IN THE SUPREME COURT FOR STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Supreme Court Case No. 59752

District Court Case No. A558787

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

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CLERK OF THE COURT

ROPP
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO DISMISS**

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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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

COMES NOW, Defendants State of Nevada, ex rel. Department of Taxation (hereinafter "Department"), Nevada Tax Commission (hereinafter "NTC"), Nevada State Board of Examiners, and Michele Jacobs, in her official capacity only, by and through their attorneys, Catherine Cortez Masto, Attorney General, David J. Pope, Sr. Deputy Attorney General, Blake Doerr, Sr. Deputy Attorney General and Vivienne Rakowsky, Deputy Attorney General, and hereby file their Reply to Plaintiffs' Opposition (hereinafter "Opp") to Defendants' Motion for Partial Summary Judgment and Motion to Dismiss. This Reply is filed pursuant to

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NRCP 12(b)(5) and 56 and is also based on all pleadings and papers on file herein, the attached Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

DATED this 7th day of March, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3426
F: (702) 486-3416

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

I. None of the Case 1 Plaintiffs[1] had exhausted administrative remedies at the time they filed their complaint and exhaustion is required for "as applied" constitutional challenges.

The Nevada Supreme Court has stated that exhaustion of administrative remedies is required for "as applied" challenges. In *Malecon Tobacco, LLC v. Dept. of Taxation,* 118 Nev. 837, 841, 59 P.3d 474, 841 (2002), the Nevada Supreme Court stated, "[w]e are persuaded that a distinction between the constitutionality of a statute on its face as opposed to its constitutionality as applied is appropriate when applying the exhaustion requirement." The *Malecon* Court had noted that some states allow "facial" constitutional challenges to precede to court without requiring exhaustion of administrative remedies but require exhaustion of administrative remedies for "as applied" challenges because "as applied" challenges require factual evaluations. *Id.* at 840-841. The Court went on to say, "[t]he constitutionality of the statutes challenged here, as applied, involves a factual evaluation, and this evaluation is best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case." Because none of the Case 1 Plaintiffs had exhausted administrative remedies at the time of filing their Complaint, Case 1 can include a facial challenge but cannot include an "as applied" challenge.

With regard to the as applied challenge, i.e. Case 2, which was started by requesting a refund from the Department and ended in a final decision from the NTC, is the proper means of bringing the matter before this court was a judicial review pursuant to NRS 233B.130. With regard to the refunds requested by the original Case 2 Plaintiffs, no further exhaustion is necessary and should this court determine that the matter can proceed as a judicial review the proceedings should be limited to the record below and the standards of review set forth in NRS 233B.135.

The Department initially raised the issue of failure to exhaust in a motion to dismiss filed on or about April 18, 2008, as Plaintiffs have pointed out. Opp., p. 41, ln. 27-28. The motion to dismiss was pending for approximately two years. The motion was denied in December 2010 and Plaintiffs thereafter amended the Case 2 Complaint. The Case 1

[1] Plaintiffs refer to Déjà vu and Little Darlings as the Déjà vu plaintiffs. Déjà vu never exhausted administrative remedies, and neither did Little Darlings.

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Las Vegas, NV 89101

Complaint was amended prior to the denial of this first motion to dismiss, but while the motion was pending. The order denying the motion to dismiss was signed December 9, 2010 and filed December 10, 2010. Pursuant to N.R.C.P. 12(a)(3), the State of Nevada or any political subdivision thereof, and any officer or employee have 45 days from their respective dates of service to file an answer or other responsive pleading. *See also* NRS 41.0341. The Defendants do not believe that they have been properly served with the amended complaints pursuant to NRS 41.031. If Defendants have not been served with the amended complaint in Case 1, which was filed on or about January 28, 2009, then more than 120 days have passed and the amended complaint in Case 1 should be dismissed. N.R.C.P. 4(i). With regard to the amended complaint filed in Case 2, Defendants will have 45 days from their respective dates of service to respond.

Pursuant to N.R.C.P. 12(h)(3), "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Moreover, at the option of the Defendants, this issue could also be brought in a motion to dismiss or pled as an affirmative defense. Should it be determined that this defense, or the intertwined statute of limitations issue, should have been pled as an affirmative defense, then pursuant to N.R.C.P. 15(a) Defendants can amend their Answers to Plaintiffs original complaints by leave of court and such leave will be granted when justice so requires. If this court lacks subject matter jurisdiction over any claims, then justice so requires the granting of leave to amend and those claims should be dismissed.

II. Déjà vu and Little Darlings could have filed refund requests when the original Case 2 Plaintiffs filed.

As an excuse as to why Déjà vu and Little Darlings did not exhaust administrative remedies when the original Case 2 Plaintiffs did, Plaintiffs argue that refund requests from Déjà vu and Little Darlings were not due at the time that the original Case 2 Plaintiffs filed their refund requests with the Department. However, the three years is a statute of limitations not a period that has to be exhausted before refunds can be filed. Plaintiffs admit this in their Opposition, p. 8, ln. 7-8. Thus, refund requests are due within three years, not at the three

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year mark. Moreover, Plaintiffs state they are filing refund requests on a monthly basis and Déjà vu and Little Darlings could have filed refund requests along with the original Case 2 Plaintiffs but did not. Nonetheless, they argue that Déjà vu and Little Darlings did not become subject to the LET until the statute was amended in June 2005 and that therefore they did not file refund requests when the original Case 2 Plaintiffs filed. Regardless, the original Case 2 Plaintiffs filed their requests for refund on February 27, 2007 and Déjà vu and Little Darlings could have done the same. *See* NRS 368A.220 (requiring the tax to be reported and paid by the last day of the month following the reporting period). Therefore, if Case 2 proceeds as a judicial review, Déjà vu and Little Darlings cannot be a part of it for the following reasons: they had not exhausted their administrative remedies at the time Case 2 was commenced and still have not; they had not reported LET for the periods at issue in Case 2 (January, February, March and April of 2004); and, they are not parties of record with regard to the administrative proceeding as required by NRS 233B.130(1). In fact, Plaintiffs admit that the administrative record does not include and is not about Déjà vu and Little Darlings. Opp., p. 9-10. Therefore, contrary to Plaintiffs' assertions, it is very relevant that Déjà vu and Little Darlings are not part of the administrative record. Opp., p. 10, ln. 9-10.

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III. Exhaustion of administrative remedies was not futile for the Case 1 Plaintiffs at the time of the commencement of Case 1.

When Case 1 was commenced, the Department had not denied the refunds requested by the original Case 2 Plaintiffs and the NTC had not reviewed the denials and had not made a final decision. Even after the Department denied the refunds, it cannot be said that the NTC had taken a position with regard to the constitutionality of the LET. The NTC is the head of the Department. NRS 360.120(2). Pursuant to NRS 360.245, decisions of the Department are subject to review by the NTC. The NTC can affirm, reverse or modify a decision of the Department. NRS 360.245. Thus, until the NTC had reviewed the denials of the requests for refund of the original Case 2 Plaintiffs, exhaustion was not futile.

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In *Dept. of Taxation v. Scotsman*, 109 Nev. 252, 255 (1993)[2], the Nevada Supreme Court stated that the exhaustion doctrine will not "deprive the court of jurisdiction where initiation of administrative proceedings would be futile." Following a final determination by the State that Scotsman's sales were subject to a three and one-quarter percent sales tax Scotsman had sued for declaratory relief seeking a determination that the tax was unconstitutional. *Id.* at 253. Though Scotsman had challenged the assessment and paid under protest, Scotsman had not administratively requested a refund pursuant to statute. The Court found that requiring Scotsman to request a refund pursuant to the statute following the Court's determination that the tax was unconstitutional would be futile. *Id.* at 255. The Court noted that a statutory refund claim by Scotsman following the Court's determination that the tax was unconstitutional would have been time-barred. *Id.*

The *Scotsman* case cites to the case of *Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 388 (1982). In *Engelmann,* the Court stated, "[w]here one has not enjoyed a fair opportunity to exhaust the administrative process, or where resort to administrative procedures would be futile, exhaustion of administrative remedies is not required." *Id.* The Court noted that "any administrative remedies Engelmann might have pursued, were no longer viable." *Id.*

In the case at hand, the NTC had not heard or decided the constitutional issue prior to the Case 1 Plaintiffs commencing their case. In addition, the Case 1 Plaintiffs could have filed timely refund requests, as six of the eight Case 1 Plaintiffs later did prior to commencing Case 2. Though the three year statute of limitations was not about to run for Déjà vu and Little Darlings, they could have filed refund requests as they have stated that they became subject to the tax in 2005 and Case 1 was commenced in December of 2006.

IV. <u>There was no admission in Federal Court that exhaustion was never required</u>. [3]

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[2] This case predates the change to NRS 372.680 that occurred in 1999.

[3] Plaintiffs state the undersigned admitted to having represented the Defendants before the federal courts and the NTC, but the undersigned only admitted to having represented the Department before the NTC. Opp., p. 50, ln. 19-22; See Motion to Dismiss and subsequent briefing before the federal courts (not signed by the undersigned).

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Contrary to Plaintiffs' assertions, Defendants did not admit, in the related federal proceedings, that exhaustion of administrative remedies was not required. Opp. p. 42, ln. 3-4. Before the Federal District Court, Defendants argued that:

> the Court in *Scotsman* affirmed a direct refund action of the tax, even though the taxpayer did not first pursue its remedy through the administrative levels. In doing so, the Nevada Supreme Court implicitly acknowledged that the refund remedy was available notwithstanding the limitations in NRS 374.675.[] If the remedy of a refund action is available under NRS Chapter 374, it is available under NRS Chapter 368A, which is *in pari material."* (citation omitted).

Reply to Plaintiff's Opposition to Motion to Dismiss, p. 6. The Defendants also argued that exhaustion is normally required and noted two exceptions. *Id.* at p. 8. In *Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.,* 109 Nev. 252, 255, 849 P.2d 317, 319 (1993), the Nevada Supreme Court stated that exhaustion of administrative remedies is not required when: (1) the issues relate solely to the interpretation or constitutionality of a statute; and, (2) when initiation of administrative remedies would be futile. The Court went on to say:

> Having forced Scotsman to pay the disputed tax, the State must now "undo" the unlawful deprivation by refunding the tax. *McKesson*, 496 U.S. at 39, 110 S.Ct. at 2251. It is the only effective remedy available to Scotsman; prospective relief alone (i.e., future exemption from tax) would hardly afford Scotsman a meaningful remedy for the unconstitutional deprivation of its property. To relieve the State of its obligation to refund the unlawful and coerced tax payments would contravene the Fourteenth Amendment. *Id.*

Scotsman had appealed the Department's decision to the NTC. 107 Nev. 127, 129, 808 P.2d 517, 518 (1991). After the NTC refused Scotsman's request for relief, Scotsman initiated a suit for declaratory relief. *Id.* The district court found in favor of the Department on cross-motions for summary judgment. *Id.* The Supreme Court reversed and remanded for entry of summary judgment in favor of Scotsman. *Id.* at p. 134, 521. Post-remand, Scotsman filed a motion for summary judgment based on the Supreme Court's decision and in connection therewith requested a refund. 109 Nev. 252, 253-254, 849 P.2d 317, 318

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(1993). The Department opposed on the basis that Scotsman had not timely requested refunds. *Id.* Scotsman prevailed as the Court found that requesting refunds after the Court had decided the tax application was unconstitutional and after the time for doing so had passed would be futile. *Id.* at 319-320, 255-256.

The *Scotsman* case may have allowed a declaratory relief action to proceed in district court before Scotsman requested a refund. However, Scotsman had appealed the denials to the NTC. Moreover, *Scotsman* was decided prior to *Malecon,* which clearly provides that a facial challenge may go directly to court without exhausting administrative remedies whereas an "as applied" challenge requires exhaustion. 118 Nev. 837, 841, 59 P.3d 474, 477 (2002). Reading the *Scotsman* cases and the *Malecon* case together, exhaustion of administrative remedies is not required for a facial challenge or when exhaustion would otherwise be futile.

V. Pursuant to N.R.C.P. 12(h), lack of subject matter jurisdiction can be raised anytime and the issue regarding whether Case 2 should have been filed as a judicial review places into question whether this court has subject matter jurisdiction.

As previously stated, pursuant to N.R.C.P. 12(h)(3), lack of subject matter jurisdiction can be raised anytime. The issue regarding whether Case 2 should have been filed as a judicial review pursuant to NRS 233B.130 is a question of statutory interpretation and therefore a question of law. *State v. Catanio,* 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The Case 2 Plaintiffs appealed from a final decision of the NTC. *See* NTC Decision attached to the instant motion as Exh. A. Pursuant to NRS 233B.130(6), "The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies." (emphasis added). Therefore, the "action" allowed by NRS 368A.290 cannot be governed by the rules of civil procedure and therefore must be a judicial review. As previously stated, this is a question of law and the court already has all the facts necessary to decide the issue. Consequently, even construing the Case 2 Complaint liberally and drawing every fair inference in favor of the Plaintiffs, it appears to a certainty that the original Case 2 Plaintiffs

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exhausted their administrative remedies and appealed from a final decision of the NTC and failed to file a petition for judicial review and the case should be dismissed. *Simpson v. Mars,* 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Buzz Stew, LLC v. City of N. Las Vegas,* __ Nev.__, 181 P.3d 670, 672 (Adv.Op. 21, April 17, 2008); *Blackjack Bonding v. City of Las Vegas Mun. Court,* 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

State v. Obexer & Son, Inc., 99 Nev. 233, 660 P.2d 981 (1983) was decided in 1983 and the tax at issue was collected from January 1, 1974 through December 31, 1976. The statutes related to sales and use tax refunds were added in 1979. See NRS 372.360, *et. seq.* NRS 372.680 was first amended in 1999 and it was changed to require a final decision from the NTC before a refund matter could proceed to district court. See NRS 372.680 (indicating that its been amended once, in 1999, and that it now contains the requirement for a final decision from the NTC).

Saveway Super Service Stations, Inc. v. Cafferata, 104 Nev. 402, 760 P.2d 127 (1988) was decided in 1988, which is before the relevant statutory change to NRS 233B.130(6) made in 1989. In addition, the statute at issue, NRS 365.460 provided:

> After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may bring an action against the state treasurer in the district court in and for Carson City for the recovery of the excise tax so paid under protest.

Id. at p. 404, fn. 3. The court also noted:

> that NRS 365.460 requires that the action be brought against the state treasurer, who was not an immediate party to the administrative proceedings. In fact, the tax commission is not a party to the subsequent claim for restitution. This point is obviously more compatible with a construction that the statute allows an independent action against the holder of the overpaid tax.

Pursuant to NRS 233B.130, a judicial review is limited to the parties of record to the administrative proceeding. NRS 365.460 was amended in 1999 and 2001 and the only apparent changes include the addition of the words "or supplier" and some additional words

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Las Vegas, NV 89101

are now capitalized. Thus, this statute was not changed to require a final decision from the NTC. *Cf.* NRS 372.680 and NRS 368A.290.

The *Scotsman* cases also predate the statutory changes made in 1999. *See Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.*, 109 Nev. 252, 256, 849 P.2d 317, 320 (1993) (setting forth two exceptions to the exhaustion of administrative remedies requirement. (citation omitted)).

In *Sparks Nugget,* 179 P.3d 570, 573 (2008), whether the case should have been filed as a judicial review was not raised; the parties stipulated to facts and filed cross-motions for summary judgment. There simply was no trial *de novo* on the facts, nor any issue regarding application of administrative res judicata or the proper standard of review. As stated by the court:

> Because the parties have stipulated to the operative facts in this case, the only issue before us involves the interpretation and application of Nevada constitutional and statutory provisions.

Id. (emphasis added).

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Though California's refund statutes may have been based on independent actions for restitution and pursued through trials de novo, Nevada has statutorily gone another way.[4] *Marchica v. State Bd. of Equalization,* 237 P.2d 725, 731, 107 Cal.App.2d 501, 510 (1951). One thing that has not changed over the years is that a litigant cannot get to a court of equity

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[4] California appears to have progressed in its own direction as well. First of all, Ch. 233B of the NRS applies to the Department whereas California's equivalent apparently has been interpreted to not apply to the California taxing authority or to apply with different standards of review.
Pursuant to NRS 233B.039, Ch. 233B of the NRS applies to all agencies except those specifically exempted in NRS 233B.039. The Department is not specifically exempted. In addition, pursuant to NRS 233B.135, the standard of review with regard to factual issues is substantial evidence and the review is limited to the administrative record. Pursuant to case law, an agency interpretation of a statute or regulation is entitled to deference. *See Meridian Gold Co. v. Dept. of Taxation,* 119 Nev. 630, 635, 81 P.3d 516, 519 (2003). Finally, pursuant to NRS 233B.020(2), the provisions of Ch. 233B "are intended to supplement statutes applicable to specific agencies," or complete them.
In California, Sect. 11501 of the Government Code provides "[t]his chapter applies to any agency as determined by the statutes relating to that agency." Thus, the agency specific statutes dictate whether California's equivalent of the APA applies. If California's equivalent of the APA applies, the petitioner files a petition for writ of mandate. Cal. Gov't Code § 11523 (2009). When a petition for writ of mandate is filed, the following standard of review applies:

> (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
> (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

Cal. Civ. Proc. Code § 1094.5(b-c) (2009). In effect, "independent judgment" means that the trial court disregards the factual findings of the administrative proceedings. Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies,* 42 UCLA L. Rev. 1157, 1162-1163 (1995). This "independent judgment" approach is said to be "idiosyncratic to California. *Id.* at 1163. Whereas California's law provides for "independent judgment," Ch. 233B of the NRS does not. Moreover, the "independent judgment" approach doesn't seem to apply in all tax cases. *See Auerbach v. Assessment Appeals Bd. No. 2 for the county of Los Angeles,* 167 Cal. App.4th 1428, 1437, 85 Cal.Rptr.3d 105, 112 (2008) (stating, "[o]n the other hand, if no fundamental vested right presents in the case and the trial court applied the substantial evidence test, then the reviewing court's task is the same as the trial court's – examination, under the substantial evidence test . . .."). In addition to the standards of review mentioned above, California case law refers to "broad judicial review." *See Agnew v. State Board of Equalization,* 64 Cal.Rptr.2d 771, 777 (1997) (providing, "'[w]here the Board has not adopted a formal regulation addressing a particular tax question, its interpretation of the statutes and existing regulations in assessing taxes due is subject to broad judicial review,'" as opposed to the court giving great weight to an agency's interpretation of its own formal regulation when it has adopted one); See *Wallace Berrie & Company v. State Board of Equalization,* 40 Cal.3d 60, 65, 707 P.2d 204, 207-208 (1985) (discussing the difference between "broad judicial review" and "a more limited standard of judicial review" in the context of a use tax refund case). Nevada and California have gone different directions, at least since 1989 and the removal from Nevada's APA of the language allowing trial de novo, and California law cannot be persuasive authority on this issue. *McKay v. Bd. of Supervisors of Carson,* 102 Nev. 644, 650 (1986) (the Nevada Supreme Court stated, "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed." (citation omitted). The Court further stated, "[i]t is ordinarily presumed that the legislature, by deleting an express portion of a law, intended a substantial change in the law." (citation omitted)).

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if there is an adequate remedy at law. *Shelton v. Platt,* 139 U.S. 591, 594-596 (1891). In fact, it is presumed that the remedy at law is adequate. *Id.* at 595. Because Plaintiffs are pursuing an action in restitution, Plaintiffs have to show that the remedy at law is not adequate. *Id.* Plaintiffs tried the same before the 9th Circuit Court of Appeals and the Federal District Court for purposes of the Tax Injunction Act, 28 U.S.C. §1341 and failed. *See* Opp., Exh. 6 and Exh. 7. Nonetheless, Plaintiffs argue that tax refund matters are actions in restitution and cite *State of Nevada v. Obexer,* 99 Nev. 233, 237, 660 P.2d 981, 984, (1983) (citing *El Tejon Cattle Co. v. County of San Diego,* 252 Cal.App.2d 449, 60 Cal.Rptr. 586, 595 (Ct.App. 1967)) which says that "[a]ctions to recover taxes paid are equitable in nature." *El Tejon Cattle Co.* cites *Simms v. County of Los Angeles,* 35 Cal.2d 303, 316, 217 P.2d 936, 944 (1950), which cites to *Steel v. San Luis Obispo County,* 152 Cal. 785, 930 P. 1020 (1908) and *H. & W. Pierce, Inc. v. Santa Barbara County,* 40 Cal.App. 302, 180 P. 641 (1919). The *H. & W. Pierce, Inc.* case provides, "[t]he powers and duties of county boards of equalization are prescribed by Section 3672 of the Political Code. No appeal from its decisions, or other method of having its decisions reviewed by a court of law, is provided by statute." Thus, in *H. & W. Pierce, Inc.,* there was no adequate remedy at law.

Refund statutes are an adequate remedy at law. Recognizing the need to avoid the enjoining of the collection of taxes to protect the revenue needed to support their budgets, states enacted anti-injunction statutes. To avoid attack against the anti-injunction statutes, the states adopted refund statutes to avoid claims that there was no adequate remedy at law and claims of irreparable harm. In *Dows v. City of Chicago,* 11 Wall. 108, 110, 78 U.S. 108, 110, 20 L.Ed. 65 (1871), the U.S. Supreme Court stated, long before the enactment of the Tax Injunction Act:

> No court of equity will . . . allow its injunction to issue to restrain [state officers collecting state taxes], except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury . . . before the aid of a court of equity can be invoked.

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California v. Grace Brethren Church, 457 U.S. 393, 412, 102 S.Ct. 2498, 2510 (1982) (citing *Dows*, 11 Wall at 110; 78 U.S. at 110). Irreparable harm is a necessary element to be proven when requesting a preliminary injunction. *Michael A. Baron, M.D., Ltd. v. Gerson*, __ Nev. __, 238 P.3d 794 (2008). Restitution, like a preliminary injunction, is an equitable remedy. Black's Law Dictionary, 1313 (6th Ed. 1990). Because Nevada has a refund procedure, there is no irreparable harm and there is no need for equitable relief, such as a preliminary injunction or an action for restitution, because there is an adequate remedy at law.[5] *Grace Brethren Church,* 457 U.S. 393, 413-414, 102 S.Ct. 2510-2511 (providing that an adequate remedy at law exists where a taxpayer can seek a refund through state administrative and judicial procedures, can proceed to district court following a denial of a refund, and can have the district court decision reviewed by a higher state court). In the case at hand, the remedy at law allows a taxpayer to seek a refund through state administrative and judicial procedures, to then proceed to district court via a petition for judicial review followed by Nevada Supreme Court review. In addition, the Nevada Legislature authorized the NTC to consider constitutional issues. *See* NRS 368A.200(5)(a); see also NRS 368A.140. Therefore, nothing prevents a taxpayer from raising constitutional objections to the tax and Nevada's remedy at law is adequate which means Plaintiffs cannot be allowed to maintain an action for restitution. *Id.*

Nevada did start with California's sales and use tax statutes in 1955. But, Nevada adopted its Administrative Procedures Act in 1965, adopted its sales and use tax refund statutes in 1979, made changes to the APA in 1989 and amended the refund statutes in 1999 to require a final decision from the NTC in order for a matter to proceed to district court. NRS 372.630, et seq.; NRS 233B.010, et seq.; NRS 233B.130(6); NRS 372.680; NRS 372.675. Therefore, the "action" provided for by NRS 372.680 is a judicial review pursuant to NRS 233B.130. Because NRS 368A.290 is similar to NRS 372.680, the "action" provided for by NRS 368A.290 is also a judicial review pursuant to NRS 233B.130.

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[5] The Defendants incorporate by reference all briefing and oral arguments submitted and made with regard to Plaintiffs Motion for Preliminary Injunction and Renewed Motion for Preliminary Injunction.

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The Defendants' construction of NRS 368A.290 does not abrogate the refund statute. The refund statute abrogates the need for an action in equity via a trial de novo by offering as the statutory remedy a judicial review pursuant to NRS 233B.130. See *County of Washoe v. Golden Road Motor Inn, Inc.*, 105 Nev. 402, 404, 777 P.2d 358, 359 (1989) (providing, "[i]f a statutory procedure exists either for recovery of taxes collected erroneously or for disputing an excessive assessment, *that procedure must be followed.*" (emphasis in original)).

Plaintiffs discussion regarding NRS 360.245 is simply erroneous. The purpose of various sections of NRS 360.245 is to say that decisions of the NTC are final for purposes of judicial review, to give notice to the counties and local governments that a refund appeal was going to be heard by the NTC and that tax revenues to be refunded would include their respective shares of the tax revenues received. NRS 360.245(1) requires a taxpayer whose claim for refund was denied to appeal to the NTC. When such a case is appealed to the NTC, local governments are given notice and can seek to intervene and become a party to the appeal for purposes of judicial review. NRS 360.245(6); NRS 233B.130. Only parties to the administrative record can be parties to a judicial review before the District Court. NRS 233B.130. Thus, contrary to Plaintiffs' assertions, changing "Department" to "Commission" is a big change.

In 2001, shortly after the 1999 statutory change to NRS 372.680 and the 1989 statutory change to NRS 233B.130(6), the Nevada Supreme Court decided the case of *Nevada Tax Commission v. Nevada Cement Company*, 117 Nev. 960, 36 P.3d 418 (2001). Nevada Cement Company initially paid either sales or use tax when it purchased various items of equipment and later requested a refund. *Nevada Tax Commission v. Nevada Cement Company*, 116 Nev. 877, 879, 8 P.3d 147 (2000). The case was first heard by an administrative hearing officer, then the Commission and thereafter was reviewed pursuant to Ch. 233B of the NRS. See also *County of Washoe v. Golden Road Motor Inn, Inc.*, 105 Nev. 402, 404, 777 P.2d 358, 359 (1989) (requiring exhaustion of administrative remedies and proceeding as a Chapter 233B judicial review).

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Unless Case 2 is allowed to proceed as a judicial review, this court lacks subject matter jurisdiction and the case should be dismissed.

VI. Summary Judgment is not premature and no further discovery is needed to oppose this motion.

With regard to the issues raised in the instant motion, there are no genuine issues of material fact. Plaintiffs state they are pursuing both a facial challenge and an "as applied" challenge. According to the Nevada Supreme Court, applied challenges require exhaustion of administrative remedies. *Malecon Tobacco, LLC, v. State Department of Taxation,* 118 Nev. 837, 841 (2002). None of the Case 1 Plaintiffs had, at the time of the commencement of the case, exhausted administrative remedies. No genuine issue of material fact exists with regard to this issue. With regard to "as applied" challenges, Nevada law requires exhaustion and therefore there can be no "as applied" challenge in Case 1. In addition, with regard to Case 2, Déjà vu and Little Darlings are not parties of record as required by NRS 233B.130. Moreover, they have not exhausted administrative remedies. Consequently, Déjà vu and Little Darlings cannot be part of the Case 2 "as applied" challenge. No genuine issue of material fact exists with regard to these issues and partial summary judgment is appropriate.

Whether Case 2 proceeds as a judicial review pursuant to the standards set forth in NRS 233B.135 is a question of statutory interpretation and, as such, is a question of law. Again, no genuine issues of material fact exist with regard to this issue and partial summary judgment is appropriate.

With regard to administrative res judicata, Plaintiffs cannot show that it doesn't apply. The issue decided by the NTC was whether the LET is unconstitutional and whether the original Case 2 Plaintiffs were entitled to a refund; the issue is the same. *See* NTC Decision attached to the instant motion as Exh. A. The original Case 2 Plaintiffs are the same as the appellants in the appeal presented to the NTC. *Id.* Finally, the decision of the NTC is a final decision on the merits and is being asserted against the original Case 2 Plaintiffs. For the foregoing reasons, administrative res judicata applies. *See Britton v. City of N. Las Vegas,* 106 Nev. 690, 692-693 and 569-570, 799 P.2d 568 (1990) (adopting the rule of administrative

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res judicata and indentifying the three things that must be shown for it to apply); *Campbell v. Nevada Tax Com'n.*, 109 Nev. 512, 515, 853 P.2d 717, 719 (1993) ("Following the decisions of the hearing officer and the Tax Commission, the Campbells filed a separate action in district ***515*** court against the Tax Commission, the Tax Department, and the State of Nevada. The district court granted summary judgment against the Campbells, finding that the Campbells were barred by administrative res judicata from seeking a judicial evidentiary hearing because the Campbells had already had a full administrative hearing ****719*** on the same issues."). There are no genuine issues of material fact and partial summary judgment is appropriate.

Claim preclusion and issue preclusion apply in this case because, as stated above, the parties are the same, the claims or issues are the same and the decision is final. *Star Capital Corp. v. Ruby*, __ Nev. __, 194 P.3d 709, 711-713 (2008). There are no genuine issues of material fact and partial summary judgment is appropriate.

These arguments are based on the fact that there is a final administrative decision following a hearing. *Britton v. City of N. Las Vegas,* 106 Nev. 690, 692-693 and 569-570, 799 P.2d 568 (1990); *Campbell v. Nevada Tax Com'n.,* 109 Nev. 512, 515, 853 P.2d 717, 719 (1993) ("On appeal to this court, we reversed the order granting summary judgment and remanded the case to the district court. *Campbel v. State, Dep't of Taxation,* 108 Nev. 215, 216, 827 P.2d 833, 834 (1992). We determined that, although the Campbells had no right to a second evidentiary hearing, the Campbells' case merited judicial review. *Id.* at 219, 827 P.2d at 836. Accordingly, we remanded the case and directed the district court to review the case pursuant to NRS 233B.135, the standard of review for administrative agency determinations."). The decision of the NTC is a final decision on the merits and, unless this matter is allowed to proceed as a judicial review, the NTC's decision precludes the matter from proceeding in district court as a trial de novo. The original Case 2 Plaintiffs were afforded due process and they shouldn't be allowed a second bite at the apple because in hind sight they didn't make the most of it.[6]

[6] The original Case 2 Plaintiffs filed refund requests which were denied, appealed to the NTC, filed briefs and exhibits before the NTC, argued their case to the NTC and received a final decision from the NTC.

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Thus, no further discovery is needed to oppose this motion for partial summary judgment and partial summary judgment must be granted as requested.

VII. Changes to the LET in 2005 do not effect the application of administrative res judicata or issue preclusion or claim preclusion.

Only the original Case 2 Plaintiffs are parties to the administrative record. Prior to amending the Case 2 Complaint to add Déjà vu and Little Darlings, the parties were the same in Case 2 as in the administrative record. Déjà vu and Little Darlings did not seek to intervene in the matter heard by the NTC and are not parties to the administrative record. Pursuant to 233B.130, the parties and issues are limited to those contained in the record. Thus, the original Case 2 Plaintiffs could have had the administrative decision and record reviewed pursuant to NRS 233B.135. As such, any issues not raised before the NTC cannot be raised on judicial review and any requests for refund that have not been denied by the NTC are not properly before the court. If Plaintiffs wanted Déjà vu and Little Darlings to be part of the administrative record, then Déjà vu and Little Darlings should have filed refund requests and appealed at the same time or joined the appeal. Because the original Case 2 Plaintiffs share the same parties and issues and they all filed refund requests for the same four months in 2004 and obtained a final decision from the NTC, changes to the LET in 2005 do not affect the application of administrative res judicata, issue preclusion or claim preclusion.

VIII. The 1983 claims must be dismissed or partial summary judgment must be granted.

The Defendants are not "persons" for purposes of 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989). In response to the instant motion, Plaintiffs, for the first time, allege to have made 11 U.S.C. 1983 claims for the purpose of obtaining injunctive relief rather than damages as pled in the complaints. Neither the original, or the renewed, motion for injunctive relief set forth a claim for injunctive relief based on 11 U.S.C. 1983. Defendants incorporate herein by reference all briefing and arguments submitted and made with regard to Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Renewed Motion for Preliminary Injunction.

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Contrary to Plaintiffs assertions, the *Will* case provides:

> The Michigan Court of Appeals vacated the judgment against the Department of State Police, holding that a State is not a person under § 1983, but remanded the case for determination of the possible immunity of the Director of State Police from liability for damages. The Michigan Supreme Court granted discretionary review and affirmed the Court of Appeals in part and reversed in part. *Smith v. Department of Pub. Health*, 428 Mich. 540, 410 N.W.2d 749 (1987). The Supreme Court agreed that the State itself is not a person under § 1983, but held that a state official acting in his or her official capacity also is not such a person.

491 U.S. 58, 61 (1989). The Court further stated:

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-166, 105 S.Ct. 3099, 3104-3105, 87 L.Ed.2d 114 (1985); *Monell, supra*, at 690, n. 55, 98 S.Ct., at 2035, n. 55.

In a footnote, the court noted:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S., at 167, n. 14, 105 S.Ct., at 3106, n. 14; *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454, 52 L.Ed. 714 (1908).

Id. at p. 71, fn. 10. In *Kentucky v. Graham*, 473 U.S. 159, 168, 105 S.Ct. 3099, 3107 (U.S.Ky.,1985.), the court stated:

> Section 1988 does not guarantee that lawyers will recover fees anytime their clients sue a government official in his personal capacity, with the governmental entity as ultimate insurer. Instead, fee liability runs with merits liability; if federal law does not make the government substantively liable on a *respondent superior* basis, the government similarly is not liable for fees on that basis under § 1988. Section 1988 simply does not create fee liability where merits liability is non-existent.

As previously stated, Plaintiff did not argue for injunctive relief pursuant to 11 U.S.C. 1983 either in the original motion for injunctive relief or its renewed motion for injunctive relief.

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Plaintiffs could not obtain an injunction in federal court because of the Tax Injunction Act. 28 U.S.C. §1341; see Opp., Exh. 6 and 7.

In *National Private Truck Council, Inc. v. Oklahoma Tax Com'n,* 515 U.S. 582, 589-591, 115 S.Ct. 2351, 2355-2357 (1995), the U. S. Supreme Court held that state courts cannot award injunctive and declaratory relief, pursuant to 11 U.S.C. § 1983, in state tax cases when an adequate legal remedy exists. The Court stated:

> In determining whether Congress has authorized state courts to issue injunctive and declaratory relief in state tax cases, we must interpret § 1983 in light of the strong background principle against federal interference with state taxation. Given this principle, we hold <u>that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists.</u>
>
> . . .
>
> Whether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this way.
>
> . . .
>
> Given the strong background presumption against interference, with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation. See *Fair Assessment, supra,* at 110, 102 S.Ct., at 183 ("[T]he principle of ***591*** comity which predated the Act [§ 1341] was not restricted by its passage"). After all, an injunction issued by a state court pursuant to § 1983 is just as disruptive as one entered by a federal court.
>
> . . .
>
> The availability of an adequate legal remedy renders a declaratory judgment unwarranted as well. In *Great Lakes,* we observed that "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes ... require a like restraint in the use of the declaratory judgment procedure." 319 U.S., at 299, 63 S.Ct., at 1073. The declaratory judgment procedure "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *ibid.,* and thus must be treated as being no less potentially disruptive than an injunction. See also *Grace Brethren Church,* 457 U.S., at 408, 102 S.Ct., at 2508 ("[T]here is little practical difference between injunctive and

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> declaratory relief"). Cf. *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (holding that prohibition ***2357** against enjoining pending state criminal proceedings applies to granting of declaratory relief). Declaratory relief in state tax cases might throw tax administration "into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law." *Perez v. Ledesma*, 401 U.S. 82, 128, n. 17, 91 S.Ct. 674, 699, n. 17, 27 L.Ed.2d 701 (1971) (Brennan, J., concurring in part and dissenting in part). We simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists.[FN6]

Id. (emphasis added). Though there are exceptions, they do not apply.

> As we have made clear, however, the multiplicity-of-suits rationale for permitting equitable relief extends only to those situations where there is a real risk of "numerous suits between the same parties, involving the same issues of law or fact." *Matthews v. Rodgers*, 284 U.S. 521, 530, 52 S.Ct. 217, 221, 76 L.Ed. 447 (1932). Thus, if a state court awards a refund to a taxpayer on the ground that the tax violates the Federal Constitution, but state tax authorities continue to impose the unconstitutional tax, injunctive and declaratory relief might then be appropriate.

Id. (emphasis added). Because a refund has not yet been awarded on the basis that the LET is unconstitutional, the Department has not continued to impose an unconstitutional tax. Moreover, an adequate legal remedy exists and Plaintiffs have not shown otherwise. For these reasons, neither injunctive nor declaratory relief can be awarded.

Consequently, all §1983 claims must be dismissed for failure to state a claim upon which relief can be granted or partial summary judgment must be granted because there are no genuine issues of material fact.

IX. The Plaintiffs are trying to have it both ways, not the Defendants.

Case 1 Plaintiffs did not exhaust administrative remedies prior to commencing Case 1. The original Case 2 Plaintiffs did exhaust administrative remedies prior to commencing Case 2. After amending the complaints in both cases, Case 1 and Case 2 have the same plaintiffs and the same issues. Plaintiffs cannot have two cases. *Public Serv. Comm'n of Nev. v. Eighth Judicial Dist. Court of the State of Nev., et al.*, 107 Nev. 680, 684-685, 818 P.2d 396, 399 (1991).

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At this point, the only claim that all the Plaintiffs can pursue is the facial challenge and, if they prevail, the *Scotsman* case says they get a refund of taxes they have paid. 109 Nev. 252, 256 (1993); see also *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, et al.*, 496 U.S. 18, 31, 110 S.Ct. 2238, 2247 (1990) (providing, "[i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation").

X. NAC 368A.170 only applies if Plaintiffs collected reimbursement from their patrons.

NAC 368A.170 is similar to, but not the same as, NAC 372.765. NAC 368A.170 provides,

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

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In addition, NRS 368A.200(3) states, "[a] business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount." NRS 368A.200(4) provides, "[a]ny 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." Together, these statutes say that the facility is liable for the LET it collects on beverages and other tangible personal property and admission charges and that the facility can collect reimbursement for the payment of LET. NRS 368A.200(3-4). If an admissions ticket does not say whether the LET is included or not included, it is presumed that it's not included and the facility pays the tax on the face amount of the ticket. Id.

NAC 372.765 provides:

> 1. Any over-collection must, if possible, be refunded by the retailer to the person from whom it was collected.
>
> 2. If an audit deficiency exists involving any over-collection and the amount over-collected has not been paid to the Department, the Department will credit the retailer if it is furnished with satisfactory proof that a refund has been given as required by subsection 1. The Department will not provide a credit for interest assessed on any over-collection that is not reported or that is under-reported, but the Executive Director may approve a credit of not more than 75 percent of the penalty assessed if a refund is given as required by subsection 1.
>
> 3. A retailer shall:
>
> (a) Use all practical methods to determine the amount to be refunded pursuant to subsection 1 and the name and address of the person to whom the refund is to be made.
>
> (b) Within 60 days after receiving notice from the Department that a refund must be made, make an accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.
>
> 4. Any over-collection that cannot be refunded for any reason must be paid to the Department.
>
> 5. As used in this section, "over-collection" means any money that is collected as tax on an exempt transaction or that exceeds the amount provided in NAC 372.760.

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Pursuant to NRS 372.110, the sales tax is to be "collected by the retailer from the consumer insofar as it can be done." Pursuant to NRS 372.354, retailers are to hold the sales tax they collect in a separate account in trust for the State. With regard to the sales tax, retailers have to state the amount of the tax and collect it and the collected tax belongs to the State.

Thus, with regard to the LET, a taxpayer remits the tax to the Department and may reimburse themselves for the tax from their patrons. NAC 368A.170. With regard to the sales tax, it must "be collected by the retailer from the consumer insofar as it can be done." In addition, pursuant to NRS 372.354, a retailer must hold the collected taxes in a separate account in trust for the State. Thus, with regard to the sales tax, the retailer is a collection agent for the State and must hold the collections in trust for the State; the retailer has no claim to the collected tax.

Plaintiffs make much to do about NAC 368A.170, a discussion before the NTC and comments made at various time to this court. Opp., p. 47-48. As set forth above, the two regulations are similar, but different; the sales tax is expressly a trust fund tax. NAC 368A.170 allows an LET taxpayer to indicate on a ticket or receipt the amount of the tax that is included. It also allows the taxpayer to reimburse themselves from their customers for any tax paid. In the administrative proceedings below, Plaintiffs stated that they did not increase their prices to cover the tax. Four of the original six Case 2 Plaintiffs submitted affidavits indicating the same. Opp., Exh. 22. Provided Plaintiffs paid the tax, following a determination that the LET is unconstitutional their remedy is a refund. *Scotsman,* 109 Nev. 252, 256; *McKesson Corp.*, 496 U.S. 18, 39.

XI. Plaintiffs' remedy is provided by statute as well as case law.

Plaintiffs point to NAC 368A.170 and make much to do about what their remedy may be. As stated in *Dept. of Taxation v. Scotsman*, 109 Nev. 252, 255 (1993), since Plaintiff is limited to a postpayment refund action, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Should Plaintiffs prove an "unconstitutional deprivation" through the facial challenge, the Scotsman case indicates they get a refund. Id.; *see also McKesson*,

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496 U.S. at 39, 110 S.Ct. at 2251. Should the original Case 2 Plaintiffs prevail on the "as applied" challenge through a judicial review, they'll get a refund pursuant to statute as they have exhausted administrative remedies.

WHEREFORE, the Defendants respectfully request:

(1) the dismissal of the 11 U.S.C. §1983 claims;

(2) the dismissal of the "as applied" challenge in Case 1 as the Case 1 Plaintiffs had not exhausted administrative remedies at the time the case was commenced;

(3) the dismissal of the "as applied" challenge in Case 2 as Case 2 was not filed as a judicial review in accordance with NRS 233B.130;

(4) the dismissal of the "as applied" challenge in Case 2 as the original Case 2 Plaintiffs received a final decision from the NTC following a hearing and a new claim for an "as applied" challenge in an independent action is barred by administrative res judicata, issue preclusion or claim preclusion and partial summary judgment must be granted;

(5) that, should the Case 2 "as applied" challenge be allowed to proceed as a judicial review pursuant to Ch. 233B of the NRS, it should proceed with only the original Case 2 Plaintiffs as Déjà vu and Little Darlings failed to exhaust administrative remedies and are not part of the administrative record as required by NRS 233B.130;

(6) dismissal of the amended complaint in Case 1; and,

(7) any other relief this court deems just and appropriate.

Respectfully submitted this 7th day of March, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3426
F: (702) 486-3416

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

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CLERK OF THE COURT

SUPP

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

PLAINTIFFS' SUPPLEMENTAL FILING IN OPPOSITION TO NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983

Date of Hearing: March 15, 2011
Time of Hearing: 9:00 a.m.

8479

NOW COME Plaintiffs, by and through their counsel, and hereby submit the following supplemental documents which were referenced in Plaintiffs' Opposition to Nevada Department of Taxation's Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the As Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983, filed on February 22, 2011:

1. **Dep't of Tax 'n v. Newmont Gold Co.** (Nev. 1st Judicial Dist., Sept. 3, 1996)
2. **Lohse v. Nevada ex rel. Dep't of Tax'n**, Case No. CV-05-00376, Nev. 2 Jud. Dist., Findings of Fact, Conclusions of Law and Judgment, filed Jan. 18, 2007
3. Affidavit of Norman J. Azevedo, dated May 8, 2009
4. **Southern California Edison v. The First Judicial District Court of the State of Nevada et al.**, Case No. 09-OC 00016 1B; Supreme Court Case No. 55228, Order Denying Defendant's Motion to Dismiss, filed June 30, 2009

DATED this 11th day of March, 2011

BY: */s/ William H. Brown*

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

BRADLEY J. SHAFER
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110
Brad@bradshaferlaw.com
Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 11h day of March, 2011, the foregoing **PLAINTIFFS' SUPPLEMENTAL FILING IN OPPOSITION TO NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

Catherine Cortez Masto
Attorney General
David J. Pope
Sr. Deputy Attorney General
Blake A. Doerr
Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Facsimile: (702) 486-3420
Attorneys for the Nevada Defendants

/s/ Marwanda Knight
An employee of the **LAW OFFICES OF WILLIAM H. BROWN, LTD**

EXHIBIT 1

CASE NO. 96-00894A

DEPT. NO. II

REC'D & FILED

'96 SEP -5 P3:05

ALAN GLOVER
CLERK
BY: DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, ex rel,
DEPARTMENT OF TAXATION,

Petitioner,

vs.

NEWMONT GOLD COMPANY,

Respondent.

NOTICE OF ENTRY OF ORDER

TO: Petitioner STATE OF NEVADA, ex rel, DEPARTMENT OF TAXATION, and to its attorney, John Bartlett, Esq.

PLEASE TAKE NOTICE that on September 3, 1996 the Court entered its ORDER, a copy of which is attached hereto as Exhibit "A."

DATED this 4th day of September, 1996.

BIBLE, HANEY, HOY, TRACHOK
& WADHAMS

By: _____
MARK S. SERTIC, ESQ.
JAMES L. WADHAMS, ESQ.
Attorneys for Respondents

BIBLE, HANEY, HOY, TRACHOK & WADHAMS
ATTORNEYS AND COUNSELORS AT LAW
RENO, LAS VEGAS

CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of BIBLE, HANEY, HOY, TRACHOK & WADHAMS, Attorneys at Law, and that on the 5th day of September, 1996, I gave to Reno-Carson Messenger Service for hand delivery on this date, a true copy of the foregoing or attached document, addressed to:

Frankie Sue Del Papa
Attorney General
John S. Bartlett
Sr. Deputy Attorney General
198 South Carson Street
Carson City, NV 89710

Joy I. Keller

(NSS\NOTENTRY.ESM)

BIBLE, HANEY, HOY, TRACHOK & WADHAMS
ATTORNEYS AND COUNSELORS AT LAW
RENO, LAS VEGAS

EXHIBIT A

REC'D & FILED

'96 SEP -3 A11:28

ALAN GLOVER
BY _____ CLERK
DEPUTY

Case No. 96-00894A

Dept. No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

ooo

STATE OF NEVADA, ex rel,
DEPARTMENT OF TAXATION,

Plaintiff,

vs.

NEWMONT GOLD COMPANY,

Defendant.

ORDER

THIS MATTER comes before the Court upon the Motion to Dismiss filed by Defendant on July 3, 1996. This order is based upon a review of the Motion, the court file, and the law applicable to the issues raised in the Motion.

On June 30, 1995, the Plaintiff, Department of Taxation, issued a deficiency judgment upon Defendant, Newmont Gold Company, after an audit by Plaintiff of Defendant for the period of February 1, 1992 through December 31, 1994. The judgment was based upon Plaintiff's finding that sales tax totaling $24,970,400.00 was due Plaintiff from Defendant's sale of a Refractory Ore Treatment Plant ("roaster") to Phillip Morris Capital Corporation for $340,000,000.00.

///

On October 17, 1995, an appeal by Defendant of this deficiency judgment was heard by Administrative Hearing Officer Janice Wright in Carson City, Nevada. Ms. Wright rendered her decision upholding the deficiency judgment on February 1, 1996.

On May 2, 1996, the Tax Commission heard Defendant's appeal of the Hearing Officer's decision upholding the Department of Taxation's deficiency judgment. The Tax Commission voted unanimously to reverse the Decision and Order of the Hearing Officer finding that the leaseback transaction was not a bona fide sale subject to sales tax. Also, a majority of the Commission voted that even if the transaction was a sale leaseback, it was exempt under NRS 372.320 and 372.035(1).

Plaintiff filed its Petition for Judicial Review of the Tax Commission's decision on May 23, 1996. Defendant filed its Motion to Dismiss Plaintiff's Petition on July 3, 1996. Plaintiff argues in its Opposition to Defendant's Motion that while the Tax Commission is the statutory head of the Department of Taxation, its decisions favoring the taxpayer should be appealable by the Department. Plaintiff cites State, Dep't of Motor Vehicles v. McGuire, 827 P.2d 821 (Nev. 1992) in which the Nevada Supreme Court upheld that Department's appeal of its hearing officer's adverse decision. However, that case is distinguishable from the instant case in that the appeal was not of a decision by the head of that department as is the situation in the instant case.

Because the Tax Commission is not employed full time to administer this State's tax laws, and its members are not selected based upon their tax law expertise, Plaintiff argues that the Tax Commission's decisions should be appealable.

However, the Legislature has clearly established the Tax Commission's structure and authority as Head of the Department of Taxation. NRS 360.120(2). Further, the Legislature directed that the Tax Commission ". . . shall have the power to direct what proceedings, actions or prosecutions shall be instituted to support the law." NRS 360.260. Lastly, by statute, the Tax Commission has authority to review on appeal all decisions of officers of the Department of Taxation, and it "may reverse, affirm or modify them." NRS 360.245.

Therefore, because the Department of Taxation can not be aggrieved by a decision of its Head (Tax Commission), Defendant's Motion to dismiss Plaintiff's Petition for Judicial Review is granted. NRS 233B.130(1)(b).

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Plaintiff's Petition for Judicial Review is granted.

DATED this 30 day of September, 1996.

DISTRICT JUDGE

cc: Frankie Sue Del Papa, Esq.
Mark S. Setic, Esq.

EXHIBIT 2

ORIGINAL

FILED

JAN 19 2007

RONALD A. LONGTIN, JR., CLERK
By: K Rogers
DEPUTY

1750
John S. Bartlett, #143
777 E. William St., Suite 201
Carson City, NV 89701
(775) 841-6444
(775) 841-2172 [fax]

Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR WASHOE COUNTY

JOHN LOHSE, DDS and BRENT CORBRIDGE, DMD,

Plaintiffs,

vs.

STATE OF NEVADA ex rel. NEVADA DEPARTMENT OF TAXATION,

Defendant.

Case No.: CV 05-00376

Dept. 8

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came on for bench trial on December 14, 2006. John S. Bartlett, Esq. appeared as counsel on behalf of the plaintiffs John Lohse DDS and Brent Corbridge DMD. Appearing as counsel on behalf of defendant State of Nevada was Dianna Hegeduis, Sr. Deputy Attorney General and David Pope, Sr. Deputy Attorney General.

Plaintiffs have brought this action to recover a refund of sales tax they paid to the Nevada Department of Taxation on the purchase of various items of tangible personal property plaintiffs apply to the teeth of their patients in the course of their professional practice of dentistry, specializing in orthodontics. The plaintiffs contend their retail purchase of the items detailed in their refund claim, consisting of bands, wires, brackets, pins, springs and similar items commonly referred to collectively as orthodontic braces, bonding materials, impression materials used to create models of a patient's mouth, the substances used to secure the brackets to the teeth, retainers and materials used to make retainers, and headgear worn in conjunction with orthodontic braces, are exempt from sales tax under the provisions of NRS 372.283(1)(d) and

NRS 374.287(1)(d) as medicines "sold to a licensed ...dentist... for the treatment of a human being." As statutory support for their position, plaintiffs cite the language in NRS 372.283(2)(b)(4) that excludes from the definition of medicine "braces or supports other than those prescribed or applied by a licensed provider of health care, within the scope of his practice, for human use" as providing the authority for the definition of medicine to include "braces or supports" that are prescribed or applied by a licensed provider of health care, within the scope of his practice, for human use. Plaintiffs assert the orthodontic braces, retainers, and headgear are encompassed within the terms "braces or supports," and they all fall within the statutory definition of "medicine" set forth in NRS 372.283(2) and NRS 374.287(2) because these items clearly are applied or connected to the teeth of their patients in the diagnosis, cure, mitigation, treatment or prevention of disease or affliction of their patients' teeth, mouth, jaw and gums, and are commonly recognized as such.

Defendant State of Nevada Department of Taxation counters that these items do not fall within the statutory definition of a "medicine" because they are not applied "to the human body in the diagnosis, cure, mitigation, treatment or prevention of disease or affliction of the human body." Defendant further argues that the language in NRS 372.283(2)(b)(4) was not intended by the Legislature to apply to orthodontic braces.

The Court having heard and considered the testimony of the two witnesses who testified, Dr. Lohse for plaintiffs, and Dino DiCianno, Executive Director of the Nevada Department of Taxation for the State, having reviewed and considered the Stipulations of the parties and the Exhibits admitted into evidence, and believing itself to be fully informed on the applicable language of the statutes at issue, makes the following findings of fact, and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs John Lohse and Brent Corbridge are Nevada licensed dentists, specializing in orthodontic dentistry, and operate their professional dental practice in Washoe County.

2. On July 25, 2003 plaintiffs, through their counsel, filed a claim with the Nevada Department of Taxation pursuant to NRS 372.630 et seq., seeking a refund of sales taxes in the amount of $12,176.44, plus interest. In their claim plaintiffs asserted that their purchases of

bands, wires, brackets, pins, springs and similar items commonly referred to collectively as orthodontic braces, bonding materials, impression materials used to create models of a patient's mouth, the substances used to secure the brackets to the teeth, retainers and materials used to make retainers, and headgear worn in conjunction with orthodontic braces, are exempt from sales tax under the provisions of NRS 372.283(1)(d) and NRS 374.287(1)(d) as medicines "sold to a licensed ...dentist... for the treatment of a human being." The refund claim purported to cover the period from June 1, 2000 through the date the refund claim was filed, however, a review of the invoices submitted in support of the claim and the summaries thereof indicate the claim only included purchases from various vendors made between October 25, 2001 through February 27, 2003.

3. On July 30, 2003 the Nevada Department of Taxation denied their claim without a hearing. Plaintiffs filed a timely appeal of this denial to the Nevada Tax Commission. On December 1, 2004 the Nevada Tax Commission issued its written ruling denying the refund claim. Plaintiffs timely filed this action on February 17, 2005 after fully exhausting their administrative remedies.

4. Based on the testimony of Dr. Lohse, Exhibits H-1 through H-7 introduced into evidence at the trial, and on documentation provided by plaintiffs from the American Association of Orthodontics, the Court finds that the practice of orthodontic dentistry is concerned with the diagnosis, prevention and treatment of dental and facial irregularities. The application of orthodontic braces (the common terminology for the brackets, wires, pins, screws and other materials that make up orthodontic braces) and facemasks used in conjunction with orthodontic braces, to the human body offers the therapeutic benefits of correcting such afflictions as crowded teeth, overjet or protruding upper teeth, a deep overbite, an open bite, excessive spacing due to previous tooth loss, crossbite, and underbite (all referred to as "malocclusions" in the technical jargon of the dentist). These conditions not only adversely affect a person's appearance, but left uncorrected these conditions can also cause tooth loss, excessive tooth wear or grinding, inefficient chewing, periodontal disease due to greater difficulty in cleaning teeth, and misalignment of the jaw leading to chronic headaches and joint problems. Orthodontic

braces are also used in conjunction with other medical procedures to correct severe dentofacial problems, cleft lip and palate, and other problems. While improvement of the physical appearance of a patient's mouth or face is an important benefit from orthodontic treatment, the Court rejects the notion that orthodontic braces are utilized solely for cosmetic reasons.

5. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, the Court finds that retainers supplied by plaintiffs to their patients are worn by the patient for purposes of maintaining the teeth in their proper alignment after correction through the use of orthodontic braces, and so prevent the recurrence of malocclusions of the teeth.

6. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, the Court finds that the materials purchased and applied to the teeth of their patients by the plaintiffs in making impressions of the teeth are used for the purpose of diagnosing the specific problem to be corrected and to devise a plan to correct the particular malocclusion affecting the patient.

7. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, this Court finds that certain of the materials purchased by the plaintiffs constitute a crown that is placed to cover the tooth. See Exhibit G, Tab A, invoice no. 5153 for example.

8. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, this Court finds that sponges, cotton rolls and sani cloths purchased from Henry Schein are in the category of a pad, compress or dressing.

9. Plaintiffs paid a total of $12,176.44 in sales tax to its Nevada licensed vendors that was then remitted to the Nevada Department of Taxation, on its purchase of the tangible personal property documented in the invoices and summaries admitted into evidence in Joint Exhibit G that make up the plaintiffs' refund claim.

CONCLUSIONS OF LAW

1. Plaintiffs fully exhausted all administrative remedies prior to bringing this action under NRS 372.680.

2. An action brought pursuant to NRS 372.680 is an original proceeding, not an appeal from a final decision by an administrative agency. *State of Nevada v. Obexer & Sons, Inc.*, 99 Nev. 233, 237, 660 P.2d 981, 984 (1983). This Court is not limited to a review of the record

before the administrative agency; the Court is free to take new evidence on issues of fact, and owes no deference to findings by the administrative agency on issues of fact or on issues of law.

3. The Court finds that the language of NRS 372.283 is not so ambiguous within the factual context of this case that resort to the legislative history of AB 373 (1995), the legislative bill that amended NRS 372.283 to its current form, is necessary to resolve the issues of law in this case. However, even if we examine the legislative history of this bill, there is nothing in the history provided to this Court that provides any guidance on what types of "braces or supports" provided by a licensed provider of health care within the scope of his practice for human use were or were not intended to be exempt as medicine from sales or use tax.

4. The Court construes the language in NRS 372.283(2)(b)(4) and NRS 374.287(2)(b)(4) to exclude from the definition of "medicine" only those "braces or supports" **that are not** prescribed or applied by a licensed provider of health care within the scope of his practice for human use. On the other hand, tangible personal property in the form or nature of a brace or support prescribed or applied by a licensed dentist within the scope of his practice for human use is a substance or preparation constituting a medicine if the brace or support is applied internally or externally to the body of the patient in the diagnosis, cure, mitigation, treatment or prevention of disease or affliction of the human body and which is commonly recognized as intended for such use.

5. The bands, brackets, wires, pins, screws and other items purchased by plaintiffs, which together constitute what is commonly known as an orthodontic brace, retainers and other materials used to manufacture retainers, facemasks used in conjunction with orthodontic braces, materials used to create impressions of a patient's mouth for purposes of diagnosis and treatment of the patient, and those materials identified as falling in the category of a pad, compress or dressing all fall within the statutory definition of a "medicine" as that term is defined in NRS 372.283(2) and NRS 374.287(2) because all of these items are applied to patients in the diagnosis, cure, mitigation, treatment or prevention of disease or affliction of the human body and are commonly recognized as intended for that use. Consequently, the plaintiffs' retail

purchases of these items are exempt from sales or use tax under NRS 372.283(1)(d) and NRS 374.287(1)(d).

6. Those items constituting a dental crown purchased by plaintiffs and applied to the teeth of their patients also fall within the definition of a "prosthetic" as that term is defined in Nev. Admin. Code 372.763(2), and so are exempt from sales or use tax under NRS 372.283(1)(a) and NRS 374.287(1)(a).

7. Plaintiffs are entitled to a refund of the $12,176.44 in sales taxes. According to NRS 372.695, plaintiffs are entitled to recover interest on the sales taxes to be refunded at the rate of 6% per annum from the date the taxes were paid by plaintiffs to a date not exceeding 30 days prior to the refund warrant issued by the State.

JUDGMENT

Judgment on the plaintiffs' action to recover a refund of $12,176.44 in sales tax is awarded to plaintiffs, together with interest thereon to be calculated in accordance with NRS 372.695, and costs of suit in the amount of $448.80.

DATED this 19 day of January, 2007.

District Court Judge

DOCKET

JAN 19 2007

Initials

EXHIBIT 3

AFFIDAVIT OF NORMAN J. AZEVEDO

1. I, Norman J. Azevedo, declare that I have personal knowledge of the matters set forth in this affidavit and can competently testify thereto if so called.

2. Exhibit 1 to the Department of Taxation's (the "Department") Motion to Dismiss is a copy of a memorandum to Bernie Anderson, Chairman of the Assembly Committee on Judiciary (the "Assembly Committee") dated May 7, 1999 entitled "Venue Sections of S.B. 362" that I authored in my capacity as Senior Deputy Attorney General (the "Venue Memorandum").

3. Exhibit 2 to the Department's Motion to Dismiss is a copy of minutes of the March 23, 1999 meeting of the Senate Committee on Taxation (the "Senate Committee"), at which I was present to answer questions regarding the venue provisions of S.B. 362 (the "Committee Minutes").

4. The Venue Memorandum and my remarks to the Senate Committee were provided in response to specific questions relating to the venue provisions in S.B. 362, *i.e.*, the amendments to existing tax refund statutes that expanded the jurisdictions in which tax refund actions could be brought. In preparing the Venue Memorandum and providing my remarks to the Senate Committee, I was not speaking on behalf of either Committee, any Member of the Legislature, the Department or the Nevada Tax Commission (the "Commission").

5. S.B. 362 did not change the remedy afforded to a taxpayer whose claim for refund of sales or use tax was denied by the Department (in the case of claims denied before the statute was amended) or the Commission (in the case of claims denied after the statute was amended). Prior to the passage of S.B. 362, NRS 372.680 provided that a taxpayer whose claim for sales or use tax refund had been denied by the *Department* may "bring an action against the department on the grounds set forth in the claim *in a court of competent jurisdiction in Carson City* . . . ." After the passage of S.B. 362, NRS 372.680 provided, and continues to provide, that a taxpayer whose claim for sales or use tax refund has been denied by the *Commission* may "bring an action against the department

on the grounds set forth in the claim *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 department* . . . ." Both before and after the amendment, a taxpayer's remedy was to "bring an action against the department." Statutes authorizing refund actions for other taxes were similarly amended to expand the permissible venue from Carson City to Carson City, the county of residence or principal place of business of the claimant or a county in which relevant proceedings occurred.

6. As the Venue Memorandum explains, I thought these amendments were advisable because, in general, they conformed the permissible venues for tax refund actions to the venues in which petitions for judicial review must be filed under the Administrative Procedures Act (NRS 233B). For example, I began my discussion by noting that "[t]he Nevada Department of Taxation has been governed by this venue provision [NRS 233B.130(2)(b)] since its passage in 1965." I concluded by recommending the amendments, because "[b]y having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers." Thus, my point was simply that the *venue* provisions of existing statutes authorizing refund actions should be conformed to the existing *venue* provision in the APA.

7. These amendments did not make refund actions in the district court *subject to* the APA. In both the Venue Memorandum and in my remarks to the Senate Committee, I made two statements about S.B. 362 that are cited by the Department that are not entirely complete with respect to sales and use tax claims for refund.

a. First, the Venue Memorandum states: "In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department [of] Taxation will proceed initially to an administrative hearing officer for an administrative trial." However, S.B. 362 amended NRS 360.245(1) to require an appeal directly to the Commission first without the intermediate step of a hearing officer.

b. Second, the Venue Memorandum states that, following a final decision from the Commission, "the taxpayer may file a petition with a district court in a judicial review

proceeding." However, in the specific case of a claim for refund of sales and use tax that has been denied by the Commission, this statement would need to be modified to say: "the taxpayer must bring an action against the Department pursuant to NRS 372.680 to obtain a refund of sales and use tax previously paid."

Under penalties of perjury, I declare the foregoing to be true and correct. Executed this 8th day of May, 2009 in Carson City, Nevada.

Norman J. Azevedo

EXHIBIT 4

Case No.: 09 RP 00016 1B

Dept. No.: I

REC'D & FILED
2009 JUN 30 PM 3:55
ALAN GLOVER
BY C. COOPER CLERK

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

v.

STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION,

Defendants.
_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

On June 16, 2009 before the Honorable James T. Russell, Defendant's April 20, 2009 Motion to Dismiss pursuant to NRCP 12(b)(5) ("Motion") came on regularly for hearing. The parties were represented by the respective counsel of record: Norman J. Azevedo and Charles C. Read for Plaintiff Southern California Edison and Catherine Cortez Masto, Attorney General of the State of Nevada, by Gina C. Session, Chief Deputy Attorney General, for Defendant Nevada Department of Taxation. The Court has read and considered the points and authorities and other materials submitted in support of, and in opposition to the Motion, and has considered the arguments of counsel at the hearing on the Motion. Based on the foregoing, and good cause appearing, the Court hereby rules as follows:

1. On February 27, 2009 the Nevada Tax Commission's ("Commission") issued a final decision denying Plaintiff's claims for refund of use taxes. Plaintiff filed its Amended Complaint against Defendant on March 27, 2009 pursuant to NRS 372.680. NRS 372.680 provides, in relevant part:

///

"1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on grounds set forth in the claim . . . for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments."

Defendant's argument is that Plaintiff should have filed a Petition for Judicial Review pursuant to NRS 233B.130, and the failure to do so should result in the dismissal of its Amended Complaint.

The Defendants argument would have this Court ignore and give no meaning to NRS 372.680. This violates the requirement that the Court must consider the statutes in pari materia, such that legal effect is given to each statute. Whether the Plaintiff filed its Amended Complaint under NRS 372.680 or NRS 233B.130, it was timely filed; and as such, this Court will not dismiss the Amended Complaint. See, ***Campbell v. State, Dept of Taxation,*** 108 Nev. 215, 219, 827 P.2d 833 (1992).

2. This Court reserves the right to treat the Amended Complaint as a Petition for Judicial Review as to the February 27, 2009 final decision of the Nevada Tax Commission. See, NRS 360.245(5), and ***Campbell,*** supra at 219.

3. The Court directs the parties to meet and confer to resolve issues relating to the nature of the proceedings in this Court pursuant to NRS 372.680 and NRS 233B.135. To the extent the parties are unable to resolve such issues that arise, the parties by cross-motions shall request the Court to resolve such issues.

4. Defendant may request that the Court certify its denial of Defendant's Motion as a final judgment pursuant to NRCP 54(b), which this Court based on the unresolved issue of the standard of review to be applied, is not inclined to grant. Any such request for certification shall be by motion, pursuant to FJDCR 15.

IT IS SO ORDERED.

Dated this 30th day of June, 2009

JAMES T. RUSSELL
District Judge

CERTIFICATE OF MAILING

I hereby further certify that on the 30th day of June, 2009, I placed a copy of the foregoing in the United States Mail postage prepaid, addressed as follows:

Norman Azevedo, Esq.
510 West Fourth Street
Carson City NV 89703

Gina Sessions, Esq.
100 N. Carson Street
Carson City NV 89701

Christine Erven
Judicial Assistant

CERT
William H. Brown, Esq. (7623)
LAW OFFICES OF
WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 366-9371
E-mail: Will@WHBesq.com
Counsel for Plaintiffs

Bradley J. Shafer, Esq. (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	)	Case No. A554970 Dept. No. IX **CERTIFICATE OF SERVICE**

8503

capacity only,)
)
Defendants.)
)

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2010, service of the: **FIRST AMENDED COMPLAINT** was made this by e-mailing/mailing a true and correct copy of same to the address listed below:

Blake A. Doerr, Deputy Attorney General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
E-Mail: BDoerr@ag.nv.gov
Counsel for Defendants

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

4825-4921-5240, v. 1

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	March 15, 2011
06A533273	Little Darlings Of Las Vegas LLC, K-Kel Inc, et al vs Nevada Dept Of Taxation, Olympus Garden Inc, et al	
March 15, 2011	9:00 AM	All Pending Motions

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

COURT CLERK: Dameda Scott
RECORDER: Jill Hawkins
REPORTER:

PARTIES PRESENT:

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

JOURNAL ENTRIES

- Plaintiffs' Renewed Motion for Preliminary Injunction on Order Shortening Time...Nevada Department of Taxation's Motion for Partial Summary Judgment on the Plaintiff's Claims for Refund and Motion to Dismiss the Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 USC 1983...Status Check

Appearances and Minute Order in cases A533273 and A554970. COURT NOTED, cases are COORDINATED, not consolidated. COURT ORDERED, Declaratory Relief claims only CONSOLIDATED between the cases, as stated fully on the record.

Colloquy regarding descriptors, implementation of a sealed coding system, and in camera review of sealed documents (see Vault Notice). After arguments by counsel, COURT STATED ITS FINDINGS and ORDERED, Defendant's Motion for Partial Summary Judgment GRANTED IN PART; Plaintiffs' Renewed Motion for Preliminary Injunction DENIED.

3/25/11 CHAMBERS STATUS CHECK: CODING REPORT

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing | COURT MINUTES | March 15, 2011

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

March 15, 2011 **9:00 AM** **Status Check**

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

COURT CLERK: Dameda Scott
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REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
Doerr, Blake A.	Attorney
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3/25/11 CHAMBERS STATUS CHECK: CODING REPORT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

LITTLE DARLINGS OF LAS VEGAS, INC., et al. Plaintiffs vs. NEVADA DEPARTMENT OF TAXATION. et al. Defendants	CASE NO. A-533273 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

TUESDAY, MARCH 15, 2011

APPEARANCES:

FOR THE PLAINTIFFS:	WILLIAM H. BROWN, ESQ. BRADLEY J. SHAFER, ESQ.
FOR THE DEFENDANTS:	BLAKE A. DOERR, ESQ. DAVID J. POPE, ESQ. VIVIENNE RAKOWSKY, ESQ.
COURT RECORDER: JILL HAWKINS District Court	TRANSCRIPTION BY: FLORENCE HOYT Las Vegas, Nevada 89146

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

LAS VEGAS, NEVADA, TUESDAY, MARCH 15, 2011, 9:04 A.M.

(Court was called to order)

THE COURT: Little Darlings of Las Vegas versus Nevada Department of Taxation and all the related cases. Do I have everyone I need?

Counsel, if you could all identify yourselves for purposes of the record.

MR. BROWN: Good morning, Your Honor. William Brown on behalf of the plaintiffs, local counsel. With me is Brad Shafer.

MR. POPE: 'Morning, Your Honor. David Pope with the Attorney General's Office on behalf of the defendants. And with me are Blake Doerr and Vivienne Rakowsky, also with the AG's Office on behalf of the defendants.

THE COURT: Good morning. At our last hearing I believe I told you that I was going to have my assistant go through and try and do some research because I had concerns about the descriptions in the column called "NAICS Description" on the document that was presented in camera DV Sealed 0015 and the following pages.

After Mr. Kutinac completed his very extensive review of the entities to the best he could identify them, it appears, as we discussed in court, that some of those descriptors may not be very accurate. For instance, one of the strip clubs is identified as "clothing accessory stores."

So --

MR. SHAFER: Okay.

THE COURT: Well, that's why I did this, because you haven't seen it.

MR. SHAFER: I appreciate it.

THE COURT: Yeah. So that's why we're doing this extra work, and I wasn't the one who was going to bless the entire time I did the research.

So what my inclination is, and I know that this is a concern because you've expressed it already, is to come up with a coding system on which this document which has been presented in camera which begins on DV Sealed 0015 can have a code which identifies the name of the tax-paying entity. For instance, the one on the first line might be Number 1, and that you could then keep a copy of the code with "1 = name" that was on the line in 1 in a sealed envelope and provide a sealed envelope with that information to me, but all of the other information that is on the sheet besides that that is in Column "LET Taxpayer" will be disclosed to the plaintiffs. So that's my inclination. But I know it is a rather item of concern, so I'm happy to hear what you think we should do.

MR. DOERR: You know, after the hearing last time we spoke with Mr. Shafer about it, and he expressed concern about not even wanting the information that we spoke about. There were several phone calls back and forth. He expressed some

desire to have some information about some -- the taxpayers who requested exemptions, but he never called us back. So we don't really know what he wants.

MR. SHAFER: Your Honor --

THE COURT: Wait. Let's let him finish.

MR. SHAFER: Sorry.

THE COURT: Is there anything else you want to say?

MR. DOERR: That's really all I had to say about it.

THE COURT: Okay.

MR. SHAFER: Your Honor, this goes back to the letter with the exhibits after all the discovery disputes. It goes to Question Number 1. What I have told this Court and what I have told them, I am willing to limit my requests to those categories that I have identified, and I identified them in a redline under Judge -- in the document that was given to Judge Togliatti. I think we spoke about those when I was here last. Certainly one of the categories that I wanted was the category that you said apparently something is misidentified. But I am not asking for all the information in the entire two-page chart, only those categories that I've previously identified and those categories that are set forth in that letter that encompasses to Judge Togliatti what the outstanding discovery disputes were. And I believe that's Issue Number 1. And I lay out those categories there.

THE COURT: Okay. So --

MR. DOERR: I have a -- I need a clarification. Did you say that one that was -- I'm sorry. You said it was --

THE COURT: The item that is the first item on the chart, which is why I started this enterprise --

MR. DOERR: Right.

THE COURT: -- because it appeared to me not to be accurate, has an NAICS description of "clothing accessory stores." And I remember last time we were here you said you rely upon what the taxpayer puts on the form. They have a code they use, and if they use the wrong code, you keep it; right?

MR. DOERR: So, just for clarification, that's in the top list, in the top category; is that correct?

THE COURT: It is in the page DV Sealed 15. And the first taxpayer on the list on the first NAICS description it attributes to that taxpayer "clothing accessory stores."

MR. DOERR: Uh-huh. So that's identified as a gentlemen's club.

THE COURT: I knew from driving on the I-15 that entity was probably not a clothing accessory store.

MR. DOERR: But it's included under "Gentlemen's Clubs," under that category.

THE COURT: It is included on how you broke it down, because you broke it down yourself, is what you told me, when it appeared to you the code was wrong, you put them together.

MR. DOERR: That's correct.

THE COURT: Which is why I have $34 million in tax revenue from that first group you grouped together.

MR. DOERR: And that's --

THE COURT: Right?

MR. DOERR: -- identified as a clothing store; correct?

THE COURT: Yes.

MR. DOERR: So --

MR. SHAFER: Which apparently isn't even one of the categories that I asked about.

THE COURT: Well, but --

MR. DOERR: Well, I think you're misunderstanding what she's saying, Brad.

THE COURT: -- you understand that the AG's Office tried to do, even when perhaps the taxpayer may have tried to say they were something else, they tried to -- because they're smart, too, they tried to group them as the gentlemen's clubs.

MR. SHAFER: Okay.

THE COURT: So what I'm proposing is essentially what I do in cases where doctors break up and I have to protect patient privacy, and I've had it in a case involving a brothel, where we try and protect customer identities, that we're just going to do a code that protects the identity of those entities to the extent they need to be properly

protected at this point in time, but to give the plaintiff the information they need to do an adequate investigation prior to me making a determination on the constitutionality issues.

MR. POPE: What is that information, Your Honor, with regard to the categories that they are requesting information for?

MR. DOERR: Your Honor, are you saying to do this coding system for the for first group?

THE COURT: I think you should do that for more than the first group. I think you should do it for all of them. But I think the only group that is truly of concern ultimately in this case is the first group. I think you need the -- he needs the information on the other groups because he's going to argue that the tax is unfairly directed at gentlemen's clubs only. And if you don't have the information as to those other three pages who aren't gentlemen's clubs, then he's going to have a hard time showing that difference in the revenue, tax revenue.

MR. DOERR: I'm going to express my concern that we can even get that much documentation to him.

THE COURT: Well, no, it's not -- it's not a documentation issue. You're going to take this DV Sealed 15 and the four following pages --

MR. DOERR: Okay.

THE COURT: -- you're going to black out the column

that says "LET Taxpayer" --

MR. DOERR: Uh-huh.

THE COURT: -- you're going to write on the line that's 1, you're going to write "1" or some other number that you guys choose, hopefully sequentially, and then you're going to say, the number I put there covered up the name whatever the name of that entity is and 1 equals that entity.

MR. DOERR: Uh-huh. What about the backup documentation for this?

THE COURT: I'm not going to order that produced at this time. Only this very nice long document.

MR. DOERR: I guess then my concern would be there are certain groups of taxpayers where there are only -- there's only one entity.

THE COURT: Like the Sun City Summerlin Community Association? No, that's in a big group.

MR. DOERR: Some of the other groups at that -- and the 5 percent taxpayer group, I know there are single taxpayers.

THE COURT: Okay. Well, we'll deal with that when we get there.

So how long do you think? Because everybody, when I give them this task, because you're not the first person I've asked to do it, has a different time that it's going to take them to do this coding.

MR. DOERR: The way I understand it, I could have something today.

THE COURT: I usually think it takes about a week to get it done. So how about a week?

MR. DOERR: How about a week.

THE COURT: Okay. Do you want me to place these documents and Dan's summary that he did of who the people really were in a sealed envelope?

MR. DOERR: Yes.

THE COURT: Okay. Denita, this is going to be Court's Exhibit 1 for today. Please place it in a sealed envelope, because it was an in-camera review that I did in connection with this discovery dispute.

If we could now go to the renewed motion for preliminary injunction.

MR. SHAFER: Your Honor, could I just bring up one other discovery issue?

THE COURT: Is it on my calendar today?

MR. SHAFER: Not exactly. But it deals with the overall discovery dispute. But I see you have a lot of things going on. I just want to --

THE COURT: Well, why don't we go to your motion for preliminary injunction.

MR. SHAFER: Okay. That's fine.

THE COURT: Thank you.

MR. SHAFER: Your Honor, we have exhaustively briefed this issue, and I'm not going to take up a lot of the Court's time. There are three ways that a tax can violate the First Amendment. Number one, it can be a direct tax on First Amendment-protected activity, which this is. Live entertainment is constitutionally protected. So facially the statute's unconstitutional for that reason.

The third reason -- and I'll get to the second one in a minute, but the third reason is that the statute is a content-based tax. Again, Your Honor, this Court can resolve that facially, because we know, for example, that NASCAR is exempted, animal shows are exempted, Minor League Baseball is exempted, and what is not exempted are strippers.

We've gone through the 25 sets of exemptions and exceptions that are contained in the statute, and certainly many, many of those are specifically content related and therefore under all the precedent of the United States Supreme Court this statute is unconstitutional.

The third issue is the gerrymandering, is this directed towards a small group of taxpayers. Your Honor had the foresight in going through the chart, not the chart that I haven't seen yet, but the chart that I have seen, and pointed out that irrespective of their mathematical errors on that chart the numbers exceed 80 percent in regard to the gentlemen's clubs. And while I believe that additional

discovery will substantiate that, as well, I think it's clear that the lion's share of this tax relates to only the gentlemen's clubs.

We have shown Your Honor the legislative history that talks about the fact that they weren't actually concerned that if they said, we're just going to tax adult entertainment, that that was a flag for the courts, and so we don't want to raise that flag so what we'll do is we'll make it a general tax and then we'll exempt out just about everybody except the gentlemen's clubs. And we've submitted that -- all of that evidence to Your Honor.

The only other thing, Your Honor, that I really wanted to say about the motion for preliminary injunction is the issue of irreparable harm. I have set forth in great detail, Your Honor, the various representations of my brother counsels here both before the Nevada Tax Commission and before Judge Togliatti in regard to the application or the inapplicability of the NAC. The NAC is out there. Your Honor, they specifically raised and requested Judge Togliatti in the first -- in their response to the first motion for preliminary injunction to dismiss the request for relief, if not the lawsuit in and of itself, because they claimed that we didn't even have standing to ask for an injunction because we were not paying the tax. Again, that goes directly to the NAC in regard to if we don't have the names and addresses of the

customers and we can't give the tax back to them, that we're not entitled to this.

Again, Your Honor, the NAC is nothing we ever invoked in this litigation. They were the ones that invoked it before the Nevada Tax Commission. We submitted, Your Honor, the transcript of the Nevada Tax Commission where one of the commissioners even recognizes that and says, that's an additional basis and I agree and that we, my clients would be unjustly enriched if they were to get the tax back, the multi millions of dollars that they paid because they don't give it back to the customers. And he describes as a flow through.

And, Your Honor, I understand that now because they're in a box that they are now taking the position that the NAC doesn't apply. But that certainly is not the position that they have stated both to the Nevada Tax Commission and to Judge Togliatti, Your Honor.

In addition, the next motion we're going to do is the motion to dismiss and/or for summary judgment. If there is one --

THE COURT: Can we wait till we get to that one.

MR. SHAFER: Pardon me?

THE COURT: Can we wait till we get to that one.

MR. SHAFER: Yes, Your Honor. But I just want to explain it in the context of the irreparable harm. Because if there's one valid argument they have in there, it's the

Eleventh Amendment immunity issue; and, unless they're going to concede that the State of Nevada is waiving Eleventh Amendment immunity, I can't get damages. Maybe my clients can get the tax back, but they can't get damages. And not having these millions and millions of dollars for years and years, since basically 2004, my clients can at least assert that they have been damaged. But we can't get that -- we can't get that money back if in fact Your Honor agrees with them that the Eleventh Amendment immunity applies. We can get 1983 injunctive and declaratory relief, but we can't get damages, because it's the State of Nevada.

So because of all that and the reasons that we put in the brief, we can show irreparable harm, Your Honor. And I'd ask the Court to enjoin the tax. Unless --

THE COURT: Okay. Can you tell me what the new evidence or new law is that you've presented to me since Judge Togliatti made her decision on this issue on the law and the facts prior to my being assigned to this case.

MR. SHAFER: Sure. Your Honor, the first thing is the motion to dismiss based on Eleventh Amendment immunity. That's number one, because now they're saying we're not entitled to damages.

Number two, that -- the hearing on the dismissal of that was not in December, it was much earlier, but --

THE COURT: Oh, I know. It was a long time ago.

MR. SHAFER: Yes. It took months and months for the -- for the orders to be entered. And one of the additional things is we submitted the transcript, Your Honor, of these three attorneys standing up, each giving a slightly different opinion in regard to the application of the NAC.

THE COURT: Okay.

MR. SHAFER: Thank you, Your Honor.

THE COURT: There does not appear to me to be any new information or argument that is presented with the motion for preliminary injunction other than the Eleventh Amendment issue, which I do not think is appropriate for injunctive relief.

So if we could now go to the motion for partial summary judgment.

MR. POPE: Thank you, Your Honor. David Pope of the Attorney General's Office on behalf of the defendants.

And if I may approach, Your Honor, I have two new cases I would like to discuss.

THE COURT: Why are you giving them to me now?

MR. POPE: I had a 60-page opposition to reply to.

THE COURT: One's from 1986, the other's from 1986.

MR. POPE: Okay. Your Honor, this motion is about dismissing certain claims and/or the granting of partial summary judgment on other claims.

First of all with regard to the 1983 claims, they

should all be dismissed. Defendants are not persons for purposes of damages in 1983 claims, and if there was any doubt remaining about 1983 claims existing in this case, the National Private Truck Council case should have erased that. That case states that neither injunctive or declaratory relief can be obtained pursuant to 1983 actions in State Court cases when the effect is to enjoin the collection of taxes. The reason for this goes way back. Based on federalism, courts are not to get involved with state taxation issues. And if this type of an action in Federal Court would mess with the state's ability to collect its revenue, it would have the same effect in State Court.

So in addition to that case there are these two new cases I just presented to Your Honor. Thank you for accepting those. In re Boughton Trucking & Materials versus County Will was a decision by the Illinois Appellate Court. And there the court found that the trial court properly dismissed plaintiff's complaints for failure to exhaust the remedies available to them. The court had noted that the central tenet of the U.S. Supreme Court's decision in the Felder v. Casey case, which is 47 US 131, was that states may not place a greater burden upon 1983 claimants than those burdens imposed by federal law because the Tax Injunction Act and the U.S. Supreme Court's decision in Real Estate Association, Inc., v. McNary, which is cited as 454 US 100, require exhaustion of

administrative remedies.

The exhaustion required in the case at hand is essentially the same as what would be required to get into a Federal Court, and therefore these 1983 claims cannot be maintained.

In addition, in the Lindercamp v. Bismarck School District decision, that was the decision by the North Dakota Supreme Court -- there the court imposed under state law limitations similar to the Tax Injunction Act in 1983 actions brought in State Court claims challenging the levy of state taxes. The court held that taxpayer may not bring a 1983 action in a State Court seeking to enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where an adequate state remedy is available.

Your Honor, the state's remedy, starting with the administrative remedies and then the refund statute, provided an adequate remedy, and therefore these 1983 actions cannot be maintained in this case or these cases.

With regard to the other claims, it's important to consider what happened chronologically with regard to Case 1. None of the plaintiffs none of the Case 1 plaintiffs had filed -- or, I mean, had exhausted administrative remedies prior to that case being commenced. They hadn't requested refunds, they hadn't had a hearing before the NTC. And it's also important to note that at that time no case had been presented

to Nevada Tax Commission, and the Nevada Tax Commission hadn't decided the issue. So exhaustion of administrative remedies wouldn't have been futile.

Therefore, Case 1 can only have a facial constitutional challenge, because, as our Supreme Court has stated in the Malacon case, a facial constitutional challenge should not require exhaustion of administrative remedies and can go directly to District Court, whereas that same court -- that same decision states that as applied challenges require exhaustion of administrative remedies and cannot go directly to District Court.

With regard to Case 2, the original six Case 2 plaintiffs filed their complaint after exhausting administrative remedies. They filed administrative requests for refund, which were denied. They appealed those to the Nevada Tax Commission. They had a hearing before the Nevada Tax Commission. They filed briefs and presented exhibits, presented their case, got a final decision. That case should have been filed as a judicial review. And there are several points that I want to make, Your Honor, to support this argument.

First of all, NRS Chapter 233B was amended in 1989 to remove the language that allowed final decisions of agencies to proceed to District Court as de novo actions. In addition, in 1999 NRS 372.680, which is the refund statute for

the sales and use tax chapter and is apparently the statute after which the LET refund statute was modelled, was changed to require a final decision from the Nevada Tax Commission before the denial of a refund action could proceed to District Court. And the logical reason for requiring final decision from the Nevada Tax Commission before proceeding to District Court is because the plain language of the statutory scheme requires or only provides for a judicial review and does not provide for a de novo action.

With these changes to the statutory scheme the plain language of the statutory scheme and of NRS 372.680 and therefore NRS 368A.290, which is the LET refund statute, because it was based on the sales and use tax statute, the plain language of the scheme and of the refund statute itself provides for only a -- or for a judicial review pursuant to Chapter 233B.

This same argument was supported by the Legislative Council Bureau's amicus brief filed in the case of Southern California Edison pending before -- currently pending before the Nevada Supreme Court.

Contrary to plaintiffs' arguments, Nevada and California have gone separate ways with regard to their statutory remedies for tax refunds. California law cannot be persuasive with regard to this issue, as explained in the briefs.

Unlike NRS 365.460, neither NRS 372.680, the sales and use tax refund statute, or NRS 368A.690 -- or .290, the LET refund statute, require additional -- have any additional requirements. This statute was the statute at issue in the Saveway case. The statute requires that the taxpayer -- after a refund has been denied, the taxpayer has to sue the treasurer in State Court.

So, although the tax is administered by the Department and the Commission, they have to sue somebody else to get the money back. The court in the -- our Nevada Supreme Court said that that statute, that type of refund statute was more like a de novo action statute because you had to sue somebody else. The Commission wasn't part of the administrative record.

With regard to NRS 360.245(7), that statute was changed, and it says that if a local government who's a party to an appeal before the NTC is limited to judicial review -- or it says that they would be limited to a judicial review and they can intervene and get involved, and that way they're permitted to proceed with the judicial review.

It would be inconsistent, then, to argue that somebody else gets a trial de novo pursuant to 372.680 or 368A.290.

Finally, NRCP 81(a) provides that the rules of civil procedure do not govern procedure and practice in any special

statutory proceeding insofar as they are consistent or in conflict with the procedure and practice provided by the applicable statute. The applicable statute here would be NRS Chapter 233B.

If, on the other hand, this Court finds that there is ambiguity with regard to the refund statute, then all the legislative history cited to you in the defendants' brief clarifies that ambiguity, and the remedy provided for by the word "action" in the refund statute is a judicial review.

Therefore, this Case 2 should have been filed as a judicial review. It wasn't. The time for doing so has passed, and the case should be dismissed.

If, as in one of the Supreme Court cases where the complaint was deemed to be a judicial review and the case proceeded as a judicial review, if that happens in this case, then only the original six plaintiffs -- Case 2 plaintiffs can be a part of that case. NRS 233B.130 limits a judicial review to the administrative record and to the parties involved in those -- in that record. Deja Vu and Little Darlings didn't exhaust their administrative remedies. They could have. Plaintiffs argued in their brief that they started filing or became subject to the tax in July 2005. Case 1 was started in '06. They didn't have to wait three years to request a refund. They could have submitted a refund request. At that time it wouldn't have been futile to exhaust administrative

remedies. They didn't get into this case, and now they're prohibited from being part of the administrative record.

In addition, pursuant to Nevada case Public Service Commission of Nevada versus Eighth Judicial District Court, cite is 107 Nev. 680, plaintiffs cannot have two cases pending at the same time both of which are seeking declaratory relief. Case 1 was filed first. It has a claim for declaratory relief. Case 2 was filed thereafter, has the same claim in it. Therefore, that claim needs to be dismissed out of Case 2.

THE COURT: But don't you think the consolidation takes care of that issue because we're going to handled it all at one time?

MR. POPE: Well, they haven't been consolidated, Your Honor. They're coordinated.

THE COURT: Okay. Did I do that, or did Judge Togliatti do that?

MR. POPE: We had a discussion with you, and I think we all kind of agreed to the coordination.

THE COURT: Okay. All right.

MR. POPE: That was when you handled the one hearing for us.

THE COURT: Yeah. Prior to me being assigned to you as your judge, yeah.

MR. POPE: Correct.

Therefore, if Case 2 proceeds as a judicial review, it should not contain a claim for declaratory relief in Case 1. Case 1 requests relief, and it should be dismissed from Case 2.

In addition, Your Honor, defendants have not waived the right to raise this issue that Case 2 should proceed as a judicial review. Pursuant to NRCP 12(h), issues of subject matter jurisdiction can be raised at any time. This is such an issue. If the case -- if Your Honor rules that the case should have proceeded as a judicial review, as we believe it should have, then the time for filing a judicial review has passed, and the Court doesn't have subject matter jurisdiction.

In addition, in the Campbell case, which is another Nevada case, summary judgment was granted on the basis of administrative res judicata, which is another argument we're making in this motion.

With regard to all these issues plaintiffs can show no set of facts that would entitle them to relief, and the claims should be dismissed, and/or there are no genuine issues of material fact. The defendants are entitled to judgment as a matter of law.

With regard to the '83 claims, it's a question of law, and the National Private Truck case and the other cases cited take care of those claims. So with regard to the Case 2

being dismissed or proceeding as a judicial review, it's an issue of statutory construction, which is a question of law. And we believe that the authorities we've cited take care of that issue.

With regard to whether plaintiffs can have two declaratory relief actions pending at the same time, that's also taken care of by a case I just cited.

With regard to Deja Vu and Little Darlings being dismissed from Case 2 it's a question of law that is decided by the cited authorities, also.

Therefore, applying either standards -- either standard, Your Honor, the defendants request dismissal of all of the 1983 claims from both Case 1 and Case 2, the dismissal of Case 2 for failure to file a timely judicial review, or, alternatively and provided that Case 2 proceeds as a judicial review, the dismissal of the claim for declaratory relief and the dismissal of Deja Vu Showgirls and Little Darlings pursuant to NRS 233B.130, which limits District Court review to the administrative record and parties included in it.

Thirdly, Your Honor, dismissal of the as applied challenge from Case 1 is none of the Case 1 plaintiffs had exhausted administrative remedies when they commenced that case.

Your Honor, I'd also like to mention that in 1989 233B.130 was amended to add subsection (6), which said that

233B is the exclusive remedy for judicial review of or judicial action, same word that's in our refund statute regarding final decisions of agencies.

And with that, we request any other relief that the Court deems just and fair. Thank you.

THE COURT: Thank you.

MR. SHAFER: Judge, do you want me to go to the podium?

THE COURT: Wherever it's easier, as long as you keep your voice up so we can pick you up on the recording.

MR. SHAFER: I apologize for not being up here before. We've normally just argued from our chairs.

But first of all, Your Honor, he cites a case involving the Tax Injunction Act, which is true, and, as the Court is very well aware, we tried to file this lawsuit first in Federal Court so that the State judges wouldn't have to deal with that. The State was the one that in fact filed the motion to dismiss. The Federal Court dismissed it, and the Ninth Circuit affirmed, and therefore under the Tax Injunction Act we can't get a remedy in Federal Court. But, as we pointed out to the Court, there are, you know, literally a billion cases that say that the State Courts have concurrent jurisdiction with the Federal Courts with regard to 1983 relief, and, more importantly, that State Courts can't require exhaustion of administrative remedies in regard to 1983

actions, either, the seminal case allowing for injunctive and declaratory relief, Your Honor, being the Patsy case.

Now, interestingly, brother counsel made the argument that, well, it's only the refund action and it's not the -- you know, we can't get declaratory relief action in the second action, you know. And I hate doing this, but here's what they said in the Federal Court in regard to their reply to plaintiffs' opposition to the motion to dismiss. And this is at page 6. And they say, "The court in Scottsman affirmed a direct --" and we've all referred to Scottsman quite a bit "-- a direct refund action to the tax even though the taxpayer did not first pursue its remedy through the administrative levels. In doing so the Nevada Supreme Court implicitly acknowledged that the refund remedy was available notwithstanding the limitations of NRS 374.675."

And then they put a footnote there, and I'll get back to -- I will get back to the footnote in a minute.

"If the remedy of the refund action is available under NRS 374, it is available under NRS Chapter 368A, which is in pari materia," and they cite State Division of Insurance versus State Farm Mutual.

Now, this is what they say in Footnote 4, Your Honor. "Scottsman 1 and 2 arguably implied declaratory relief is an available option. The Supreme Court suggested this when it noted, 'It (a refund action),'" they put that qualification

in there, clarification, "'is the only effective remedy available to Scottsman. Prospective relief alone (i.e., future exemption from tax) would hardly afford Scottsman a meaningful remedy for the unconstitutional deprivation of its property.'" They cite Scottsman. "When that case was earlier up on appeal it was noted, but not discussed, that the suit was for declaratory relief."

So what they said in the District Court, the Federal District Court, in order to get dismissal of that, in order to say that there was a plain, efficient, speedy remedy in State Court is directly opposite of what he just said to Your Honor two minutes ago.

Now, in their motion to dismiss the amended complaint filed back in 2006 in the United States District Court, Your Honor, they refer to the action under 368A as an action. And they say this at page 7. "Within 90 days of denial of the Commission of a taxpayer's appeal of a claim for refund the taxpayer may bring an action in court." And they cite it. Then they say, "By default jurisdiction for such actions lie in the District Court." They cite the Nevada constitutional provision. And then they say, "Therefore, the Nevada Supreme Court has original appellate jurisdiction." They cite Nevada Constitution Article VI, Section 4.

Your Honor, if you look at the Saveway case, which is almost an identical-worded statute, which, by the way, the

statute that we're talking about here, 368A.290, was enacted far after all these statutory amendments and therefore, if there was any type of demand for us to file a petition for judicial review, it would have been statutorily put in there. What Saveway says is they filed a petition for a writ of judicial review, the District Court dismissed it with prejudice, and the Supreme Court affirmed.

Had we filed a petition of judicial review, they would be here with Saveway, and they would say, Your Honor, look at what they did, they did exactly what the plaintiff did in Saveway, they did the wrong thing, it's supposed to be an original action, they didn't file it, dismiss it out, collateral estoppel, administrative collateral estoppel and res judicata.

Your Honor, the statute is clear. It is an action against the Department. It is not a petition for judicial review in regard to the Commission's ruling. Had they wanted to say that, they could have said that. We researched this quite heavily. We had -- we had conferences with now Judge Sullivan, who was my co-counsel at the time. And the statute is what the statute is. We filed an original action seeking a refund under the statute, naming the Department as the defendant.

Now, it isn't jurisdictional, Your Honor, because, as we pointed out to the Court, in fact the District Court

where they first tried this stunt up in Carson City said, no, that would be a direct violation of what the statute says. The statute says to file this, they filed that, and that judge is going to consider that portion of the case, you know, under the rules of a petition for writ of judicial review. That judge didn't dismiss it.

Now, what's more interesting about that, Your Honor, is that while the plaintiffs filed to get up to the Nevada Supreme Court and then got a stay of those proceedings to take that issue about what standards govern in regard to the action, the State of Nevada didn't take any type of petition to the Nevada Supreme Court saying, oh, no, this is jurisdictional, they didn't file the correct legal proceeding. And in that case it's just an action against the Department. If you take a look at the briefing that was submitted in that, one of the arguments that is made by some of the amici is that they should have brought other counties in and things like that as parties.

Well, take a look at our second action. It's not only against the Department, it's against the Commission, as well, Your Honor. The Commission is labelled as a defendant. There is no basis or reason whatsoever to dismiss that action, Your Honor. We did exactly what the statute said. We have briefed -- it's no secret that the briefing in front of Your Honor is the same briefing that's in front of the Supreme

Court on the California Edison case. And, you know, we all -- we all apologize for the detail of all that, but, you know, that's what it is. And clearly the analogous statutes are there. This statute was enacted after the statutory amendments. It is what it is. It says what it says. We filed the exact action that it calls for. Your Honor, there's no basis whatsoever to dismiss that.

The only other thing I have to say, Your Honor, is that brother counsel says the Deja Vu plaintiffs could have exhausted administrative remedies. Well, we've submitted to Your Honor the letters from the Commission saying that they're sitting on all the appeals. My clients have made the appeals. The Commission is sitting on the appeals, all the appeals that are being generated not only from the Deja Vu plaintiffs, but from my other clients, as well, pending the outcome of this lawsuit. So there's nothing that they could have done.

THE COURT: Can you address for me the issue of damages under your 1983 action.

MR. SHAFER: Well, Your Honor, you know, when they're right, they're right.

THE COURT: Okay. Thanks.

MR. SHAFER: But, Your Honor, what I want to -- you know -- and we addressed this in our briefing, and we didn't try to say anything to the contrary.

THE COURT: I understand. Okay.

MR. SHAFER: Yeah. The declaratory relief and injunctive relief --

THE COURT: It's okay to say they're right on that issue.

MR. SHAFER: But that -- but, Your Honor --

THE COURT: That actually gives you more credibility on other issues when you say, Judge, they're right.

MR. SHAFER: Thank you, Your Honor.

THE COURT: All right.

MR. SHAFER: But it doesn't apply to the injunctive and declaratory relief.

THE COURT: Is there anything else you want to add?

MR. POPE: Just briefly, Your Honor.

Your Honor, Patsy does not say that exhaustion is not required in all cases. And I've cited to at least two subsequent at least State Court cases that explain why.

The Scottsman case was decided after the statutory changes to 233B and also to 372.680, and therefore, you know, the law changes. The case -- I need to take that back and rearrange it.

The cases were decided -- the Scottsman cases were decided before the changes to 233B and 372.680, and also in that case I believe that the parties had stipulated to facts and filed motions for summary judgment. So no one raised this issue in that case.

With regard to the Saveway case there's the same thing. That case was also decided before the statutory changes, at least the 233B change.

And with regard to comments made before the Federal District Court, the same as with these issues, laws change, and, you know, the Department's -- we're making the arguments that are appropriate for this case. Thank you.

THE COURT: Thank you.

The motion is granted in part. With respect to the plaintiffs' claim for damages under 1983, those claims are precluded and are dismissed.

With respect to the dec relief claims, for purposes of this litigation I am consolidating those claims between the two cases. The remaining issues will remain coordinated, but the dec relief claims are being consolidated so there won't be a duplication.

Any questions? Have a nice day.

MR. SHAFER: Thank you, Your Honor.

MR. POPE: Thank you, Your Honor.

THE COURT: So you're going to get that produced in about a week. I'm going to set it on my chambers calendar to look at on March 25th. If there is an issue with the production, just somebody send a status report, and I'll schedule a conference call. Okay. Have a nice day.

THE PROCEEDINGS CONCLUDED AT 9:44 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.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt
FLORENCE HOYT, TRANSCRIBER

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DATE

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CLERK OF THE COURT

CERT
William H. Brown, Esq. (7623)
LAW OFFICES OF
WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 366-9371
E-mail: Will@WHBesq.com
Counsel for Plaintiffs

Bradley J. Shafer, Esq. (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	Case No. A533273 Dept. No. IX **CERTIFICATE OF SERVICE**

9017

capacity only,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2011, service of the: **VERIFIED AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY FEES AND COSTS** was made this by e-mailing/mailing a true and correct copy of same to the address listed below:

Blake A. Doerr, Deputy Attorney General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
E-Mail: BDoerr@ag.nv.gov
Counsel for Defendants

By_____
An employee of the **LAW OFFICES OF WILLIAM H. BROWN, LTD.**

4819-0252-7753, v. 1

CERT
William H. Brown, Esq. (7623)
LAW OFFICES OF
WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 366-9371
E-mail: Will@WHBesq.com
Counsel for Plaintiffs

Bradley J. Shafer, Esq. (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

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Blake A. Doerr, Deputy Attorney General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
E-Mail: BDoerr@ag.nv.gov
Counsel for Defendants

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

4819-0252-7753, v. 1

CERT
William H. Brown, Esq. (7623)
LAW OFFICES OF
WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 366-9371
E-mail: Will@WHBesq.com
Counsel for Plaintiffs

Bradley J. Shafer, Esq. (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	Case No. A533273 Dept. No. IX **CERTIFICATE OF SERVICE**

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Blake A. Doerr, Deputy Attorney General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
E-Mail: BDoerr@ag.nv.gov
Counsel for Defendants

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

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CLERK OF THE COURT

CERT

William H. Brown, Esq. (7623)
LAW OFFICES OF
WILLIAM H. BROWN, LTD.
330 S. Third Street, Suite 860
Las Vegas, NV 89101
Telephone: (702) 366-9311
Facsimile: (702) 366-9371
E-mail: Will@WHBesq.com
Counsel for Plaintiffs

Bradley J. Shafer, Esq. (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

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Defendants.)
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Blake A. Doerr, Deputy Attorney General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
E-Mail: BDoerr@ag.nv.gov
Counsel for Defendants

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

4819-0252-7753, v. 1

ANAC
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

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. 08A554970
Dept. No. XI

ANSWER TO FIRST AMENDED COMPLAINT

. . .

. . .

. . .

COMES NOW, Defendants Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michelle Jacobs, in her official capacity only, by and through their attorneys, CATHERINE CORTEZ MASTO, Attorney General, BLAKE A. DOERR, Senior Deputy Attorney General, DAVID POPE, Senior Deputy Attorney General, and VIVIENNE RAKOWSKY, Deputy Attorney General, and hereby submit their Answer to Plaintiff's First Amended Complaint.

INTRODUCTION

1. Answering paragraph 1, Answering Defendants admit that Plaintiffs have filed a complaint and an amended complaint seeking a refund of Live Entertainment Tax for the periods of January, February, March and April of 2004, as well as declaratory relief, injunctive relief and damages. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 1, and upon said basis, deny each and every remaining allegation contained therein.

JURISDICTION AND VENUE

2. Answering paragraph 2, Answering Defendants believe this court lacks subject matter jurisdiction with regard to the granting of a refund and the declaratory relief requested as these issues have been decided by a final decision of the Nevada Tax Commission and Plaintiffs did not file a petition for judicial review pursuant to NRS 233B.130. Answering Defendants admit that the statutes and rules of civil procedure cited by Plaintiffs speak for themselves. Further, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 2, and upon said basis, deny each and every remaining allegation contained therein.

3. Answering paragraph 3, Answering Defendants assert that because Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Renewed Motion for Preliminary Injunction were denied by this Court, Plaintiffs' claim for injunctive relief is moot. With respect to any other allegations, Answering Defendants are without sufficient knowledge or information upon

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

4. Answering paragraph 4, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

PARTIES

5. Answering paragraph 5, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

6. Answering paragraph 6, 7, 8, 9, 10, 11 and 12, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

7. Answering paragraph 13, Answering Defendant Nevada Department of Taxation admits that it is a governmental entity created under the laws of the State of Nevada and that it administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers in Nevada. Nevada Department of Taxation further answers that it is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 13, and upon said basis, denies each and every remaining allegation contained therein. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

8. Answering paragraph 14, Answering Defendant Nevada Tax Commission admits that it is a governmental entity created by the laws of the State of Nevada which administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes with regard to non-gaming licensed taxpayers and that it is statutorily authorized to consider and rule upon appeals of refund claims. Defendant Nevada Tax Commission also

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admits that it rendered the decision denying the refunds requested by the original six Plaintiffs and further answers that it is without sufficient knowledge or information as to the remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

9. Answering paragraph 15, Answering Defendant State Board of Examiners admits that it is a governmental entity created under the laws of the State of Nevada, consisting of the governor, the secretary of state, and the attorney general. Answering Defendant Nevada State Board of Examiners further admits that pursuant to NRS 368A.250, it is authorized to approve refunds of amounts collected by the Nevada Department of Taxation in excess of the amount legally due. State Board of Examiners further answers that it is without sufficient knowledge or information as to any remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

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Las Vegas, NV 89101

STATEMENT OF FACTS

10. Answering paragraph 16, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

11. Answering paragraph 17, Answering Defendants admit that on or about July 22, 2003, the State of Nevada enacted a Tax on Live Entertainment pursuant to Chapter 368A. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained paragraph 22, and upon said basis, deny each and every allegation contained therein.

12. Answering paragraph 18, Answering Defendants admit that at some time following the enactment of Chapter 368A of the Nevada Revised Statutes administrative

regulations, otherwise known as Chapter 368A of the Nevada Administrative Code, were promulgated regarding the administration and enforcement of Chapter 368A of the Nevada Revised Statutes (Plaintiffs erroneously refer to Chapter 38A). Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 18 and, upon said basis, deny each and every remaining allegation contained therein.

13. Answering paragraph 19, Answering Defendant Nevada Department of Taxation admits that it collects the tax imposed by Chapter 368A from taxpayers who/which are not licensed gaming establishments. Answering Defendant Nevada Department of Taxation further admits that pursuant to NRS 368A.140 it shall adopt such regulations as are necessary to carry out this function. Other Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

14. Answering paragraph 20, Answering Defendants deny that 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 exotic dancing, topless dancing and fully nude performance dance entertainment. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained therein and, upon said ground, deny each and every allegation contained therein.

15. Answering paragraph 21, Answering Defendants admit that the statutory sections cited therein, as they existed when enacted, speak for themselves. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained therein and, upon said ground, deny each and every allegation contained therein.

16. Answering paragraph 22, Answering Defendants admit that Chapter 368A was amended by Assembly Bill No. 554 which reduced the scope of the exception as contained in

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Las Vegas, NV 89101

NRS 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Answering Defendants deny that the specific purpose of the amendment was to extend the tax obligation as contained in Chapter 368A to "adult" entertainment establishments including a number of Plaintiffs in this action. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

17. Answering paragraph 23, 24, 25, 26, 27, and 28, Answering Defendants admit that the Plaintiffs mentioned therein are subject to Chapter 368A of the NRS and have been and are required to pay the Live Entertainment Tax found in Chapter 368A of the NRS. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

18. Answering paragraph 29, Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

19. Answering paragraph 30, Answering Defendants admit that Plaintiffs present some type of live entertainment at their business premises. Answering Defendants further answer they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

20. Answering paragraph 31, Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

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Las Vegas, NV 89101

21. Answering paragraph 32, Answering Defendants admit the allegations contained therein.

22. Answering paragraph 33, Answering Defendants admit that Plaintiffs contend that the Live Entertainment Tax found in Chapter 368A of the NRS is illegal and unconstitutional and that Plaintiffs' desire is to not have to pay the Live Entertainment Tax. Answering Defendants deny that the Live Entertainment Tax is both illegal and unconstitutional. Answering Defendants further deny that Plaintiffs are under threat of criminal prosecution and/or subject to the imposition of fines. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

23. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

24. Answering paragraph 35, Answering Defendant Nevada Department of Taxation admits that it has denied the requests for refund. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

25. Answering paragraph 36, Answering Defendants admit that a hearing was scheduled before Defendant Nevada Tax Commission at which would be heard the appeals of denials of requests for refunds of the Live Entertainment Tax for tax periods January, February, March and April, 2004 submitted by the original six Plaintiffs (Deja Vu and Little Darlings were not parties to this administrative appeal) and that the hearing was scheduled for July 9, 2007. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining

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allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

26. Answering paragraph 37, Answering Defendants admit that the hearing was continued to August 6, 2007. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

27. Answering paragraph 38, Answering Defendants admit that the Nevada Tax Commission, after considering the argument and materials submitted, issued a written decision, dated October 12, 2007, denying the appeals of the original six Plaintiffs. Answering Defendants deny that any witness testimony was offered at the hearing before the Nevada Tax Commission. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

28. Answering paragraph 39, Answering Defendants admit that any statutory sections cited therein speak for themselves. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

29. In answering paragraph 40, Answering Defendants admit that NRS 368A.300(3)(b) speaks for itself. Answering Defendants deny that the term "Board" is found within NRS 368A.300(3)(b).

30. In answering paragraph 41, Answering Defendants deny that Chapter 368A of the NRS is unconstitutional on its face and as applied to Plaintiffs. Answering Defendants further deny that Chapter 368A is a direct tax on "First Amendment" freedoms. Answering Defendants further deny that Chapter 368A of the NRS applies only to a small number and category of speakers, that it violates Article 10, §1 of the Nevada Constitution and that its an

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impermissible discriminatory tax which discriminates based upon the content of speech and expression. Answering Defendants further deny that Plaintiffs are exempt from the Live Entertainment Tax. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of the allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

31. In Answering paragraph 42, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

32. Answering paragraph 43, Answering Defendants admit that the excerpts from the statute appear to be the same language found in the statute cited therein and that the statutory section cited therein speaks for itself.

33. Answering paragraphs 44, 45 and 46, Answering Defendants admit that the statutory sections cited therein speak for themselves.

34. Answering paragraph 47, Answering Defendants admit that pursuant to NRS 368A.140(2)(a) (Plaintiffs incorrectly cite Chapter 368A.142(2)) the Nevada Department of Taxation is statutorily required to collect the Live Entertainment Tax from non-gaming licensed taxpayers and pursuant to NRS 368A.140(2)(b) is empowered to adopt such regulations as are necessary to carry out the provisions of paragraph (a) and further admit that the statute speaks for itself. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

35. Answering paragraph 48, Answering Defendants admit that the statutory sections cited or referred to therein speak for themselves.

36. Answering paragraph 49, Answering Defendants admit that pursuant to NRS 368A.200(5) the tax imposed by Chapter 368A is not applicable to a variety of statutorily

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mandated circumstances and further admit that any statutory sections cited or referred to therein speak for themselves.

37. Answering paragraphs 50 and 51, Answering Defendants admit that the statutory sections cited therein speak for themselves.

COUNT I – DECLARATORY RELIEF

38. Answering paragraph 52, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

39. Answering paragraph 53, Answering Defendants deny each and every allegation contained therein.

40. Answering paragraph 54, Answering Defendants deny that the Live Entertainment Tax is an unconstitutional and/or impermissible tax, deny Plaintiffs' claim that they are not subject to the Live Entertainment Tax and deny each and every remaining allegation contained therein.

41. Answering paragraph 55, Answering Defendants admit that the court could have had subject matter jurisdiction to review the final decision of the Nevada Tax Commission applying the standard set forth in NRS 233B.135 had the original six Plaintiffs filed a timely petition for judicial review. Answering Defendants further admit that the court has dismissed all claims pled pursuant to 42 U.S.C. 1983 and therefore Plaintiffs claim for declaratory relief pursuant to 42 U.S.C. 1983 has been dismissed. With regard to any remaining allegations contained within paragraph 55, including the allegation that this court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendants pursuant to state law, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

42. Answering paragraph 56, Answering Defendants deny each and every allegation contained therein.

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43. Answering paragraph 57, Answering Defendants deny each and every allegation contained therein.

COUNT II – REQUEST FOR REFUND

44. Answering paragraph 58, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

45. Answering paragraph 59, Answering Defendants deny that the Live Entertainment Tax is unconstitutional and deny that Plaintiffs are exempt from paying the Live Entertainment Tax. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

46. Answering paragraph 60, Answering Defendants Nevada Department of Taxation and Nevada Tax Commission deny the allegation that they erred by not granting Plaintiffs' requests for refunds. Other Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in paragraph 60 and, upon said ground, deny each and every remaining allegation contained therein.

47. Answering paragraph 61, Answering Defendants deny the allegation that this court has the power to grant Plaintiffs' requests for refunds pursuant to NRS 368A.290 and NRS 368A.300 on the basis that the "action" provided for by the statutes is a petition for judicial review of the a final decision of the Nevada Tax Commission to be filed pursuant to NRS 233B.130 and Plaintiffs did not file a timely petition for judicial review and therefore this court does not have subject matter jurisdiction. Answering Defendants admit that the statutory sections cited therein speak for themselves and deny each and every remaining allegation contained in paragraph 61..

48. Answering paragraph 62, Answering Defendants deny that Plaintiffs have been damaged and further deny that they have caused Plaintiffs any damage. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to

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the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

COUNT III – INJUNCTIVE RELIEF

49. Answering paragraph 63, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

50. Answering paragraph 64, Answering Defendants deny that any action taken or to be taken by Defendants to enforce any portion of Chapter 368A has deprived and will deprive Plaintiffs of their constitutional rights. Answering Defendants further deny that any action taken or to be taken by Defendants to enforce any portion of Chapter 368A has caused or will cause Plaintiffs irreparable harm as this Court has found that the Plaintiffs have not suffered irreparable harm. Answering Defendants admit that this court has dismissed Plaintiffs' claims for injunctive relief pursuant to 42 U.S.C. 1983 and has denied Plaintiffs' original motion for injunctive relief and Plaintiffs' renewed motion for injunctive relief because Plaintiffs have not suffered and will not suffer irreparable harm. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

51. Answering paragraph 65, Answering Defendants deny that Chapter 368A of the NRS violates Plaintiffs' constitutional rights and further deny the allegation that an adequate remedy at law does not exist. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 65 and, upon said ground, deny each and every remaining allegation contained therein.

52. Answering paragraph 66, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

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53. Answering paragraph 67, Answering Defendants deny that Chapter 368A is blatantly and patently unconstitutional and that Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims against Chapter 368A. Answering Defendants further deny that they will suffer no harm by the entry of an injunction. An injunction would result in the State of Nevada embracing a loss of revenue at a time when it is needed most. The Answering Defendants deny that balancing of equities tip in favor of the Plaintiffs. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

AFFIRMATIVE DEFENSES

1. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Plaintiffs fail to state a claim upon which relief may be granted.

2. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Answering Defendants claim all immunities, defenses, exemptions, and limitations on liability pursuant to the provisions of Chapter 41 of the Nevada Revised Statutes.

3. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Answering Defendants are entitled to qualified immunity as a matter of law.

4. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of monetary damages is available under that statute.

5. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint the Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of injunctive relief is available under that statute.

6. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Plaintiffs are not entitled to attorneys fees under 42 U.S.C. § 1983 or 42 U.S.C. § 1988.

7. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this Court has dismissed all of the Plaintiffs 42 U.S.C. § 1983 claims.

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8. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Answering Defendants allege that the Plaintiff has failed to comply with NRS 233B.130 which solely allows for judicial review.

9. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this court lacks subject matter jurisdiction as Plaintiffs failed to file a judicial review pursuant to NRS 233B.130 and NRS 368A.290 seeking review of the Nevada Tax Commission's final decision dated October 12, 2007.

10. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Déjà vu and Little Darlings have not exhausted administrative remedies and are not parties of the administrative record as required by NRS 233B.130.

11. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Plaintiffs have failed to plead that this court has jurisdiction over some Plaintiffs.

12. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this action is barred by administrative res judicata.

13. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this action is barred by the application of issue preclusion and claim preclusion.

14. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the "as applied" constitutional challenge is limited to judicial review of the Nevada Tax Commission's decision dated October 12, 2007 because "as applied" challenges require exhaustion of administrative remedies. In this case, the original six Plaintiffs pursued administrative remedies, obtained a final decision from the Nevada Tax Commission and failed to file a judicial review. Having failed to file a petition for judicial review, Plaintiffs "as applied" claim has been decided by the final decision of the Nevada Tax Commission dated October 12, 2007.

15. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the claim against Michelle Jacobs in her official capacity is duplicative.

16. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Plaintiffs cannot obtain equitable relief when there is an adequate remedy at law.

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17. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, pursuant to Chapter 368A of the Nevada Revised Statutes, Plaintiffs are not entitled to an injunction, writ of mandate, or any other legal or equitable process to prevent or enjoin the collection of the tax, penalty or interest imposed by Chapter 368A.

18. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Nevada Department of Taxation properly assessed tax as authorized and required by, and in accordance with, Chapter 368A of the Nevada Revised Statutes and the applicable Nevada Administrative Code provisions.

19. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this Court has found that the Plaintiffs have not suffered irreparable harm.

20. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this Court has denied the Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Renewed Motion for Preliminary Injunction.

21. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Federal District Court as well as the Ninth Circuit have denied the Plaintiffs' request for an injunction.

22. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Defendants are entitled to sovereign immunity.

23. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this action is barred by Nevada Revised Statutes 41.031 and 41.0337, due to Plaintiffs' failure to name the State of Nevada as a defendant.

24. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained damages as a result of the tax as alleged, such damages, if any, were caused and contributed to by the negligence or other wrongful conduct of the Plaintiffs.

25. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained any damages as a result of the tax as alleged, that such damages, if any, were caused and contributed to by the wrongful conduct of those persons whose conduct on their part is imputed to the Plaintiffs.

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26. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained any damages as a result of the tax as alleged, that such damages, if any, occurred because the Plaintiffs were the active and primary cause of any damages or injury herein.

27. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained any damages, Plaintiffs' claims are barred based on the doctrine of unclean hands.

28. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Answering Defendants allege that this Court lacks jurisdiction to hear Plaintiff's claims.

29. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the claims are barred by the applicable statutes of limitations and/or statutes of repose.

30. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred and/or diminished as a result of the failure of the Plaintiff to mitigate its damages.

31. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred by the doctrine of latches.

32. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred because the Plaintiffs have waived its claims.

33. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred by the doctrine of estoppel.

34 As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, a refund would result in unjust enrichment to Plaintiff.

35. Answering Defendants allege that at the time of filing of this Answer, all possible affirmative defenses may have not been alleged pending the development of sufficient facts after reasonable inquiry; therefore, , Answering Defendants reserve the right to amend this Answer to allege additional affirmative defenses if warranted by subsequent investigation.

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Las Vegas, NV 89101

WHEREFORE, Defendants pray that this Court enter judgment in their favor and that Plaintiffs take nothing by way of their Complaint.

DATED this 6th day of April, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
Attorneys for Defendants

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 10th day of April, 2011, I served the **ANSWER TO FIRST AMENDED COMPLAINT**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
The William H. Brown Law Office, Ltd.
330 S. Third St., Ste. 860
Las Vegas, NV 89101

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. 2
Lansing, MI 48906-2110

An employee of Office of Attorney General

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

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CLERK OF THE COURT

ANAC
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

ANSWER TO VERIFIED AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY FEES AND COSTS

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COMES NOW, Defendants Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michele Jacobs, in her official capacity only, by and through their attorneys, CATHERINE CORTEZ MASTO, Attorney General, BLAKE A. DOERR, Senior Deputy Attorney General, DAVID POPE, Senior Deputy Attorney General, and VIVIENNE RAKOWSKY, Deputy Attorney General, and hereby submit their Answer to Plaintiff's Verified Amended Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs.

INTRODUCTION

1. Answering paragraph 1, Answering Defendants deny that they as well as their agents, employees and representatives are acting under the color of state law to deprive the Plaintiffs of their rights, privileges and immunities secured to them by the Constitution of the State of Nevada and the Constitution of the United States. The Answering Defendants deny that the Live Entertainment Tax as established by Title 32, Chapter 368A of the Nevada Revised Statutes is an impermissible tax on constitutionally protected expression. Answering Defendants deny that the Live Entertainment Tax is unconstitutional either on its face or as applied. Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity as to the balance of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

JURISDICTION AND VENUE

2. Answering paragraph 2, Answering Defendants believe this court lacks subject matter jurisdiction with regard to the granting of a refund and the declaratory relief requested as these issues have been decided by a final decision of the Nevada Tax Commission and Plaintiffs did not file a petition for judicial review pursuant to NRS 233B.130. Defendants admit that the statutes and rules of civil procedure cited by Plaintiffs speak for themselves. Further, Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 2, and upon said basis, deny each and every remaining allegation contained therein.

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3. Answering paragraph 3, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein. Answering Defendants deny that they are persons for purposes of 42 U.S.C. § 1983 and further assert that all 42 U.S.C. § 1983 claims were dismissed by this Court.

4. Answering paragraph 4, Answering Defendants assert that because Plaintiffs' 42 U.S.C. § 1983 claims were dismissed by this Court, a request for attorney's fees and costs pursuant to 42 U.S.C. § 1988 is moot. With respect to any other authorization for attorney's fees and costs, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

5. Answering paragraph 5, Answering Defendants assert that because Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Renewed Motion for Preliminary Injunction were denied by this Court, Plaintiffs' claim for injunctive relief is moot. Further, Plaintiffs' claims for Declaratory Relief under 42 U.S.C. § 1983 were dismissed by this Court. With respect to any other allegations, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

6. Answering Paragraph 6, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

PARTIES

7. Answering paragraph 7, Answering Defendants repeat and reallege its answers to paragraphs 1 through 6, inclusive, as though fully set forth at this point and incorporated herein by reference.

8. Answering paragraphs 8, 9, 10, 11, 12, 13, 14, 15, and 16, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to

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the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

9. Answering paragraph 17, Answering Defendant Nevada Department of Taxation admits that it is a governmental entity created under the laws of the State of Nevada and that it administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers in Nevada. The Nevada Department of Taxation further Answers that the Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained paragraph 17, and upon said basis, deny each and every allegation contained therein. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

10. Answering paragraph 18, Answering Defendant Nevada Tax Commission admits that it is a governmental entity created by the laws of the State of Nevada which administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes with regard to non-gaming licensed taxpayers and that it is statutorily authorized to consider and rule upon appeals of claims under Chapter 368A. The Answering Defendant Nevada Tax Commission further answers that they are without sufficient knowledge as to the remaining allegations and therefore deny the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

11. Answering paragraph 19, Answering Defendant State Board of Examiners admits that it is a governmental entity created under the laws of the State of Nevada, consisting of the governor, the secretary of state, and the attorney general. Answering Defendant Nevada State Board of Examiners further admits that pursuant to NRS 368A.250, it is authorized to approve refunds of amounts collected by the Nevada Department of

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Taxation in excess of the amount legally due. The answering Defendant State Board of Examiners further answers that it is without sufficient knowledge as to the remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

12. Answering paragraph 20, Answering Defendant Michelle Jacobs admits that she is an employee of the Nevada Department of Taxation and was, in some official capacity, responsible for the administration of Chapter 368A. Other Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

STATEMENT OF FACTS

13. Answering paragraph 21, Answering Defendants repeat and reallege its answers to paragraphs 1 through 20, inclusive, as though fully set forth at this point and incorporated herein by reference.

14. Answering paragraph 22, Answering Defendants admit that on or about July 22, 2003, the State of Nevada enacted a Tax on Live Entertainment pursuant to Chapter 368A. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained paragraph 22, and upon said basis, deny each and every allegation contained therein.

15. Answering paragraph 23, Answering Defendant Nevada Department of Taxation admits that it collects the tax imposed by Chapter 368A (Plaintiffs incorrectly cite Chapter 367A) from taxpayers who/which are not licensed gaming establishments. Answering Defendant Nevada Department of Taxation further admits that pursuant to NRS 368A.140 it shall adopt such regulations as are necessary to carry out this function. Other Answering Defendants further answer that they are without sufficient knowledge or information upon

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which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

16. Answering paragraph 24, Answering Defendants deny that 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 exotic dancing, topless dancing and fully nude performance dance entertainment. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained therein and, upon said ground, deny each and every allegation contained therein.

17. Answering paragraph 25, Answering Defendants admit that the statutory sections cited therein, as they existed when enacted, speak for themselves. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained therein and, upon said ground, deny each and every allegation contained therein.

18. Answering paragraph 26, Answering Defendants admit that Chapter 368A was amended by Assembly Bill No. 554 which reduced the scope of the exception as contained in NRS 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Answering Defendants deny that the specific purpose of the amendment was to extend the tax obligation as contained in Chapter 368A to "adult" entertainment establishments including a number of Plaintiffs in this action. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

19. Answering paragraph 27, 28, 29, 30, 31, 32, 33, and 34, Answering Defendants admit that the Plaintiffs mentioned therein are required to pay the Live Entertainment Tax found in Chapter 368A of the NRS. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity

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of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

20. Answering paragraph 35, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

21. Answering paragraph 36, Answering Defendants admit that the Plaintiffs present some type of live entertainment upon their premises. With respect to the balance of the allegations, the Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

22. Answering paragraph 37, Answering Defendants admit the allegations contained therein.

23. Answering paragraph 38, Answering Defendants deny that the Live Entertainment Tax as mandated by chapter 368A is both illegal and unconstitutional. Answering Defendants further deny that Plaintiffs are under threat of criminal prosecution and/or subject to the imposition of fines. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

24. Answering paragraph 39, Answering Defendants deny that Chapter 368A is a direct tax on "First Amendment" freedoms. Answering Defendants further deny that the Live Entertainment Tax is unconstitutional on its face and as applied to Plaintiffs. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

25. Answering paragraph 40, Answering Defendants deny that Plaintiffs' ability to provide constitutionally protected entertainment and Plaintiffs' constitutional rights have been

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infringed upon due to Chapter 368A. This Court has found that the Plaintiffs have not suffered irreparable harm, making the allegation that the Plaintiffs have suffered and will continue to suffer irreparable harm, moot. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

26. Answering paragraph 41, Answering Defendants repeat and reallege its answers to paragraphs 1 through 40, inclusive, as though fully set forth at this point and incorporated herein by reference.

27. Answering paragraph 42, Answering Defendants admit that the excerpts from the statute appear to be the same language found in the statute cited therein and that the statutory sections cited therein speak for themselves.

28. Answering paragraphs 43, 44 and 45, Answering Defendants admit that the statutory sections cited therein speak for themselves.

29. Answering paragraph 46, Answering Defendants admit that pursuant to NRS 368A.140(2)(a) (Plaintiffs incorrectly cite Chapter 368A.142(2)) the Nevada Department of Taxation is statutorily required to collect the Live Entertainment Tax from non-gaming licensed taxpayers, and pursuant to NRS 368A.140(2)(b) is empowered to adopt such regulations as are necessary to carry out the provisions of paragraph (a), and further admit that the Statute speaks for itself. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

30. Answering paragraph 47, Answering Defendants admit that pursuant to NRS 368A.200(5) the tax imposed by Chapter 368A is not applicable to a variety of statutorily mandated circumstances and further admit that any statutory sections cited or referred to therein speak for themselves.

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31. Answering paragraphs 48 and 50, Answering Defendants admit that the statutory sections cited therein speak for themselves.

32. Answering paragraph 49, Answering Defendants deny that the Plaintiffs do not have ability to seek injunctive relief in state court against the collection of the Live Entertainment Tax. With respect to the balance of the allegations, Answering Defendants admit that the statutory sections cited therein speak for themselves.

COUNT I – DECLARATORY RELIEF

32. Answering paragraph 51, Answering Defendants repeat and reallege its answers to paragraphs 1 through 50, inclusive, as though fully set forth at this point and incorporated herein by reference.

33. Answering paragraph 52, Answering Defendants deny each and every allegation contained therein.

34. Answering paragraph 53, Answering Defendants deny that the Live Entertainment Tax is an unconstitutional and/or impermissible tax, deny Plaintiffs' claim that they are not subject to the Live Entertainment Tax and deny each and every remaining allegation contained therein.

35. Answering paragraph 54, Answering Defendants admit that the court could have had subject matter jurisdiction to review the final decision of the Nevada Tax Commission applying the standard set forth in NRS 233B.135 had the original six Plaintiffs filed a timely petition for judicial review. Answering Defendants further admit that the court has dismissed all claims pled pursuant to 42 U.S.C. §1983 and therefore Plaintiffs claim for declaratory relief pursuant to 42 U.S.C. §1983 has been dismissed. With regard to any remaining allegations contained within paragraph 54, including the allegation that this court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendants pursuant to state law, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

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36. Answering paragraph 55, Answering Defendants deny each and every allegation contained therein.

37. Answering paragraph 56, Answering Defendants deny each and every allegation contained therein.

COUNT II – INJUNCTIVE RELIEF

38. Answering paragraph 57, Answering Defendants repeat and reallege its answers to paragraphs 1 through 56, inclusive, as though fully set forth at this point and incorporated herein by reference.

39. Answering paragraph 58, Answering Defendants deny that any action taken or to be taken by Defendants to enforce any portion of Chapter 368A has deprived and will deprive Plaintiffs of their constitutional rights. Answering Defendants further deny that any action taken or to be taken by Defendants to enforce any portion of Chapter 368A has caused or will cause Plaintiffs irreparable harm as this Court has found that the Plaintiffs have not suffered irreparable harm. Answering Defendants admit that this court has dismissed Plaintiffs' claims for injunctive relief pursuant to 42 U.S.C. § 1983 and has denied Plaintiffs' original motion for injunctive relief and Plaintiffs' renewed motion for injunctive relief because Plaintiffs have not suffered and will not suffer irreparable harm. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

40. Answering paragraph 59, Answering Defendants deny that Chapter 368A of the NRS violates Plaintiffs' constitutional rights and further deny the allegation that an adequate remedy at law does not exist. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 59 and, upon said ground, deny each and every remaining allegation contained therein.

41. Answering paragraph 60, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the

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allegations contained therein and, upon said ground, deny each and every allegation contained therein.

42. Answering paragraph 61, Answering Defendants deny that Chapter 368A is blatantly and patently unconstitutional and that Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims against Chapter 368A. Answering Defendants further deny that they will suffer no harm by the entry of an injunction. An injunction would result in the State of Nevada embracing a loss of revenue at a time when it is needed most. The Answering Defendants deny that balancing of equities tip in favor of the Plaintiffs. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

COUNT III – DAMAGES AGAINST DEFENDANTS

43. Answering paragraph 62, Answering Defendants repeat and reallege its answers to paragraphs 1 through 61, inclusive, as though fully set forth at this point and incorporated herein by reference.

44. Answering paragraph 63, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

45. Answering paragraph 64, Answering Defendants deny that Chapter 368A is an illegal and/or unconstitutional tax, and that as a direct and proximate cause of the application and/or enforcement of Chapter 368A that the Plaintiffs have suffered significant and substantial damages. Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the balance of allegations contained therein and, upon said ground, deny each and every allegation contained therein.

46. Answering paragraph 65, Answering Defendants deny that Defendants will be liable for alleged losses pursuant to 42 U.S.C. § 1983 because those claims have been dismissed by this Court. Answering Defendants are without sufficient knowledge or

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information upon which to form a belief as to the truth or falsity of the balance of allegations contained therein and, upon said ground, deny each and every allegation contained therein.

47. Answering paragraph 66, Answering Defendants deny each and every allegation contained therein.

COUNT IV – ATTORNEY FEES AND COSTS

48. Answering paragraph 67, Answering Defendants repeat and reallege its answers to paragraphs 1 through 66, inclusive, as though fully set forth at this point and incorporated herein by reference.

45. Answering paragraph 68, Answering Defendants deny each and every allegation contained therein.

As to any allegations not specifically answered above or inadvertently omitted, Answering Defendants deny them in their entirety.

AFFIRMATIVE DEFENSES

1. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Plaintiffs fail to state a claim upon which relief may be granted.

2. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Answering Defendants claim all immunities, defenses, exemptions, and limitations on liability pursuant to the provisions of Chapter 41 of the Nevada Revised Statutes.

3. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Answering Defendants are entitled to qualified immunity as a matter of law.

4. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of monetary damages is available under that statute.

5. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint the Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of injunctive relief is available under that statute.

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6. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Plaintiffs are not entitled to attorneys fees under 42 U.S.C. § 1983 or 42 U.S.C. § 1988.

7. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this Court has dismissed all of the Plaintiffs 42 U.S.C. § 1983 claims.

8. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Answering Defendants allege that the Plaintiff has failed to comply with NRS 233B.130 which solely allows for judicial review.

9. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint this court lacks subject matter jurisdiction as Plaintiffs failed to file a judicial review pursuant to NRS 233B.130 and NRS 368A.290 seeking review of the Nevada Tax Commission's final decision dated October 12, 2007.

10. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint Déjà vu and Little Darlings have not exhausted administrative remedies and are not parties of the administrative record as required by NRS 233B.130.

11. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint Plaintiffs have failed to plead that this court has jurisdiction over some Plaintiffs.

12. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint this action is barred by administrative res judicata.

13. This action is barred by the application of issue preclusion and claim preclusion.

14. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint the "as applied" constitutional challenge is limited to judicial review of the Nevada Tax Commission's decision dated October 12, 2007 because "as applied" challenges require exhaustion of administrative remedies. In this case, the original six Plaintiffs pursued administrative remedies, obtained a final decision from the Nevada Tax Commission and failed to file a judicial review. Having failed to file a petition for judicial review, Plaintiffs "as applied" claim has been decided by the final decision of the Nevada Tax Commission dated.

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15. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint the claim against Michelle Jacobs in her official capacity is duplicative.

16. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint Plaintiffs cannot obtain equitable relief when there is an adequate remedy at law.

17. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint pursuant to Chapter 368A of the Nevada Revised Statutes, Plaintiffs are not entitled to an injunction, writ of mandate, or any other legal or equitable process to prevent or enjoin the collection of the tax, penalty or interest imposed by Chapter 368A.

18. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Nevada Department of Taxation properly assessed tax as authorized and required by, and in accordance with, Chapter 368A of the Nevada Revised Statutes and the applicable Nevada Administrative Code provisions.

19. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this Court has found that the Plaintiffs have not suffered irreparable harm.

20. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this Court has denied the Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Renewed Motion for Preliminary Injunction.

21. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint the Federal District Court as well as the Ninth Circuit have denied the Plaintiffs' request for an injunction.

22. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Defendants are entitled to sovereign immunity.

23. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this action is barred by Nevada Revised Statutes 41.031 and 41.0337, due to Plaintiffs' failure to name the State of Nevada as a defendant.

24. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained damages as a result of the tax as alleged, such damages, if any, were caused and contributed to by the negligence or other wrongful conduct of the Plaintiffs.

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25. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained any damages as a result of the tax as alleged, that such damages, if any, were caused and contributed to by the wrongful conduct of those persons whose conduct on their part is imputed to the Plaintiffs.

26. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained any damages as a result of the tax as alleged, that such damages, if any, occurred because the Plaintiffs were the active and primary cause of any damages or injury herein.

27. As for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, if the Plaintiffs sustained any damages, Plaintiffs' claims are barred based on the doctrine of unclean hands.

28. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Answering Defendants allege that this Court lacks jurisdiction to hear Plaintiff's claims.

29. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the claims are barred by the applicable statutes of limitations and/or statutes of repose.

30. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred and/or diminished as a result of the failure of the Plaintiff to mitigate its damages.

31. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred by the doctrine of latches.

32. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred because the Plaintiffs have waived its claims.

33. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Plaintiffs' claims are barred by the doctrine of estoppel.

34. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, a refund would result in unjust enrichment to Plaintiff.

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35. Answering Defendants allege that at the time of filing of this Answer, all possible affirmative defenses may have not been alleged pending the development of sufficient facts after reasonable inquiry; therefore, , Answering Defendants reserve the right to amend this Answer to allege additional affirmative defenses if warranted by subsequent investigation.

WHEREFORE, the answering Defendants pray as follows:

1. That Plaintiffs take nothing by reason of the Amended Complaint on file herein;

2. That the Amended Complaint be dismissed with prejudice as against the answering Defendants;

3. That this Court enter judgment in favor of the Defendants; and

4. For such other and further relief as the Court may deem just and proper under the circumstances.

DATED this _____ day of April, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
Attorneys for Defendants

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 6th day of April, 2011, I served the **ANSWER TO VERIFIED AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY FEES AND COSTS**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
The William H. Brown Law Office, Ltd.
330 S. Third St., Ste. 860
Las Vegas, NV 89101

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. 2
Lansing, MI 48906-2110

An employee of Office of Attorney General

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

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ORDD
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION ON ORDER SHORTENING TIME**

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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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

Defendants' Renewed Motion for Preliminary Injunction on Order Shortening Time came on for hearing on March 15, 2011;

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

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Las Vegas, NV 89101

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The Court having considered the papers and pleadings as well as the oral argument and finding that the Plaintiffs' did not offer any new evidence, new law or new information, hereby orders:

Defendants' Renewed Motion for Preliminary Injunction on Order Shortening Time is DENIED.

IT IS SO ORDERED.

DATED this 5th day of April, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake A. Doerr
Senior Deputy Attorney General

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

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ORDR
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

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

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **ORDER**

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K-KEL, INC., d/b/a *Spearmint Rhino* *Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic 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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the as Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983 came on for hearing on March 15, 2011;

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

The Court having considered the papers and pleadings as well as the oral argument hereby orders:

Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the as Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983 is GRANTED IN PART and DENIED IN PART.

With regard to all of Plaintiffs' claims asserted under 42 U.S.C. 1983, Defendants' motion to dismiss is GRANTED and all claims asserted under 42 U.S.C. 1983 are hereby DISMISSED;

With regard to Defendants' motion to dismiss and/or for partial summary judgment on the basis that Case 1 should be limited to a facial challenge because none of the Case 1 Plaintiffs exhausted administrative remedies before commencing Case 1 and therefore Case

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Las Vegas, NV 89101

1 should not contain an "as applied" challenge, Defendants' motion is GRANTED IN PART AND DENIED IN PART as the claim for declaratory relief in Case 1 is now consolidated with the claim for declaratory relief in Case 2 (these claims for declaratory relief are not the claims for declaratory relief asserted under 42 U.S.C. 1983, as all claims asserted under 42 U.S.C. 1983 have been dismissed as previously indicated in this order);

With regard to the remainder of Defendants' motion to dismiss and/or for partial summary judgment, Defendant's motion is DENIED WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED this 5th day of April, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Senior Deputy Attorney General

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

REGISTER OF ACTIONS
CASE NO. 06A533273

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

Case Type: **Other Civil Filing**
Subtype: **Other Civil Matters**
Date Filed: **12/19/2006**
Location: **Department 11**
Conversion Case Number: **A533273**
Supreme Court No.: **60037**

PARTY INFORMATION

		Lead Attorneys
Defendant	**Jacobs, Michelle**	**Blake A. Doerr** *Retained* 702-486-3416(W)
Defendant	**Nevada Dept Of Taxation**	**Blake A. Doerr** *Retained* 702-486-3416(W)
Defendant	**Nevada State Board Of Examiners**	**Blake A. Doerr** *Retained* 702-486-3416(W)
Defendant	**Nevada Tax Commission**	**Blake A. Doerr** *Retained* 702-486-3416(W)
Doing Business As	**Crazy Horse Too Gentlemen's Club**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Deja Vu Showgirls**	~~**William H. Brown**~~ ~~*Retained*~~ ~~702-474-4222(W)~~
Doing Business As	**Little Darlings**	
Doing Business As	**Olympic Garden**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Scores**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Spearmint Rhino Gentlemen's Club**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Treasures**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~

Plaintiff	**D I Food And Beverage Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**D Westwood Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Deja Vu Showgirls Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**K-Kel Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Little Darlings Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Olympus Garden Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Power Company Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Shac LLC *Doing Business As* Sapphire**	**William H. Brown** *Retained* 702-474-4222(W)

EVENTS & ORDERS OF THE COURT

04/08/2011 **Status Check** (3:00 AM) (Judicial Officer Gonzalez, Elizabeth)
04/08/2011, 04/22/2011
Status RE: Coding Report

Minutes
03/25/2011 3:00 AM

04/08/2011 3:00 AM

04/22/2011 3:00 AM
- The Court has reviewed Second Supplemental Production served on March 15, 2011, and ORDERED, matter off calendar.

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REGISTER OF ACTIONS
CASE NO. 08A554970

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

Case Type: **Other Civil Filing**
Subtype: **Other Civil Matters**
Date Filed: **01/09/2008**
Location: **Department 11**
Conversion Case Number: **A554970**
Supreme Court No.: **59752**

PARTY INFORMATION

		Lead Attorneys
Defendant	**Nevada Dept Of Taxation**	**David J. Pope** *Retained* 7026568084(W)
Defendant	**Nevada State Board Of Examiners**	**David J. Pope** *Retained* 7026568084(W)
Defendant	**Nevada Tax Commission**	**David J. Pope** *Retained* 7026568084(W)
Doing Business As	**Crazy Horse Too Gentlemen's Club**	
Doing Business As	**Olympic Garden**	
Doing Business As	**Sapphire**	
Doing Business As	**Scores**	
Doing Business As	**Spearmint Rhino Gentlemen's Club**	
Doing Business As	**Treasures**	
Plaintiff	**D I Food And Beverage 0f Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**D Westwood Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**K-Kel Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Olympus Garden Inc**	**William H. Brown**

		Retained 702-474-4222(W)
Plaintiff	**Power Co Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**SHAC LLC**	**William H. Brown** *Retained* 702-474-4222(W)

EVENTS & ORDERS OF THE COURT

04/08/2011 **Status Check** (3:00 AM) (Judicial Officer Gonzalez, Elizabeth)
04/08/2011, 04/22/2011
Status RE: Coding Report

Minutes
03/25/2011 3:00 AM

04/08/2011 3:00 AM

04/22/2011 3:00 AM
- The Court has reviewed Second Supplemental Production served on March 15, 2011, and ORDERED, matter off calendar.

Return to Register of Actions

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NEOJ
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI

NOTICE OF ENTRY OF ORDER

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. . .

. . .

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

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic 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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Denying Plaintiffs' Renewed Motion for Preliminary Injunction on Order Shortening Time was entered on 5th day of April, 2011, and e-filed on the 6th day of April, 2011, a copy of which is attached hereto.

DATED this 12th day of April, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /S/ BLAKE A. DOERR
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
Attorneys for Defendants

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 12th day of April, 2011, I served the **NOTICE OF ENTRY OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
Turco & Draskovich
815 S. Casino Center Blvd.
Las Vegas, NV 89101

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. 2
Lansing, MI 48906-2110

/s/ TRACI PLOTNICK
An employee of Office of Attorney General

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

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CLERK OF THE COURT

ORDD
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION ON ORDER SHORTENING TIME**

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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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

Defendants' Renewed Motion for Preliminary Injunction on Order Shortening Time came on for hearing on March 15, 2011;

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

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

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The Court having considered the papers and pleadings as well as the oral argument and finding that the Plaintiffs' did not offer any new evidence, new law or new information, hereby orders:

Defendants' Renewed Motion for Preliminary Injunction on Order Shortening Time is DENIED.

IT IS SO ORDERED.

DATED this 5th day of April, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: Blake A. Doerr
Senior Deputy Attorney General

Attorney General's Office
100 N. Carson Street
Carson City, NV 89701

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CLERK OF THE COURT

NEOJ
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

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

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI

NOTICE OF ENTRY OF ORDER

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K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic 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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order was entered on 5th day of April, 2011, and e-filed on the 6th day of April, 2011, a copy of which is attached hereto.

DATED this 12th day of April, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /S/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
Attorneys for Defendants

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 12th day of April, 2011, I served the **NOTICE OF ENTRY OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
Turco & Draskovich
815 S. Casino Center Blvd.
Las Vegas, NV 89101

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. 2
Lansing, MI 48906-2110

/s/ TRACI PLOTNICK
An employee of Office of Attorney General

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

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CLERK OF THE COURT

ORDR
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

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

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **ORDER**

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K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic 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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the as Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983 came on for hearing on March 15, 2011;

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

The Court having considered the papers and pleadings as well as the oral argument hereby orders:

Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the as Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983 is GRANTED IN PART and DENIED IN PART.

With regard to all of Plaintiffs' claims asserted under 42 U.S.C. 1983, Defendants' motion to dismiss is GRANTED and all claims asserted under 42 U.S.C. 1983 are hereby DISMISSED;

With regard to Defendants' motion to dismiss and/or for partial summary judgment on the basis that Case 1 should be limited to a facial challenge because none of the Case 1 Plaintiffs exhausted administrative remedies before commencing Case 1 and therefore Case

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

1 should not contain an "as applied" challenge, Defendants' motion is GRANTED IN PART AND DENIED IN PART as the claim for declaratory relief in Case 1 is now consolidated with the claim for declaratory relief in Case 2 (these claims for declaratory relief are not the claims for declaratory relief asserted under 42 U.S.C. 1983, as all claims asserted under 42 U.S.C. 1983 have been dismissed as previously indicated in this order);

With regard to the remainder of Defendants' motion to dismiss and/or for partial summary judgment, Defendant's motion is DENIED WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED this 5th day of April, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: Becka Dalton for
David J. Pope
Senior Deputy Attorney General

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	April 22, 2011

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

April 22, 2011 **3:00 AM** **Status Check**

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

COURT CLERK: Dameda Scott

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- The Court has reviewed Second Supplemental Production served on March 15, 2011, and ORDERED, matter off calendar.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	April 22, 2011

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

April 22, 2011 **3:00 AM** **Status Check**

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

COURT CLERK: Dameda Scott

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- The Court has reviewed Second Supplemental Production served on March 15, 2011, and ORDERED, matter off calendar.

MOT
WILLIAM H. BROWN, ESQ. (7623)
TURCO & DRASKOVICH
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Phone: (702) 474-4222
Fax: (702) 474-1320
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, et al., Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION, et al. Defendants.	CASE NO.: A533273 DEPT. NO.: 11 *Coordinated with* CASE NO.: A533273 DEPT. NO.: 11 Date of Hearing: Time of Hearing:

COME NOW, Plaintiffs by and through counsel, William H. Brown, Esq., and move this Honorable Court to vacate its Order of April 5, 2011, and to reconsider and clarify its ruling with respect to Plaintiffs' claims under 42 U.S.C. § 1983.

This motion is made and based on the pleadings on file herein, the following Memorandum of Points and Authorities, and any oral argument entertained by the Court at the time of hearing on this matter.

DATED: April 25, 2011

TURCO & DRASKOVICH

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

NOTICE OF MOTION

TO: Defendants; and

TO: David J. Pope, Esq., counsel for Defendants.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the foregoing Motion will be on for hearing before the above entitled court on the 27 day of MAY IN CHAMBERS, 2011, at ____ a/p.m., or as soon thereafter as counsel may be heard.

DATED this 25 day of April, 2011.

Respectfully submitted,

BY: William Brown

WILLIAM H. BROWN, ESQ. (7623)
TURCO & DRASKOVICH
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Phone: (702) 474-4222
Fax: (702) 474-1320
Will@whbesq.com
Counsel for Plaintiffs

POINTS AND AUTHORITIES

A. Introduction

Currently, the order entered on April 5, 2011 (the "Order"; **Ex. 1**)) dismisses all of Plaintiffs' claims under 42 U.S.C. § 1983 ("1983"), including the right to declaratory and injunctive relief.

Now, Plaintiffs seek clarification from the Court that it did not dismiss all of Plaintiffs' claims under § 1983 but rather only Plaintiffs' claim for damages and as such, Plaintiffs are still entitled to seek declaratory and injunctive relief under § 1983.

B. Factual Background

Originally, Plaintiffs sued Defendants on the grounds that the Live Entertainment Tax (NRS Chapter 368A; the "LET") is unconstitutional, essentially because it constitutes an impermissible tax on rights guaranteed by the First Amendment of the United States Constitution.

In part, Plaintiffs argued that because the LET was unconstitutional the resulting deprivation of rights, liberties, or immunities secured by the Constitution and laws authorized Plaintiffs to sue and to seek relief under § 1983 at law, "in equity, or other proper proceeding for redress ..."[1] *See* Amended Complaint ¶ 3 (**Ex. 2**).

For relief, Plaintiffs requested declaratory and injunctive relief, damages under § 1983, and costs and attorney fees under 42 U.S.C. § 1988. *See* Amended Complaint ¶¶ 51 – 68 (**Ex. 2**).

1. The State Moved to Dismiss Plaintiffs' § 1983 Claim for Damages Only.

On January 25, 2011, the State moved, among other things, to dismiss Plaintiffs' claims for damages under § 1983 on the sole basis that "[t]he State, its agencies, and its officials acting in their official capacities, are not 'persons' within the meaning of 1983." *See* State's Motion at 24:2-4. (**Ex. 3**)

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[1] Plaintiffs also asserted that the LET violated Article I, §§ 9, and 10 of the Nevada Constitution, as well as the First and Fourteenth Amendment to the United States Constitution. *See* Amended Complaint ¶ 5 (**Ex. 2**).

In support, the State relied exclusively on *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 109 S.Ct. 2304, 2312 (1989). *See* Id. At 24:3-4.

At the hearing, Plaintiffs' counsel agreed that Plaintiffs could not recover damages under § 1983, conceding to the Court that with respect to damages, "well, when they're right, they're right."

However, the fact that Plaintiffs may not recover damages under 1983 does not mean Plaintiffs are not entitled to an appropriate remedy under §1983, e.g., declaratory and/or injunctive relief. This is precisely what Plaintiffs seek, and precisely what they argued in response.

2. Plaintiffs Clarified that—Regardless of Damages—Plaintiffs Seek, and Are Entitled to, Injunctive Relief under 1983.

In their Opposition, Plaintiffs responded to the State's request to dismiss the 1983 damages claim as follows:

> First, the [State] misreads *Will*. It clearly holds that 'a state official acting in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' *Will*, 491 U.S. at 71 n.10 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); and *Ex Parte Young*, 209 U.S. 123, 159-160 (1908)). Here, of course, Plaintiffs seek injunctive relief, and have sued the [State Department of Taxation] official Michelle Jacobs in her official capacity in order to be able to obtain just such judicial relief.
>
> Second, however, case law *does* support a plaintiff's right to bring suit under [1983] against a state agency. For example, in *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1073 (6th Cir. 1994), the plaintiff filed a civil rights action under § 1983 against the Michigan Liquor Control Commission, ***a state agency***, challenging the revocation of its liquor license if it presented topless dancing. The court held that the plaintiff *did* have standing to so challenge the regulations of the state agency. *Id.*
>
> Plaintiffs' Opposition at 39-40 (**Ex. 4**).

Therefore, Plaintiffs clarified that regardless of damages they were still entitled to, and were in fact seeking, injunctive relief under §1983.

In sum, the State only sought dismissal of Plaintiffs' claim for damages under 1983, not to prospectively deny Plaintiffs any remedy under 1983, including injunctive relief. But, the Order appears to do just this. The Order reads:

"…all claims asserted under 42 U.S.C. 1983 are hereby DISMISSED." Order at 2:24-25 (**Ex. 1**).

Accordingly, the Court must clarify that while Plaintiffs are not entitled to damages under §1983 they may still seek injunctive relief under §1983.

C. The Court Should Reconsider Its Order and Clarify that Plaintiffs Are Entitled to Seek Injunctive Relief Under 1983.

This Court has inherent authority to reconsider its prior orders, and for sufficient cause, may amend, correct, resettle, modify, or vacate an order previously made and entered. *See, e.g., Trail v. Faretto*, 91 Nev. 401 (1975).

Rehearings are appropriate when substantially different evidence is subsequently introduced or the decision is clearly erroneous. *See Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737 (1997). A motion for rehearing should be granted in instances where new issues of fact or law are raised supporting a ruling contrary to the ruling already reached. *See Moore v. City of Las Vegas*, 92 Nev. 402 (1976).

Here, sufficient cause exists for the Court to amend, correct, resettle, modify, or vacate its Order, as it is overly broad, grants more relief than sought, overstates the Court's actual ruling, and ultimately will have the likely unforeseen consequence of preventing the Court from its power and duty to fashion relief that Plaintiffs are entitled to seek under §1983.

To begin, the propriety of claims brought under §1983 is not to be determined solely on the basis of relief sought. *See Courtney v. Reeves*, 635 F.2d 326 (5th Cir., 1981). Thus, here, the propriety of

Plaintiffs' §1983 claims should not be determined solely on the basis that Plaintiffs only specifically sought damages, or, that such damages are not appropriate.

Rather, it is well settled that where federal rights have been invaded, and §1983 provides for a general right to sue for such, courts may use any available remedy, and should adjust the remedy to grant the appropriate relief. *See, e.g., Donahue v. Staunton*, 93 S. Ct. 1419, 410 U.S. 955 (1972); *see also, Ute Indian Tribe of Uintah and Quray Reservation v. Probst*, 91 S. Ct. 189, 400 U.S. 926 (1970).

Here, the State has never argued that Plaintiffs are not entitled to <u>any</u> relief under §1983; rather, it has simply asserted that the remedy of damages is not available under §1983 (a fact Plaintiffs' counsel conceded). Further, as Plaintiffs explained in their Opposition (excerpted above): (1) a state official in her official capacity <u>is</u> a person for §1983 purposes when, as here, a plaintiff seeks injunctive relief; and (2) a plaintiff <u>may</u> sue a state agency under §1983 to challenge its regulations, again as here.

Therefore, the Order grants relief that (1) the State did not request (i.e., precluding §1983 declaratory and injunctive relief); and (2) in any event, is clearly erroneous under the law.

As such, the Court should reconsider and amend its Order to clarify that Plaintiffs are entitled to seek injunctive relief under §1983.

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///

D. CONCLUSION

In conclusion, and for the reasons discussed above, the Court should reconsider its Order and clarify that, while Plaintiffs are not entitled to money damages under 1983, they may still seek declaratory and injunctive relief under §1983.

Dated this 26 day of April, 2011

Respectfully submitted,

BY: _____

WILLIAM H. BROWN, ESQ. (7623)
TURCO & DRASKOVICH
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Phone: (702) 474-4222
Fax: (702) 474-1320
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

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2011, service of the forgoing:

MOTION TO RECONSIDER AND CLARIFY ORDER

was made this date by e-serving, and by faxing a true and correct copy of same to the address listed below:

David J. Pope, Esq.
Blake A. Doerr, Esq.
Vivienne Rakowsky, Esq.
Nevada Attorney General
555 E. Washington Ave., Ste. 3900
LV, NV 89101
Fax: 486-3416
Counsel for Defendants

An employee of
TURCO & DRASKOVICH

EXHIBIT “1”

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CLERK OF THE COURT

ORDR
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

Attorney General's Office
555 E. Washington, Suite 3900
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DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **ORDER**

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K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic 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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the as Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983 came on for hearing on March 15, 2011;

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

The Court having considered the papers and pleadings as well as the oral argument hereby orders:

Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the as Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983 is GRANTED IN PART and DENIED IN PART.

With regard to all of Plaintiffs' claims asserted under 42 U.S.C. 1983, Defendants' motion to dismiss is GRANTED and all claims asserted under 42 U.S.C. 1983 are hereby DISMISSED;

With regard to Defendants' motion to dismiss and/or for partial summary judgment on the basis that Case 1 should be limited to a facial challenge because none of the Case 1 Plaintiffs exhausted administrative remedies before commencing Case 1 and therefore Case

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1 should not contain an "as applied" challenge, Defendants' motion is GRANTED IN PART
2 AND DENIED IN PART as the claim for declaratory relief in Case 1 is now consolidated with
3 the claim for declaratory relief in Case 2 (these claims for declaratory relief are not the claims
4 for declaratory relief asserted under 42 U.S.C. 1983, as all claims asserted under 42 U.S.C.
5 1983 have been dismissed as previously indicated in this order);
6 With regard to the remainder of Defendants' motion to dismiss and/or for partial
7 summary judgment, Defendant's motion is DENIED WITHOUT PREJUDICE.
8 IT IS SO ORDERED.
9 DATED this 5th day of April, 2011.
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11
12
13 Respectfully submitted:
14 CATHERINE CORTEZ MASTO
Attorney General
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16 By: Becka Dalton for
David J. Pope
17 Senior Deputy Attorney General
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DISTRICT COURT JUDGE

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

EXHIBIT “2”

ACOM
BRADLEY J. SHAFER
Michigan Bar No. P36604
Shafer & Associates, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
bjshafer@acd.net
Attorneys for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT

CLARK COUNTY, NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *Deja Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *Little Darlings*, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, L.L.C. d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores* **Plaintiffs,** **v.** **NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,** **Defendants.**	**CASE NO. A533273** **DEPT. NO. IX** **VERIFIED AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY FEES AND COSTS**

NOW COMES Plaintiffs, 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* (collectively referred to herein as the "Plaintiffs"), by and through their attorneys, and state for their complaint against Defendants Nevada Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michelle Jacobs in her official capacity only (collectively referred to herein as the "Defendants"), as follows:

INTRODUCTION

1. This is a civil action wherein Plaintiffs pray for a declaratory judgment, damages, attorney fees and costs, as well as both a preliminary and permanent injunction to restrain and enjoin the Defendants, as well as their agents, employees and representatives, from acting under color of state law to deprive the Plaintiffs of their rights, privileges and immunities secured to them by the Constitution of the State of Nevada and the Constitution of the United States. Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face and as applied to Plaintiffs, and to enjoin, all aspects of 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"), as being an impermissible tax on constitutionally protected expression. A copy of that statute is attached hereto as Ex. "A," and is incorporated herein by reference.

JURISDICTION AND VENUE

2. 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, and 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.

3. The federal statutory law which further authorizes the institution of this suit is 42 U.S.C. § 1983, which provides, in part:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

4. Authorization for the request of attorney's fees and costs is conferred by 42 U.S.C. § 1988.

5. This suit is authorized by law to redress deprivations under color of state law of rights, privileges, and immunities secured by Article I, §§ 9 and 10, of the Nevada Constitution, as well as the First and Fourteenth Amendments to the United States Constitution, and for declaratory and injunctive relief.

6. Venue resides in this Court and is proper and appropriate as the various acts complained of occurred, and the Defendants are located, within Clark County in the State of Nevada.

PARTIES

7. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

8. Plaintiff, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu Showgirls* ("*Deja Vu*"), 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, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings* ("*Little Darlings*"), 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.

10. 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.

11. 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.

12. 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.

13. 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

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.

48. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S. § 368A.250, which provides that if the Department determines that any tax has been "erroneously or illegally collected or computed," the 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 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.

49. Chapter 368A provides, at N.R.S. § 368A.280(1), that "[n]o 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." Accordingly, Plaintiffs have no ability to seek injunctive relief in state court against collection of the Live Entertainment Tax.

50. Chapter 368A provides, at N.R.S. § 368A.290(1), that the 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 Department may be appealed to the Nevada Tax Commission.

COUNT I - DECLARATORY RELIEF

51. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

52. Chapter 368A is unconstitutional on its face and as applied to Plaintiffs under Article I, §§ 9 and 10 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 substantive due process rights of the Plaintiffs and others;

j. 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;

k. It is an impermissible direct tax on constitutionally protected freedoms;

l. It impermissibly requires a person or business to pay for the right to exercise a right guaranteed by the Nevada and United States Constitutions;

m. It was enacted upon an insufficient record and is not justified on any factual or legal ground; and

n. It violates the separation of powers doctrine.

53. Because the Live Entertainment Tax is an impermissible and/or unconstitutional direct tax upon expression protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment 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).

54. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendants, and should do so here.

55. 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).

56. 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 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 in the past.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court declare the Live Entertainment Tax under Chapter 368A unconstitutional on its face and as applied to Plaintiffs; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment 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.

COUNT II - INJUNCTIVE RELIEF

57. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

58. 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.

59. 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.

60. The public interest weighs in favor of preventing deprivation of constitutional rights, and is always served by enjoining an unconstitutional law.

61. 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.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter both a preliminary and permanent enjoining 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. Further, Plaintiffs respectfully request that this Honorable Court enter a permanent injunction ordering Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs 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, together with interest as required by N.R.S. § 368A.310.

COUNT III - DAMAGES AGAINST DEFENDANTS

62. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

63. All of the actions of Defendants, by and through their agents, employees and representatives, have been undertaken, and will be undertaken, in the course and scope of official duties and under the color of state law.

64. As a direct and proximate cause of the application and/or enforcement of Chapter 368A by Defendants against the Plaintiffs, the Plaintiffs have incurred and suffered significant and substantial damages, and will in the future suffer significant and substantial damages, including, but not limited to having to pay an illegal and/or unconstitutional tax; loss of constitutional rights; lost business profits; and having to incur costs and attorney fees in seeking protection of their constitutional rights asserted herein.

65. Any actions by Defendants to enforce and/or apply Chapter 368A against the Plaintiffs have been and will be made under color of state law, and will unquestionably result in the deprivation of Plaintiffs' constitutional and civil rights as set forth above so as to render Defendants liable for these losses pursuant to 42 U.S.C. §1983.

66. Pursuant to 42 U.S.C. §1983 and common law, Plaintiffs are entitled to an award of damages for the injuries set forth above.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to enter an award of damages against Defendants and in favor of the Plaintiffs in amounts to which the Plaintiffs are found to be entitled.

COUNT IV - ATTORNEY FEES AND COSTS

67. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

68. Because Chapter 368A is violative of the Nevada Constitution and the United States Constitution on its face and as applied to Plaintiffs, and because its application and/or enforcement has and will deprive the Plaintiffs of their fundamental state and federal constitutional rights, Plaintiffs are entitled, as prevailing parties, to an award of costs and attorney fees incurred herein pursuant to 42 U.S.C. § 1988.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to award costs and

Respectfully submitted,

SHAFER & ASSOCIATES, P.C.

Dated: January 26, 2009

By: _____

BRADLEY J. SHAFER (P36604)
Attorney for Plaintiffs
3800 Capital City Boulevard, Suite 2
Lansing, Michigan 48906
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
Admitted Pro Hac Vice

EXHIBIT "3"

MPSJ
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983

Date:_____
Time:_____

. . .

. . .

. . .

pursuant to NRS 368A.260 alleging that the LET is unconstitutional, that the requests for refund were denied by the Department, and that the NTC affirmed the denials of the requested refunds. Case 2 Amended Complaint, pp. 8-9, paras. 34-38. The Case 2 Plaintiffs essentially request a judicial determination that the LET is unconstitutional and that they are entitled to a refund. Amended Complaint, pp. 16 -17, paras. A-E. The issues raised by the Case 2 Plaintiffs in their Amended Complaint were raised and adjudicated in the administrative proceedings and the hearing presided over by the NTC. *See* NTC's Decision attached hereto as Ex. "A". Because the Case 2 Plaintiffs' issues raised in the Amended Complaint were raised by the claims for refund filed by the Case 2 Plaintiffs and adjudicated by the NTC, they were actually and necessarily litigated in the administrative proceedings below. The NTC's decision is final and the Case 2 Plaintiffs should not be permitted to re-litigate matters that have been adjudicated and finally decided.

D. THE CASE 1 CLAIM FOR DAMAGES PURSUANT TO 42 U.S.C. 1983 MUST BE DISMISSED.

The Case 1 claim for damages pursuant to 42 U.S.C. 1983 must be dismissed because none of the Defendants are "persons" for purposes of the statute. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated; and, (2) that the

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

violation was committed by a person acting under the color of state law. *West v. Atkins,* 487 U.S. 42, 48 (1988). The State, its agencies, and its officials acting in their official capacities, are not "persons" within the meaning of § 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989).

The Department, the NTC, the State Board of Examiners and Michelle Jacobs, in her official capacity only, were sued under Section 1983 for allegedly enforcing an unconstitutional tax statute. However, none of the parties named as Defendants are "persons" within the meaning of Section 1983.

E. THE ONLY REMAINING ISSUE IS THE "FACIAL CHALLENGE" REGARDING THE CONSTITUTIONALITY OF THE LET.

The six Case 2 Plaintiffs exhausted their administrative remedies but failed to pursue a petition for judicial review. Because they failed to timely file a petition for judicial review, the Case 2 Plaintiffs allowed the NTC's decision to become final and lost the ability to have this court review the NTC's decision which affirmed the Department's denial of the refund claims. In addition, by abandoning the statutory right to judicial review, the Case 2 Plaintiffs lost the ability to pursue an "as applied" challenge regarding the constitutionality of the LET. *See Malecon Tobacco, LLC, et al. v. Department of Taxation,* 118 Nev. 837, 841, 59 P.3d 474 (2002) (holding, "we conclude that the Taxpayers must exhaust their administrative remedies *before filing a complaint* in the district court. Since they did not exhaust their administrative remedies, the district court properly dismissed the complaint for lack of subject matter jurisdiction."); *see also Public Serv. Comm'n of Nev. v. Eighth Judicial Dist. Court of the State of Nev., et al.,* 107 Nev. 680, 684-685, 818 P.2 396, 399 (1991) (providing, "'[i]t is well-settled that courts will not entertain a declaratory judgment action if there is pending, at the time of the commencement of the action for declaratory relief, another action or proceeding to which the same persons are parties and in which the same issues may be adjudicated.'" (citation omitted)). In the *Public Serv. Comm'n* case, the Nevada Supreme Court further stated:

> Further, a court will refuse to consider a complaint for declaratory relief if a special statutory remedy has been provided. (citation omitted). A separate action for declaratory judgment is not an

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

EXHIBIT "4"

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

BRADLEY J. SHAFER
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

PLAINTIFFS' OPPOSITION TO NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTARTINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983

Date of Hearing: March 15, 2011
Time of Hearing: 9:00 a.m.

However, as discussed above, Chapter 368A was amended in ***2005***, with those amendments serving as additional substantiation of the targeting and gerrymandering of the Live Entertainment Tax.

Neither res judicata nor collateral estoppel apply when there has been a change in the law. *See, e.g.,* **Commissioner of Internal Revenue v. Sunnen**, 333 U.S. 591, 600 (1948); **B.N. Spradling v. City of Tulsa**, 198 F.3d 1219, 1223 (10th Cir. 2000); **Southwest Exploration Co. v. Riddell**, 362 F.2d 833, 836 (9th Cir. 1966) (judicial decisions dealing with "tax years other than those presently under consideration, would not operate under the doctrine of res judicata to prevent the relitigating of the question of liability with respect to a deficiency for such other years. ***Each year is the origin of a new liability and a new separate cause of action***") (emphasis added) (citing **Sunnen**, 333 U.S. at 598). In fact, as the Ninth Circuit has stated, "[c]ollateral estoppel itself is applied ***more strictly in tax cases than others***." **Parker v. Westover**, 221 F.2d 603, 605 (9th Cir. 1955) (emphasis added).

VI. THE CASE 1 CLAIMS PURSUANT TO 42 U.S.C. 1983 SHOULD NOT BE DISMISSED.

The Department relies on **Will v. Michigan State Dep't of State Police**, 491 U.S. 58, 71 (1989), in alleging that the Plaintiffs have failed to state a claim under 42 U.S.C. § 1983 for the reason that the "States, its agencies, and its officials acting in their official capacities" are not "persons" under Section 1983 of Title 42 of the United States Code. Dept. Mtn., pp. 23-24. First, the Department misreads **Will**. It clearly holds that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" **Will**, 491 U.S. at 71 n.10 (citing **Kentucky v. Graham**, 473 U.S. 159, 167 n.14 (1985); and **Ex Parte Young**, 209 U.S. 123, 159-160 (1908)). Here, of course, Plaintiffs seek injunctive relief, and

have sued Department official Michelle Jacobs in her official capacity in order to be able to obtain just such judicial relief.

Second, however, case law *does* support a plaintiff's right to bring suit under 42 U.S.C. § 1983 against a state agency. For example, in **G&V Lounge, Inc. v. Michigan Liquor Control Comm'n**, 23 F.3d 1071, 1073 (6th Cir. 1994), the plaintiff filed a civil rights action under §1983 against the Michigan Liquor Control Commission, ***a state agency***, challenging the revocation of its liquor license if it presented topless dancing. The court held that the plaintiff *did* have standing to so challenge the regulations of the state agency. **Id.**

VII. THE "FACIAL CHALLENGE" REGARDING THE CONSTITUTIONALITY OF THE LET IS NOT THE ONLY REMAINING ISSUE BEFORE THIS COURT.

The Department claims that the "six Case 2 Plaintiffs exhausted their administrative remedies but failed to pursue a petition for judicial review. Because they failed to timely file a petition for judicial review, the Case 2 Plaintiffs allowed the NTC's decision to become final and lost the ability to have this court review the NTC's decision which affirmed the Department's denial of the refund claims." Dept. Mtn., p. 24. In addition to its continued contention that Plaintiffs were limited to a judicial review action and failed to avail themselves of that option, the majority of the Department's argument that only the "facial challenge" remains properly before this Court involves its assertion that Plaintiffs did not exhaust their administrative remedies. Dept. Mtn., pp. 24-27.

The Department argues that Plaintiffs had not exhausted their administrative remedies at the time they filed their complaint and, therefore, cannot bring an "as applied" challenge to the LET. This is basically the same argument that the Defendants raised before Judge Togliatti in Defendants' Motion to Dismiss, p. 5-8, filed on April 18, 2008. While Plaintiffs do not wish

RSPN
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI

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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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER

The Defendants do not oppose the clarification of the Court's order and believe the same can be done without a hearing. Defendants argued for dismissal of all 1983 claims which is in line with *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 515 U.S. 582, 115 S.Ct. 2351 (1995), a copy of which is attached hereto as *Exhibit A*. See also Excerpts from Defendant's Reply attached hereto as *Exhibit B*. In *National Private Truck*, the United States Supreme Court stated:

> We simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists.
>
> . . .
>
> Of course, nothing we say prevents a State from empowering its own courts to issue injunctions and declaratory judgments even when a legal remedy exists. Absent a valid federal prohibition, state courts are free to issue injunctions and declaratory judgments under *state* law. When a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983, however, state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy.

Id. at 591-592.

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

The order in question was drafted with the belief that all 1983 claims had been dismissed. The draft order was then provided to Plaintiffs' counsel who were given approximately a week to respond with any changes. See e-mail attached hereto as *Exhibit C*. Having received no response from Plaintiffs' counsel, the order was submitted to this Court for signature. Plaintiffs' counsel did not contact Defendants' counsel until after the order had been signed and filed with a notice of entry of order. Should this Court clarify that the order was limited to dismissal of the 1983 damages claims, Defendants' counsel will submit a draft order indicating the same.

DATED this 27th day of April, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3426
F: (702) 486-3416

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 27th day of April, 2011, I served the **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER,** via facsimile and by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
Turco & Draskovich
815 S. Casino Center Blvd.
Las Vegas, NV 89101
Fax: (702) 474-1320

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. 2
Lansing, MI 48906-2110
Fax: (517) 886-6565

/s/ Debra Turman
An employee of Office of Attorney General

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

Exhibit A

West Reporter Image (PDF)

515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509, 63 USLW 4632

Briefs and Other Related Documents
Judges and Attorneys
Oral Argument Transcripts with Streaming Media

Supreme Court of the United States
NATIONAL PRIVATE TRUCK COUNCIL, INC., et al., Petitioners
v.
OKLAHOMA TAX COMMISSION et al.

No. 94-688.
Argued April 18, 1995.
Decided June 19, 1995.

Class action was brought by and on behalf of nonresident motor carriers challenging constitutionality of retaliatory/third-tier taxes imposed on non-Oklahoma residents operating foreign-based motor carriers. The District Court, Oklahoma County, John M. Amick, J., upheld constitutionality of challenged taxes, and dismissed claims, including claim under § 1983. The Supreme Court, 806 P.2d 598, affirmed in part and reversed in part. The United States Supreme Court, 111 S.Ct. 2882, granted certiorari, vacated judgment and remanded. On remand, the Oklahoma Supreme Court, 879 P.2d 137, reinstated judgment. Certiorari was granted. The Supreme Court, Justice Thomas, held that: (1) since there was adequate legal remedy, Oklahoma courts could not award either declaratory or injunctive relief against state taxes under § 1983, and (2) since no relief could be awarded pursuant to § 1983, no attorney's fees could be awarded under § 1988.

Affirmed.

Justice Kennedy concurred and filed opinion.

West Headnotes

[1] KeyCite Citing References for this Headnote

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1041 k. Contracts, Trade, and Commercial Activity. Most Cited Cases
(Formerly 78k108.1)

One of rights, privileges, or immunities protected by § 1983 was right to be free from state action that violates dormant commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; 42 U.S.C.A. § 1983.

[2] KeyCite Citing References for this Headnote

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases

Principles of federalism and comity generally counsel that courts should adopt hands-off approach with respect to state tax administration.

[3] KeyCite Citing References for this Headnote

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases

Tax Injunction Act itself precluded courts from awarding declaratory judgments regarding constitutionality of state taxes. 28 U.S.C.A. § 1341.

[4] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4135 k. In General. Most Cited Cases
(Formerly 92k283)

States are afforded great flexibility in satisfying requirements of due process in field of taxation; as long as state law provides clear and certain remedy, states may determine whether to provide predeprivation process or instead to afford postdeprivation relief. U.S.C.A. Const.Amend. 14.

[5] KeyCite Citing References for this Headnote

78 Civil Rights
78III Federal Remedies in General
78k1314 Adequacy, Availability, and Exhaustion of State or Local Remedies
78k1321 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k209)

Section 1983 does not call for either federal or state courts to award injunction and declaratory relief in state tax cases when adequate legal remedy exists. 42 U.S.C.A. § 1983.

[6] KeyCite Citing References for this Headnote

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak213 Licenses and Taxes
118Ak214 k. Liability for Tax in General. Most Cited Cases

Oklahoma offered adequate remedy in form of refunds for unlawful imposition of third-structure taxes against certain nonresident motor carriers and, therefore, Oklahoma courts could not award either declaratory or injunctive relief against state taxes under § 1983. 42 U.S.C.A. § 1983.

[7] KeyCite Citing References for this Headnote

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions

170Bk27 k. State Taxes. Most Cited Cases

Tax Injunction Act reflects congressional concern with federal court interference with state taxation. 28 U.S.C.A. § 1341.

[8] KeyCite Citing References for this Headnote

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak213 Licenses and Taxes
118Ak213.1 k. In General. Most Cited Cases

There may be extraordinary circumstances under which injunctive or declaratory relief is available in state tax case even when legal remedy exists.

[9] KeyCite Citing References for this Headnote

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk7 k. Equity Jurisdiction. Most Cited Cases

Multiplicity-of-suits rationale for permitting equitable relief in state tax case which has available legal remedy extends only to those situations where there is real risk of numerous suits between same parties, involving same issues of law or fact.

[10] KeyCite Citing References for this Headnote

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak213 Licenses and Taxes
118Ak214 k. Liability for Tax in General. Most Cited Cases

If state court awards refund to taxpayer on ground that tax violates Federal Constitution, but state tax authorities continue to impose unconstitutional tax, injunctive and declaratory relief might then be appropriate; in such circumstance, legal remedy may be thought to be "inadequate."

[11] KeyCite Citing References for this Headnote

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak213 Licenses and Taxes
118Ak213.1 k. In General. Most Cited Cases

Absent valid federal prohibition, state courts are free to issue injunctions and declaratory judgments in state tax cases under state law.

[12] KeyCite Citing References for this Headnote

78 Civil Rights
78III Federal Remedies in General

78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
(Formerly 78k296)

When no relief can be awarded pursuant to § 1983, no attorney's fees can be awarded under § 1988. 42 U.S.C.A. §§ 1983, 1988.

****2352** Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***582** In the Oklahoma state courts, petitioners successfully challenged certain state taxes as violating the "dormant" Commerce Clause. The Oklahoma Supreme Court ordered respondents to award refunds pursuant to state law, but declined to award declaratory or injunctive relief under 42 U.S.C. § 1983 or attorney's fees under § 1988. The court reasoned that because adequate remedies existed under state law, the Tax Injunction Act would have precluded petitioners from seeking an injunction in federal court; although that Act does not apply to state courts, the Oklahoma Supreme Court invoked the principle of "intrastate uniformity" to conclude that petitioners were not entitled to injunctive or declaratory relief under § 1983.

Held:

1. Section 1983 provides no basis for courts to issue injunctive or declaratory relief in state tax cases when there is an adequate remedy at law. This Court has long held that courts should adopt a hands-off approach with respect to state tax administration. *Dows v. Chicago*, 11 Wall. 108, 110, 20 L.Ed. 65. In passing § 1983, Congress did ****2353** not limit this strong background principle with state taxation. Construing § 1983 with this principle of noninterference in mind, the Court concludes that § 1983 does not call for courts-whether federal or state-to disrupt state tax administration by issuing injunctive or declaratory relief when state law furnishes an adequate legal remedy. Pp. 2355-2357.

2. Since no relief could be awarded under § 1983, no attorney's fees can be awarded under § 1988. P. 2357.

879 P.2d 137 (Okl.1994), affirmed.

THOMAS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 2357.

Richard A. Allen, Washington, DC, for petitioners.

Stanley P. Johnston, Deputy Gen. Counsel, Oklahoma Tax Com'n, Oklahoma City, OK, for respondent.

***583** Justice THOMAS delivered the opinion of the Court.

In the Oklahoma state courts, petitioners successfully challenged certain Oklahoma taxes as violating the "dormant" Commerce Clause. Although the Oklahoma Supreme Court ordered respondents to award refunds pursuant to ***584** state law, it also held that petitioners were not entitled to declaratory or injunctive relief under Rev. Stat. § 1979, 42 U.S.C. § 1983, and, accordingly, that they could not obtain attorney's fees under 42 U.S.C. § 1988(b) (1988 ed., Supp. V). Petitioners argue that this holding violates the Supremacy Clause, U.S. Const., Art. VI, cl. 2. We affirm.

I

In 1983, Oklahoma imposed third-structure taxes against motor carriers with vehicles registered in any of 25 States.[FN1] It did so in order to retaliate against those States that had imposed discriminatory taxes against trucks registered in Oklahoma. In December 1984, petitioners filed a class action in an Oklahoma trial court, arguing that the taxes violated the dormant Commerce Clause and the Privileges and Immunities Clause of Art. IV, § 2, cl. 1. Pursuant to state law and § 1983, petitioners sought declaratory and injunctive relief as well as refunds of taxes paid. In addition, they sought attorney's fees under both state law and § 1988.[FN2]

FN1. Third-structure taxes are those nonregistration, nonfuel taxes that are neither apportioned nor prorated. One example of a third-structure tax is an axle tax, which imposes a flat charge based on the number of axles per vehicle. See *Private Truck Council v. Oklahoma Tax Comm'n*, 806 P.2d 598, 600-601 (Okla.1990).

FN2. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."Section 1988(b) provides:

"In any action or proceeding to enforce a provision of sectio[n] ... 1983 ... of this title ..., the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (1988 ed., Supp. V).

***585** The trial court upheld the constitutionality of the taxes, but the Oklahoma Supreme Court reversed and held that the taxes were invalid under our dormant Commerce Clause jurisprudence. *Private Truck Council v. Oklahoma Tax Comm'n*, 806 P.2d 598 (1990). The court awarded refunds under state law, but declined to award relief under § 1983 and declined to award attorney's fees under § 1988. In so ruling, it relied on *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (CA8), cert. denied, 469 U.S. 834, 105 S.Ct. 126, 83 L.Ed.2d 68 (1984), which held that § 1983 may not be used to secure remedies for dormant Commerce Clause violations.

[1] After the Oklahoma Supreme Court's decision, we held that one of the "rights, privileges or immunities" protected by ***2354** § 1983 was the right to be free from state action that violates the dormant Commerce Clause. See *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). Accordingly, we granted the taxpayers' petition for certiorari, vacated the judgment, and remanded the case for further consideration in light of *Dennis*. 501 U.S. 1247, 111 S.Ct. 2882, 115 L.Ed.2d 1048 (1991).

On remand, the Oklahoma Supreme Court once again held that petitioners were not entitled to relief under § 1983. 879 P.2d 137 (1994). The court noted that because adequate remedies existed under state law, the Tax Injunction Act, 28 U.S.C. § 1341, would have precluded petitioners from seeking an injunction in federal court. 879 P.2d, at 140-141. Although the Tax Injunction Act does not apply in state courts, the Oklahoma Supreme Court relied upon the principle of "intrastate uniformity" to conclude that a state court need not grant injunctive or declaratory relief under § 1983 when such remedies would not be available in federal court. *Id.*, at 141 (quoting *Felder v. Casey*, 487 U.S. 131, 153, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988)). We granted certiorari to resolve a conflict among the state courts as to whether, in tax cases, state courts must provide ***586** relief under § 1983 when adequate remedies exist under state law.[FN3]

FN3. Compare *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985) (States need not provide § 1983 remedy in state tax cases) and *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976) (same), with *Murtagh v. County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993), cert. denied (States must provide § 1983 remedy in state tax cases), 511 U.S. 1017, 114 S.Ct. 1397, 128 L.Ed.2d 71 (1994), and *Harlan Sprague Dawley, Inc. v. Indiana Dept. of State Revenue*, 583 N.E.2d 214 (Ind.Tax 1991) (same).

II

[2] [3] We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. Immediately prior to the enactment of § 1983, the Court articulated the reasons behind the reluctance to interfere:

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. Chicago*, 11 Wall. 108, 110, 20 L.Ed. 65 (1871).

Since the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the Tax Injunction Act in 1937 is one manifestation of this aversion. See 28 U.S.C. § 1341 (prohibiting federal courts from enjoining the collection of any state tax "where a plain, speedy and efficient remedy may be had in the courts of such State"). We subsequently relied upon the Act's spirit to extend the prohibition from injunctions to declaratory judgments regarding the constitutionality of state taxes. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Later, we held that the Tax Injunction Act itself precluded district courts from awarding such declaratory judgments. See ***587** *California v. Grace Brethren Church*, 457 U.S. 393, 407-411, 102 S.Ct. 2498, 2507-2509, 73 L.Ed.2d 93 (1982).

[4] The reluctance to interfere with state tax collection continued in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation. As long as state law provides a " 'clear and certain remedy,' " *id.*, at 51, 110 S.Ct., at 2258 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285, 32 S.Ct. 216, 217, 56 L.Ed. 436 (1912)), the States may determine whether to provide predeprivation process (*e.g.*, an injunction) or instead to afford postdeprivation relief (*e.g.*, a refund), 496 U.S., at 36-37, 110 S.Ct., at 2250-2251. See also *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100-102, 113 S.Ct. 2510, 2519, 125 L.Ed.2d 74 (1993). Of particular relevance to this case, *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 116, 102 S.Ct. 177, 186, 70 L.Ed.2d 271 (1981), held that because of principles of ****2355** comity and federalism, Congress never authorized federal courts to entertain damages actions under § 1983 against state taxes when state law furnishes an adequate legal remedy.

Seeking to overcome the longstanding federal reluctance to interfere with state taxation, petitioners invoke the Supremacy Clause and the straightforward proposition that it requires state courts to enforce federal law, here §§ 1983 and 1988. When they have jurisdiction, state courts have been compelled to provide federal remedies, notwithstanding the existence of less intrusive state-law remedies. See, *e.g.*, *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961). Accordingly, petitioners argue that we should require the Oklahoma Supreme Court to award equitable and declaratory relief under § 1983 and attorney's fees under § 1988.

For purposes of this case, we will assume without deciding that state courts generally must hear § 1983 suits.[FN4] But this ***588** does not necessarily mean that, having found a violation of federal law, state courts must award declaratory and injunctive relief under § 1983 in tax cases. Though federal

courts are obliged to hear § 1983 claims, it is clear that they may not award damages or declaratory or injunctive relief in state tax cases when an adequate state remedy exists. See *Fair Assessment, supra,* at 116, 102 S.Ct., at 186; *Great Lakes Dredge & Dock Co. v. Huffman, supra,* at 293, 63 S.Ct., at 1070; *Matthews v. Rodgers,* 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447 (1932); 28 U.S.C. § 1341.

> FN4. We have never held that state courts must entertain § 1983 suits. See *Martinez v. California,* 444 U.S. 277, 283, n. 7, 100 S.Ct. 553, 558, n. 7, 62 L.Ed.2d 481 (1980) ("We have never considered ... the question whether a State *must* entertain a claim under § 1983"). Cf. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 234, n. 7, 107 S.Ct. 1722, 1730, n. 7, 95 L.Ed.2d 209 (1987) (observing that whether state courts must assume jurisdiction over § 1983 claims involving state taxes "is not entirely clear").

As we explain more fully below, the background presumption that federal law generally will not interfere with administration of state taxes leads us to conclude that Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law. FN5

> FN5. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 68-69, 109 S.Ct. 2304, 2310-2311, 105 L.Ed.2d 45 (1989), already established that petitioners' claim for refunds against the State could not proceed under § 1983.

III

Petitioners correctly point out that the Tax Injunction Act does not prohibit state courts from entertaining § 1983 suits that seek to enjoin the collection of state taxes. Nor can a desire for "intrastate uniformity" permit state courts to refuse to award relief merely because a federal court could not grant such relief. As petitioners note, it was not until 1875 that Congress provided any kind of general federal-question jurisdiction to the lower federal courts. See *Palmore v. United States,* 411 U.S. 389, 401, 93 S.Ct. 1670, 1678, 36 L.Ed.2d 342 (1973). "Until that time, the state courts provided the only forum for vindicating many important federal claims." *Ibid.* Because of the Supremacy Clause, state courts could not have refused to hear cases arising under federal law merely to ensure "uniformity"between ***589*** state and federal courts located within a particular state.

[5] [6] In determining whether Congress has authorized state courts to issue injunctive and declaratory relief in state tax cases, we must interpret § 1983 in light of the strong background principle against federal interference with state taxation. Given this principle, we hold that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists. Petitioners do not dispute that Oklahoma has offered an adequate remedy in the form of refunds. Under these circumstances, the Oklahoma courts' denial of relief under § 1983 was consistent with the long line of precedent underscoring the federal reluctance to interfere with state taxation.

Our cases since *Dows* have uniformly concluded that federal courts cannot enjoin the collection of state taxes when a remedy at ****2356*** law is available. See, e.g., *Matthews v. Rodgers, supra,* at 525, 52 S.Ct., at 219 (a "scrupulous regard for the rightful independence of state governments ... and a proper reluctance to interfere by injunction with their fiscal operations, require that [injunctive] relief should be denied in every case where the asserted federal right may be preserved without it"); *Singer Sewing Machine Co. of N.J. v. Benedict,* 229 U.S. 481, 485, 33 S.Ct. 942, 943, 57 L.Ed. 1288 (1913); *Boise Artesian Hot & Cold Water Co. v. Boise City,* 213 U.S. 276, 282, 29 S.Ct. 426, 428, 53 L.Ed. 796 (1909). Until *Fair Assessment,* one could have construed these cases as concerning only the equitable powers of the federal courts. See 454 U.S., at 108-111, 102 S.Ct., at 182-184. In *Fair Assessment,* however, the principle of noninterference with state taxation led us to construe § 1983 narrowly. We held that § 1983 does not permit federal courts to award damages in state tax cases when state law provides an adequate remedy. See *id.,* at 116, 102 S.Ct., at 186. Although there was

much discussion of the limitations on equity power, that discussion was useful only insofar as it provided a background against which § 1983 must be interpreted. Indeed,because ***590** *Fair Assessment* considered whether damages were available under § 1983, the principle of equitable restraint that we discussed could have no direct application in that case.

In concluding that Congress did not authorize damages actions in state tax cases brought in federal court, we found no evidence that Congress intended § 1983 to overturn the principle of federalism invoked in *Dows* and subsequently followed by the courts. Construing § 1983, we held that the case was "controlled by principles articulated even before enactment of § 1983 and followed in later decisions." *Id.*, at 115, 102 S.Ct., at 185-186.

Just as *Fair Assessment* relied upon a background principle in interpreting § 1983 to preclude damages actions in tax cases brought in federal court, so we rely on the same principle in interpreting § 1983 to provide no basis for courts to award injunctive relief when an adequate legal remedy exists. Our interpretation is supported not only by the background principle of federal noninterference discussed in *Fair Assessment,* but also by the principles of equitable restraint discussed at length in that case. See *id.*, at 107-109, 102 S.Ct., at 181-183. Whether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this way.

[7] [8] [9] [10] To be sure, the Tax Injunction Act reflects the congressional concern with *federal* court interference with state taxation, see 28 U.S.C. § 1341, and there is no similar statute divesting state courts of the authority to enter an injunction under federal law when an adequate legal remedy exists. But this silence is irrelevant here, because we do not understand § 1983 to call for courts (whether federal or state) to enjoin the collection of state taxes when an adequate remedy is available under state law. Given the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation. See *Fair Assessment, supra,* at 110, 102 S.Ct., at 183 ("[T]he principleof ***591** comity which predated the Act [§ 1341] was not restricted by its passage"). After all, an injunction issued by a state court pursuant to § 1983 is just as disruptive as one entered by a federal court.

The availability of an adequate legal remedy renders a declaratory judgment unwarranted as well. In *Great Lakes,* we observed that "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes ... require a like restraint in the use of the declaratory judgment procedure." 319 U.S., at 299, 63 S.Ct., at 1073. The declaratory judgment procedure "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *ibid.,* and thus must be treated as being no less potentially disruptive than an injunction. See also *Grace Brethren Church,* 457 U.S., at 408, 102 S.Ct., at 2508 ("[T]here is little practical difference between injunctive and declaratory relief"). Cf. *Samuels v. Mackell,* 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (holding that prohibition ****2357** against enjoining pending state criminal proceedings applies to granting of declaratory relief). Declaratory relief in state tax cases might throw tax administration "into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law." *Perez v. Ledesma,* 401 U.S. 82, 128, n. 17, 91 S.Ct. 674, 699, n. 17, 27 L.Ed.2d 701 (1971) (Brennan, J., concurring in part and dissenting in part). We simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists.[FN6]

FN6. As our opinions reveal, there may be extraordinary circumstances under which injunctive or declaratory relief is available even when a legal remedy exists. For example, if the "enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, [or] throw a cloud upon the title," equity might be invoked. *Dows v. Chicago,* 11 Wall. 108, 110, 20 L.Ed. 65 (1871). As we have made clear, however, the multiplicity-of-suits rationale for permitting equitable relief extends only to those situations where there is a real risk of "numerous suits between the same parties, involving the same issues of law or fact." *Matthews v. Rodgers,* 284 U.S. 521, 530, 52 S.Ct. 217, 221, 76 L.Ed. 447 (1932). Thus, if a state court awards a refund to a taxpayer on the ground that the tax violates the Federal Constitution, but state tax authorities continue to impose the

unconstitutional tax, injunctive and declaratory relief might then be appropriate. In such circumstances, the remedy might be thought to be "inadequate."

[11] ☑ ***592** Of course, nothing we say prevents a State from empowering its own courts to issue injunctions and declaratory judgments even when a legal remedy exists. Absent a valid federal prohibition, state courts are free to issue injunctions and declaratory judgments under *state* law. When a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983, however, state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy.

[12] ☑ Because petitioners had an adequate legal remedy, the Oklahoma courts could not have awarded either declaratory or injunctive relief against the state taxes under § 1983. It follows that when no relief can be awarded pursuant to § 1983, no attorney's fees can be awarded under § 1988. Accordingly, the judgment of the Oklahoma Supreme Court is

Affirmed.

Justice KENNEDY, concurring.

One reason for difficulty in adapting 42 U.S.C. § 1983 to an action attacking a state tax is, in my view, that § 1983 was not intended for claims based on the Commerce Clause at all. See *Dennis v. Higgins*, 498 U.S. 439, 451, 111 S.Ct. 865, 872-873, 112 L.Ed.2d 969 (1991) (KENNEDY, J., dissenting) (violations of the Commerce Clause do not give rise to a cause of action under § 1983); see also *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 117, 110 S.Ct. 444, 454, 107 L.Ed.2d 420 (1989) (KENNEDY, J., dissenting) (a federal statute's pre-emptive effect does not secure a right within the meaning of § 1983). The Court has not adopted that position, however, and on that premise I agree with today's opinion and join it in full.

U.S.Okl.,1995.
National Private Truck Council, Inc. v. Oklahoma Tax Com'n
515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509, 63 USLW 4632

Briefs and Other Related Documents (Back to top)

- 1995 WL 215020 (Appellate Brief) PETITIONERS' REPLY BRIEF (Apr. 11, 1995)
- 1995 WL 130557 (Appellate Brief) BRIEF OF RESPONDENTS (Mar. 24, 1995)
- 1995 WL 89295 (Appellate Brief) BRIEF OF PETITIONERS (Feb. 21, 1995)
- 1994 WL 16042711 (Appellate Petition, Motion and Filing) Petitioners' Reply to Brief in Opposition (Dec. 13, 1994) Original Image of this Document (PDF)
- 1994 WL 16100167 (Appellate Petition, Motion and Filing) Respondents' Brief in Opposition (Nov. 23, 1994)
- 1994 WL 16042708 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari to the Supreme Court of Oklahoma (Oct. 17, 1994) Original Image of this Document with Appendix (PDF)

Judges and Attorneys (Back to top)

Judges | Attorneys

Judges

- **Amick, Hon. John M**
State of Oklahoma District Court, 7th Judicial District
Oklahoma City, Oklahoma 73102
Litigation History Report | Judicial Reversal Report | Profiler

- **Kennedy, Hon. Anthony M.**
Supreme Court of the United States

Washington, District of Columbia 20543
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Thomas, Hon. Clarence**
Supreme Court of the United States
Washington, District of Columbia 20543
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

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Attorneys

Attorneys for Petitioner

- **Allen, Richard A.**
Washington, District of Columbia 20006
Litigation History Report | Profiler

Oral Argument Transcripts with Streaming Media (Back to top)

- 1995 WL 243453 (Oral Argument) Oral Argument (Apr. 18, 1995)

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West Reporter Image (PDF)

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Exhibit B

ROPP
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3095
F: (702) 486-3416
dpope@ag.nv.gov
bdoerr@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Nevada Department of Taxation

E-Filed: March 7, 2011

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CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores. Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO DISMISS**

. . .

. . .

. . .

Thus, no further discovery is needed to oppose this motion for partial summary judgment and partial summary judgment must be granted as requested.

VII. Changes to the LET in 2005 do not effect the application of administrative res judicata or issue preclusion or claim preclusion.

Only the original Case 2 Plaintiffs are parties to the administrative record. Prior to amending the Case 2 Complaint to add Déjà vu and Little Darlings, the parties were the same in Case 2 as in the administrative record. Déjà vu and Little Darlings did not seek to intervene in the matter heard by the NTC and are not parties to the administrative record. Pursuant to 233B.130, the parties and issues are limited to those contained in the record. Thus, the original Case 2 Plaintiffs could have had the administrative decision and record reviewed pursuant to NRS 233B.135. As such, any issues not raised before the NTC cannot be raised on judicial review and any requests for refund that have not been denied by the NTC are not properly before the court. If Plaintiffs wanted Déjà vu and Little Darlings to be part of the administrative record, then Déjà vu and Little Darlings should have filed refund requests and appealed at the same time or joined the appeal. Because the original Case 2 Plaintiffs share the same parties and issues and they all filed refund requests for the same four months in 2004 and obtained a final decision from the NTC, changes to the LET in 2005 do not affect the application of administrative res judicata, issue preclusion or claim preclusion.

VIII. The 1983 claims must be dismissed or partial summary judgment must be granted.

The Defendants are not "persons" for purposes of 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989). In response to the instant motion, Plaintiffs, for the first time, allege to have made 11 U.S.C. 1983 claims for the purpose of obtaining injunctive relief rather than damages as pled in the complaints. Neither the original, or the renewed, motion for injunctive relief set forth a claim for injunctive relief based on 11 U.S.C. 1983. Defendants incorporate herein by reference all briefing and arguments submitted and made with regard to Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Renewed Motion for Preliminary Injunction.

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Contrary to Plaintiffs assertions, the *Will* case provides:

> The Michigan Court of Appeals vacated the judgment against the Department of State Police, holding that a State is not a person under § 1983, but remanded the case for determination of the possible immunity of the Director of State Police from liability for damages. The Michigan Supreme Court granted discretionary review and affirmed the Court of Appeals in part and reversed in part. *Smith v. Department of Pub. Health*, 428 Mich. 540, 410 N.W.2d 749 (1987). The Supreme Court agreed that the State itself is not a person under § 1983, but held that a state official acting in his or her official capacity also is not such a person.

491 U.S. 58, 61 (1989). The Court further stated:

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-166, 105 S.Ct. 3099, 3104-3105, 87 L.Ed.2d 114 (1985); *Monell, supra*, at 690, n. 55, 98 S.Ct., at 2035, n. 55.

In a footnote, the court noted:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S., at 167, n. 14, 105 S.Ct., at 3106, n. 14; *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454, 52 L.Ed. 714 (1908).

Id. at p. 71, fn. 10. In *Kentucky v. Graham*, 473 U.S. 159, 168, 105 S.Ct. 3099, 3107 (U.S.Ky., 1985.), the court stated:

> Section 1988 does not guarantee that lawyers will recover fees anytime their clients sue a government official in his personal capacity, with the governmental entity as ultimate insurer. Instead, fee liability runs with merits liability; if federal law does not make the government substantively liable on a *respondent superior* basis, the government similarly is not liable for fees on that basis under § 1988. Section 1988 simply does not create fee liability where merits liability is non-existent.

As previously stated, Plaintiff did not argue for injunctive relief pursuant to 11 U.S.C. 1983 either in the original motion for injunctive relief or its renewed motion for injunctive relief.

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Plaintiffs could not obtain an injunction in federal court because of the Tax Injunction Act. 28 U.S.C. §1341; see Opp., Exh. 6 and 7.

In *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 515 U.S. 582, 589-591, 115 S.Ct. 2351, 2355-2357 (1995), the U. S. Supreme Court held that state courts cannot award injunctive and declaratory relief, pursuant to 11 U.S.C. § 1983, in state tax cases when an adequate legal remedy exists. The Court stated:

> In determining whether Congress has authorized state courts to issue injunctive and declaratory relief in state tax cases, we must interpret § 1983 in light of the strong background principle against federal interference with state taxation. Given this principle, we hold that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists.
>
> . . .
>
> Whether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this way.
>
> . . .
>
> Given the strong background presumption against interference, with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation. See *Fair Assessment*, *supra*, at 110, 102 S.Ct., at 183 ("[T]he principle of ***591*** comity which predated the Act [§ 1341] was not restricted by its passage"). After all, an injunction issued by a state court pursuant to § 1983 is just as disruptive as one entered by a federal court.
>
> . . .
>
> The availability of an adequate legal remedy renders a declaratory judgment unwarranted as well. In *Great Lakes*, we observed that "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes ... require a like restraint in the use of the declaratory judgment procedure." 319 U.S., at 299, 63 S.Ct., at 1073. The declaratory judgment procedure "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *ibid.*, and thus must be treated as being no less potentially disruptive than an injunction. See also *Grace Brethren Church*, 457 U.S., at 408, 102 S.Ct., at 2508 ("[T]here is little practical difference between injunctive and

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> declaratory relief"). Cf. *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (holding that prohibition **2357 against enjoining pending state criminal proceedings applies to granting of declaratory relief). Declaratory relief in state tax cases might throw tax administration "into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law." *Perez v. Ledesma*, 401 U.S. 82, 128, n. 17, 91 S.Ct. 674, 699, n. 17, 27 L.Ed.2d 701 (1971) (Brennan, J., concurring in part and dissenting in part). We simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists.[FN6]

Id. (emphasis added). Though there are exceptions, they do not apply.

> As we have made clear, however, the multiplicity-of-suits rationale for permitting equitable relief extends only to those situations where there is a real risk of "numerous suits between the same parties, involving the same issues of law or fact." *Matthews v. Rodgers*, 284 U.S. 521, 530, 52 S.Ct. 217, 221, 76 L.Ed. 447 (1932). Thus, if a state court awards a refund to a taxpayer on the ground that the tax violates the Federal Constitution, but state tax authorities continue to impose the unconstitutional tax, injunctive and declaratory relief might then be appropriate.

Id. (emphasis added). Because a refund has not yet been awarded on the basis that the LET is unconstitutional, the Department has not continued to impose an unconstitutional tax. Moreover, an adequate legal remedy exists and Plaintiffs have not shown otherwise. For these reasons, neither injunctive nor declaratory relief can be awarded.

Consequently, all §1983 claims must be dismissed for failure to state a claim upon which relief can be granted or partial summary judgment must be granted because there are no genuine issues of material fact.

IX. The Plaintiffs are trying to have it both ways, not the Defendants.

Case 1 Plaintiffs did not exhaust administrative remedies prior to commencing Case 1. The original Case 2 Plaintiffs did exhaust administrative remedies prior to commencing Case 2. After amending the complaints in both cases, Case 1 and Case 2 have the same plaintiffs and the same issues. Plaintiffs cannot have two cases. *Public Serv. Comm'n of Nev. v. Eighth Judicial Dist. Court of the State of Nev., et al.*, 107 Nev. 680, 684-685, 818 P.2d 396, 399 (1991).

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Las Vegas, NV 89101

496 U.S. at 39, 110 S.Ct. at 2251. Should the original Case 2 Plaintiffs prevail on the "as applied" challenge through a judicial review, they'll get a refund pursuant to statute as they have exhausted administrative remedies.

WHEREFORE, the Defendants respectfully request:

(1) the dismissal of the 11 U.S.C. §1983 claims;

(2) the dismissal of the "as applied" challenge in Case 1 as the Case 1 Plaintiffs had not exhausted administrative remedies at the time the case was commenced;

(3) the dismissal of the "as applied" challenge in Case 2 as Case 2 was not filed as a judicial review in accordance with NRS 233B.130;

(4) the dismissal of the "as applied" challenge in Case 2 as the original Case 2 Plaintiffs received a final decision from the NTC following a hearing and a new claim for an "as applied" challenge in an independent action is barred by administrative res judicata, issue preclusion or claim preclusion and partial summary judgment must be granted;

(5) that, should the Case 2 "as applied" challenge be allowed to proceed as a judicial review pursuant to Ch. 233B of the NRS, it should proceed with only the original Case 2 Plaintiffs as Déjà vu and Little Darlings failed to exhaust administrative remedies and are not part of the administrative record as required by NRS 233B.130;

(6) dismissal of the amended complaint in Case 1; and,

(7) any other relief this court deems just and appropriate.

Respectfully submitted this 7th day of March, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: (702) 486-3426
F: (702) 486-3416

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

Exhibit C

Blake A. Doerr

From: Blake A. Doerr
Sent: Friday, March 25, 2011 12:27 PM
To: 'brad@bradshaferlaw.com'; 'Will Brown'
Cc: Vivienne Rakowsky; David J. Pope
Subject: Orders
Attachments: Order re MPSJ and MTD.pdf; Order Denying Renewed Motion for Preliminary Injunction.pdf

We have prepared the attached orders regarding the recent motions.
Please review.
If you have any comments or concerns with the language, let me know.
If I have not heard from you by April 1, I will submit them to the Court.
Thanks.
Blake

Blake A. Doerr, Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
bdoerr@ag.nv.gov
Phone: (702) 486-3095
Fax: (702) 486-3416