the

exhibit as well.

THE COURT: He's very --

MR. SHAFER: So I'm going to do that also.

THE COURT: Okay.

MR. SHAFER: So we don't have to bother you --

MR. DOERR: Right. I've always been willing to --

MR. SHAFER: Okay.

THE COURT: Okay.

MR. DOERR: -- assist you in this.

MR. SHAFER: Okay.

MR. DOERR: I don't -- I don't think you can say that I haven't been.

MR. SHAFER: Yeah. Got it. Got it.

THE COURT: Okay. So --

MR. DOERR: We'll prepare the order.

THE COURT: -- you'll prepare the order. I need you to sign off as to form and content. I accept faxed signatures or, you know, your colleague here --

MR. SHAFER: Will can do it.

THE COURT: -- he can do it. It doesn't matter to me whoever does it, but I -- I would like a -- so I'm going to status check discovery for in camera production also on the 23rd. If you choose to move it because of the other issue or it's going to take some time to compile this, for example --

MR. DOERR: It's --

THE COURT: -- we can move it.

MR. DOERR: -- not. We've got it all.

THE COURT: You have it, okay. So whatever you agree to, as long as I'm available that day, just check and make sure and we'll move it for your --

MR. SHAFER: I'll be back in four weeks in addition, so.

THE COURT: Fine. Okay. Now, we have one other thing before you hop into -- go to the airport and have that fabulous lunch that you're going to have at McCarran.

MR. SHAFER: Yes, Your Honor.

THE COURT: Is, I want summary orders for the motions that were just happening out there, except for the one that's being addressed on the 23rd. Clearly, it would have been premature in my -- my opinion, and I'm even more convinced now than I was before that I want a complete record before I commit to a decision.

And so I'm not going to do detailed findings and hamstring myself. On the preliminary injunction it's clear, based upon everything that I've read, that I was not able to determine who was going to prevail at that point in time, and I still don't think at this point in time, so I'm going to deny the motion.

The summary judgments, material issues of fact

exist in this court's view. Denying the motion. I want them summary. Don't want a lot of detail because I'm not prepared to make that detail yet.

MR. SHAFER: Summary (indiscernible) denied, no explanation for it.

THE COURT: And cross motion denied.

MR. DOERR: We -- we had a --

THE COURT: You knew your cross motion was denied. You've been doing -- you've been doing discovery for 18 months, so.

MR. SHAFER: They've got two -- well, yeah, they've got two motions -- (indiscernible) and motion for summary judgment.

MR. DOERR: Motion to dismiss, as well.

THE COURT: Yeah, that's denied.

MR. DOERR: I'll assume that's denied summarily.

THE COURT: Summarily denied. But this other issue is a significant one. It's the only remaining out -- it is the preliminary motion. The only remaining sub issue that I will be more detailed, but I'm going to have you prepare the order so that you get it done, so that he can or you can, whoever wants to do whatever they need to do, can deal with that.

Okay, I'm -- I'm happy to be involved in the management of the case, and I'm sorry you haven't had more

court time on those issues. But I will tell you that it's been a progression for me, based upon some other matters that you just learn as you go that perhaps you don't -- you don't want to --

MR. SHAFER: Jump the gun.

THE COURT: Correct. Perfect. Okay.

MR. DOERR: We're happy with that.

MS. RAKOWSKY: Thank you for your time.

THE COURT: Okay. I appreciate it.

MR. SHAFER: What's your time line for the -- for the motion?

THE COURT: Well, we're just having a status check on the production on the 23rd. I'm letting you --

MR. BROWN: 23rd, Your Honor or the 24th?

THE COURT: The -- the date that we gave you, 24th. I'm sorry, yes.

MR. BROWN: I realize -- I'm sorry to throw a fly in the ointment. I realize I have a mediation at 10:00 that day.

THE COURT: With?

MR. BROWN: A foreclosure mediation.

THE COURT: Oh. Oh, that's like chiseled into stone and --

MR. BROWN: Would the 26th, is that possible?

THE COURT: Here's the thing. There's a rule that

requires local counsel to be present for all proceedings unless the court waives that requirement for a particular day. Any objection?

MR. DOERR: No objection, Your Honor.

MR. BROWN: Beautiful.

THE COURT: Thank you.

MR. SHAFER: Thank you, Your Honor.

THE COURT: Have a nice trip.

MR. SHAFER: It's been a pleasure.

MR. POPE: Thank you, Your Honor.

THE COURT: Oh, your disks, don't leave without your disks. She needs a date. If you can think back that far. We can look -- my clerk can look it up on Odyssey for you. Do you want us to do that?

MR. SHAFER: Yes, please.

(Court adjourned at 10:55 a.m.).

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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Julie Lord
JULIE LORD, TRANSCRIBER

1-13-12
DATE

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	**COURT MINUTES**	**August 24, 2010**

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

August 24, 2010 **9:30 AM** **All Pending Motions**

HEARD BY: Togliatti, Jennifer **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette Lester

PARTIES PRESENT: **NONE**

JOURNAL ENTRIES

- Status Check: Injunctive Relief ... Status Check: Discovery / In Camera Review

There being no appearances, MATTER ORDERED, OFF CALENDAR.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing **COURT MINUTES** **August 24, 2010**

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

August 24, 2010 **9:30 AM** **All Pending Motions**

HEARD BY: Togliatti, Jennifer **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette Lester

PARTIES PRESENT: **NONE**

JOURNAL ENTRIES

- Status Check: Injunctive Relief ... Status Check: Discovery / In Camera Review

There being no appearances, MATTER ORDERED, OFF CALENDAR.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	September 16, 2010

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

September 16, 2010 **9:30 AM** **All Pending Motions**

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette G. Sison-Britt

PARTIES PRESENT:

Shafer, Bradley J.	Attorney
Brown, William H.	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE	Attorney

JOURNAL ENTRIES

- Status Check: Injunctive Relief ... Status Check: Discovery / In Camera Review

Upon Court's inquiry regarding Discovery issues from last date. Parties indicated they submitted IN-CAMERA review documents to chambers yesterday. Colloquy. There was an issue of one particular spreadsheet that had differing amounts that related to year-end versus fiscal amount totals from the documents submitted related to 2003 & 2004. Copy of spreadsheet provided to Court and counsel IN OPEN COURT. Colloquy at the bench. State indicated they would be supplementing the record with the updated information. Plaintiff made record of proceedings to date and status of production. Court indicated it is not fully briefed on the separation of powers issue. Court indicated matter is going to be continued for further review. Colloquy. Counsel indicated they would try to narrow down the items to which Plaintiff indicates entitlement. Further colloquy. Court noted this Court may have some disclosures to make based upon production. COURT ORDERED, matter CONTINUED. At the request of parties, counsel requested to set a hearing and submit a stipulation to put matter back on calendar. COURT SO ORDERED; parties to contact chambers for a Stipulation,

setting slip for a new hearing date. FURTHER, parties to agree to cut-offs on the supplemental briefing schedule.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	September 16, 2010

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

September 16, 2010 **9:30 AM** **All Pending Motions**

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette G. Sison-Britt

PARTIES PRESENT:

Shafer, Bradley J.	Attorney
Brown, William H.	Attorney
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DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	December 09, 2010

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

December 09, 2010 **9:00 AM** **Further Proceedings**

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Dameda Scott
RECORDER: Yvette G. Sison-Britt
REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney

JOURNAL ENTRIES

- Brad Shafer, Esq. Pro Hac Vice with William Brown.

Colloquy regarding prior order on Preliminary Injunction DENIED WITHOUT PREJUDICE; Order signed IN OPEN COURT and returned to counsel to be filed. Arguments by counsel. For the purpose of organization, COURT ORDERED, Deja Vu to file letter with attachments, with a cover sheet indicating Memorandum in Support of Requests. COURT FURTHER ORDERED, Deputy Attorney General to file Table with a cover sheet. COURT NOTED, Decision to issue regarding separation of powers, as well as Minute Order regarding Discovery issues, and SET Status Check; appearances may be waived or may use Court Call system.

12/28/10 9:00 AM STATUS CHECK: REASSIGNMENT / TIME SCHEDULE

CLERK'S NOTE: COURT ORDERED, a copy of this Minute Order to be placed in coordinated case A554970 (DS 12/13/10)

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	December 09, 2010
08A554970	K-Kel Inc vs Nevada Dept Of Taxation, Olympus Garden Inc, et al	

December 09, 2010 **9:00 AM** **Minute Order**

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Dameda Scott
RECORDER: Yvette G. Sison-Britt
REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney

JOURNAL ENTRIES

- A533273 LITTLE DARLINGS OF LAS VEGAS VS. NEVADA DEPT. OF TAXATION, ET AL HEARING 12/9/10...FURTHER PROCEEDINGS IN DEPT. 9....MINUTE ORDER ALSO PLACED IN THIS COORDINATED MATTER:

Brad Shafer, Esq. Pro Hac Vice with William Brown.

Colloquy regarding prior order on Preliminary Injunction DENIED WITHOUT PREJUDICE; Order signed IN OPEN COURT and returned to counsel to be filed. Arguments by counsel. For the purpose of organization, COURT ORDERED, Deja Vu to file letter with attachments, with a cover sheet indicating Memorandum in Support of Requests. COURT FURTHER ORDERED, Deputy Attorney General to file Table with a cover sheet. COURT NOTED, Decision to issue regarding separation of powers, as well as Minute Order regarding Discovery issues, and SET Status Check; appearances may be waived or may use Court Call system.

12/28/10 9:00 AM STATUS CHECK: REASSIGNMENT / TIME SCHEDULE

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, et al. Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION NEVADA TAX COMMISSION, et al., Defendants.	.	CASE NO. A-533273 DEPT. NO. 9 *Coordinated with:* A-554970 **Transcript of Proceedings**

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION/SEPARATION OF POWERS ISSUE, DISCOVERY ISSUES; AND TRIAL SCHEDULING ISSUES

THURSDAY, DECEMBER 9, 2010

APPEARANCES:

FOR THE PLAINTIFFS:
WILLIAM H. BROWN, ESQ.
330 S. Third St., Ste. 860
Las Vegas, NV 89101

BRADLEY J. SHAFER, ESQ.
3800 Capitol City Blvd, Ste. 2
Lansing, MI 48906

FOR DEPT. OF TAXATION:
VIVIENNE RAKOWSKY, ESQ.
BLAKE DOERR, ESQ.
DAVID J. POPE, ESQ.
Attorney General's Office
555 E. Washington Ave., #3900
Las Vegas, NV 89101

COURT RECORDER:
YVETTE SISON-BRITT
District Court

TRANSCRIPTION BY:
VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, THURSDAY, DECEMBER 9, 2010, 9:57 A.M.

THE COURT: Good morning.

MR. SHAFER: Morning, Your Honor. One second, I'm sorry.

(Pause in the proceedings)

THE COURT: Okay. First of all, I want to have you state your appearances on A-533273. Am I missing the -- well, if you would state your appearances on that case.

MR. BROWN: William Brown, local counsel for plaintiffs.

MR. SHAFER: Brad Shafer appearing on behalf of the plaintiffs, Your Honor, and we do have two cases here.

THE COURT: Yes. I'm looking for the other case number. I'm with you.

MS. RAKOWSKY: Vivienne Rakowsky from the Attorney General's Office representing the Department of Taxation.

MR. DOERR: Blake Doerr for the Department of Taxation.

MR. POPE: David Pope also with the Attorney General's Office, and we'll be representing the defendants. All representing the defendants.

MR. BROWN: Judge, I have the other case number here.

THE COURT: Well, the -- I believe -- hold on one second. I don't think any of the pleadings -- you know, when

you've -- when something's filed and it has one case, unless I -- sometimes the Clerk's Office, if all the case numbers related or consolidated or otherwise aren't on the caption, they won't put it on the calendar.

MS. RAKOWSKY: Your Honor, one is A-533273 and the other one is A-554970.

THE COURT: Okay. (To Clerk) So if you could reference that case number, you know, as part of -- include any minutes from this case -- I mean, the one that's on calender, in the other case. Okay.

My staff -- I don't know who my -- did I have you state your appearances yet? I'm --

MR. SHAFER: Yes.

THE COURT: I'm getting -- I'm still back at my last motion hearing.

MR. SHAFER: Stellar argument, might I say, as out-of-state counsel.

MR. DOERR: We're going to stop and squat now.

MR. POPE: Please refrain.

THE COURT: It just makes me wonder what family court is like.

MR. BROWN: Oh, it's like that.

THE COURT: Okay. Well, anyway, my staff called somebody in an effort to estimate, you know, setting aside a time period since I'm in trial, and so we set aside an hour,

and I'm right on schedule. I have my jury come being back at 11:00, based upon somebody's estimate.

And I apologize, she didn't call of you, but I just said pick one and go with -- go with it.

MR. SHAFER: Yes, we --

MR. DOERR: We all coordinated on that. We're all on page.

THE COURT: Okay.

MR. DOERR: We'll be finished in an hour.

THE COURT: Terrific. Okay, well, I have an hour. So let me just get my note pad for a moment. Okay, I'm ready when you are.

MR. SHAFER: Thank you, Your Honor. As I see it, at least I'm here to talk about three issues today. One is the discovery dispute that has been ongoing. The second is part of the Motion for Preliminary Injunction that we talked about, strictly the legal issue of the Separation of Powers of whether the portion of the live entertainment tax that prohibits the Court from -- prohibits any Court from entering injunctive relief or otherwise interfering with collection of tax is a violation of Separation of Powers.

And the third thing, Your Honor, this is now the fourth time I've come to Vegas to talk about this motion, and we've talked about this before. Our Scheduling Order has lapsed a long, long time ago, and I'm concerned that when this

case gets reassigned, as you explained to us the last time we were here it was going to be at the end of the year, I want to make sure that I don't have a problem with a new judge.

You've told me on numerous occasions as I've been here on this motion that I was going to have my opportunity to take my depositions, and I want to make sure that there's some type of order or Scheduling Order or something in place to -- and we've talked about this before the argument, Your Honor, and my opposition isn't going to have any problem with that.

But I just want to make sure some Judge, or the Discovery Commissioner, or whatever, doesn't say, "Oh, you know, I don't care what parties agreed to, you should have, you know, extended the prior order." And I just want to make sure that I have the opportunity to take discovery. So I'd like some type of Scheduling Order.

Your Honor, in regard to the discovery dispute, and I'm going to try to be really brief on all of this because we have argued it -- parts of this, the two critical arguments, we have argued them both already. So what I want to do is kind of zero in on the discovery disputes, and I want to point out to the Court why all of this evidence has come to the forefront.

Your Honor, as you will recall, we filed a Motion for Preliminary Injunction to enjoin the enforcement of the live entertainment tax. And we were here -- we argued that on

two different occasions over a two year period. And there was also a Motion to Dismiss and a Motion for Summary Judgment.

And then one of the times I was here on this motion you indicated that you were, basically you wanted to make sure all the facts were in front of the Court and therefore, you were basically denying, I'm going to say without prejudice, because I think you just wanted to say, I want to clear the docket, I want to get the discovery done and then we'll move forward.

There have been no order -- formal orders entered, but that is basically the -- the -- the posture that I see the case in as of right now.

Now, in response to the Motion for Summary Judgment -- I'm sorry, in response to the Motion for Preliminary Injunction, the Nevada Tax Commission attached two charts, three charts. There were Exhibits, I think, B and C, and the Court have seen these many a time.

And so what I did was, I asked for discovery in regard to the back-up documentation for what these charts are. Now, again, at least setting aside the Separation of Powers argument, the Court has denied, at least orally, the Motion for Preliminary Injunction. The only factual evidence that the State of Nevada put in front of this Court in regard to that motion were these charts in regard to who's paying the tax.

So I then filed my discovery, we had disputes in regard to the Discovery Commissioner. We got some additional documentation from the Nevada Tax Department. We've been in front of Your Honor. I came out here four times. We only were in front of you three times. One of the hearings was adjourned because of a scheduling problem once I got here. And we were given additional documents from the State.

Then I offered the last time I was here that I would submit a letter to Mr. Doerr, Mr. Doerr would respond, and then I would submit a letter to the Court saying what is the final discovery disputes, and we have done that, Your Honor.

And so I -- unless the Court really wants me to reargue all the stuff about why this stuff isn't privileged and all that, it's in the briefing, we've argued that before. And because they put this evidence before this Court, because I'm entitled to take discovery in regard to the evidence that they put in front of this Court, because this Court denied the Motion for Preliminary Injunction, at least in part, because that was the only factual evidence that they submitted, those documents, I'm entitled to take discovery in regard to how those charts were prepared.

And you'll -- Your Honor, you will also recall that in these various hearings Mr. Doerr gave you one chart, I think the first time we were here, that the numbers were different from these charts that were attached to the Motion

for Preliminary Injunction. Then we got the big chart where, you know, Mr. Doerr changed some numbers, fixed some things, and those numbers are different from the second chart. So I've got now three charts. One of -- you know, a series that was submitted in response to the Motion for Preliminary Injunction, the two supplements, they don't match, and what I have is a chart being prepared by Mr. Doerr.

So the question is, if I have discovery questions, which I do, in regard to these documents, how they were prepared, what -- what they consist of, who am I supposed to depose other than Mr. Doerr if I can't get the back-up documentation? And you know, I've been an attorney lots of years. I don't think I've ever deposed a lawyer. Most judges wouldn't let me depose a lawyer. I don't want to depose a lawyer. So that's where we stand.

And -- and again, Your Honor, I've submitted a letter that explains what the discovery -- the remaining discovery disputes are. I would point out there's one typographical error in that letter. When I was referring to page -- I probably ought to get it out. Your Honor, in paragraph number five, on page 2 of my letter, when I referred to Page DV00002, it's actually supposed to be Page 21 as opposed to Page 2. So, I'm sorry.

THE COURT: So plaintiffs have requested to be provided the, quote, notes, end quote, redacted on Page

DV00021. The State again asserted NRS 368(a).180 and claims the redactions name the entity in the information that would allow the identification of the entity and refuses to provide the redacted information?

MR. SHAFER: Yes, Your Honor. And I just tried to paraphrase what Mr. Blake was stating. We -- we've attached, and I believe you got it twice because I -- Mr. -- I'm sorry, Mr. Doerr submitted, I think on his own. But we've also attached, they have a chart that goes through the request and what the State's answer is and why they're not going to produce certain things. So in addition to all the tons of briefing that the Court has gotten before it.

Your Honor, and again, we've been here on a number of times, and so I don't want to belabor it. Unless you have any further questions on that, I'm just going to move onto the Separation of Powers because I know you're under time constraints.

Again, we've argued the Separation of Powers issue. I've pointed out the provisions of the Nevada Constitution that grants to the Court the power to grant injunctive relief. We have submitted to the Court -- the main case we relied upon was the Ohio Supreme Court or -- versus City of Norwood (phonetic).

The State said well, you know, that's an Ohio case. Then in one of our replies to their two supplements we gave

the Court about another, I don't know, six or seven cases around the country where other Courts have said exactly that, that the judiciary -- I'm sorry, that the Legislature cannot divest the judiciary of its powers of injunctive relief.

We've cited to the Court the cases in Nevada talking about the Separation of Powers. The last supplement, I guess, which is what I will deal with, is that they say that this matter is res judicata because this was decided by the Federal Court.

We filed our original constitutional claim against the live entertainment tax in Federal Court, and the State defendant -- and I use the State generically, but the Department of Taxation, defended on the basis that the Tax Injunction Act, a federal statute, does not permit jurisdiction because of issues of comity between the states and the federal government. Does not permit the Federal Courts to have jurisdiction to enjoin state tax statutes if there's a plain and efficient speedy remedy in Court. The Federal District Court granted that motion. The Ninth Circuit affirmed.

The issue before Your Honor is -- has nothing to do with -- oh, and the -- the District Court -- the Federal District Court didn't consider any of the merits of any of the claims that we had raised. And we did not raise, in fact, in that case, in the federal case, the Separation of Powers

argument that is before you today.

Here we are raising the Separation of Powers argument. And, Your Honor, we have cited in our reply to the second supplement that the -- that the defendants have submitted the clear Nevada law on this issue. It has to be the exact same issue. It has to have been fully litigated and decided by the Court, and that wasn't done. That issue wasn't even in front of the Federal District Court. This is a separate and distinct argument here being raised for the first time before Your Honor. Res judicata does not bar it. Unless you have any other questions, because I know you're pressed for time.

THE COURT: No, I mean, I have, you know, 50 minutes left.

MR. SHAFER: Okay, well --

THE COURT: You flew here. Take it.

MR. SHAFER: I don't know if you've had an opportunity to read our replies to their supplements because --

THE COURT: Well, here's what I --

MR. SHAFER: Yes, Your Honor.

THE COURT: I did read the substantive briefs. When it comes to -- and we'll go back to this, I guess, before we're done -- the letter with the 20 paragraphs of specifics, which I asked for, by the way, so I'm not criticizing it. I'm

just -- I'm just saying as far as the Court being able to do a line by line ruling today, I mean, what is it that the parties anticipated the Court was going to do about these very specific discovery today? You were looking for some rulings, correct?

MR. SHAFER: I would like some.

THE COURT: Okay.

MR. SHAFER: I think we would all like some.

THE COURT: I know. Well, I -- it's --

MR. SHAFER: We've also talked about the fact that next December we're coming up on the five years, so we've really got to finish this case out, so.

THE COURT: Yes. Where's my State letter? Hold on. Here's my next question.

MR. SHAFER: Yes, Your Honor.

THE COURT: I've denied without prejudice, in my view, and perhaps I wasn't -- I was remiss in not ordering someone to prepare an Order, but I've denied the Motion for Preliminary Injunction without prejudice, and obviously had you doing discovery. Granted, not to the extent that plaintiff would like, plaintiffs, but at the end of the day you've been doing discovery. Let's move on.

So there's no Written order regarding that. Perhaps that should be done. By, I think, operation of my comments, one of the three times that you were here and we did spend an

hour, at least, on this case, at least, there were the other preliminary motions that were brought that I think was pretty clear that I was denying everything with prejudice and letting discovery go forward.

MR. DOERR: And that -- and that's what we understood as well, Your Honor.

MR. SHAFER: Yes, Your Honor.

THE COURT: Okay, so do -- we do not have formal orders evidencing --

MR. DOERR: That's correct.

THE COURT: -- those rulings? Could someone undertake --

MR. DOERR: Did we bring those? I brought them last time, and I just --

THE COURT: Did I not sign them?

MR. DOERR: I inadvertently -- we were -- we got off on the discovery issue and then I inadvertently forgot to ask you to sign them.

THE COURT: Okay.

MR. DOERR: I know that we were preparing them. Did we end up with those today? We didn't prepare one on the Motion for Preliminary Injunction since that was their motion. We created very simple orders.

THE COURT: But if it gets denied, you -- you prepare it usually. So I'll need you to do that.

MR. DOERR: Okay.

THE COURT: Okay, do you mind doing that?

MR. DOERR: We have the motion -- an order denying Motion to Dismissal without prejudice and an order denying the Motion for Summary Judgment without prejudice ready for you today. I can ask counsel to look at them and --

THE COURT: Yes. Yes, I'd like to have those in the record. I know it was a long time ago, but -- and do -- does it have the date of my actual ruling in there? That was when you were here for the -- we went off on the discovery issues. What date?

MR. SHAFER: Your Honor, we -- you addressed all three of those the very first time we were here on the motion, and what you said is, there was another case you had that went up to the Nevada Supreme Court that you learned that you shouldn't rule precipitously on these matters. So you were going to deny everything that was pending, and you wanted all the facts in front of you is paraphrasing what you said.

THE COURT: Yes.

MR. DOERR: And we agreed.

THE COURT: Okay. So, but I don't recall what date that was. Is that --

MR. BROWN: This does have the date of July 31st, 2008.

THE COURT: Okay.

MS. RAKOWSKY: But that was when the hearing was, I believe, on the (indiscernible) motion.

THE COURT: Okay, then if I could -- if you're in agreement with the -- I mean --

MR. SHAFER: I have no problem.

THE COURT: -- they're not detailed, it says denied, right, without prejudice?

MR. DOERR: Denied without prejudice.

MR. SHAFER: Denied without prejudice.

THE COURT: Okay, that's great. Then I'm going to sign those, and when you -- would you file these for me?

(Pause in the proceedings)

MS. RAKOWSKY: 8/24. August 24, 2010, was the hearing where you denied the --

MR. DOERR: Wait a minute. No, I think that was the status check. Yeah.

THE COURT: Well, I don't think it matters. At the end of the day the -- it does detail when -- when it came on for hearing. I think we all understand that -- that the ruling denying this was certainly before I signed it, but I don't think it -- I mean, there was an understanding between the parties of what the Court intended because you've operated under that standing for -- understanding for quite some time. So here they are signed.

MS. RAKOWSKY: Thank you, Your Honor.

THE COURT: If you could prepare one for the preliminary injunction that doesn't address the Separation of Powers issue, which I'm obviously going to address with you today.

So -- I mean, you know, it's one thing to have a denial of the Motion for Preliminary Injunction. It's another thing to have a substantive ruling one way or the other. You know, cannot consider such thing by -- as a matter of law, versus, sorry, disagree with you, State of Nevada will consider it as a matter of law. It doesn't mean I'm granting the preliminary injunction. Simply saying it's allowed by law so that you can have some ruling on that.

MS. RAKOWSKY: Thank you, Your Honor.

THE COURT: Okay, so --

MS. RAKOWSKY: I'm first going to respond to the discovery. And I think we can clear this up very --

THE COURT: Let's -- I would go to the Separation of Powers because I have a feeling I'm going to have to go through this in detail until --

MS. RAKOWSKY: Can I just put one thing on the --

THE COURT: Sure.

MS. RAKOWSKY: -- record? I'm so sorry. But basically, Rule 26, if you just go back to the basic rules, number one, parties may obtain discovery regarding any matter, quote/unquote, not privileged, okay? It says it in black and

white.

And at NRS 368(a).180, which involves the confidentiality of files and records, except as otherwise provided in this section, and they give two other sections, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. They're privileged.

Secondly, Counsel keeps talking about a protective order. Section 1 of 368(a).180 goes onto say the Board -- the Department and any employer of the Board or the Department may not be required to produce the records, files or information for the inspection, which is -- which is a protective order -- for the inspection of any person for use in any action or proceeding. This is an action or proceeding. There's no protective order.

This -- this discovery dispute has been going on that I've been working on it for almost a year and a half. We've produced everything we can produce legally. He asked us a series of questions. We went back to my client. I asked him about certain documents that -- that were -- that the attorney for the plaintiff felt were incomplete. That's what the Department had. That's what they gave me. That's what we produced.

Your Honor, as far as the Excel document that was produced by Mr. Doerr, that was produced pursuant to the

Discovery Commissioner's order. She sat there and she said, you're not going to get in privileged information. However, the Department, Mr. Doerr, is to produce the amount paid by each group, which is what he did. He went and collected all the information from the Department. He produced it the way the Discovery Commissioner ordered him to do. We produced it to the plaintiff.

You asked us for a copy of it that you could see in camera of where he got the numbers from. We produced that to you. These -- that's really all we can do. There -- the plaintiff has not demonstrated a -- a reason why we should -- why he needs individual taxpayer information. He doesn't. He has the groups. He knows what they do.

As far as the margin for error. We produced a chart to him which showed that the margin for error between the receipts, the first one, which was a projection, some of them were based on receipts taken in, some of them were based on receipts after everything was organized. The latest one has the best numbers we have.

The margin for error is less than one percent. So if -- if the State of Nevada says to the plaintiff, take your one percent, add one more percent to the Gentlemen's Club, then all the numbers are fine and we're fine. Then there's no reason to continue this, and we can move on because that margin for error is less than one percent when everything's

extrapolated out. He's talking about a difference in numbers which is pennies compared to the amount of tax. So we'll give him that one percent. Let him add it on.

Moving to Separation of Powers.

THE COURT: Okay.

MS. RAKOWSKY: I've had my say on discovery. Okay? All right. Your Honor, 368(a).280, which is the -- Nevada's anti-injunction statute with respect to live entertainment tax does not take the power from the judiciary. If you read the chapter, and you're supposed to read chapter of laws as a whole, not as a one statute acting independent, you'll see that right above that in Chapter 368 you have the statutes which involve refund.

Now, the refund, when you look at the statutory scheme, if the -- if the plaintiffs have overpaid, they're entitled to a refund. They can -- they can ask for that refund. So when you read it, first the refund statutes, then the anti-injunction statute.

Now, the anti-injunction statute was basically, and case law in other states and federal case law says that's a preemptive strike. And the reason an anti-junction statute is contained in a taxing statute is because if everybody who is effected by a tax were to -- were to get an injunction, the governments couldn't exist. They -- they rely on this money. This money is budgeted.

It's -- it's money that the state needs to survive. Every time there's a tax, you can't have a group of taxpayers asking for an injunction to stop the collection of a tax. And the case law going way back to the late 1800s, which I believe I included in my brief, says that even if a tax is illegal, it's pay now, litigate later. You can get the money back.

Not only can you get the money back, but according to Nevada's refund statute, you get the money back plus interest. The interest right now is at six percent. You get less than one percent in the bank. So it's a better -- it's a better investment, shall we say, to pay the tax and try to get the refund because they'll get a refund plus interest.

Now, what -- when -- when these parties appeared before you in 2008 to argue it, they argued -- they argued about the Separation of Powers issue. And at that time I reviewed a transcript, and at that time you said that you were going to make a substantive ruling on the Motion for Preliminary Injunction.

In fact, you went as far to say that you didn't intend to rely on Chapter 368.280 because -- and you were going to make a substantive decision about the injunction, whether an injunction -- whether these parties were entitled to the injunction. And when we appeared here later you said that the -- they are not entitled to an injunction. Therefore, they do have a plain and speedy remedy at law.

At that point since we don't get to the Separation of Powers issue. But if we were to start talking about the Constitution, the Constitution -- and, in fact, in the case law that was provided by -- by counsel, one of the cases is a motor vehicle case, if I can find where I put it. But basically, it -- these cases that he provided, not one of them had to do with, first of all, the collection of tax.

One of them had to do with zoning. One of them had to do with traffic. They were all different -- for different purposes and none of them tax. In fact, Counsel has never provided any of his case law any place where an injunction was placed on the collection of a tax. It might have been a licensing fee where -- where they tried to raise it, but there was never one against a tax.

In addition, the Constitution, when it talks about Separation of Powers, it says that one part of -- one government of the three tri parte government should not take the function of another government, of another one of the how -- you know --

MR. DOERR: Branches.

MS. RAKOWSKY: Thank you. Another one of the branches. Okay, and so the legislature, when the legislature passed an injunction -- an anti-injunction act, they're not taking the power from the judge. They're not issuing injunctions. They're not using your functions. What they're

doing is -- is creating something for you to look at as the judge and determine whether it's applicable, if you get to that. But the way our statutes are Written, you don't get to that, because there is a plain and speedy remedy at law, which is the refund.

Now, this was our argued by counsel at the Federal Court level. In fact, in his brief, on Page 10 of his brief he says, there is no plain and speedy remedy available in State Court. That's the title. And then he goes onto say, the reason there's no plain and speedy efficient remedy in the course in Nevada is because the state legislature has specifically and statutorily precluded such a judicial remedy.

And it cites the thing where -- it cites the anti-injunction act. So he went into -- he went into Federal Court and said that, I can't get relief in State Court, because State Court can't give me an injunction.

When -- when this Federal District Court prepared the order, they said another argument by -- attempted by the plaintiff is that there is no remedy in the State Court. This argument is based on NRS 368(a).280, and it says first it should be noted that the foregoing statute does not preclude a taxpayer from pursuing the established procedure for assessing a tax or seeking a refund.

So -- so the -- the Court addressed the exact same issue. They didn't use the word Separation of Powers, but

they used, is State Court precluded from granting an injunction because there was a law prohibiting that from happening. And they're saying no, the language of the statute does not, as the plaintiff suggests, preclude judicial recourse in State Court. It merely prevents a preemptive strike, which is what I discussed earlier.

It stops people from going into Court, demanding an injunction so they don't have to pay a tax. The -- the Ninth Circuit affirmed, Ninth Circuit state -- went through the entire record and said Deja Vu has failed to establish that there is any defect in Nevada Court and administrative system which deprives it of a plain, speedy and efficient remedy to challenge Nevada's live entertainment tax. Therefore, the District Court -- and it said the District Court did not have jurisdiction, which ties back.

But this is all -- we -- as I said, we don't -- we don't get to the Separation of Powers when it comes to injunction because there is that plain and speedy remedy law. And if you have any questions, I'd be glad to answer them.

MR. POPE: Your Honor, may I just add one thing? I'm citing from a case -- I'm going to read from a case that we have not provided to opposing counsel at this point, but I have copies, and I can give him a copy. And it's a California case, Modern Barber Colleges v. California Employment Stabilization Commission. And the cite is 31 Cal.2d 720.

And it's just some reasoning for what Ms. Rakowsky has explained. And it states that the legislature has -- excuse me, it has been consistently held that the legislature has power to determine what are grounds for equitable relief and when and under what circumstances injunctions may be granted.

It says, Statutory changes are almost perpetual. The jurisdiction of Courts of Equity is not thereby enlarged. Neither is it diminished when the statutory changes -- in statutory changes some rights cease to exist in certain cases, which Courts of Equity once entertain can no longer arise.

In other words, the grant of power to Court of Equity -- Courts of Equity -- was not intended as a limitation upon the power to legislate upon the rights of persons. And then it finally says legislative enactment of reasonable procedural conditions precedent to invoking a particular remedy, or the substitution of one remedy, such as an action at law, for another, such as, in this case it's a proceeding in mandamus, but which is also an equitable remedy, so that would be similar to an injunction, cannot be considered an interference with the jurisdiction over such remedies vested in Courts by the Constitution.

So whereas, even though California has a constitutional -- a section in its Constitution that -- that states what our statute says, that no injunction will lie,

this case does not say that the constitutional provision is necessary. And the reasons that the Court cited are the reasons that I just stated would not require a constitutional provision.

And clearly state that these statutory changes can be made by the legislature. And it's not -- it does not affect the jurisdiction of the Courts. Thank you.

MR. SHAFER: What happens if you or your successor actually rules that the live entertainment tax is unconstitutional under the First Amendment? The State is telling you, you can't enjoin the Department of Taxation from trying to collect the tax in the future against anybody else other than the litigants of the case because you don't have the authority to enter an injunction.

And let's talk about the plain efficient speedy remedy that we have or don't have in regard to the state proceedings. Let's set aside the fact that, as we talked about before, the one case was filed four years ago, and we had to go through the Department of Taxation and run that gauntlet.

But the -- I want the Court to remember, and it's been a long time, but this is all in the files that you have in front of you. In the Department of Taxation, for the first time, the Department of -- I'm sorry, the defendants raised, when we had our administrative hearing, for the first time the

NAC that says, that you can't get the tax back unless you can get it back to the customer who paid it.

And we submitted, Your Honor, affidavits saying -- and we also -- we also submitted the case law that people have the ability to engage in First Amendment protected expression anonymously. Our customers don't have to give us addresses and telephone numbers and full legal names when they come in, and my clients don't collect that.

So according to them in the argument that they raise that in the Nevada Department of Taxation where we had the administrative proceeding, and I have put in front of Your Honor, we can never, ever get the tax back because we're not collecting that data. Now, at the end of the day I don't know whether you or your successor is going to buy that argument of theirs, but they have nevertheless invoked it.

So now I can't get the tax back because of an argument they raised. We never submitted that. You don't see that in any pleading in the Federal Court. We never raised that. They raised it for the first time in the administrative proceeding, saying we can never get the tax back.

If that's the case, and there's no dispute that my clients are engaged in first amendment presumptively protected expression, my clients are continuing to pay this tax, and you can take a look at whatever chart you're looking at, my clients are paying millions upon millions of dollars a year,

and we have no remedy to stop this from occurring, Your Honor.

Now, we've also cited to Your Honor the other Nevada precedent, I it was the Penrose (phonetic) case, there's Penrose I and II. I'm trying to recall back from all the briefing, about the fact that the -- the Nevada Supreme Court has noted that you can get an injunction against a tax statute setting aside this particular statute. Just the case law from Nevada Supreme Court, if it involves -- if it will result in a multiplicity of suits, or result in irreparable harm.

Well, here's the irreparable harm, Your Honor. They have the NAC that they're waving in front of the Nevada Tax Commission. And remember, Your Honor, one of the two cases you have in front of you is just an appeal from that. Now, it's not all of the clients, because Deja Vu and Little Darlings, they didn't start paying until 2005.

So the first case they're in, the second -- the -- the other case that they're not. I may have those two -- I may have those two mixed up, but I don't think so. I think the -- I think the constitutional case was the first case, and the -- the -- yeah, it must have been, the appeal was the second case. So there's no remedy they can ever get. Not because I say so, Your Honor, but because of what they say so.

Now, getting to NRS 368(a).180. Again -- and this is the statute dealing with the protections of the records here. You know, first of all, Your Honor, I'll just point out

there's some documents like in Exhibits 34 through 37 that -- and I'm deleting out all the zeros. I'm just giving you the actual bate stamp number, where what we're -- what we are asserting and would appear that -- appear to be the documents to us, is that people that may or may not fit within the statute, once they invoke -- once the legislature invokes the 2005 amendments, you may recall -- and this is the reason that Little Darlings and Deja Vu, the -- the clubs that are not in both cases, that the legislature determined in 2005 that some of the clubs, some of the strip clubs were not paying the tax and therefore they changed the -- the number of the patrons who, you know, could come into the facility. The phrase escapes me right now. But the seating capacity, they changed the seating capacity in order to make sure that the strip clubs were coming into the statute. That is what the change in 2005 did.

You also may remember that we gave you the legislative history where that is specifically discussed. And Your Honor, if you take a look at 675, which is also attached to the letter, because Mr. Doerr gives me a unredacted version of this, and you go down to the second to the last paragraph it says the DAG -- I'm not sure what that means. I'm sure it's probably the direct of gaming or something, I'm guessing.

MR. DOERR: I'm sorry.

MR. POPE: I'm sorry, we missed --

MR. SHAFER: DAG.

MS. RAKOWSKY: Deputy attorney general.

MR. SHAFER: Okay.

THE COURT: Deputy attorney general.

MR. POPE: Deputy attorney general, yeah.

MR. SHAFER: Okay. The DAG has concerns about your recommended language ambient entertainment number three. In summary, he feels the language may lead to the exemption of, quote, entertainers, unquote, at the gentlemen's clubs. Therefore, we did not incorporate it in our draft. We certainly welcome comments at the hearing.

From day one when I was here, you got what my argument, that -- and the word you used to me and you used to them is, Mr. Shafer contends this is an artifice. This is drafted as a general tax law, remember that -- remembering that there was already a casino entertainment tax in place. And that what they did was they exempted out 25 statutory exemptions, basically everybody else except the clubs.

Now, I didn't put evidence in front of Your Honor in regard to the motion for summary -- I'm sorry, the Motion for Preliminary Injunction with the exception of giving Your Honor the statute, the NAC, the -- and the legislative history.

The Department of Taxation was the one that submitted the charts to Your Honor. And if you take a look at NRS 368(a).180, subparen (a), this talks about what is not

subject to the confidentiality provisions. And it says, Testimony by a member or employee of the Board or 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 of the records, files or information or the facts shown thereby are directly involved in the action or proceeding.

They put this evidence at issue in this case. And Your Honor, I don't want to remind you, but on two different occasions when we were here, you told Mr. Doerr, Mr. Doerr, Mr. Shafer doesn't have to, you know, rely on what you say. They're the ones that put these charts in as evidence. You denied my motion. I'm entitled to discovery of the evidence that they put in front of this Court, and that they're probably going to put in front of this Court either on a later Motion for Summary Judgment or at trial.

Now, I know some of the evidence that they've already -- you know, that they're already going to rely on because we have the Motion for Preliminary Injunction. All I'm trying to do is figure out what this is all about. I'm trying to get to the bottom of this. And Your Honor, that's why I believe this stuff is not subject to the privilege.

Again, we will -- we will agree to whatever protective order you want, attorneys eyes only, nothing goes

into a public deposition, depositions under seal. There aren't going to be people on the outside that are going to be deposed on this. Probably not, although now I have -- do have some names of some people from like the Reno Entertainment Commission, or something that I just got. So -- but setting aside that I probably won't have to depose any of those people, the people who are going to be deposed are going to be representatives of the state.

We can hold the whole trial in chambers, you know, under seal. I don't care. I'm not going out and giving any information to anyone. But I have to be able to have the data to be able to find out what it is they're relying on, what has been submitted to this Court by way of the various charts so that I can determine whether it's relevant, whether there's problems.

Your Honor, you'll also remember that in the chart, the big chart and the little chart before that, I gave you my copy that had underlines. I didn't even say I wanted breakdowns or anything. I wanted things in certain categories where I could make certain determinations of things I thought were relevant. And it wasn't like I was asking for 85 percent of what was there.

I gave you the red-line version. There were probably six categories in each one of the two. You remember there was a category for five percent live entertainment tax,

and another category, or another segregation of the ten percent, and I said I want the back-up documentation for that. And that is, I believe, what they gave you under seal in chambers however.

And that's what I'm looking for, Your Honor. And, you know, the unredacted versions of some of these pages. You know, I -- we went through -- remember when we were talking about the plans of the stealth fighter and I was showing you this, which is -- you know, I've got a couple hundred pages of this, you know. I'm not asking for that. That's not in my -- that's not even in my letter. So, Your Honor --

THE COURT: The record should reflect he showed me a black box, a page -- an eight by eleven page of papers sideways that had a big black box on it and maybe one little tiny little sentence along the bottom.

MR. SHAFER: And the record will reflect that Mr. Shafer is fanning his exhibit book where there's page after page after page of that. Thank you, Your Honor.

MR. DOERR: As opposed to the alleged disclosure of the plans for the stealth bomber, Your Honor.

MR. SHAFER: Which China already has, but that's another story.

THE COURT: Through Wikileaks.

MS. RAKOWSKY: May I please respond?

THE COURT: Yes.

MS. RAKOWSKY: Thank you. First of all, the statute allows the records of people directly involved. The people directly involved, which is different than the federal statute, this is directly involved, are the people on the title -- on the title of the pleadings. They're directly involved. And if their clients want that information and they don't have the records, we'll give them that information.

The people who are not directly involved are the other strip clubs, are the other people who pay LET, and are other taxpayers in this state who rely on the confidentiality and the privilege that's only given to the taxpayers themselves for the Department and those affiliated with the Department to keep that information confidential.

If the State were to start giving out taxpayer confidential information, it would have a huge impact on the ability to collect tax. I mean, we can't give that out. We've given him the totals. We've given Your Honor the classifications so you can see what -- how the -- it was determined that certain people are LET payers are gentlemen's club and there are other categories. We've given you the list of the -- of the businesses involved in those categories. We can't give this information to him because we can't give it out.

Secondly, with regards to the issue of him not getting refunds, I believe Mr. Shafer's kind of misquoting the

statute as far as the ability for the Department to give refunds. The imposition of the tax is contained in NRS 368(a).200. And Sections 3 and 4, it says that a business entity that collects an amount taxable pursuant to Subsection 1 is liable for the tax imposed. But it's entitled to collect the reimbursement for any person.

So in other words, they have to pay that tax on the admission. They can collect it separately from their patrons, or they can include it in the ticket price and then make out the check. It says any ticket for live entertainment must stay with the tax imposed by this sections, including the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

He says his -- his people have not been collecting the tax, they've been paying it. So if he can verify the fact that that LET tax has come out of the pockets of his clients, he's entitled to -- he -- he will be entitled to refund if he wins this case, with interest.

THE COURT: Have you done discovery on that?

MR. SHAFER: She wasn't there at the proceeding.

MS. RAKOWSKY: I'm reading the statute. Your Honor, I was reading the statute.

MR. SHAFER: I -- you know, all -- all I can say is the first I ever heard of the NAC was when -- I don't remember

which one of you guys brought it up. One of them brought it up at the administrative proceeding. We had a -- for some reason, and I don't remember why it was, we had an adjournment of the administrative proceeding for a few weeks, maybe a month or something, and in that time, you know, I talked to my clients and we submitted affidavits in regard to what went on.

And I believe in one of the pleadings we point out that in the ruling of, if I'm using the word "commissioners" is correct, one of the commissioners said, and I would also note that -- and I'm paraphrasing -- because they didn't comply with the NAC they wouldn't be entitled to the refund anyway. And that's something that you or your successor is going to have to make a determination on.

Now, you know, I'm not saying that right or wrong. I'm saying what they argued as a way to preclude us from trying to get back our tax refund in the administrative proceeding that is directly in front of Your Honor by way of appeal.

THE COURT: So was that argued?

MR. POPE: Your Honor, I was part of the administrative proceeding along with another deputy, Dennis BelCourt, an so Mr. Doerr and Ms. Rakowsky were not there. And, you know, I think one of the things that plaintiffs are going to have to show is how they did handle that -- that issue. Did they include the tax and did they have a sign on

the wall or did they not?

And -- and, you know, we haven't gotten to that point yet.

THE COURT: And because if they did not, then the State's position would be what?

MR. POPE: Well, I'm not sure, and I don't know that we're here to say that today. But it depends upon what they did and what evidence they have to show what they did.

THE COURT: Well, let me ask you this. If you took a position before in an administrative proceeding, is it your -- is it your --

MR. POPE: I'm not sure if we took it in administrative proceeding or, I mean, took a position, or if what Mr. Shafer just said, a commissioner recited a regulation. I don't recall, Your Honor. I'm not -- I'm not sure.

MR. DOERR: And Your Honor, may -- may I speak? Remember that the issue that he's speaking about, the issue of the refund, that's been adjudicated at the hearing officer and at the tax commission. He included it in his Complaint before Your Honor. We actually believe that should really be -- that issue should be here on a Petition for Judicial Review, not a bring more facts to you about this, not a rehearing of that.

That should be a review of the process. And we have talked about, as this proceeds, considering filing a motion to

have that issue severed. We think this is about the Constitution -- constitutional question. And I would like to point out --

THE COURT: Well -- I have --

MR. DOERR: -- that when Mr. Shafer --

THE COURT: -- I have a note here that says before you ever said these words, my note is, did I forget a Petition for Judicial Review, question mark. Because I'm not clear --

MR. DOERR: Well --

THE COURT: Anyway.

MR. DOERR: -- I think they're --

THE COURT: But let me just --

MR. DOERR: Okay.

THE COURT: -- let me ask you a question. I mean, part of your argument today is we never get to the Separation of Powers, judge, and we don't have to go there, speedy adequate remedy at law, the five years runs in -- and they'll have an answer and their money in a month -- in a year. Excuse me, not a month, a year.

Okay, that's the argument. But it -- but, you know, what Counsel is saying is that if you, the State, took the position that they wouldn't be entitled to these funds based upon some requirements of the Code, then it's really affording --

MR. DOERR: The refund can go back to the person who

paid it. That may be -- and for sales and use tax purposes, that's the customer, that's not the retailer.

THE COURT: Is there anything that doesn't allow a company to pay it and just -- I mean, your -- is it going to be the State's position oh, it's included in the -- it's included in the price --

MR. DOERR: Well --

THE COURT: -- of the ticket --

MR. DOERR: Well, Your Honor --

THE COURT: -- and they didn't keep that information. You haven't taken a position on that one way or another you're saying to me?

MR. DOERR: I'm not saying that. I'm saying that, in fact, I believe in our first argument, I argued that I don't think it could ever be construed to have been not paid by their customer. It's the customer who bears the burden of the tax, the retailer under sales and use tax, the club in this case, is the collection agent. They're not the payer, they're the remitter. They remit the tax. They don't pay the tax, they get it from their client --

THE COURT: So hypothetically someone has a -- has an issue before the tax commissioner or commission, and is there a history of -- of commissioner decisions where there have been refunds when -- when there wasn't specific patron information or was it -- were they denied? I mean, that's

pretty simple. I'm thinking this isn't -- might be the first constitutional challenge, but it can't be the first challenge of a taxpayer for a refund.

MR. DOERR: I believe -- I'm not sure it's ever gotten there. If the taxpayer shows the Department that they have given the money back, and it's defined in the statute what they're supposed to do and how they're supposed to make that proof, we don't go to the commission. They've shown that they gave it back to the person who paid it. They need to have an affidavit from the person saying, I paid it and they gave me my tax money back.

So they have to pay the money out of their pocket back to their customer, then come to us for the refund. I'm not sure it's ever gone to the commission where they've shown that.

MR. SHAFER: And -- and --

MR. DOERR: The Department decides that. Now, it probably hasn't been done with respect to a live entertainment tax.

MR. SHAFER: I don't think so.

MR. DOERR: Because this is a new one. This is -- this is younger, but I can tell you with respect to sales and use tax, the law speaks to who can get the refund.

Now, again, Your Honor, I would suggest that the whole issue, that this really should not be here about facts.

This should -- that issue about the refund should be here on a Petition for Judicial Review. And we've considered filing a motion to sever that part off and letting the Constitution -- constitutional argument go forward here.

THE COURT: I understand, but to some degree they are intertwined because from the -- from, you know --

MR. DOERR: I understand.

THE COURT: -- here -- I mean, you know, in its incredibly basic layman terms, you know, your position is there's a speedy adequate remedy at law, money with interest, just like every other, you know, money with interest, judge.

MR. SHAFER: Just like every other state.

THE COURT: And if they choose not to keep track of who's paying it because, you know, it's -- it's -- it chills the strip club patronage, then that's their decision. That's basically what you're arguing to me.

MS. RAKOWSKY: On the other hand, if this is declared unconstitutional it's a whole different issue. That means that the statute doesn't exist. That means that the reg doesn't exist. So -- so we're not totally precluding this because if this is declared unconstitutional it's gone. It's gone for everybody. It's not just gone for 14 people.

THE COURT: Well, if it's declared unconstitutional, then it doesn't matter whether you wrote down the name of the person --

MS. RAKOWSKY: Right.
THE COURT: -- who paid or not.
MS. RAKOWSKY: Because -- because the statute -- and that's what --
THE COURT: Or maybe it does. Does it?
MR. SHAFER: Unless you can't enjoin it.
THE COURT: How many -- how many tax -- how many tax law -- how many -- how many states have collected tax on something that's been later declared unconstitutional and that the -- the state said, you know, we know it wasn't -- it wasn't supposed to be your money so we're not giving it back to you, we'll have an abandoned property fund or a -- you know, we'll -- I mean, how -- how -- has that ever happened --
MR. POPE: Your Honor --
THE COURT: -- in the history of ever and -- and how was it managed?
MR. POPE: I don't have statistics, but it goes to who has the right to request the refund. So in -- in the sales and used tax context, the incidents of the tax is ultimately on the consumer, but the retailer has the burden to collect and remit the tax. And so if -- if the retailer has collected the tax, then they have to show that they've given it back to the customer before they can request the refund.
In this case, you know, I don't know that it's been so clearly decided with the LET. I don't know that it's ever

gone there.

MR. DOERR: And I think the commission said, we don't think this is unconstitutional, you don't get a refund. So that issue -- you know, again, I think that that question should be here on judicial review.

MR. POPE: What the -- what the statute says, Your Honor, is a business entity that collects any amount that is taxable, pursuant to the LET, is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

MS. RAKOWSKY: So they're paying -- it's a pay first. They're paying it. They're entitled to collect it if they want, but if they don't want it, they still have to pay it.

MR. SHAFER: Your Honor --

MR. DOERR: It comes from the customer.

MR. SHAFER: Your Honor --

MR. DOERR: The receipts, it comes from the customer.

MR. SHAFER: I can't even get the State of Nevada to have one consistent argument of whether we are the payer or the remitter. If we are the remitter, and we can't show that we can give it back to the customer, which I'm acknowledging we can't, because I've told you that in the record are affidavits to that effect, we don't get it back.

MR. POPE: Your Honor, if they collected it and remitted it, they have no harm, essentially have no standing. Why are we here?

MR. DOERR: In fact, they get a collection (indiscernible).

MR. SHAFER: Then nobody gets -- then nobody can ever get this back. Nobody can ever get this back. If that's their position, let them make that on the record, I'll change my whole case. I'll -- I'll say that, you know, we're here on behalf of the -- the customers, and the customers aren't going to do it so we have third-party standing to make a constitutional argument.

MR. POPE: But that's not why we're here today, Your Honor. We're here on a couple of things. We're on this -- this discovery issue. We're here on this preliminary injunction issue. And --

MS. RAKOWSKY: We're not here to argue the merits of this case.

MR. POPE: Or to change the claims or arguments.

MR. SHAFER: Your Honor, the question in regard to the Separation of Powers, as they stood up and argued to the Court, was that we had a just fine and dandy remedy, because we could make our request for refund. And I've just pointed out that of three attorneys, you get three different arguments from the State of Nevada in regard to what this tax is, who's

paying it, who's remitting it, who gets it back.

MR. POPE: That's his preliminary injunction argument, Your Honor. It's irrelevant, because they have the adequate remedy. And the -- the reasons the last time we were here, you said yeah, you're giving me reasons, but you're not telling me why. Well, the reasons and the why are they're combined. It's -- it's to protect the revenue collection for the State, and then those other reasons that I gave you today from that case.

You have to pay first, and sue later. It's not an irreparable harm. As long as you get your money back with interest you have not been harmed.

MR. DOERR: And remember, they're here about their -- the dancer's ability to do --

THE COURT: You know, there's the argument --

MR. DOERR: -- their first amendment activity.

THE COURT: One second. There's the argument that nothing prohibits your client from keeping track of all these people other than the incredible administrative costs that I can imagine that would take to pay back the --

MR. SHAFER: Yes.

THE COURT: -- non -- I mean, the --

MR. DOERR: Every other retailer has that opportunity and can --

MR. SHAFER: Yes.

MR. DOERR: -- or can't do that.

MR. SHAFER: Your Honor, yes, there is a reason. And we gave it to the Court previously. The U.S. Supreme Court and all the Federal Courts, they all acknowledge that people have the right to engage in First Amendment protected expression anonymously.

MR. DOERR: We agree.

MR. SHAFER: Your Honor, that is the sole basis of the Supreme Court lawsuit of last term that has all the democrats and all the unions up in arms where all these groups were able to funnel soft money into the Congressional campaigns of this year --

MR. DOERR: Is that relevant?

MR. SHAFER: -- that never have to report who that money came from. Those customers have the absolute right not to give that information.

MR. DOERR: So, Your Honor, then his client gets to keep all of their client's money. You see, if they get the refund, his client gets to keep all of his client's tax money that he got back.

MR. SHAFER: And our affidavits --

MR. DOERR: That's why the statute is set up the way it is.

MR. SHAFER: And the affidavits -- we actually have to constrain ourselves to the record at least in regard to the

administrative proceeding, the second case. And the affidavits say we never increased our door fees to account for the tax, we just paid it out of our regular revenues. That is what the affidavits say.

My clients paid that money. My clients are entitled to that money. They say through the NAC, they're not.

THE COURT: Okay. Are you --

MR. DOERR: We've said enough.

MR. POPE: Thank you, Your Honor.

THE COURT: Yes. I know you go a long time in between hearings in this matter, at least with me, so I appreciate the passion. I'm glad you come here ready to do battle and make my life miserable. Not because you don't do a good job because, quite frankly, I think you all do a great job. I just have so many decisions to make.

With regards to -- just so that I'm clear, the December 6th, 2010 letter that came to me that has 20 paragraphs you did or did not have a specific letter to the Court, just you have a general position that has been articulated very succinctly by counsel. You didn't put anything in a letter, correct?

MS. RAKOWSKY: Yes.

THE COURT: I'm not missing anything or am I?

MR. DOERR: I believe I provided that to you --

MS. RAKOWSKY: There was a chart --

MR. DOERR: -- in a Courtesy copy.
MR. SHAFER: It's the chart. It's Exhibit B.
MR. DOERR: He's reiterated what we've stated in that chart --
MR. SHAFER: Yes, but I -- I don't --
MR. DOERR: -- in his letter.
MR. SHAFER: -- I don't want in any way --
MR. DOERR: He paraphrased.
MR. SHAFER: -- minimize that they gave you a chart of their positions on each of the 23 --
THE COURT: All right, there's my -- hold on, hold on.
MR. SHAFER: -- pages.
THE COURT: Let me make sure I have my chart.
MR. SHAFER: Your Honor, and what you have to do is you have to go past the documents. They gave -- they gave me a set of unredacted documents, or documents with less redactions and then about halfway through Exhibit B they gave you this chart.
MS. RAKOWSKY: May I approach, Your Honor?
THE COURT: Yes. Give me one more copy of the chart.
MS. RAKOWSKY: (Indiscernible) every one of his (indiscernible).
THE COURT: Okay. Here's my next question. Was

this filed -- just, you know, anything that's sent to me is not actually part of the official Court record available for --

MR. BROWN: Did we file a letter?

THE COURT: -- Supreme Court review. Well, you know, when you're referencing for the purposes of appeal, or Writs, or anything else, if anybody's referencing some communication that the Court relied upon, I have a vision of making a ruling referencing this letter, issuing a minute order, and then depending on how it goes, if someone says I'm taking up a Writ on you, Judge, I'd have --

MR. SHAFER: Okay, we -- we will, Your Honor. Mr. Brown indicates they just made sure you had it for today.

MR. BROWN: I'll just attach a caption and with one exhibit.

THE COURT: Yeah, I would just call it -- and -- and I would also -- I would -- to make it easier -- okay, exactly where is this table that I have reviewed, by the way, but yet, because I didn't organize it well enough, or I've moved the pleadings, I don't know where it is right now, what is this attached to?

MR. DOERR: The letter that we sent to Mr. Shafer.

MS. RAKOWSKY: And with a -- with additional discovery with a --

MR. DOERR: With the additional pages that we

provided unredacted.

THE COURT: Okay.

MR. SHAFER: It is the last part of Exhibit B to my letter to you.

THE COURT: Okay. Here's what I'm going to ask, to make it simple, because at the end of the day if someone takes up a Writ on discovery I did or did not allow, someone's going to need a clear and concise pleading filed with the Court to reference to the Supreme Court.

So I'm going to ask that Deja Vu file this letter with all of its attachments with a cover sheet that says, Memorandum in Support of Request for Specific Discovery Rulings by the Court.

Then I'm going to ask the State to file this table prepared for my convenience, with a cover sheet that says, Response by, fill in the blank, the parties, Department of Taxation, State of Nevada, to Deja Vu Show Girls Memorandum in Support of Request for the Court to Order certain discovery so that both of these are filed and can be easily accessed for anyone's review, because this is its own animal as far as a dispute between the parties. Okay? All right. Then --

MS. RAKOWSKY: Well, except for -- I'm sorry, except for one thing. This letter was written after he got that table. So there's a earlier letter that, I guess, you would have to file also, because the letter that you're referring to

with these paragraphs is his letter in reference to the discovery that we provided.

MR. DOERR: He sent us a letter and asked for stuff. We sent him a detailed response --

THE COURT: Now you're talking about the 20 paragraph letter?

MS. RAKOWSKY: That's the third thing.

MR. DOERR: That's his response to --

THE COURT: Okay. If you would include the --

MR. DOERR: The original request.

MS. RAKOWSKY: It's October 25th, 2010 correspondence.

MR. SHAFER: Your Honor, the letter that came to you had my original letter to them, and their response with all the additional materials --

THE COURT: Right, the letter to me has --

MR. SHAFER: -- including the chart.

THE COURT: -- Exhibit A --

MR. BROWN: It's Exhibit A.

THE COURT: -- which is the original --

MR. SHAFER: Correct.

MS. RAKOWSKY: That's correct, Your Honor.

THE COURT: -- October 25th?

MR. SHAFER: Correct.

THE COURT: Okay. So -- so if he files -- what I'm

asking him to do is -- is take the letter that he sent to me, call it a Memorandum in Support of a Request for a Specific Order of Certain Discovery, or a Ruling regarding certain requests for certain discovery, however you want to caption it, but to highlight it for everyone's purposes that this is the document that the Court is going to rule upon as far as yes, you can have it or no, you cannot and here's why so that you can do with that ruling what you need to do, whoever.

MR. BROWN: So effectively this will be the universe which may be reviewed subsequently?

THE COURT: Right. I mean, of course, you have all these other things you're going to reference.

MR. BROWN: Right. Right.

THE COURT: But at the end of the day what's --

MR. BROWN: It boils down to that.

THE COURT: -- it boils down to this.

MR. BROWN: Right.

THE COURT: Because you don't have a formal objection really going on. It started with a formal objection --

MR. BROWN: Yeah.

THE COURT: -- and it's morphed into this.

MR. BROWN: Right.

THE COURT: But it was just too -- it was -- it was too much. I needed it broken down and --

MR. BROWN: Right.

MR. SHAFER: We -- we tried to boil it down.

THE COURT: Yeah, that was helpful. And so anything else you can think of? So the Court's plan is to -- I am -- I am not finding as a matter of law that my review of the Separation of Powers issue is barred by res judicata of the order of the Federal Court, for the record.

So you leave here with one ruling, albeit a little one. It is a ruling nonetheless.

So I need someone to prepare an Order just on that, because as big as this case is, all these little subissues slip through the cracks if I don't just get the Order out.

So the -- so -- so I do plan to issue a decision regarding the Separation of Powers subissue as it relates to the Motion for Preliminary Injunction, which I've already denied without prejudice, if that makes sense to you. That's how I see it. It's it is a -- it is a threshold issue which, quite frankly, I didn't make a specific ruling. You know, State's position is I don't have to. Plaintiff's position is I do. I'll issue a minute order on the Separation of Powers issue.

And then I'm going to issue a minute order on the discovery as your -- on the memorandum requesting specific discovery be ordered and it's -- it's probably a memorandum in supplement to Discovery Commissioner's objection. You might

want to call it that. Memorandum -- I know the title's getting longer, but, by the minute.

MR. SHAFER: And there was that --

THE COURT: Are you going to prepare the order --

MR. SHAFER: -- please, please --

THE COURT: -- regarding the --

MR. SHAFER: Yes, I will.

THE COURT: -- not barred by --

MR. BROWN: Separation of Powers.

THE COURT: -- res judicata?

MR. SHAFER: Yes, I will do that. And you know, just because, Your Honor, I really, really, really don't want to get sued for malpractice --

THE COURT: What?

MR. SHAFER: -- if we could do something about just a Scheduling Order?

THE COURT: Oh, no, no, no.

MR. SHAFER: Okay.

THE COURT: Here's -- here's what I'm going to do. I want to have you come into Court for scheduling purposes only after I've made these two decisions. So you don't have to come in from out of town necessarily, because what would happen -- here's what I anticipate.

I -- I just want to give, after hearing everything you have to say, some more thought to the -- the issues and

issue a minute order that you can go off and do whatever you need to do with. Then the idea is I have you come back to Court. If I have denied the discovery, I'm assume you're going up on a Writ and doing what you need to do. If I've granted the discovery, I assume you're going up on a Writ and doing what you need to do.

In the meantime, depending on whether it was denied or granted will define, I think, the parameters of a Scheduling Order.

So what I -- what I suggest is I -- I want nothing more than to decide this before December 31st. It is my life's goal.

MR. BROWN: It will be a New Year's resolution.

MR. SHAFER: And I appreciate that.

THE COURT: No, because then it has to be after New Year's, so it's -- it's -- it's -- it's -- and so what I'm going to do is I'm going to set a Status Check. But I'm not going to rule from the Bench. So -- so the desire that you might have to fly here for this should be significantly reduced, because all I'm going to do is, based upon my rulings, it's either going to be a shorter setting or a longer setting, and then I'm going to order the case reassigned and -- and have -- and set it for a discovery -- have it -- set it for a scheduling conference in that new department.

So the -- the first Status Check you have would just

be to put each other on notice of what you think, and then -- so that -- do you understand what I'm saying? You come in, I've denied the -- the discovery, or we could be ready in three months, okay? I've granted it, we need six months, we need seven months, whatever, I don't know.

But when you're going to do a contemporaneous Writs, you know, then you've taken those positions. I would reassign it, get it set right away in January in front of the new judge so that the -- but I will have that rulings for that judge in place. That would be the plan. That's my plan.

So in order to make sure that the plan is effected, I would like you to come in on December 28th at 9:00 o'clock to discuss a reassignment, and based upon the Court's rulings, what each side's time schedule would -- you would propose. This would require you to actually talk, to see if maybe you could agree, which I know you do.

MS. RAKOWSKY: We do.

MR. SHAFER: We've --

THE COURT: You work together very well.

MR. SHAFER: No, we actually did that before, and I think we all agree, you know --

THE COURT: It depends on the ruling on the 20 paragraphs.

MR. SHAFER: It does. But I think we know the window that we want for depositions, assuming that we don't --

THE COURT: Well, what's the window?
MR. BROWN: March.
MR. SHAFER: 90 days.
MR. BROWN: Middle of March.
MR. SHAFER: 90 days to wrap up the depositions.
THE COURT: Now, are any of the depositions --
MR. SHAFER: They all are.
THE COURT: They're all contingent on --
MR. SHAFER: On the documents, so like I say, Your Honor, we're -- we're not taking -- we haven't scheduled anything outside --
THE COURT: Well, then you don't really even need -- you probably don't even need to come in. What I could do is I'll set a status check reassignment so that I reassign the case in open Court. It's more of administerial, an administrative thing to make sure that my staff is notifying you of the new department and getting it set on calendar for -- unless you could stipulate to something right now, and then if my ruling makes it moot, it's moot. And if -- if you are allowed to go through, then -- then we have it in place. That's -- that's an option.
MR. SHAFER: I -- I think we really do, at least I, need to see what the ruling is, because, you know, there's three alternatives here. You grant everything, you grant

nothing, or you grant something in the middle. And something in the middle might not result in a Writ. So is there --

THE COURT: For you. (Indiscernible) result in a Writ for them.

MS. RAKOWSKY: You may not be speaking for us right now.

MR. SHAFER: You know, I don't know. I guess, what my question is, you know, and I have no problem in coming out here for that. It's just -- it's a problem on the 28th probably to get a plane.

THE COURT: No, I know.

MR. SHAFER: So I -- I guess, my question is do you have the capacity to patch me in telephonically?

THE COURT: Yeah, we have Court call.

MR. SHAFER: Why don't we just do that?

THE COURT: That's fine because if the plan is, you know, to get you on the same page so that when we send it to the new department, that judge just has to hear, you know, all -- I've made the rulings, hopefully the formal orders are pending, if not done, and -- and then all you've got to do is just -- you know, my plan is to work on it next week. I don't -- I don't have a trial going and I'm not taking one.

MR. SHAFER: Can I improperly ask the Court a legal question?

THE COURT: Sure.

MR. SHAFER: How does the five year -- seeing that I'm from out of state -- how does the five year rule work if you have a Writ going up?

THE COURT: There are certain -- my -- my expectation is there are certain matters that toll the five years and there are certain matters that don't. My view is a discovery Writ would not toll the five years, and you are -- I also think that, you know, the -- the -- the Deja Vu First Amendment issue is your five years. I think your other case has some procedural issues.

MR. SHAFER: Okay.

MS. RAKOWSKY: Your Honor, could I just --

THE COURT: I think you have -- I think -- I think that counsel's -- I've been wondering all along how come there's no Petition for Judicial Review on that because that's -- that's normally the mechanism for any administrative ruling or administrative findings based upon a hearing and a ruling. You know, whether you could cure that or not, off the top of my head, without a stipulation I do not know.

MS. RAKOWSKY: Your Honor, I'm sorry (indiscernible). I'd just like to bring up a minute order from this Court on August 18th, I believe, where when the plaintiffs had brought in the objection to the Discovery Commissioner's report. And I believe your minute order, you -- you ordered the plaintiffs' objection was granted in part

as follows: The defendant shall produce for an in camera review the names listed in Exhibit K, which we did produce, exemptions as well as any correspondent document and e-mail, which were prompted a letter being sent -- sent to them, and we -- we gave you all that.

And then you said their objection was denied in all other respects. And it says, and defendant's counter motion was denied, and it was set for a Status Check. But now they're reopening all the discovery issues that were denied by the Discovery Commissioner, subsequently denied by you. And now they're reopening and going back to -- this is going on since --

THE COURT: Okay, can I tell you something?

MS. RAKOWSKY: -- since 2000 and something.

THE COURT: Can I tell you something?

MS. RAKOWSKY: We got to get this done.

THE COURT: Unless you stand before me as an officer of the Court in good faith telling me that I said those specific words in that very last tagged line sentence, we might need a transcript, because this is incredibly complicated for some clerk who hasn't read anything and is just trying to follow along and assimilate what I say. And I would -- and I'm not -- I'm not impugning whoever wrote that minute order, but -- but I don't recall saying those words just like that.

I always leave it a little vague, and that's always something I pay for later, I guess. And so unless you're telling me that you recall specifically that, unfortunately in a case like this, the minutes are helpful as a tool to guide us, perhaps, in -- in what we need transcripts for and what we don't. Does that make sense to you?

MS. RAKOWSKY: Yeah, it does, absolutely, Your Honor. I just wanted to bring it to the Court's attention, because we were basing it on that, and now we feel like we're -- we just feel like we're back at square one. This has been going on since 2006. It's just --

MR. SHAFER: The reason it continued was because of the chart. That was their supplement that you ordered produced, and --

THE COURT: Now we're fighting about the chart --

MR. SHAFER: Because the chart didn't match --

THE COURT: -- and the details within the chart.

MR. SHAFER: -- the exhibits that they had in the motion for -- response for Motion for Preliminary Injunction.

MR. DOERR: Now we've explained that 30 times. I'm not sure why we're even talking about that anymore.

MS. RAKOWSKY: And we gave you your (indiscernible).

THE COURT: I understand.

MS. RAKOWSKY: And we're giving (indiscernible).

MR. POPE: Your Honor, I'll attest to the general

accuracy of that minute order because there -- it -- if there is another order that says that the Discovery Commissioner's order was vacated, there -- I believe that you also said that, you know, it was limited to the names and the categories, and everything else was granted -- not granted.

THE COURT: Denied.

MS. RAKOWSKY: Denied.

MR. POPE: Because it included sanctions. So it's something that we remember that -- that, you know, was not vacated. The whole order was not vacated. And in considering the universe of the discovery issue, it was at one time limited to that.

THE COURT: Now, did you list -- did you list that as part of your response in here, this is outside the original -- I mean, in this table chart?

MS. RAKOWSKY: I did not because I provided that they wrote us a letter, we provided it to him in response to his letter because we've been telling him for several years --

THE COURT: Is your letter in here?

MR. BROWN: Okay, so --

MS. RAKOWSKY: We've been telling (indiscernible).

MR. DOERR: No good deed goes unpunished.

MR. SHAFER: Why have we come back three times then?

MS. RAKOWSKY: May I talk?

MR. SHAFER: Three times.

MR. BROWN: Okay, if that's not properly before the Court, we can file a brand new Motion to Compel, they can file their opposition, and we'll end up right back here with exactly the issues in the letter.

MS. RAKOWSKY: We -- we -- we've been telling them for years that please just tell us what you're not happy with and we'll respond. On October 25th we finally got a letter from them telling us what they were not happy with. So it was our response to -- to plaintiff's counsel explaining why we couldn't give certain information.

That information, as far as I'm concerned, had already been ruled on, but we were just trying to be as accommodating as we can.

THE COURT: All right.

MR. POPE: Your Honor, if the transcript indicates what we said it indicates, can we submit it?

THE COURT: Sure.

MR. POPE: Okay.

MR. BROWN: There's a discovery dispute. That dispute is before the Court right now. The Court can rule on it now or we can file a brand new motion to bring it before our new judge. Those are the two options.

THE COURT: Oh, I don't want to do that to him.

MR. BROWN: I don't either. And it's not necessary.

THE COURT: Okay. Well, what I'm going to do is I'm

going to look at what you've provided me thus far. If -- if as I'm going through and articulating what I'm doing and why there's any reason for me to go back, I'll burn a CD and I'll look at it. I think I probably already have a CD on -- and the date of that was --

MS. RAKOWSKY: May I approach with this? I'll give --

THE COURT: Yeah, I just need the -- I actually have that. I printed all the minutes out for this case. Hold on, was it August 12th or --

MR. DOERR: Yes.

MS. RAKOWSKY: It was the August 12th, 2010 hearing.

THE COURT: I need the August 12th hearing on this. And we also discussed -- one other thing, not to complicate it. We also discussed, and I've given thought since the last time you were here as far as having a record and filing things under seal. At this point nobody -- nobody disputes that these names exist, and I don't think I need to make a record of those names under seal at this point. It's just a matter of turning them over. That's what we're fighting about, and I don't think any ruling that I make needs the names to be under seal. I mean, wouldn't you agree?

Usually you have the existence of information or the non-existence of information that you're fighting about and whether it's privileged or not or whether it's subject to

discovery or not, and then you document that if you don't -- don't order it produced so the Supreme Court could look at that existing or non-existing. Everybody agrees it exists and generally what it is. It's just names. It's names and -- and -- and perhaps designations that plaintiff doesn't accept.

MR. SHAFER: Well, there's data.

MR. DOERR: Names and amounts.

MS. RAKOWSKY: Those names --

MR. SHAFER: There's data.

MS. RAKOWSKY: -- and amounts can't -- cannot be part of the record.

THE COURT: Well, anyway, but do you understand what I'm saying?

MS. RAKOWSKY: It would have to be either under seal if you --

THE COURT: Right, that's what I just said.

MS. RAKOWSKY: But not --

MR. DOERR: Do they exist? We agree they exist.

THE COURT: Right.

MR. POPE: They exist.

THE COURT: I mean, so that's -- that's -- so I'm not going to even go there. I was thinking about that the last time you were in Court, and I just don't think it's necessary at this time. Although, I will go paragraph by paragraph and I will see you on December 28th. If you have

any -- you know about Court call. You can help him set up --

MR. BROWN: Sure. One last scheduling issue. I won't be back in town until the 29th.

THE COURT: Your appearance is waived.

MR. BROWN: Oh, problem solved. Good.

MR. POPE: Your Honor, I'll also be out of town on the 28th, but --

THE COURT: Your appearance is waived.

MR. POPE: -- (indiscernible). Why, thank you.

MS. RAKOWSKY: But Blake and I will be (indiscernible).

MR. DOERR: I'll be here, Your Honor.

MS. RAKOWSKY: Blake and I will be delighted to be here.

MR. SHAFER: I'll be on the phone --

THE COURT: All right, I'll see you then.

MR. SHAFER: -- if I'm not here.

THE COURT: Thank you.

MS. RAKOWSKY: Thank you for your time, Your Honor.

MR. SHAFER: Thank you, Your Honor.

MR. BROWN: Thank you, Your Honor.

(Proceeding concluded at 11:19 a.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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(303) 798-0890

JULIE LORD, TRANSCRIBER DATE

WILLIAM H. BROWN, ESQ.
Nevada Bar No.: 7623
LAW OFFICES OF
WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101
Tel. (702) 366-9311
Fax: (702) 366-9371
E-Mail: Will@WHBesq.com
Counsel for Plaintiffs

BRADLEY J. SHAFER, ESQ.
Michigan State Bar P36604
SHAFER & ASSOCIATES, P.C.
3800 Capital City Boulevard, Suite 2
Lansing, Michigan 48906
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, 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* 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. A554970 Dept. No. IX **FIRST AMENDED COMPLAINT** **COMPLAINT** Arbitration exemption: NAR 3(A): Seeks Declaratory and Injunctive Relief

NOW COME Plaintiffs, 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* (collectively referred to herein as the "Plaintiffs"), by and through their attorneys, and state for their first amended complaint pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b) against Defendant Nevada Department of Taxation, Defendant Nevada Tax Commission, and Defendant Nevada State Board of Examiners (collectively referred to herein as the "Defendants"), as follows:

INTRODUCTION

1. This is a civil action brought pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b), wherein Plaintiffs pray for a refund of the Live Entertainment Tax paid for the tax periods of January, February, March, and April, 2004, as well as for declaratory judgment, injunctive relief, and damages. Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face and as applied to these Plaintiffs, and enjoin, the Nevada Tax on Live Entertainment (referred to herein as the "Live Entertainment Tax," or simply the "Tax") as established by Title 32, Chapter 368A, of the Nevada Revised Statutes ("Chapter 368A"), and the regulations promulgated in furtherance thereof, as being an impermissible tax on constitutionally protected expression. A copy of the statute as originally enacted is attached hereto as Exhibit 1, and a copy of the current codified version of Chapter 368A is attached hereto as Exhibit 2, and both are incorporated herein by reference. A copy of the administrative regulations promulgated in furtherance of Chapter 368A is attached hereto as Exhibit 3, and is incorporated herein by reference.

JURISDICTION AND VENUE

2. This Court has jurisdiction and power to grant the refund requested pursuant to N.R.S. 368A.290 as well as jurisdiction and authority to grant the declaratory judgment prayed for

here pursuant to Rule 57 of the Nevada Rules of Civil Procedure and N.R.S. 33.040. Additionally, this Court has jurisdiction and power to grant the injunctive relief requested pursuant to Rule 65 of the Nevada Rules of Civil Procedure and N.R.S. § 33.010.

3. This suit is authorized by law to redress deprivations under color of state law of the rights, privileges, and immunities secured by Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution, as well as the First and Fourteenth Amendments to the United States Constitution, and for declaratory and injunctive relief.

4. Venue resides in this Court and is proper and appropriate as relevant proceeds were conducted, and the Plaintiffs maintain their principal place of business, within Clark County in the State of Nevada, pursuant to N.R.S. 368A.290(2).

PARTIES

5. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

6. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

7. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*")is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

8. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a Limited Liability Company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

9. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club* ("*Crazy Horse*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

10. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* ("*Treasures*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

11. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* ("*Scores*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

12. None of the Plaintiffs operate their facilities as licensed gaming establishments under the laws of the State of Nevada.

13. Defendant Nevada Department of Taxation (hereinafter sometimes referred to simply as the "Department") is a governmental entity created under the laws of the State of Nevada, which administers and enforces the statutory provisions challenged herein, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers. It is a required Defendant in this action pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b).

14. Defendant Nevada Tax Commission (hereinafter sometimes referred to simply as the "Commission") is a governmental entity created under the laws of the State of Nevada, which administers and enforces some of the statutory provisions challenged herein, and is authorized to consider and rule upon, among other things, appeals of claims under Chapter 368A. It is named as a Defendant here as it rendered the decision which the Plaintiffs Challenge by way of this action.

15. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to simply as the "Board of Examiners") is a governmental entity created under the laws of the State of Nevada, and consists of the governor, the secretary of state, and the attorney general. Pursuant to N.R.S. § 368A.250, the Board of Examiners is authorized to approve, among other things, refunds with regard to any erroneously or illegally collected or computed tax under Chapter 368A, which the Plaintiffs seek here.

STATEMENT OF FACTS

16. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

17. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous exceptions, an excise tax on admission to any facility within the State of Nevada that provides defined "live entertainment."

18. Shortly after the enactment of Chapter 368A, numerous and various administrative regulations were promulgated regarding the administration and enforcement of Chapter 38A. These regulations, which set forth definitions, applicability and methods of calculating the Live Entertainment Tax, and procedures, can be found at NAC 368A.010 through NAC 368.540, and are attached hereto as Exhibit 3. As utilized herein, the phrase "Chapter 368A" encompasses both the statute and these regulations promulgated in furtherance thereof attached as Exhibit 3.

19. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is obligated to collect the tax imposed by Chapter 368A from taxpayers who/which are not licensed gaming establishments, and is also obligated to adopt such regulations as are necessary to carry out those functions.

20. Upon information and belief, one of the primary purposes for the enactment of Chapter 368A was to impose an excise tax upon those establishments in the State of Nevada that provide live so-called "adult" entertainment in the form of exotic dancing, "topless" dancing, and fully nude performance dance entertainment.

21. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided had a maximum

occupancy of less than 300 persons.

22. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which - - among other things - - reduced the scope of the exception as contained in N.R.S. § 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Upon information and belief, the purpose of the July 17, 2005, amendments to Chapter 368A, and in particular those to N.R.S. § 368A.200(5)(d), was to specifically extend the tax obligation as contained in Chapter 368A to "adult" entertainment establishments which were not then subject to the Live Entertainment Tax, including a number of the Plaintiffs in this action. The same amendments changed the language of some provisions of Chapter 368A. Unless stated otherwise, all references herein to the statutory provisions of Chapter 368A are to the current codified version attached hereto as Exhibit 2.

23. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Spearmint Rhino* is subject to Chapter 368A, as amended, and have required *Spearmint Rhino* to pay the Live Entertainment Tax as mandated therein.

24. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas Boulevard, Las Vegas, Nevada, 89104, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Olympic Garden* is subject to Chapter 368A, as amended, and have required *Olympic Garden* to pay the Live Entertainment Tax as mandated therein.

25. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Sapphire* is subject to Chapter 368A, as amended, and have required *Sapphire* to pay the Live Entertainment Tax as mandated therein.

26. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Crazy Horse* is subject to Chapter 368A, as amended, and have required *Crazy Horse* to pay the Live Entertainment Tax as mandated therein.

27. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Treasures* is subject to Chapter 368A, as amended, and have required *Treasures* to pay the Live Entertainment Tax as mandated therein.

28. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Scores* is subject to Chapter 368A, as amended, and have required *Scores* to pay the Live Entertainment Tax as mandated therein.

29. All of the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500 persons.

30. The Plaintiffs all present upon their business premises some form of live "exotic" performance dance entertainment. Some of the Plaintiffs present live clothed and "topless" female performance dance entertainment, and others of the Plaintiffs present live clothed, "topless" and fully nude female performance dance entertainment; all of which is non-obscene. The non-obscene performance dance entertainment presented on the establishments operated by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by not only Article I, §§ 9 and 10, of the Nevada Constitution, but by the First and Fourteenth Amendments to the United States Constitution as well.

31. Chapter 368A is a lengthy and complex statute containing numerous and various provisions

affecting the constitutionally protected conduct of the Plaintiffs, their agents, representatives, entertainers and employees, as well as those individuals from the consenting adult audience who would seek to view the entertainment provided by the Plaintiffs. Plaintiffs assert the constitutional rights of their patrons as well in this action.

32. The Defendants take the position that pursuant to the definitions set forth in Chapter 368A, Plaintiffs are obligated to pay the Live Entertainment Tax since their establishments fall within the definition of "live entertainment" found in N.R.S. § 368A.090, and since they are not otherwise exempted from having to pay that tax.

33. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is both illegal and unconstitutional, and for those reasons they do not desire to pay those taxes. Nevertheless, under threat of criminal prosecution and/or the imposition of fines and other penalties against them, Plaintiffs have, beginning at various times, paid the Live Entertainment Tax mandated by Chapter 368A.

34. Pursuant to N.R.S. § 368A.260, Plaintiffs each filed timely requests for refunds of the Live Entertainment Tax they had paid, together with claims for the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310.

35. To date, each request for refund has been denied by the Defendant Nevada Department of Taxation, pursuant to a one page letter. Each letter informed the Plaintiffs that the denial may be appealed to Defendant Nevada Tax Commission pursuant to N.R.S. § 360.245 by filing a written notice of appeal with the Defendant Department within thirty days of the service of the denial letter.

36. Each Plaintiff has filed a timely written notice of appeal with the Defendant Department of Taxation. After the Plaintiffs and the Defendant Department had an opportunity to submit briefing to the Defendant Nevada Tax Commission, a hearing was scheduled on July 9, 2007, before the Defendant Commission to hear the appeal of the denials of the requests for refunds

of the Live Entertainment Tax paid by the Plaintiffs for the tax periods of January, February, March, and April, 2004.

37. After the hearing commenced on July 9, 2007, the Defendant Commission voted to continue the hearing until August 6, 2007, in order to give the parties an opportunity to submit supplemental materials and information.

38. The Defendant Commission, after considering the testimony, argument, and materials submitted on July 9, 2007, and on August 6, 2007, issued a written decision denying Plaintiffs' appeals on October 12, 2007. That ruling is attached hereto as Exhibit 4.

39. Pursuant to N.R.S. § 368A.290, "[w]ithin 90 days after a final decision upon a claim filed pursuant to this chapter is rendered" by the Commission, "the claimant may bring an action against the Department on the grounds set forth in the claim." It is pursuant to this provision that Plaintiffs have filed this action.

40. Pursuant to N.R.S. 368A.300(3)(b), if the claimant is aggrieved by the decision of the "Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment."

41. Plaintiffs further filed this action in order to protect their fundamental constitutional rights from infringement by the enforcement of Chapter 368A, which they contend is unconstitutional on its face as it: 1) imposes a tax directly on "live entertainment;" an activity which is protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and Fourteenth to the United States Constitution, therefore constituting a direct tax on "First Amendment" freedoms and in particular on live exotic performance dance entertainment; 2) applies only to a small number and category of speakers; 3) it is in violation of Article 10, §1 of the Nevada Constitution; and 4) it is an impermissible discriminatory tax which discriminates based upon the content of speech and expression. In addition, N.R.S.

368A.200(5)(a) precludes the taxation of live entertainment that "the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution." Because the Plaintiffs cannot be so taxed under either the United States or Nevada Constitutions, Plaintiffs are exempt from having to pay the Live Entertainment tax pursuant to this exemption. These are the grounds which Plaintiffs set forth in their requests for refunds.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

42. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

43. Chapter 368A states, at N.R.S. § 368A.200(1), that "[e]xcept as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided." If the live entertainment is provided at a facility with a maximum occupancy of less than 7,500, the rate of tax is 10% of the admission charge to the facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the facility. If the live entertainment is provided at a facility with a maximum occupancy of at least 7,500, the rate of the tax is 5% of the admission charged to the facility.

44. Chapter 368A defines an "[a]dmission charge" in N.R.S. § 368A.020 as:

> [T]he total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

45. Chapter 368A defines a "facility" in N.R.S. § 368A.060 as:

> "(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:
>
> (1) An establishment that is not a licensed gaming establishment; or
> (2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment."

46. "[L]ive entertainment" is defined in N.R.S. § 368A.090 as:

> "[A]ny activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present."

This definition includes, among other activities, "[d]ancing performed by one or more professional or amateur dancers."

47. Chapter 368A states, at N.R.S. § 368A.140(2), that the Defendant Department shall collect the Live Entertainment Tax from non-gaming licensed taxpayers, such as is the case of the Plaintiffs here, and is empowered to "adopt such regulations are necessary to carry out" that collection.

48. N.R.S. § 368A.090(b) specifically excludes certain types of entertainment from the definition of "live entertainment," such as: instrumental or vocal music if it "does not routinely rise to the volume that interferes with casual conversation" and would not "generally cause patrons to watch as well as listen"; occasional performances by employees who have primary job functions other than performing; performances in certain licensed gaming establishments "as long as performers stroll continuously throughout the facility" or if they "enhance the theme of the establishment or attract patrons to the areas of the performances"; entertainment that is provided by patrons; animal behaviors for the purpose of education and scientific research; and occasional dancing which, among other things, "primarily serves to provide ambience to the facility."

49. Pursuant to N.R.S. § 368A.200(5), the tax imposed by Chapter 368 is not applicable to a variety of circumstances. Some of the exemptions include live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitution; live entertainment that is not provided at a licensed gaming establishment if the

facility has a maximum seating capacity of less than 200; live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those limits, if the facility has a maximum seating capacity of less than 200; merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment; and music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.

50. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S. § 368A.250, which provides that if the Defendant Department determines that any tax has been "erroneously or illegally collected or computed," the Defendant Department must record the fact and certify the amount owed and from whom it was collected to Defendant Board of Examiners. If the amount is approved by the Defendant Board of Examiners, it is then credited on any amount that is due from that person under Chapter 368A, with the balance refunded to that person.

51. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Defendant Nevada Tax Commission is authorized to render a final decision upon claims for refunds under that chapter. Further, at N.R.S. § 368A.300(2), Chapter 368A provides that a claim thereunder that is disallowed by the Defendant Department may be appealed to the Defendant Commission.

COUNT I - DECLARATORY RELIEF

52. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

53. Chapter 368A is unconstitutional on its face and as applied to the Plaintiffs under Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, for numerous and various reasons, including, but not limited to, the fact that:

(a) It effectuates an impermissible prior restraint on speech and expression;

(b) It fails to further any important, substantial or compelling governmental interest;

(c) It permits restrictions on speech and expression that are greater than are essential to further any asserted governmental interests;

(d) It permits restrictions on speech and expression that are not the least restrictive means available;

(e) It contains criteria that are both arbitrary and capricious and which are not supported by any legislative record;

(f) It contains numerous and various terms and phrases which are impermissibly vague, and ambiguous, and the applicable definitions as contained therein are impermissibly and substantially overbroad judged in relation to their plainly legitimate sweep;

(g) It imbues the Defendants with unbridled discretion;

(h) It impermissibly singles out constitutionally protected businesses for certain regulations;

(i) It violates the procedural and substantive due process rights of the Plaintiffs and others, including but not limited to the customers and patrons who frequent Plaintiffs' establishments;

(j) It violates the privacy rights of the customers and patrons who frequent Plaintiffs' establishments;

(k) It violates Plaintiffs' equal protection rights in that it unconstitutionally discriminates against expressive businesses based upon the content of speech, and it further creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Nevada, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;

(l) It is an impermissible direct tax on constitutionally protected freedoms;

(m) It is a discriminatory tax that only impacts upon a small number and category of speakers;

(n) It is an impermissible discriminatory tax that discriminates based upon the content of speech and expression;

(o) It impermissibly requires a person or business to pay for the right to exercise a right guaranteed by the Nevada and United States Constitutions;

(p) It was enacted upon an insufficient record and is not justified on any factual or legal ground;

(q) It violates the separation of powers doctrine; and

(r) The Nevada Tax Commission violated Plaintiffs' procedural due process rights by failing to provide a fair and impartial hearing.

54. Because the Live Entertainment Tax is an impermissible and/or unconstitutional tax upon in violation of Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, Plaintiffs are not subject to payment of the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

55. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendants, and should do so here.

56. Because of the questioned constitutionality of the Live Entertainment Tax as required by Chapter 368A, and because of the potential application of the exemption as contained in N.R.S. § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to these Plaintiffs, Plaintiffs are entitled to a declaration by this Court in regard to the constitutionality of Chapter 368A as well as the applicability of the exemption as contained in N.R.S. § 368A.200(5)(a).

57. For the reasons as set forth above, this Court should declare that the Live Entertainment Tax as mandated by Chapter 368A is unconstitutional on its face and as applied to the Plaintiffs. Also for the reasons as set forth above, this Court should declare that Plaintiffs need not pay the Live Entertainment Tax as required by Chapter 368A both as a result of the constitutional violations as enumerated above as well as the specific exemption as set forth in N.R.S. § 368A.200(5)(a). In addition, this Court should declare that the Defendants have violated the constitutional rights of the Plaintiffs by requiring them to have paid the Live Entertainment Tax for the tax period of January 2004 through April 2004, which are at issue in this action.

COUNT II - REQUEST FOR REFUND

58. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set

forth herein.

59. Plaintiffs should not have been required to pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

60. Both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax Commission erred in not granting Plaintiffs' requests for refunds.

61. This Court has the power to grant Plaintiffs' requests for refunds pursuant to N.R.S. § 368A.290 and N.R.S. § 368A.300, and should do so here.

62. As a direct and proximate result of Defendants' acts, Plaintiffs have been damaged in an amount in excess of $10,000, plus interest thereon in an amount to be determined by the trier of fact.

COUNT III - INJUNCTIVE RELIEF

63. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

64. Any action taken or to be taken by the Defendants to enforce any portion of Chapter 368A against Plaintiffs has been taken and will be taken under color of law, and has deprived and will deprive Plaintiffs of their constitutional rights as set forth herein, and will cause them irreparable harm for which compensatory damages are an inadequate remedy as a matter of law.

65. The threat of enforcement of Chapter 368A is both great and immediate. In addition, Chapter 368A is both flagrantly and patently violative of Plaintiffs' constitutional rights. There is no other remedy at law which would suffice to protect Plaintiffs' interests for the reasons above numerated.

66. The public interest weighs in favor of preventing deprivation of constitutional rights, and is always served by enjoining an unconstitutional law.

67. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims against Chapter 368A, in that it is blatantly and patently unconstitutional. The Defendants will suffer no harm by the entry of such an injunction, as there can be no legitimate governmental interest in enforcing an unconstitutional law. In addition, the "balancing" of the equities tips in favor of the Plaintiffs and in the entry of a preliminary injunction, due to the paramount position of rights afforded under the First Amendment in comparison to the lack of harm occasioned to the Defendants if such an injunction is granted.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court enter judgment against Defendants, which would include:

A. A declaration that the Live Entertainment Tax under Chapter 368A is unconstitutional on its face and as applied to the Plaintiffs; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by having required them to have paid the Live Entertainment Tax in the past;

B. A preliminary and permanent injunction restraining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs;

C. Entry of an order vacating the determinations of the Nevada Department of Taxation and the Defendant Nevada Tax Commission denying Plaintiffs' requests for refunds;

D. Entry of an order directing Defendant Nevada Department of Taxation to refund the Live Entertainment Taxes paid by the Plaintiffs for the tax periods of January, February, March and April 2004, together with the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310;

E. A permanent injunction requiring Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs during those tax periods and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs under Chapter 368A during those tax periods, together with interest as required by N.R.S. § 368A.270 and § 368A.310; and

F. Entry of such other and further relief as the Court deems just and proper.

DATED this ~~27th~~ 9th day of ~~February, 2009.~~ December, 2010

SULLIVAN BROWN

By: WILLIAM H. BROWN, ESQ.
Nevada Bar #7623
SULLIVAN BROWN
332 S. Jones Boulevard
Las Vegas, NV 89107
Telephone:(702) 471-0112
Facsimile: (702) 567-0116
Counsel for Plaintiffs

BRADLEY J. SHAFER, ESQ.*
Michigan Bar #P36604
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
Co-Counsel for Plaintiffs
*Admitted *Pro Hac Vice*

Westlaw.

NV ST 368A.010

N.R.S. **368A.010**

WEST'S NEVADA REVISED STATUTES ANNOTATED
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CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
GENERAL PROVISIONS
→368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.110, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.020

N.R.S. **368A.020**

WEST'S NEVADA REVISED STATUTES ANNOTATED
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GENERAL PROVISIONS

→368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.030

N.R.S. 368A.030

WEST'S NEVADA REVISED STATUTES ANNOTATED
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GENERAL PROVISIONS

→368A.030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.040

N.R.S. 368A.040

WEST'S NEVADA REVISED STATUTES ANNOTATED
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→368A.040. "Business" defined

"Business" means any activity engaged in or caused to be engaged in by a business entity with the object of gain, benefit or advantage, either direct or indirect, to any person or governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.050

N.R.S. 368A.050

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→368A.050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this state or another jurisdiction and any other type of entity that engages in business.

(b) A natural person engaging in a business if he is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.060

N.R.S. 368A.060

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→368A.060. "Facility" defined

"Facility" means:

1. Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(a) An establishment that is not a licensed gaming establishment; or

(b) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.

2. Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.070

N.R.S. 368A.070

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GENERAL PROVISIONS

→368A.070. "Game" defined

"Game" has the meaning ascribed to it in NRS 463.0152.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.080

N.R.S. 368A.080

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GENERAL PROVISIONS
→**368A.080.** "Licensed gaming establishment" defined

"Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0169.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.090

N.R.S. 368A.090

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GENERAL PROVISIONS

→368A.090. "Live entertainment" defined

"Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

[FN1] See Historical and Statutory Notes below for effective date information.

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WEST'S NEVADA REVISED STATUTES ANNOTATED
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GENERAL PROVISIONS

→368A.100. "Slot machine" defined

"Slot machine" has the meaning ascribed to it in NRS 463.0191.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.110

N.R.S. 368A.110

WEST'S NEVADA REVISED STATUTES ANNOTATED
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GENERAL PROVISIONS

→368A.110. "Taxpayer" defined

"Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.

2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person who collects the taxable receipts.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

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NV ST 368A.120

N.R.S. 368A.120

WEST'S NEVADA REVISED STATUTES ANNOTATED
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→368A.120. Natural persons who are deemed to be business entities

A natural person engaging in a business shall be deemed to be a business entity that is subject to the provisions of this chapter if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, or a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, for the business.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.130

N.R.S. 368A.130

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ADMINISTRATION

→368A.130. Adoption by Department of regulations for determining whether activity is taxable

The Department shall provide by regulation for a more detailed definition of "live entertainment" consistent with the general definition set forth in NRS 368A.090 for use by the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.140

N.R.S. 368A.140

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ADMINISTRATION

→368A.140. Duties of Board and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall:

(a) Collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a). The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

(a) Collect the tax imposed by this chapter from all other taxpayers; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).

3. For the purposes of:

(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, the Board and the Department shall:

(a) Jointly, coordinate the administration and collection of that tax and the regulation of taxpayers who are liable for the payment of the tax.

(b) Upon request, assist the other agency in the collection of that tax.

[FN1] See Historical and Statutory Notes below for effective date information.

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N.R.S. 368A.150

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ADMINISTRATION

→368A.150. Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax

1. If:

(a) The Board determines that a taxpayer who is a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Board shall establish an amount upon which the tax imposed by this chapter must be based.

(b) The Department determines that a taxpayer who is not a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Department shall establish an amount upon which the tax imposed by this chapter must be based.

2. The amount established by the Board or the Department pursuant to subsection 1 must be based upon the tax liability of business entities that are deemed comparable by the Board or the Department to that of the taxpayer.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.160 Page 1

N.R.S. 368A.160

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ADMINISTRATION

→368A.160. Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty

1. Each person responsible for maintaining the records of a taxpayer shall:

(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or

(2) At least 4 years if the taxpayer is not a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and

(c) Make the records available for inspection by the Board or the Department upon demand at reasonable times during regular business hours.

2. The Board and the Department may by regulation specify the types of records which must be kept to determine the amount of the liability of a taxpayer from whom they are required to collect the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.

4. A person who violates any provision of this section is guilty of a misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.170

N.R.S. 368A.170

WEST'S NEVADA REVISED STATUTES ANNOTATED
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ADMINISTRATION

→368A.170. Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State

1. To verify the accuracy of any report filed or, if no report is filed by a taxpayer, to determine the amount of tax required to be paid:

(a) The Board, or any person authorized in writing by the Board, may examine the books, papers and records of any licensed gaming establishment that may be liable for the tax imposed by this chapter.

(b) The Department, or any person authorized in writing by the Department, may examine the books, papers and records of any other person who may be liable for the tax imposed by this chapter.

2. Any person who may be liable for the tax imposed by this chapter and who keeps outside of this state any books, papers and records relating thereto shall pay to the Board or the Department an amount equal to the allowance provided for state officers and employees generally while traveling outside of the State for each day or fraction thereof during which an employee of the Board or the Department is engaged in examining those documents, plus any other actual expenses incurred by the employee while he is absent from his regular place of employment to examine those documents.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.180

N.R.S. 368A.180

WEST'S NEVADA REVISED STATUTES ANNOTATED
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CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION

→368A.180. Confidentiality of records and files of Board and Department

1. Except as otherwise provided in this section and NRS 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, 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.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.200

N.R.S. 368A.200

WEST'S NEVADA REVISED STATUTES ANNOTATED
TITLE 32. REVENUE AND TAXATION
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
IMPOSITION AND COLLECTION

→368A.200. Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this state where live entertainment is provided. If the live entertainment is provided at a facility with a maximum seating capacity of:

(a) Less than 7,500, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500, the rate of the tax is 5 percent of the admission charge to the facility.

2. Amounts paid for gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

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

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

5. The tax imposed by subsection 1 does not apply to:

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

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

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum seating capacity of less than 300.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum seating capacity of less than 300.

(f) Merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the

merchandise entitles the purchaser to admission to the entertainment.

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

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

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

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

6. As used in this section, "maximum seating capacity" means, in the following order of priority:

(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;

(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or

(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.210

N.R.S. 368A.210

WEST'S NEVADA REVISED STATUTES ANNOTATED
TITLE 32. REVENUE AND TAXATION
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
IMPOSITION AND COLLECTION

→368A.210. Taxpayer to hold taxes in separate account

A taxpayer shall hold the amount of all taxes for which he is liable pursuant to this chapter in a separate account in trust for the State.

[FN1] See Historical and Statutory Notes below for effective date information.

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NV ST 368A.220

N.R.S. 368A.220

WEST'S NEVADA REVISED STATUTES ANNOTATED
TITLE 32. REVENUE AND TAXATION
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
IMPOSITION AND COLLECTION

→368A.220. Filing of reports and payment of tax; deposit of amounts received in State General Fund

1. Except as otherwise provided in this section:

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.

3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.230

N.R.S. 368A.230

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IMPOSITION AND COLLECTION

→368A.230. Extension of time for payment; payment of interest during period of extension

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.240

N.R.S. 368A.240

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→368A.240. Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable receipts reported for a previous reporting period; and

(b) Has taken a deduction on his federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which he is unable to collect,

he is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

3. If a taxpayer collects all or part of an admission charge or charges for food, refreshments and merchandise for which he claimed a credit on a return for a previous reporting period pursuant to subsection 2, he shall include:

(a) The amount collected in the charges reported pursuant to paragraph (a) of subsection 1; and

(b) The tax payable on the amount collected in the amount of taxes reported,

in the first return filed with the Board or the Department after that collection.

4. Except as otherwise provided in subsection 5, upon determining that a taxpayer has filed a return which contains one or more violations of the provisions of this section, the Board or the Department shall:

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

(b) For the first or second return, other than a return described in paragraph (a), in any calendar year which contains one or more violations, assess a penalty equal to the amount of the tax which was not reported.

(c) For the third and each subsequent return in any calendar year which contains one or more violations, assess a penalty of three times the amount of the tax which was not reported.

5. For the purposes of subsection 4, if the first violation of this section by any taxpayer was determined by the

Board or the Department through an audit which covered more than one return of the taxpayer, the Board or the Department shall treat all returns which were determined through the same audit to contain a violation or violations in the manner provided in paragraph (a) of subsection 4.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.250

N.R.S. 368A.250

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OVERPAYMENTS AND REFUNDS

→368A.250. Certification of excess amount collected; credit and refund

If the Department determines that any tax, penalty or interest it is required to collect has been paid more than once or has been erroneously or illegally collected or computed, the Department shall set forth that fact in its records and shall certify to the State Board of Examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. If approved by the State Board of Examiners, the excess amount collected or paid must be credited on any amounts then due from the person under this chapter, and the balance refunded to the person or his successors in interest.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.260

N.R.S. 368A.260

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→368A.260. Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim

1. Except as otherwise provided in NRS 360.235 and 360.395:

(a) No refund may be allowed unless a claim for it is filed with:

(1) The Board, if the taxpayer is a licensed gaming establishment; or

(2) The Department, if the taxpayer is not a licensed gaming establishment.

A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made.

(b) No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Board or the Department within that period.

2. Each claim must be in writing and must state the specific grounds upon which the claim is founded.

3. Failure to file a claim within the time prescribed in this chapter constitutes a waiver of any demand against the State on account of overpayment.

4. Within 30 days after rejecting any claim in whole or in part, the Board or the Department shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

[FN1] See Historical and Statutory Notes below for effective date information.

N.R.S. 368A.260

END OF DOCUMENT

Westlaw.

NV ST 368A.270

N.R.S. 368A.270

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OVERPAYMENTS AND REFUNDS

→368A.270. Interest on overpayments; disallowance of interest

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, the interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the Department that a claim may be filed or the date upon which the claim is certified to the State Board of Examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.280 Page 1

N.R.S. 368A.280

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→368A.280. Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund

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

2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.290 Page 1

N.R.S. 368A.290

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→368A.290. Action for refund: Period for commencement; venue; waiver

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:

(a) The Nevada Gaming Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.

(b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.

2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

3. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.300

N.R.S. 368A.300

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→368A.300. Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Gaming Commission within 30 days after the last day of the 6-month period.

2. If the Department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Tax Commission within 30 days after the last day of the 6-month period.

3. If the claimant is aggrieved by the decision of:

(a) The Nevada Gaming Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

4. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any tax due from the plaintiff.

5. The balance of the judgment must be refunded to the plaintiff.

[FN1] See Historical and Statutory Notes below for effective date information.

N.R.S. 368A.300

END OF DOCUMENT

Westlaw.

NV ST 368A.310

N.R.S. 368A.310

WEST'S NEVADA REVISED STATUTES ANNOTATED
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→368A.310. Allowance of interest in judgment for amount illegally collected

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.320

N.R.S. 368A.320

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OVERPAYMENTS AND REFUNDS
→**368A.320**. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.330

N.R.S. 368A.330

WEST'S NEVADA REVISED STATUTES ANNOTATED
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→368A.330. Action for recovery of erroneous refund: Jurisdiction; venue; prosecution

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.340

N.R.S. 368A.340

WEST'S NEVADA REVISED STATUTES ANNOTATED
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OVERPAYMENTS AND REFUNDS
→**368A.340**. Cancellation of illegal determination

1. If any amount in excess of $25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding $25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.350

N.R.S. 368A.350

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MISCELLANEOUS PROVISIONS
→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.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.360

N.R.S. 368A.360

WEST'S NEVADA REVISED STATUTES ANNOTATED
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MISCELLANEOUS PROVISIONS

→368A.360. Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the Nevada Gaming Commission.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT

Westlaw.

NV ST 368A.370

N.R.S. 368A.370

WEST'S NEVADA REVISED STATUTES ANNOTATED
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MISCELLANEOUS PROVISIONS

→368A.370. Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

END OF DOCUMENT