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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

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 AND TO DISMISS CASE 2 FOR FAILURE TO FILE A PETITION FOR JUDICIAL REVIEW OR ALTERNATIVELY FOR AN ORDER THAT CASE 2 PROCEED AS A JUDICIAL REVIEW

Date: August 23, 2011
Time: 9:00 a.m.

. . .

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

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COMES NOW, Defendants State of Nevada, ex rel. Department of Taxation (hereinafter "Department"), NEVADA TAX COMMISSION (hereinafter "NTC"), NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, by and through their attorneys, Catherine Cortez Masto, Attorney General, and David J. Pope, Senior Deputy Attorney General, Blake Doerr, Senior Deputy Attorney General and Vivienne Rakowsky, Deputy Attorney General, and hereby moves this Court for Order granting this 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 AND MOTION TO DISMISS CASE 2 FOR FAILURE TO FILE A PETITION FOR JUDICIAL REVIEW OR ALTERNATIVELY FOR AN ORDER THAT CASE 2 PROCEED AS A JUDICIAL REVIEW. This Motion is filed pursuant to NRCP Rule 12(b)(5) and 56 and is also based on all pleadings and papers on file herein, the attached Memorandum of Points and

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Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

DATED this 18th day of July, 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

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Partial Summary Judgment will be heard before the above-entitled Court on the 23rd day of August, 2011 at 9:00 a.m. in Department XI or as soon thereafter as counsel may be heard.

DATED this 18th day of July, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /S/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
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I. FACTS AND PROCEDURAL HISTORY

Plaintiffs are the above-captioned exotic dancing establishments. Defendants are the various agencies of the State of Nevada which administer and collect the Live Entertainment Tax (hereinafter "LET") and Michelle Jacobs in her official capacity only. As background, there have been two Complaints (A533273 and A554970) filed in this matter. The two cases were coordinated for discovery and scheduling purposes, but have not been consolidated.[1]

On December 19, 2006, the eight Plaintiffs in Case A533273[2] (hereinafter "Case 1 Plaintiffs") filed a Complaint seeking as their remedies: (1) an injunction enjoining the Defendants from enforcing the provisions of the LET; (2) a refund of all LET payments that have been "involuntarily" made; (3) a declaration that the LET is unconstitutional; and, (4) an award for damages, costs and fees pursuant to 42 U.S.C. §1983. Before filing the Complaint in District Court, none of the Case 1 Plaintiffs had ever requested a refund from the Department pursuant to NRS 368A.260 and therefore had not exhausted their administrative remedies as required NRS 368A.260, NRS 368A.290, Chapter 233B of the NRS and Nevada case law.

After filing the complaint in Case 1, six of the Plaintiffs requested refunds from the Department (hereinafter "Case 2 Plaintiffs") and pursued their administrative remedies. In January 2007, the six Case 2 Plaintiffs[3] requested a refund of the LET they remitted for January, February, March and April 2004. The Department denied the refund requests. The six Case 2 Plaintiffs appealed the Department's denial of the refunds to the NTC. Following a hearing over which it presided, the NTC upheld the Department's denials of the refunds and

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[1] Subsequent to the original filing of this motion, this court ordered the consolidation of the claims for declaratory relief (the order has not yet been filed).

[2] 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

[3] The six Case 2 Plaintiffs include: K-KEL, INC.; OLYMPUS GARDEN, INC.; SHAC, LLC; THE POWER COMPANY, INC.; D. WESTWOOD, INC.; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC. The other two Case 1 Plaintiffs, DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC, had not filed claims for a refund with the Department pursuant to NRS 368A.260.

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issued its final written decision dated October 12, 2007. *See* NTC Decision attached hereto as Ex. "A".

On January 9, 2008, the Case 2 Plaintiffs filed a Complaint initiating Case A554970. The Case 2 Plaintiffs allege in their Complaint that the LET, established by Chapter 368A of the Nevada Revised Statutes (hereinafter "NRS"), is an impermissible state tax and they request the refund of LET remitted for the tax periods at issue. The Case 2 Plaintiffs allege that the LET is an unconstitutional infringement by the State of Nevada on constitutionally protected expression. The Case 2 Plaintiffs seek as their remedy: (1) an injunction enjoining the Defendants from enforcing the provisions of the LET; (2) a refund of all LET payments which they remitted for January, February, March and April 2004; and (3) a declaration that the LET is unconstitutional.

On or about January 28, 2009, the eight Class 1 Plaintiffs filed an Amended Complaint in order to add an "as applied" cause of action to the "facial" challenge to the LET contained in the initial Complaint.

On or about December 19, 2010, the Case 2 Plaintiffs' filed an Amended Complaint enlarging the caption to include all eight Case 1 Plaintiffs without leave of the Court[4] and added an "as applied" cause of action in addition to the requested declaratory relief regarding the facial challenge and claim for refund in the initial Complaint. The matrix below provides details as to the entities and causes of action in both Complaints and Amended Complaints:

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[4] This may have been an inadvertent mistake on the part of the Plaintiffs, since two of the parties listed on the Amended Complaint have not exhausted administrative remedies (Little Darlings of Las Vegas, LLC and Déjà Vu Showgirls of Las Vegas, LLC) and the parties listed in the Amended Complaint list only the original six Case 2 Plaintiffs. *See* Case 2 Amended Complaint, pp. 3-4, paras. 6–11.

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	Déjà vu Showgirls of Las Vegas (Déjà Vu Showgirls)	Little Darlings of Las Vegas LLC (Little Darlings)	K-Kel,, Inc. (Spearmint Rhino)	Olympus Garden, Inc. (Olympic Garden)	Shac, LLC (Sapphires)	The Power Company (Crazy Horse Too)	D. Westwood, Inc. (Treasures)	D.I. Food & Beverage of Las Vegas, LLC (Scores)
A533273 (Case 1) Complaint December 19, 2006 (facial challenge to LET)	X	X	X	X	X	X	X	X
Declaratory Relief	X	X	X	X	X	X	X	X
Injunction	X	X	X	X	X	X	X	X
42 U.S.C. § 1983	X	X	X	X	X	X	X	X
Amended Complaint January 28, 2009 **A533273 (Case 1)** (added as applied to the facial challenge of LET)	X	X	X	X	X	X	X	X
A554970 (Case 2) Complaint for Refund January 9, 2008			X	X	X	X	X	X
Declaratory Relief			X	X	X	X	X	X
Refund			X	X	X	X	X	X
Injunctive Relief			X	X	X	X	X	X
Amended Complaint **A554970 (Case 2)** December 19, 2010 (Added as applied to the facial challenge)	X	X	X	X	X	X	X	X
Parties who have exhausted administrative remedies			X	X	X	X	X	X
Parties who have not exhausted administrative remedies	X	X						

By order dated January 13, 2011, the District Court denied Plaintiffs' Motion for Preliminary Injunction. *See* Order, attached hereto as Ex. "B".

The refund issues raised by the Case 2 Plaintiffs in their Complaint were adjudicated through administrative proceedings and are the subject of a final decision issued by the NTC following a hearing over which it presided. *See* NTC Decision attached hereto as Ex. "A".

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Although the NTC Decision is a final decision on the merits for purposes of judicial review pursuant to NRS 360.245, the Case 2 Plaintiffs failed to file a petition for judicial review pursuant to NRS 233B.130 but instead filed a complaint citing NRS 368A.290.

By filing a Complaint as opposed to a petition for judicial review, the Case 2 Plaintiffs initiated a civil law suit against the Defendants whereby they seek another tribunal's determination of the issues already determined by the final decision of the NTC regarding the constitutionality of the LET and whether Plaintiffs are entitled to a refund of the LET. In addition, the Case 2 Plaintiffs also failed to file a petition for judicial review pursuant to NRS 233B.130.

The District Court has previously denied the injunction because there is no irreparable harm. *See* Order, attached hereto as Ex. "B".

With respect to the "as applied" claims in both Amended Complaints, Case 1 cannot contain an "as applied" challenge and only the original six Case 2 Plaintiffs could be able to pursue an "as applied" claim in Case 2.

As will be set forth below, damages pursuant to 42 U.S.C. §1983 are not recoverable because none of the Defendants are "persons."[5]

Therefore, the remaining requests for relief are basically the same in both Case 1 and Case 2: (1) a request for a declaration that the LET is unconstitutional; and, (2) a request for refund.[6] As stated above, the refund issue has already been decided through the administrative process and is the subject of a final decision on the merits by the NTC.

Accordingly, the Defendants are moving for the following relief: (1) that the "as applied" remedies in the Amended Complaints in both Case 2 and Case 1 be dismissed because, pursuant to NRS 368A.290 and NRS 233B.130, the Plaintiffs' only remedy is a petition for judicial review governed by the standard set forth in NRS 233B.135 and the Plaintiffs failed to file a petition for judicial review of the final decision of the NTC; (2) that the refund claim

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[5] Subsequent to the original filing of thi motion, the court has ordered the dismissal of all 1983 damages claims (the order has not yet been filed).

[6] Déjà vu Showgirls of Las Vegas, LLC and Little Darlings of Las Vegas, LLC never requested a refund pursuant to NRS 368A.260 for the time periods at issue and are not parties to the administrative record.

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made by the six plaintiffs in Case 2 be dismissed either because a timely petition for judicial review was not filed or by application of administrative res judicata; (3) that Déjà Vu Showgirls of Las Vegas, LLC dba Déjà vu Showgirls and Little Darlings of Las Vegas, LLC dba Little Darlings be dismissed from the Amended Complaint in Case 2 because of their failure to exhaust administrative remedies; (4) that the damages claims under 42 U.S.C. §1983 be dismissed because none of the Defendants are "persons" for purposes of 42 U.S.C. §1983;[7] and, (5) that Case 1 be limited to a facial constitutional challenge.

Therefore, because the injunction issue and damages claims have already been decided, after all the improper claims are dismissed, the only possible remaining claim is a claim for a declaration that the LET is facially unconstitutional.

II. ARGUMENT

A. STANDARD OF REVIEW

With the exception of the facial challenge to the LET, the Plaintiffs have failed to state a claim upon which relief can be granted. NRCP 12(b)(5). With respect to the Plaintiffs' causes of action regarding the "as applied" claims and its claim for damages pursuant to 42 U.S.C. §1983, the standard of review which applies is NRCP 12(b)(5).

NRCP Rule 12(b), which states in relevant part, "every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (5) failure to state a claim upon which relief can be granted . . .."

When reviewing an order granting a motion to dismiss, the court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 19 (2001). Dismissal is appropriate where it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *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). The pleadings must be liberally

[7] All 42 U.S.C. § 1983 claims for damages have been dismissed by prior order of this court which has not yet been filed.

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construed, and all factual allegations in the complaint accepted as true. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). The Plaintiffs' "as applied" claims and its claim for damages pursuant to 42 U.S.C. §1983 should be dismissed because the Plaintiffs failed to state a claim upon which relief can be granted.

With respect to the refund claims, because the Complaints have been Answered, and because the Plaintiffs have taken part in the administrative process which is a part of this record, pursuant to NRCP 12(b)(5) the standard of review for the refund causes of action is either as a Motion to Dismiss or as a Motion for Partial Summary Judgment. NRCP 12(b); NRCP 56.

Summary judgment is the pre-trial procedure which allows adjudication of legal issues which are not dependant upon the determination of material factual issues. Pursuant to NRCP 56(c)'s express language, the Court must enter an order of summary judgment in favor of the moving party when there is no issue of material fact, and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists only where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438 (1993).

The burden of establishing the non-existence of a genuine issue of material fact is on the moving party. *Pacific Pools v. McClains Concrete*, 101 Nev. 557, 559, 706 P.2d 849, 851 (1985). However, this burden is discharged when the moving party demonstrates that there is an "absence of evidence supporting one or more of the prima facia elements of the non-moving party's case." *NGA v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163, 167 (1997), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). The evidence presented must be admissible, and the opposing party is "not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture." *Id.* at 1031, quoting *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 302, 662 P.2d 610 (1983).

By arguing that they need discovery, Plaintiffs have brought a need for factual determinations into the cases. As will be set forth below, constitutional challenges involving factual determinations constitute "as applied" challenges which require the exhaustion of

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administrative remedies pursuant to Nevada law. *Malecon Tobacco, LLC v. Department of Taxation*, 118 Nev. 837, 840-841, 59 P.3d 474 (2002). Déjà vu of Las Vegas and Little Darlings did not exhaust administrative remedies and cannot show otherwise. *See NTC* Decision attached hereto as Ex. "A". Because Déjà vu of Las Vegas and Little Darlings never exhausted their administrative remedies, they are not entitled to pursue an "as applied" challenge. In fact, none of the Case 1 Plaintiffs exhausted administrative remedies before commencing Case 1 and therefore Case 1 cannot contain an "as applied" challenge. The six Case 2 Plaintiffs who did request refunds and appealed the denials of their refund requests to the NTC and obtained a final decision from the NTC affirming those denials abandoned their statutorily provided means of judicial review when they failed to file timely petition for judicial review pursuant to NRS 233B.130. The original six Case 2 Plaintiffs cannot show that they filed a petition for judicial review. Thus, none of the Plaintiffs are entitled to an "as applied" challenge. Moreover, Case 2 must be dismissed by application of administrative res judicata.

All that possibly remains is the Case 1 claim for a declaration that the LET is facially unconstitutional.

B. <u>A PETITION FOR JUDICIAL REVIEW WAS THE PROPER MEANS OF BRINGING CASE 2 BEFORE THIS COURT</u>

Plaintiffs have chosen to file this particular action as a civil complaint, rather than a judicial review pursuant to NRS 233B.130. To the best of the Defendants' knowledge and belief, Plaintiffs did not file a petition for judicial review of the NTC's decision.[8]

Pursuant to the Nevada Rules of Civil Procedure a complaint requires that an answer be filed and ultimately that a trial on the merits is held, absent summary judgment. The foregoing procedure is inappropriate to the appeal of a state agency decision. NRS 233B.130 et. seq.; *see also Southern Cal. Edison v. First Judicial Dist. Court of the State of Nevada,* 127 Nev. Adv. Op. 22, 1, 6 (2011) (concluding "that a petition for judicial review is

[8] Pursuant to NRS 233B.130(5) a person filing a petition for judicial review has 45 days to serve the petition on the agency and every party. No such petition has been served to date and the 45 days from the last date to file a petition has passed.

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the proper vehicle for challenging the Commission's decisions on claims for sales and use tax refunds . . .." "Appeals from decisions of the Commission should be by way of judicial review and not trial de novo"). With the adoption of the Administrative Procedures Act in 1965, aka Chapter 233B of the NRS, the Legislature stated its intention that the provisions in such 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." NRS 233B.130(6) (emphasis added).

In *Southern Cal. Edison v. First Judicial Dist. Court of the State of Nev.*, 127 Nev. Adv. Op. 22, 1, 6 (2011), the Nevada Supreme Court recently agreed that final decisions of the NTC regarding refunds are reviewed as a Ch. 233B judicial review and not a trial de novo. The decision states:

> We conclude that the APA applies to sales and use tax refund claims. Although NRS 372.680 allows claimants to "bring an action' in the district court and our prior decisions, including *Saveway v. Cafferata*, 104 Nev. 402, 760 P.2d 127 (1988), suggested that claimants receive a trial de novo there, the APA and general tax statutes were subsequently amended in a manner demonstrating that judicial review under the APA is now the exclusive means of proceeding with a refund claim. Therefore, when taxpayers challenge the Commission's decision on sales and use tax refund claims, the matter is subject to judicial review pursuant to the APA. NRS 372.680 permits a taxpayer to challenge the Commission's decision by filing **an action**; pursuant to NRS 233B.130, **that action must be a petition for judicial review**.

Id. at 1 (emphasis added in bold; underlining contained in original).

The provision under which Plaintiffs chose to file suit, NRS 368A.290, was first adopted in 2003 and is similar to NRS 372.680 which was revised in 1999. NRS 368A.290 states:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:
> (a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.
> (b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.
> 2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal

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> place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 3. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments. [Emphasis added.]

Following the revision, NRS 372.680 provides:

> 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 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 principle place of business or a county in which any relevant proceedings were conducted by the Department, 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. [Emphasis added.]

NRS 372.680 speaks specifically to filing a claim for refund in district court after a "final decision" by the NTC. *Id.* Prior to 1999, a taxpayer could go straight to district court after the denial of the claim by the Department without going through an administrative hearing procedure. The change to a decision by the NTC ensured that there would be an administrative hearing. *See Southern Cal. Edison*, 127 Nev. Adv. Op. at 3-6 (noting that both NRS Chapter 233B and NRS 372.680 have been amended since *Saveway v. Cafferata*, 104 Nev. 402 (1988) was decided and concluding that the Legislature's intent was that the final decisions by the NTC be subject to the provisions of Chapter 233B). NRS 372.680 does not provide authority for a trial de novo[9] and neither does NRS 368A.290.

The Nevada Supreme Court in *Hansen-Neiderhauser v. Nevada State Tax Comm'n*, 81 Nev. 307, 402 P.2d 480 (1965), discusses NRS 372.680 prior to the passage of the Administrative Procedures Act. Clearly a civil remedy for claims of overpayment existed prior to the enactment of NRS Chapter 233B. In the legislative intent section of NRS Chapter 233B it states that "provisions of this chapter are intended to supplement statutes applicable to specific agencies." NRS 233B.020(2). If ambiguity exists regarding the remedy available

[9] In fact, the Nevada Supreme Court has stated that the action provided for in NRS 372.680 must be a petition for judicial review. *Southern Cal. Edison,* 127 Nev. Adv. Op. at 1, 3-6.

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to a taxpayer seeking a refund that is aggrieved by a final decision by the NTC it is appropriate to look to the legislative history for clarification. See *Chanos v. Nevada Tax Comm'n*, ___ Nev. __ , 181 P.3d 675, 680-681 (2008).

A review of the legislative history from the 1999 changes to NRS 372.680 clears up any ambiguity about the remedy available. In a memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Senior Deputy Attorney General regarding *Senate Bill (S.B.)* 362 and the changes to NRS 372.680 it states:

> With the exception of Section 13 of *S.B.* 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to *S.B.* 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest the denial. The language of *S.B.* 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to (sic) Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event the taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in *S.B.* 362. Thus, *S.B.* 362 contemplates a change from past practice where refund claims upon passage of *S.B.* 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

See Ex. "C" (NDT 049). Mr. Azevedo's explanation is reiterated by other documents from the legislative record. Mr. Azevedo provided testimony to the Senate Committee on Taxation on March 23, 1999, which was recorded as follows:

> [T]his particular provision was addressed in NRS chapter 232B [sic] and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.

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See Ex. "D" (NDT 055). The Bill Explanation provided as Exhibit G to the Assembly Committee on Taxation on May 6, 1999 states further that change to NRS 372.680 "[p]rovides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in Clark County[10] as well as Carson City." *See* Ex. "E", Sec. 33 (NDT 061).

A July 1990 publication for the State Bar of Nevada sets forth the basis for applying judicial review to final administrative decisions. It states:

> Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court.

INTER ALIA, July 1990, The Basics of Nevada Administrative Law, p. 8. The article goes on to discuss the reasons why trial de novo is disfavored in administrative cases and why cases involving trial de novo have been reversed by the Nevada Supreme Court:

> Litigants who have successfully convinced a district court to dispense with a review of the administrative record and hold a trial de novo have repeatedly had their original efforts reversed by the Nevada Supreme Court. Those reversals are entirely salutary. Trial de novo evades an administrative body's 'judgment based upon its specialized experience and knowledge.' It is also a particularly direct intrusion on an agency's fact-finding function.
>
> Trial de novo further destroys the effectiveness of an administrative body and the administrative process by relegating an administrative hearing to 'a meaningless, formal, preliminary, which places 'upon the courts the full administrative burden of factual determination.' The waste of administrative and judicial resources inherent in a trial de novo is obvious. The only time a trial de novo should occur is in the rare instances where it is specifically provided for by statute.

Id. (citations omitted). The article cites NRS 607.215 as an example of a specific statute that provides for trial de novo. NRS 607.215(3) states, "[u]pon a petition for judicial review, the court may order trial de novo." There is no applicable statute in the case at hand that

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[10] Clark County was later dropped from the language. As adopted the venue language in NRS 372.680 mirrored the venue language in NRS 233B.130.

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specifically authorizes a trial de novo. Similar to NRS 372.680, the language in NRS 368A.290 states that a claimant "may bring an action." The Nevada Supreme Court has stated that the "action" provided for in NRS 372.680 must be a petition for judicial review pursuant to Chapter 233B. *Southern Cal. Edison,* 127 Nev. Adv. Op. at 1, 3-6. NRS 368A.290 contains no mention of a right to trial de novo and falls short of granting the court jurisdiction to order a trial de novo.

One of the cases cited in the article, *Nevada Tax Comm'n v. Hicks,* 73 Nev. 115, 310 P.2d 852 (1957), discusses the policy against a trial de novo after an agency decision. The full quote from the *Hicks* case, parts of which were included in the citation above, is as follows:

> It should be apparent that if trial de novo is permitted here it would completely destroy the effectiveness of the tax commission as an expert investigative board. The most perfunctory showing could be made before the board by a licensee with knowledge that the matter would ultimately be decided by the courts upon full evidentiary consideration. Trial de novo, in effect, could relegate the commission hearing to a meaningless, formal, preliminary and place upon the courts the full administrative burden of factual determination.

Id. at 123, 856; *see also Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275, 646 P.2d 549 (1982). Though the *Hicks* case dealt with a gaming licensee, the reasoning applies equally to the case at hand should the same argument be made with regard to NRS 368A.290. Allowing Case 2 to proceed as a trial de novo would render meaningless the expertise of the NTC, as well as the record that was before it.

Accordingly, based on the relevant statutes and the doctrine of judicial economy, and more recently the Nevada Supreme Court's decision in *Southern Cal. Edison,* it is clear that Case 2 should have been filed as a petition for judicial review.[11] Rather than filing a petition for judicial review after exhausting their administrative remedies, the original six Case 2 Plaintiffs filed a civil complaint seeking a new civil court proceeding and a trial de novo. The original six Case 2 Plaintiffs exercised their right to the administrative process, received an

[11] See Order to Proceed as Petition for Judicial Review, filed in the First Judicial District Court, Case No. 09 OC 00016 1B attached hereto as Ex. "F" (stating that the proceedings in a tax refund case that had been presented to a hearing officer and the Commission are controlled by NRS 233B.130(6). Further stating that the plaintiff was "not entitled to a second evidentiary hearing in district court, but is entitled to judicial review . . .").

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unfavorable decision from the Department, received an unfavorable decision from the NTC, accumulated an administrative record, and failed to file or serve a petition for judicial review on any of the Defendants. Because the final decision of the NTC was not the subject of a petition for judicial review filed with the District Court, the decision of the NTC is now final and preclusive.

1. CHANGES TO NRS 233B.130 AND NRS 372.680 REFLECT LEGISLATIVE INTENT THAT THIS COURT'S JURISDICTION IS LIMITED TO JUDICIAL REVIEW

Prior to 1989, Chapter 233B of the NRS specifically provided that a trial de novo was available, if provided for by an agency's statutes outside of NRS Chapter 233B. At the time NRS 233B.130(1) read in pertinent part:

> Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless otherwise provided by statutes. This chapter does not limit utilization of trial de novo to review a final decision where provided by statute, but this chapter provides an alternative means of review in those cases.

The act of May 30, 1989, ch. 716, §6, *Assembly Bill 884, Before the Committee on Government Affairs*, 1989 Nev. Stat. 3. The 1989 legislature removed this language and replaced it with the current language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are "the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [the] chapter applies." The legislature specifically removed the authorization to use a trial de novo and replaced it with language stating that the exclusive means for a court to exercise jurisdiction over a final decision of an agency is by way of judicial review. In testimony before the Assembly, Mr. Richard Campbell, Chairman of the state bar's Administrative Law Committee, explained the reasoning for the changes made by AB 884. The minutes state:

> He indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. He also pointed out it is not clear whether NRS 233 (sic) or the agency's law applies thereby creating general confusion among

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> practitioners and the courts. He indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures . . ..

Minutes of the Nevada State Legislature, Assembly Committee on Government Affairs, page 7, June 6, 1989. Mr. Campbell explained the importance of allowing administrative agencies to exercise their expertise in a given area without interference by the courts. The minutes further provide:

> Mr. McGaughey referred to page 2, line 28, 'The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.' He asked Mr. Campbell to explain that statement. Mr. Campbell replied the Administrative Law Committee does not want the courts to substitute their expertise for the expertise of the administrative agency. Mr. Sourwine mentioned that this language exists in present law.
>
> Mr. Campbell explained the court is not required to affirm the decision of an agency. Mr. Sourwine said AB 884 allows the court to modify or reverse an agency decision if it is clearly erroneous in view of reliable evidence on the whole record. Since the court does not hear the testimony of witnesses, the court is not in a position to judge credibility. Therefore, in reviewing records of an administrative agency, the court merely looks for evidence in the record that supports the agency's decision. At that point, the court defers to the agency's expertise in the particular area.

Id. at 8.

Standing alone, NRS 372.680 fits the description from the legislative history cited above of an agency provision that is incomplete and does not specify the nature of the procedure in court. The statute was changed to read that an action would follow a decision of the NTC, not a decision of the Department. NRS 372.680. The change ensured that requests for refund would fall within the purview of a contested case before an administrative body. The statutory change in 1999 denotes an effort on the part of the legislature to clarify the relationship between NRS 372.680 and NRS Chapter 233B. *See Southern Cal. Edison,* 122 Nev. Adv. Op. 3-6 (stating that "[t]he legislative history indicates that the Legislature intended for the judicial remedies contemplated in NRS 372.680 to proceed under the standards set forth in NRS Chapter 233B" and further stating that this statutory intent was clearly expressed).

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The following legislative changes in this area demonstrate the legislative intent that all final decisions by the NTC be subject to judicial review:

1989

The legislature removes language permitting original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 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).

1997

The legislature adds the language in NRS 360.245(5) that states, "A decision of the Nevada Tax Commission is *a final decision* for the purpose of judicial review." (emphasis added).

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "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 the grounds set forth in the claim . . .." NRS 372.680 (emphasis added). "Thus, [the legislation] contemplates a change from past practice where *refund claims* upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General (emphasis added).

The Legislative history of NRS 372.680 is telling of the Legislatures' intent when enacting NRS 368A.290 because by using the same language that was used in NRS 372.680 the Legislature intended that NRS 368A.290 have the same meaning as NRS 372.680. *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 120 Nev. 575, 580-581, 97 P.3d 1132, 1135-1136 (2004) (stating, "[w]hen a legislature adopts

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language that has a particular [ ] meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language); *see also Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n,* 225 P.3d 1265, 1271 (Nev. 2010) ("Whenever possible, we interpret **'statutes** within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.' (citation omitted). We presume that the Legislature enacted the statute" 'with full knowledge of existing statutes relating to the same subject.' ""). Thus, the "action" to be pursued through NRS 368A.290 is a petition for judicial review. *See Southern Cal. Edison,* 127 Nev. Adv. Op. at 1, 3-6 (determining that the "action" to be filed pursuant to NRS 372.680, which uses the same language, must be a judicial review).

2. THE LEGISLATURE HAS STATED THAT THROUGH HARMONIZATION OF NRS 372.680 AND CHAPTER 233B OF THE NRS ITS INTENT WAS THAT THE ACTION AVAILABLE TO A TAXPAYER THROUGH NRS 372.680 IS A JUDICIAL REVIEW PURSUANT TO 233B.130.

In its amicus brief filed in Case #55228 currently pending before the Nevada Supreme Court,[12] the Nevada Legislature stated its intent with regard to NRS 372.680. Nevada Legislature's Amicus Curiae Brief attached hereto as Ex. "G". The Legislature explains that by harmonizing the statutes its intent is clear from the plain language. It is further explained that the Legislature intended that the action provided for by NRS 372.680 is a judicial review pursuant to NRS 233B.130. As previously established, NRS 368A.290 has the same meaning as NRS 372.680 and therefore the action provided for by NRS 368A.290 is a judicial review pursuant to NRS 233B.130. Plaintiffs have failed to file a petition for judicial review pursuant to NRS 233B.130.

3. FAILURE TO FILE A TIMELY PETITION FOR JUDICIAL REVIEW DEPRIVES THIS COURT OF JURISDICTION TO HEAR THIS MATTER

NRS 233B.130 states in pertinent part:

> 1. Any party who is:
> (a) Identified as a party of record by an agency in an administrative proceeding; and

[12] As noted above, this case has now been decided.

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> (b) Aggrieved by a final decision in a contested case, is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.
>
> 2. Petitions for judicial review must:
>
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
>
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county where the agency proceeding occurred; and
>
> (c) Be filed within 30 days after service of the final decision of the agency.
>
> Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

The final decision by the NTC was dated October 12, 2007. Thirty days from the date of service would have been on or about November 11, 2007. The Case 2 Plaintiffs filed their complaint on January 9, 2008 and even if the complaint is deemed to be a petition for judicial review it was still undeniably filed after the 30 day period for filing a petition for judicial review pursuant to NRS 233B.130(2)(c). The sole means of this court taking action in this administrative case or reviewing the final decision by the NTC was by way of a petition for judicial review. NRS 233B.130(6); *See Southern Cal. Edison,* 127 Nev. Adv. Op. at 6. Plaintiffs simply have not filed a petition for judicial review. The failure to file a petition for judicial review in a timely manner is jurisdictional. *Kame v. Employment Sec. Dep't.,* 105 Nev. 22, 25, 769 P.2d 66, 67 (1989). The Nevada Supreme Court in *Kame* wrote:

> When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review. . .Noncompliance with the requirements is grounds for dismissal of the appeal...Thus, the time period for filing a petition for judicial review of an administrative decision is mandatory and jurisdictional...In the past, this court has upheld the dismissal of appeals for failure to timely commence them.

Id. at 25, 68 (citations omitted).

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Judicial review was the only means for the Case 2 Plaintiffs to access this court for action on the claims for refund heard by the NTC. Rather than filing a petition for judicial review, the Case 2 Plaintiffs filed a civil complaint which should be dismissed.[13] Accordingly, by not filing a petition for judicial review this court has been stripped of jurisdiction.

C. CASE 2 IS BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA

Nevada has adopted a general rule of administrative res judicata. *Britton v. City of N. Las Vegas,* 106 Nev. 690, 799 P.2d 568 (1990). The Nevada Supreme Court in *Britton* identifies three inquiries that are pertinent to the application of administrative res judicata. *Id.* at 692-693; 569-570. The inquires are "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the action in question; (2) whether there was a final judgment on the merits; and (3) whether the party against whom the judgment is asserted was a party, or in privity with a party to the prior adjudication." *Id.*

If the factors from *Britton* are applied to the facts alleged in the Complaint, it is clear administrative res judicata applies. The first factor is whether the issue decided in the prior adjudication was identical to the issue presented in the action in question. The issues decided in the previous adjudication are outlined in the NTC's Decision and Plaintiffs request for refund. This court, in reviewing the action of the NTC, is limited to the record that was before the NTC. NRS 233B.135(1)(b). Since the court is so limited, the issues decided by the NTC are identical to the issues that are properly before this court.

The second factor is whether there was a final decision on the merits. Pursuant to NRS 360.245(5), decisions of the NTC are considered final decisions for purposes of judicial review. Moreover, because no petition for judicial review has been filed and the date for filing one has passed, the decision by the NTC is final.

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[13] Though the Nevada Supreme Court has recently issued an unpublished order stating that a judicial review must be filed within the 90 days set forth in NRS 372.680, the order is not a published decision and is not binding precedent. *See* copy of Order in Nevada Supreme Court Case No. 56722 attached hereto as *Ex.* "H"; *see also* copy of Order in Nevada Supreme Court Case No. 56740 and a copy of a subsequent Order issued by the Second Judicial District Court in the related Case No. CV09-03554 attached hereto as *Ex.* "I".

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The final factor is whether the party against whom the judgment is asserted was a party, or in privity with a party, to the prior adjudication. The NTC's Decision in the administrative proceeding below was in favor of the Department and against the Case 2 Plaintiffs. The judgment is being asserted against the Case 2 Plaintiffs in the case at hand.

The Court further addressed the doctrine of administrative res judicata in a case that, like the present case, related to a request for refund of taxes. *Campbell v. Department of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992). The facts in *Campbell* were similar in many ways to the current case. Like the current case there had been an unsuccessful appeal before the NTC. *Campbell* at 216, 834. The taxpayer in *Campbell* also failed to file a petition for judicial review and instead filed a separate action pursuant to NRS 372.680. The district court judge granted summary judgment in favor of the Department on the grounds that "all of the elements necessary to apply the doctrine of res judicata to the decision of the administrative tribunal . . . exist in this case." *Campbell* at 218, 835 (quoting the district court decision). A significant difference between *Campbell* and the current case is that in *Campbell* the taxpayer did not pay the taxes until after he had been through the administrative procedure, whereas in the current case the Case 2 Plaintiffs remitted the taxes prior to going through the administrative procedure. *See* NTC Decision attached hereto as Ex. "A"; *see also* Case 2 Amended Complaint, p. 8, paras. 33 and 34.

The Nevada Supreme Court, while reaffirming the doctrine of administrative res judicata, concluded that there were unique circumstances involved in *Campbell* that justified a different result than granting summary judgment.[14] The Court remanded the case for judicial review after making clear that "pursuant to *Britton*, the Campbells do not have a right to a second evidentiary hearing." *Campbell* at 219, 836 (emphasis added).

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[14] Those unique circumstances included payment of the taxes under protest in reliance on instructions from the Department, which limited their subsequent remedies. At the time the statute allowed an action to be filed after the initial denial of a refund by the Department. As noted above, in 1999 the statute was amended to require denial by the NTC prior to filing an action for judicial review in district court.

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Because the Case 2 Plaintiffs' failed to file a petition for judicial review and because there does not exist any of the circumstances that were unique to the *Campbell* case, the Case 2 Plaintiffs' Complaint should be dismissed pursuant to the doctrine of administrative res judicata.

1. CASE 2 IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION

The Court in *Five Star Capital Corp. v. Ruby*, __ Nev. __, 194 P.3d 709, 711 (2008) does not specifically discuss administrative res judicata, but does discuss in depth the term res judicata and breaks down the difference between claim preclusion and issue preclusion. The *Five Star* Court wrote:

> In addressing claim preclusion the *Tarkanian* court stated that the doctrine 'is triggered when a judgment is entered. A valid and final judgment on a claim precludes a second action on that claim or any part of it.' Further, the court recognized that the claim preclusion doctrine 'embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach' than the issue preclusion doctrine.

Id. at 711. The Court then set forth the test for claim preclusion as follows:

> We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. These three factors in varying language, are used by the majority of the state and federal courts. This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.

Id. at 713.

Applying those factors to the current case it is clear that the parties, the six Case 2 Plaintiffs and the Department, are the same in the administrative proceeding below and in the Complaint. As argued above, the judgment by the NTC is now final.

The third factor is whether the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. NRS 233B.130 states that a party may file for judicial review if they are "[a]ggrieved by a final decision in a contested case." NRS 233B.130(1)(b). The court in an action for judicial review is limited to the record before the agency. NRS 233B.135(1)(b). NRS 368A.290(1) states a taxpayer may

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file an action "after a final decision upon a claim filed pursuant to this chapter is rendered by . . . [t]he Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim." So, pursuant to NRS 233B.130, NRS 233B.135 and NRS 368.290, the Case 2 Plaintiffs may not bring any claims that have not been actually decided below by the NTC. All the factors are met and this matter should be dismissed based on the doctrine of claim preclusion.

2. CASE 2 IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION

The *Five Star* case also addressed the doctrine of issue preclusion. The Court indicated the following factors were necessary for the application of issue preclusion:

> (1) The issue decided in the prior litigation must be identical to the issue presented in the current action;
> (2) The initial ruling must have been on the merits and have become final; ...
> (3) The party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation and;
> (4) The issue was actually and necessarily litigated.

Five Star at 713.

The NTC, in its final decision, affirmed the Department's denial of the refund claims filed by the six Case 2 Plaintiffs. *See* NTC's Decision attached hereto as Ex. "A". In their Amended Complaint, the six Case 2 Plaintiffs state that they filed requests for refund 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

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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. PLAINTIFFS CANNOT SIMULTANEOUSLY PURSUE THE SAME DECLARATORY RELIEF IN CASE 1 AND CASE 2.

Case 1 and Case 2 cannot contain the same claims for declaratory relief. *See 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 appropriate method of testing defenses in a pending action, [citation omitted], nor is it a substitute for statutory avenues of judicial and appellate review. We conclude, therefore, that the district court lacks jurisdiction to entertain the utilities' complaint for declaratory and injunctive relief.

107 Nev. at 685. Case 1 constitutes a substitute for the "statutory avenue" of a Ch. 233B judicial review. *Id.* Consequently, Plaintiffs cannot pursue the same declaratory relief in Case 1 and Case 2.

E. IF THIS COURT DOES NOT DISMISS CASE 2 AND DEEMS THE CASE 2 COMPLAINT A TIMELY FILED PETITION FOR JUDICIAL REVIEW, BIFURCATION IS APPROPRIATE.

The complaint filed by the Case 1 Plaintiffs was amended to include both a "facial challenge" and an "as applied" challenge. However, the Case 1 Plaintiffs did not exhaust their administrative remedies before filing the complaint and therefore, according to Nevada law, have no right to pursue an "as applied" constitutional challenge. *See Malecon Tobacco, LLC,* 118 Nev. 840-841 (holding that when an "as applied" constitutional challenge involves a factual evaluation exhaustion of administrative remedies is required); *see also Jordan v.*

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Fayette County Bd. of Assessment Appeals, 782 A.2d 642, 646 (holding, "'[w]hen a constitutional attack is brought against the application of a tax statute, the board is the proper authority to hear the challenge'" (citation omitted)). The Plaintiffs have persistently argued for discovery and for more and more discovery and, in doing so, are establishing the need for a factual evaluation which triggers the exhaustion of administrative remedies requirement. *Id.* Consequently, the "as applied" challenge in Case 1 must be dismissed because the Case 1 Plaintiffs did not exhaust their administrative remedies before filing their Complaint in this court. *Id.* The "facial" challenge in Case 1 can proceed because facial challenges are an exception to the exhaustion requirement. *Id.*

With regard to Case 2, by filing a complaint the original six Case 2 Plaintiffs are asking this court to preside over the re-litigation of issues that were the subject of administrative proceedings before the Department and the NTC. Based on the doctrine of administrative res judicata, claim preclusion and issue preclusion, the Case 2 Plaintiffs are barred from re-litigating the refund issues decided by the Department and affirmed by the NTC in its final decision. It would be a prodigious waste of judicial resources to start anew in a case that already has an administrative record and final decision. Moreover, the original six Case 2 Plaintiffs had an adequate legal remedy available through an NRS 233B.130 petition for judicial review whereby this court could have reviewed the final decision of the NTC for violations of constitutional or statutory provisions, acting in excess of its authority, unlawful procedure or other error of law. By failing to file a petition for judicial review within the statutory time limit under NRS 233B.130(2)(c), the Case 2 Plaintiffs abandoned their rights to review and allowed the NTC's decision to become final.

For all the reasons stated, the Amended Complaint in Case 2 should be dismissed in its entirety and the Amended Complaint in Case 1 should proceed as only a "facial" challenge. *See Malecon Tobacco, LLC,* 118 Nev. at 840-841 (stating, "[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" and noting that facial challenges can proceed directly to district court without exhausting

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administrative remedies. Further stating, "[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." (emphasis added)); *see Southern Cal. Edison,* 127 Nev. Adv. Op. 22, 3-6 (stating that final decisions of the NTC proceed as judicial reviews);

To be clear, the six Case 2 Plaintiffs exhausted their administrative remedies but failed to pursue a petition for judicial review. Because they failed to 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,* 118 Nev. at 840-841 ("as applied" challenges require exhaustion of administrative remedies). If Case 2 is dismissed, as it should be, Plaintiffs cannot pursue an "as applied" challenge and the claim should be dismissed from Case 1. Consequently, Case 1 must be limited to a "facial" challenge.

Alternatively, if this court decides that Case 2 can proceed as a judicial review, then Case 2 must be limited to the administrative record. NRS 233B.135(1)(b). Only the parties to the administrative record can participate. NRS 233B.130(1)(a); NRS 233B.135(1)(b). In addition, this court's review is limited to the issues raised in the administrative record. NRS 233B.135(1)(b). The Case 1 Plaintiffs had not exhausted administrative remedies prior to commencing Case 1 and Déjà vu and Little Darlings had not attempted to exhaust administrative remedies until after the NTC had issued its decision. Deja Vu and Little Darlings cannot be parties to Case 2 because Case 2 includes an "as applied" challenge which requires exhaustion of administrative remedies and Déjà vu and Little Darlings are not parties to the administrative record. *See Malecon Tobacco, LLC,* 118 Nev. at 840-841; NRS 233B.135.

In addition, the Case 2 "facial" and "as applied" challenges are limited to review pursuant to NRS 233B.135 as part of the judicial review. Pursuant to NRS 233B.135, the

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courts review is limited to the administrative record. This court's review of Case 2 therefore should not include a review of any of the discovery. NRS 233B.135(1)(b). If Plaintiffs wanted such information to be included in the administrative record, then it was Plaintiffs' burden to request the NTC to remand the matter to a hearing officer so that Plaintiffs could request discovery. *See* NAC 360.175(6) (allowing the NTC to remand a case to a hearing officer).

As previously stated, "facial" challenges for declaratory relief are an exception to the exhaustion doctrine and can proceed directly to district court. However, Case 1 and Case 2 cannot contain the same claim for declaratory relief. *See Public Serv. Comm'n of Nev.*, 107 Nev. at 684-685. The original six Case 2 Plaintiffs raised a "facial" challenge in Case 2 and cannot pursue the same claim in Case 1. Case 1 constitutes a substitute for the statutory avenue of judicial review. *Id.* Therefore, the original six Case 2 Plaintiffs remedy is review of the "facial" and "as applied" challenges via a judicial review subject to NRS 233B.135, if this court deems the filing of the Case 2 Complaint as a timely filed petition for judicial review.

Because an "as applied" challenge cannot be pursued in Case 1 and because the original six Case 2 Plaintiffs' facial challenge will be part of the judicial review should Case 2 proceed as such, Case 1 must be limited to a "facial challenge" by Déjà vu and Little Darlings only (unless Case 2 is dismissed, in which case all Case 1 Plaintiffs can pursue a "facial" challenge).

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CASE 1

Issue	Facts	Argument	Result
Facial Challenge	Eight (8) plaintiffs (See footnote 2).	All eight Plaintiffs have the right to challenge constitutionality of the LET in district court	The facial challenge may go forward.
Amended Complaint to add **as applied challenge**	None of the eight Plaintiffs had exhausted their administrative remedies by December 19, 2006, the time that Case 1 was filed.	Exhaustion of administrative remedies is required for an as applied challenge (*See* Malecon Tabocco LLC).	The as applied challenge must be dismissed for failure to exhaust administrative remedies
Amended Complaint to add **as applied challenge**	Two (2) Plaintiffs (Little Darlings and Déjà vu) are not part of the administrative record and have still not exhausted their administrative remedies.	These two Plaintiffs do not have any right to an as applied challenge (*See* Malecon Tobacco LLC).	The two Plaintiffs must be dismissed from Case 1 and Case 2 with respect to the as applied challenge.
Plaintiffs requests for **post-administrative decision discovery**	A facial challenge is a question of law.	Triggers factual evaluation which is irrelevant to a facial challenge and requires exhaustion. (See Malecon Tobacco LLC).	For a strictly facial challenge to the statute, no discovery is necessary.

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CASE 2

Issue	Facts	Argument	Result
The **facial challenge** was raised and litigated in the administrative proceedings and is part of administrative record.	Six (6) Plaintiffs (see footnote 3) have gone through the administrative process and received a final decision by the Nevada Tax Commission and did not file a petition for judicial review.	Plaintiffs failed to timely petition for judicial review pursuant to NRS 233B.130 and Southern Cal. Edison. Failure to timely file strips the court of subject matter jurisdiction. (See Kame v. Employment Sec. Dep't) Administrative res judicata, issue preclusion and claim preclusion apply to the facial challenge.	Facial challenge must be dismissed.
The **as applied challenge** was raised and litigated in the administrative proceedings and is part of administrative record	Six (6) Plaintiffs failed to file a petition for judicial review	Administrative res judicata, issue preclusion and claim preclusion apply. Plaintiffs failed to timely file for judicial review pursuant to NRS 233B.130 and Southern Cal. Edison.	As applied challenge must be dismissed.
The **claims for refund** were raised and litigated in the administrative proceedings and are part of administrative record.	Six (6) plaintiffs failed to file a petition for judicial review.	Administrative res judicata, issue preclusion and claim preclusion apply. Plaintiffs failed to file for judicial review pursuant to NRS 233B.130 and Southern Cal. Edison.	Refund claims must be dismissed.
Discovery	Plaintiffs have requested extensive discovery.	Judicial review is limited to administrative record below NRS 233B.135	Additional facts are not relevant for judicial review and cannot be considered.

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SUMMARY

Scenario	Facts	Law	Result
If Case 2 Complaint is dismissed in entirety and Case 1 proceeds as a facial challenge only.	All eight (8) Plaintiffs can pursue facial challenge in Case 1.	Six (6) Plaintiffs cannot pursue the same declaratory relief in two simultaneous actions (See Public Serv. Comm'n of Nev.).	Plaintiffs can pursue facial challenge in Case 1.
If Case 2 proceeds as a judicial review and Case 1 proceeds as a facial challenge only.	Six (6) plaintiffs can pursue facial and as applied challenge through judicial review.	Judicial review is limited to parties and facts and issues of administrative record below and the as applied challenges require exhaustion of administrative remedies.	Six (6) Plaintiffs pursue as applied and facial challenge through Case 2 by judicial review. Two (2) Plaintiffs pursue facial challenge through Case 1. Six (6) Case 2 Plaintiffs not entitled to facial challenge in Case 1 because they have already had a facial challenge through judicial review in Case 2 (See Public Serv. Comm'n of Nev.).
If Case 1 proceeds as a facial challenge only and Case 2 is dismissed due to failure of six (6) Plaintiffs to timely petition for judicial review.	Eight Plaintiffs filed a facial challenge in Case 1.	A petition for judicial review must be timely; otherwise the decision of the Nevada Tax Commission becomes final.	Eight Plaintiffs pursue a facial challenge only through Case 1.

In short, if this court dismisses Case 2 because it was not filed as a petition for judicial review, the only possible remaining claim is the claim for declaratory relief regarding the "facial" challenge to the constitutionality of the LET in Case 1. If this court allows Case 2 to

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proceed as a judicial review, then the "facial" challenge in Case 1 must be dismissed as to all Plaintiffs but Déjà vu and Little Darlings.

CONCLUSION

Based on the foregoing, the Department respectfully requests that this Honorable Court Order the following with respect to cases A533273 and A554790:

1. The dismissal of Plaintiffs' claims for refunds in Case 1 for failure to exhaust administrative remedies;

2. The dismissal of Plaintiffs' claims for refunds in Case 2 for failure to timely file a petition for judicial review pursuant to NRS 233B.130;

3. The dismissal of Case 2 for failure to timely file a petition for judicial review;

4. The limiting of Case 1 to a "facial" challenge for declaratory relief and the dismissal of the "as applied" challenge;

5. Alternatively, if Case 2 is allowed to proceed as a judicial review, the limiting of Case 1 to a "facial" challenge for declaratory relief by only Déjà vu and Little Darlings and the dismissal of all other Plaintiffs from the case; and,

6. Any further relief that the court deems just and fair.

Respectfully submitted this 18th day of July, 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

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CERTIFICATE OF MAILING

I, hereby certify that on the 18TH day of July, 2011, I served the foregoing **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 AND TO DISMISS CASE 2 FOR FAILURE TO FILE A PETITION FOR JUDICIAL REVIEW OR ALTERNATIVELY FOR AN ORDER THAT CASE 2 PROCEED AS A JUDICIAL REVIEW**, 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
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/s/ TRACI PLOTNICK
An employee of Office of Attorney General

Attorney General's Office
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EXHIBIT “A”

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

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DEPARTMENT OF TAXATION
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October 12, 2007

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IN THE MATTER OF: The Appeal of Olympic Gardens, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc. ("Appellants") from the Department of Taxation's Denial of their refund request pursuant to NRS 368A.260

The above matter came before the Nevada Tax Commission ("the Commission") for hearing on August 6, 2007. Bradley Shafer, Esq. and Dianna Sullivan, Esq. appeared on behalf of Appellants. Senior Deputy Attorney General David J. Pope and Deputy Attorney General Dennis Belcourt appeared on behalf of the Department of Taxation ("the Department").

The Commission hereby makes the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Appellants, as providers of live entertainment, are or have been taxpayers under NRS chapter 368A, through which is imposed the Live Entertainment Tax ("LET").
2. Appellants filed timely requests for refunds pursuant to NRS 368A.260 for the tax periods of January, February 2004, March 2004 and April 2004, claiming that the LET is facially unconstitutional, that it unconstitutionally targets them or their message, and that they are entitled to refunds for the taxes paid by them, pursuant to NRS 368A.200(5)(a).
3. The Department denied Appellants' requests.
4. Appellants filed timely appeals from the Department's denials of their refund requests.
5. In this appeal, Appellants contend that a tax on live entertainment is per se unconstitutional, that the LET is rendered unconstitutional by the number of statutory exemptions, which Appellants claim make the tax one targeted at live adult entertainment, and that the legislative record shows an intent to tax based on content, to the detriment of providers of live adult entertainment.
6. If any Finding of Fact is more properly classified as a Conclusion of Law, then it shall be deemed such.

CONCLUSIONS OF LAW

1. NRS 368A.200(5)(a) exempts from the live entertainment tax "(l)ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."
2. Entertainment can be a form of speech protected under the First Amendment of the United States Constitution and Article I, section 9 of the Nevada Constitution.
3. The United States and Nevada Constitutions do not forbid taxation of live entertainment as such.
4. NRS 368A.090 contains a definition of live entertainment. Regulations and an amendment to NRS 368A.090 define what is not live entertainment.
5. NRS 368A.200, as initially enacted in 2003 and as amended in 2005 and 2007, contains exemptions from the live entertainment tax.
6. A tax that targets a small group of speakers may violate the United States and Nevada constitutional protections against infringement of speech.
7. The live entertainment tax under NRS chapter 368A is an extension of the former casino entertainment tax (NRS chapter 463). It is imposed on an array of types of entertainment, both at licensed gaming establishments and other locations. It therefore does not target a small group of speakers.
8. A tax that constitutes a "regulation of speech because of disagreement with the message which it conveys" may violate the United States and Nevada constitutional protections against infringement of speech. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).
9. The definition in NRS 368A.090, the exemptions in NRS 368A.200, and other provisions of NRS chapter 368A delineating the scope of the tax are reasonable classifications for tax purposes and do not appear to be aimed at any message that may be contained in the entertainment by Appellants or any other speakers. See *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940) (providing, "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification").
10. Mention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment.
11. Statements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment.
12. If any Conclusion of Law is more properly classified as a Finding of Fact, then it shall be deemed such.

DECISION

After due deliberation, and based on the foregoing, the Commission denied the appeal.

FOR THE COMMISSION:

DINO DICIANO
Executive Director
Nevada Department of Taxation

cc: David Pope, Sr. Deputy Attorney General
Dennis Belcourt, Deputy Attorney General
Taxpayers (via regular mail)

EXHIBIT “B”

ORDR
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Attorneys for the Nevada Defendants

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

Plaintiff(s),

vs.

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

Defendants.

Case No. A533273
Dept. No. IX

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION WITHOUT PREJUDICE

Date of Hearing: July 31, 2008
Time of Hearing: 9:00 a.m.

DISTRICT COURT
CLARK COUNTY NEVADA

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION came on for hearing on July 31, 2008;

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants;

Diana Sullivan, 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 finds:

That the Plaintiffs cannot meet the element of showing they have suffered irreparable harm;

That this decision is not a statutory denial based on NRS 372.670 but is based upon the facts and law presented; and hereby orders:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION is DENIED without B.P.J. prejudice. Further, this Court notes the separation of powers issue has not been ruled upon herein.

DATED this 31st day of January, 2011.

IT IS SO ORDERED.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By:
Blake A. Doerr
Senior Deputy Attorney General
Nevada State Bar #9001
555 E. Washington Ave., #3900
Las Vegas, NV 89101
Attorneys for Defendants

EXHIBIT “C”

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

Writer's Direct Dial (775) 684-1223

Fax (775) 687-5798

MEMORANDUM

DATE: May 7, 1999

TO: Assemblyman Bernie Anderson
Chairman, Assembly Committee on Judiciary

FROM: Norm Azevedo, Sr. Deputy Attorney General

SUBJECT: *Venue Sections of S.B. 362*

Pursuant to the request of the Executive Director of the Nevada Department of Taxation, I have prepared this memorandum to address your venue inquiries. The sections of S.B. 362 that contain the venue provisions are as follows:

1. Section 13 applicable to Chapter 361 of the NRS (property tax).

2. Section 26 applicable to Chapter 365 of the NRS (cigarette tax).

3. Section 30 applicable to Chapter 366 of the NRS (special fuel tax).

4. Sections 33 and 36 applicable to Chapter 372 of the NRS (sales and use tax).

5. Section 41 applicable to Chapter 374 of the NRS (sales and use tax).

I was previously requested by Senator Ann O'Connell to prepare a memorandum addressing the venue concerns. A copy of my memorandum to Senator O'Connell is enclosed for your review. As you will note in my memorandum, I made reference to NRS 233B.130(2)(b) of which a copy is also enclosed for your review.

For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised Statutes, a taxpayer has the ability to file an action in one of three locations. These locations are: (1) Carson City, (2) the county in which the taxpayer resides, or (3) the county where the agency proceeding occurred. See NRS 233B.130(2)(b). The Nevada Department of Taxation has been governed by this venue provision since its passage in

1965. Historically, only audit deficiencies were subject to the application of Chapter 233B of the Nevada Revised Statutes.

With the exception of Section 13 of S.B. 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Accordingly, it would be advisable to make the venue provisions of S.B. 362 consistent with NRS 233B.130(2)(b).[1] By having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers. To the extent it is the desire to harmonize the venue provisions of S.B. 362 and the venue provisions of NRS 233B.130(2)(b), I would recommend the following language modifications to the designated sections of S.B. 362:

Sec. 13. NRS 361.435 is hereby amended to read as follows:

361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City ~~[, Nevada,]~~ *or Clark County, in any court of competent jurisdiction*

[1] It may also be advisable to caution the language in NRS 364A.280 to follow NRS 233B.130(2)(b). See Section 73 of S.B. 362.

in Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred.

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified and 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 *file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may* bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the excise tax so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred.*

Sec. 30. NRS 366.660 is hereby amended to read as follows:

366.660 1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or any officer thereof to prevent or enjoin the collection pursuant to this chapter of any excise tax or other amount required to be collected.

2. After payment of any such excise tax or other amount under protest, verified and setting forth the grounds of objection to the legality thereof, filed with the department at the time of payment of the tax or other amount protested, the special fuel supplier, special fuel dealer or special fuel user making the payment may bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the amount so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the amount so paid under protest.*

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *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 the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark county* 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 *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City *or Clark County* unless the court with the consent of the attorney general orders a change of place of trial *the action must be tried in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred unless the court with the consent of the attorney general orders a change of place of trial.*

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *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 the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark County* for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed *In a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

To the extent you need any further information or assistance, you may contact me at 684-1222. I will be out of the office for the remainder of May 7, 1999 and will return first thing Monday morning, May 10, 1999.

Enclosures

NJA:jm

EXHIBIT “D”

SENATE BILL 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association, spoke in support of S.B. 362. She said the bill clarified some issues from the original taxpayer bill of rights and the amendments in S.B. 375 of the Sixty-ninth Session.

SENATE BILL 375 OF THE SIXTY-NINTH SESSION: Clarifies authority of Nevada tax commission and makes various other changes concerning taxation. (BDR 32-1050)

Ms. Vilardo said the bill sets up a very specific procedure for determining audit dates, hearings and appeals; claims procedures; a specific procedure on the issue of deficiency determinations or overages; what procedures will be used for refunds. She noted it clarifies two provisions from S.B. 375 of the Sixty-ninth Session. Ms. Vilardo referred to *Proposed Amendments to S.B. 362* (Exhibit I).

Senator O'Connell said the bill allows the filing of a court action in Clark County. She questioned why the two counties (Clark and Carson City) were specified, as opposed to allowing filing in other jurisdictions. Ms. Vilardo said originally all of the filings were in Carson City because the attorney general's office was located in Carson City. She noted the business tax was the first and only time there was a provision made that if a court action was to be filed it could be filed in Clark County, as well as Carson City. She said the attorney general's office would be the best one to answer why it could not be filed in other courts of competent jurisdiction in Nevada. Senator O'Connell said she would like to investigate that question. Ms. Vilardo explained the amendments to the bill and said she had worked with Mr. Pursell, from the Department of Taxation, and Norman J. Azevedo, Deputy Attorney General, Taxation Section, Office of the Attorney General, on the amendments. She said the biggest thing that could be accomplished for the taxpayer and the state was to have a clear, consistent set of rules.

Mr. Pursell referred to *Section by Section Outline of S.B. 362* (Exhibit J). He called attention to page 5, section 7, lines 30-35 of the bill, recommending rather than setting the thresholds in statute, let the Nevada Tax Commission regulate the amount of taxes, penalties and interest that could be considered for a waiver. He said a statement would need to be prepared, to keep on file at the department, with the specifics of the waiver.

Senator Neal asked for an explanation of the words "not deficiency" found on page 6, section 8, line 13 of the bill. Ms. Vilardo gave examples of how this could happen. Senator O'Connell clarified the language said there was a full year to try to balance the situation. Ms. Vilardo said there would be the reporting period and a need to balance out within the 3-year audit period. She concluded by asking for support of the bill.

Senator O'Connell asked why page 29, section 54, lines 20 and 21, specified the effective time of the act was July 1, 1999 at 12:01 a.m. Dino DiCianno, Deputy Executive Director, Department of Taxation said it had to do with the calculation of interest and penalties. Mr. Pursell stated this whole process would help him in his own budget because his revenue officers and auditors had performance indicators, and this would change the focus to education of the taxpayer and making sure the department was consistent when departing information on tax collection.

Senator Neal asked about the phrase "tax extensions." Ms. Vilardo referred to page 1, section 2, lines 10-13, saying the extension had to be caused by the department, not the taxpayer. She said if it was not the fault of the taxpayer, he would not be subject to interest and penalties. Senator Neal said under the doctrine of our law, if it is not stated, it is excluded. He clarified if the tax department audited a company and the needed records for the stated period of time could not be located, application had to be made for an extension. He continued, once an extension was requested, the company cannot be charged for the period of the extension. He noted the language is not clear on this issue. Ms. Vilardo said page 1, section 2, lines 10 - 13 says,

> If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

After a short discussion, Ms. Vilardo said she would ask legal counsel to meet with Senator Neal to draft some additional wording in this section.

Senator O'Connell asked for clarification of the filing of a court action to any competent court of jurisdiction issue from the bill. She suggested removing the language referring to filing of a court action could be only in Carson City or

Clark County. Mr. Azevedo said this particular provision was addressed in NRS chapter 233B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specilicity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission. Chairman McGinness asked him to review this section and send an opinion back to the committee. Senator O'Connell asked for a draft of the amendment to be brought back to the committee. Chairman McGinness summarized the amendments proposed by Ms. Vilardo; Senator Neal's concern about the language on page 1, section 2, subsection 3; the clarifying statement on the competency of the court will be reviewed.

Stephanie Tyler, Lobbyist, Nevada Bell, also representing Sprint and AT&T, testified in support of the bill. She said the business community was pleased to see additional clarification. There were protections for the taxpayers and the entities that would be receiving revenues as a result of these actions. She noted the stability of those revenues was important, as was establishing a clear set of rules for the taxpayers with regard to their abilities, rights, and their processes of appeal.

Amy Hailey Hill, Lobbyist, Las Vegas Chamber of Commerce, and Barrick Goldstrike Mines Inc., and Retail Association of America, said for the record she supported this legislation.

SENATOR COFFIN MOVED TO DO PASS A.B. 174.

SENATOR O'CONNELL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RHOADS, SCHNEIDER AND TOWNSEND WERE ABSENT FOR THE VOTE.)

• • • • •

SENATOR O'CONNELL MOVED TO AMEND AND DO PASS S.B. 362.

SENATOR TOWNSEND SECONDED THE MOTION.

EXHIBIT “E”

Bill Explanation

SENATE BILL NO. 362

Assembly Committee on Taxation

Hearing: May 6, 1999

SUMMARY—Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Section 1: Adds sections 2, 3 and 3.5 of this act to chapter 360 of the NRS.

Section 2: Requires the department of taxation to notify a taxpayer concerning the date an audit will be completed.

Allows the department to extend the date that an audit will be completed if it provides a written notice to the taxpayer and an explanation of the reasons for the extension.

Provides, if after completion of an audit and if the department determines that delinquent taxes are due, that it may not impose any penalties or interest during the extension of the audit if the extension was not caused by the taxpayer.

Section 3: Provides that written notice be given to a taxpayer if someone affiliated with the department determines that the taxpayer is entitled to an exemption or has been taxed more than required by law.

The notice must be given within 30 days after a determination or, if the determination is a result of an audit, 30 days after completion of the audit. The notice must provide an explanation that the overpayment will be credited against any amount due or instructions on how a taxpayer obtains a refund of the overpayment.

Section 3.5: Requires the tax commission to adopt regulations to carry out sections 7 and 10 of this act.

Section 4: Clarifies that certain general provisions of the tax laws may be superseded by other provisions of the tax laws.

Clarifies that only parties aggrieved by a decision of the department of taxation may appeal the decision.

Clarifies that the tax commission may review any decision of the department and that the commission may reverse, affirm or modify any decision of the department that a taxpayer appeals or the commission reviews.

Exhibit G P 143
Assembly Committee on Taxation
Date: 5-6-99
Submitted by: ED ZIEGLER
LCB FISCAL DIV.
26

Requires the commission, when an appeal is heard, to notify the district attorney of each county which may affected by the decision.

Section 5: This section amends the taxpayer bill of rights to:

- Clarify that a taxpayer is to be notified in writing when the department of taxation determines that he is entitled to an exemption or has been taxed more than required by law.
- Provide that a taxpayer is entitled to receive written instructions from the department on how to obtain a reduction or release of a bond or other security which he is required to furnish for taxes administered by the department.
- Provide that statutes and regulations are to be construed in favor of the taxpayer if they are of doubtful validity, unless there is a specific statutory provision that is applicable.
- Provide that the provisions of the taxation statutes or regulations administered by the department may not be construed to conflict with this section or applicable regulations.
- Provide that the taxpayer bill of rights applies to all taxation statutes and regulations administered by the department.

Section 6: Clarifies that overpaid taxes are to be credited against other taxes before any overpayment is refunded.

Section 7: Provides that the department of taxation may waive any tax, penalty or interest in conformity with regulations adopted by the tax commission, if a taxpayer has relied to his detriment on written advice from a representative of the department or an opinion of the attorney general. Requires the department, if it has approved a waiver, to maintain a statement of the reason for the waiver; the amount of tax, penalty and interest owed by the taxpayer; the amount of tax, penalty or interest waived; and the facts and circumstances which led to the waiver.

Provides, upon proof that a taxpayer has in good faith collected or remitted taxes by relying on the written advice from a representative of the department or an opinion of the attorney general or the written results of an audit, that the taxpayer may not be required to pay delinquent taxes, penalties or interest if a subsequent audit determines that the taxes collected were deficient.

Section 8: Revises provisions relating to the offsetting of overpayments and underpayments by a taxpayer by:

- Clarifying that the provisions in this section may be superseded by other provisions of the tax laws and that the provisions apply to a reporting period within an audit period.
- Requiring if there is a net deficiency, that a penalty is to be calculated against the net deficiency.
- Requiring, if there is a net deficiency, that interest imposed based on the net deficiency for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Requiring, if there is a net overpayment, the interest that the taxpayer is entitled to receive must be calculated for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Specifying that the provisions of the section do not apply if the taxpayer has not remitted the taxes due in a timely manner.
- Defining "reporting period" to include any reporting period.

Section 9: Provides that the prerequisites of action for judicial review of a redetermination must follow a final order of the tax commission, rather than the department of taxation.

Clarifies that any amount to be credited or refunded to a taxpayer, if a court modifies a final order in favor of a taxpayer, is determined by comparing the amount paid to the amount owed, including interest.

Section 10: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Provides that the amount of any penalty must be based on a graduated schedule which takes into consideration the length of time the tax or fee remained unpaid.

Section 11: Provides that an action for collection of delinquent taxes may not be brought when an appeal to the tax commission is pending.

Section 12: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 13: Provides that a taxpayer who wants to consolidate actions to recover property taxes may do so in a court in Clark County as well as Carson City.

Sections 14 to 15: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 16: Provides that an action for judicial review of a refund claim under the Senior Citizens' Property Tax Assistance Act follows a denial or final action of the tax commission, not the executive director of the department of taxation.

Section 17: Provides that the provisions relating to the crediting of overpayments of net proceeds taxes does not prohibit the taxpayer from requesting a refund of the overpayment.

Section 18: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Clarifies that appeals by a taxpayer over the imposition of penalties and interest are governed by the provisions of NRS 360.245.

Section 19: Clarifies that appeals by a taxpayer over the imposition of penalties are governed by the provisions of NRS 360.245.

Sections 20 to 22: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 23: Provides that an action for judicial review of a claim for refund of business taxes follows a decision of the tax commission, not the department of taxation.

Section 24: Provides, if the department of taxation fails to act on a claim for refund of the business tax in a timely manner, that an appeal must be made to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 90 days of the decision.

Section 25: Makes it an authorization rather than a requirement that the department of taxation cancel the license of a fuel dealer after a show cause hearing with the dealer.

Section 26: Provides that a fuel dealer after paying a tax under protest must appeal the imposition of the tax to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state treasurer in a court in Clark County as well as Carson City.

Section 27: Provides that an action for judicial review of a claim to recover fuel taxes paid follows a decision of the tax commission after an appeal.

Sections 28 to 29: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 30: Provides that a taxpayer who has paid special fuel taxes under protest may file an action to recover the taxes against the state treasurer in a court in Clark County as well as Carson City.

Section 31: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect the state sales and use tax including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

Section 32: Provides that NRS 360.320 is an exception to the interest or penalty provisions of this section.

Section 33: Provides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in a court in Clark County as well as Carson City.

Section 34: Provides, if the department of taxation fails to act on a claim for refund of the sales and use tax in a timely manner, that an appeal must be made to a hearing officer within 45 days. Provides that if the taxpayer is aggrieved by the hearing officer's decision he may appeal the decision to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 45 days after the decision.

Sections 35 to 36: Provides that certain actions relating to erroneous refunds may be brought in a court in Clark County as well as Carson City.

Section 37: Clarifies that agents of the department of taxation are bound by the confidentiality provisions of this section.

Section 38: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect local sales taxes including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

G - 5

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EXHIBIT “F”

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C. COOPER

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

Southern California Edison,

Plaintiff,

vs.

STATE OF NEVADA ex rel. Department of Taxation,

Defendants.

Case No. 09 OC 00016 1B

Department No. 1

ORDER TO PROCEED AS PETITION FOR JUDICIAL REVIEW

This matter was originally before the Court as a motion to dismiss filed by Defendants. As part of the Court's order denying the motion dismiss, the Court directed the parties to meet and confer as lo the nature of the proceedings before this Court. After meeting, lhe parties were unable to agree as to the nature of the proceedings and stipulated to a briefing schedule to brief the issues to the Court. Plaintiff filed a motion that this action be conducted as a trial de novo pursuant to NRS 372.680. The Defendants filed its brief arguing that the action is subject to NRS Chapter 233B and should proceed as a petition for judicial review. Each party filed an answering brief. On October 8, 2009 a hearing was held to determine the proper nature of the proceedings before this Court.

The Court has read and considered the points and authorities and other materials

submitted by Plaintiff and Defendants and considered the arguments of counsel at the hearing. Based on the foregoing, and good cause appearing the Court hereby rules as follows:

1. The proceedings in this case are controlled by NRS 233B.130(6) which states that: "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."
2. NRS Chapter 233B applies to all administrative agencies within the state unless exempt. The Department of Taxation ("Department") and the Nevada Tax Commission ("Commission") are not exempt from the provisions of NRS Chapter 233B. NRS 233B.039. All decisions by the Commission are therefore subject to NRS 233B.130(6).
3. The judicial review standards imposed by NRS Chapter 233B apply unless there is a specified exception. NRS 372.680 which states in pertinent part: "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..." does not contain specific language authorizing the Court to conduct a trial de novo.
4. NRS 372.680 is, to some extent, only a venue statute, informing a claimant that has received a denial from the Commission of its claim for refund of sales or use tax where it may file its action to seek a recovery of taxes it has overpaid.
5. Local governments that were parties to the proceedings below filed a petition for judicial review of an earlier decision by the Commission in this matter. The Nevada Supreme Court voided the earlier decision. Uniform standards and uniform application of the law demands that both the local government agencies and the taxpayers be treated the same and supports treating the current action as a petition for judicial review.
6. The Legislature made the following changes to NRS Chapter 233B and NRS

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372.680 indicating that decisions by the Nevada Tax Commission on refund claims are subject to NRS 233B:

1989

The legislature removes language authorizing original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 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)

1997

The legislature adds the language in NRS 360.245(5) that states "A decision of the Nevada Tax Commission is **a final decision** for the purposes of judicial review." (emphasis added)

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "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 the grounds set forth in the claim..." (emphasis added). "Thus, [the legislation] contemplates a change from past practice where **refund claims** upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. (emphasis added)

7. Two cases relied upon by Plaintiff, *State v. Obexer & Sons*, 99 Nev. 233, 660 P.2d 981 (1983) and *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402, 760 P.2d 127 (1989) were both decided before any of the legislative changes noted

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above. Specifically, the change in 1999 was meant to change the past practice where a taxpayer seeking a refund could go directly to district court after a denial by the Department without a contested case going before the Nevada Tax Commission. *See* Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General.

8. The legislative change made to NRS 372.680 in 1999 ensured that there would be the opportunity for an evidentiary hearing, findings of facts and conclusions of law and the opportunity for review by the Commission prior to a decision becoming final. With the change, the legislature limited the scope of NRS 372.680 and brought it within the umbrella of NRS Chapter 233B.

9. Plaintiff participated in an evidentiary hearing before the Commission. Plaintiff is not entitled to a second evidentiary hearing in district court, but is entitled to judicial review of the Commission's February 27, 2009 decision. *Campbell v. State of Nevada*, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992).

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Therefore, this matter will proceed as a Petition for Judicial Review pursuant to NRS Chapter 233B.

IT IS SO ORDERED.

Dated this __ day of ~~October~~, 2009.

JAMES T. RUSSELL
District Judge

Submitted by:

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By: _____
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EXHIBIT “G”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN CALIFORNIA EDISON,

Petitioner,

vs.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CARSON CITY, AND THE HONORABLE JAMES TODD RUSSELL, DISTRICT JUDGE,

Respondents, and

THE STATE OF NEVADA, DEPARTMENT OF TAXATION,

Real Party in Interest.

Supreme Court Case No. 55228

First Judicial District Court
Case No. 09 OC 00016 1B

AMICUS CURIAE BRIEF OF THE LEGISLATURE OF THE STATE OF NEVADA IN SUPPORT OF THE DEPARTMENT OF TAXATION OF THE STATE OF NEVADA AND IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF AMICUS CURIAE

The Legislature of the State of Nevada (Legislature), by and through its counsel, hereby files its Amicus Curiae Brief in support of the Department of Taxation of the State of Nevada, which is the Real Party in Interest in this original action for a writ of mandamus. The Legislature's interest in this case is in seeing that the Legislature's intent in enacting the 1999 amendment to NRS 372.680 is given effect. The Legislature is filing its Amicus Curiae Brief under the authority of NRAP 29(a), which provides that the State of Nevada, or any officer or agency thereof, may file an amicus curiae brief in a case before the Court without obtaining the written consent of the parties or requesting leave of the Court.

SUMMARY OF THE ARGUMENT

Briefly stated, NRS 372.680[1] does not authorize or otherwise provide for a trial de novo in state district court on a claim for a refund of sales and use taxes because the Legislature amended the plain language of NRS 372.680 in Senate Bill No. 362 of the 1999 Legislative Session (S.B. 362) to govern actions for judicial review of decisions of the Nevada Tax Commission (Tax Commission) concerning such claims. The intent of the Legislature that NRS 372.680 should govern such actions for judicial review is evidenced by the plain language of the statute when read as part of the larger statutory scheme governing judicial actions concerning agency decisions.

Further, even if we assume for the sake of argument that the plain language of NRS 372.680 is not clear, the clear and consistent legislative history from 1999 confirms that the

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[1] NRS 374.685 is substantially the same as NRS 372.680 in all aspects relevant to this case. The arguments in this brief are meant to apply equally to NRS 372.680 and 374.685.

Legislature intended for NRS 372.680 to govern actions for judicial review of decisions of the Tax Commission pursuant to NRS chapter 233B. The Senate Committee on Taxation and the Assembly Committee on Taxation received uncontradicted and unquestioned explanations from knowledgeable and reliable sources that S.B. 362 would amend NRS 372.680 to govern such actions for judicial review, and thereafter, each house of the Legislature voted overwhelmingly to enact S.B. 362.

ARGUMENT

I. THE PLAIN LANGUAGE OF NRS 372.680, WHEN READ AS PART OF THE LARGER STATUTORY SCHEME GOVERNING JUDICIAL ACTIONS CONCERNING AGENCY DECISIONS, EVIDENCES THE LEGISLATIVE INTENT THAT NRS 372.680 SHOULD GOVERN ACTIONS FOR JUDICIAL REVIEW OF FINAL DECISIONS OF THE TAX COMMISSION.

The primary goal in construing a statute is to ascertain the intent of the Legislature in enacting the statute and to adopt an interpretation that best captures that intent.[2] As this Court has stated, "[w]e have long held that it is our duty to interpret statutes consistent with the intent of the legislature."[3] As to how the intent of the Legislature is determined, this Court has observed that "the plain meaning of a statute's words are presumed to reflect the legislature's intent in enacting the statute."[4] Therefore, the plain meaning of statutory language should be applied as written unless such a meaning violates the spirit of the act or leads to an absurd or

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[2] *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538 (2001).

[3] *Rose v. First Fed. Sav. and Loan*, 105 Nev. 454, 457 (1989). *See also State v. Schlein*, 854 P.2d 296, 299 (Kan. 1993) ("Interpretation of a statute is a question of law, and it is the function of the court to interpret a statute to give it the effect intended by the legislature.").

[4] *Anthony Lee R. v. State*, 113 Nev. 1406, 1414 (1997). *See also Wilson v. Valley Mental Health*, 969 P.2d 416, 418 (Utah 1998) ("When examining a statute we look first to its plain language as the best indicator of the legislature's intent and purpose in passing the statute.").

unreasonable result.[5] However, the words of a statute are not considered in a vacuum.[6] Each statute should be interpreted so as to be in harmony with the other statutes relating to the same subject, using the presumption that the Legislature enacted each statute with full knowledge of all other statutes relating to the same subject.[7]

Given these rules of statutory construction, we turn to the present language of NRS 372.680, which is the product of legislative amendments in 1999 pursuant to S.B. 362:

> 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 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

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[5] *Anthony Lee R. v. State*, 113 Nev. 1406, 1414 (1997).

[6] *City of Las Vegas v. Eighth Judicial Dist. Court*, 122 Nev. 1041, 1049 (2006) ("[P]articular words or phrases in an ordinance need not be read in a vacuum. The meaning of an ordinance's terms may be given context by the statutory scheme of which the ordinance is a part.") (footnote omitted). *See also State v. Smith*, 98 P.3d 1022, 1026 (N.M. 2004) ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.") (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:05, at 165 (6th ed., rev. 2000)).

[7] *State v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295 (2000) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules or statutes. . . . [W]hen the legislature enacts a statute, this court presumes that it does so with full knowledge of existing statutes relating to the same subject.") (emphasis added and citations and quotations omitted); *Nevada Comm'n on Ethics v. Ballard*, 120 Nev. 862, 866 (2004) ("We interpret the statutes that comprise the ethics law according to their plain meaning and in the context of the entire statutory scheme, consistent with the spirit of the law.") (emphasis added and footnote omitted); *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449 (2005) ("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Further, it is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.") (emphasis added and footnote and quotations omitted).

> Department, 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.

(Emphasis added.) The plain language of NRS 372.680 governs an action on a claim brought by a claimant in district court within 90 days after a final decision on that claim is rendered by the Tax Commission. If NRS 372.680 were considered in a vacuum, it could be argued that the word "action" in subsection 1 is ambiguous. In a vacuum, the word "action" in subsection 1 of NRS 372.680 could mean an action for judicial review or, alternatively, it could mean a trial de novo. However, when the language of NRS 372.680 is read in the context of other applicable statutes, the plain meaning of the language of NRS 372.680 becomes clear.

One of the other statutes which, by its terms, applies to judicial actions concerning agencies is NRS 233B.130. NRS 233B.130(6) states that "[t]he provisions of this chapter [NRS chapter 233B] 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.) Thus, we know that IF the decision of the Tax Commission referred to in NRS 372.680 is a final decision in a contested case and IF NRS chapter 233B applies to the Department of Taxation (of which the Tax Commission is the head),[8] then the provisions of NRS chapter 233B are the exclusive means of judicial action regarding that case.

As to whether the decision of the Tax Commission referred to in NRS 372.680 is a final decision in a contested case, NRS 372.680 itself provides that the decision of the Tax

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[8] NRS 360.120(2).

Commission must be a final decision.[9] We then look to the applicable definition of "contested case" in NRS 233B.032 to see that "'[c]ontested case' means a proceeding . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . . ." Based on this definition, a proceeding governed by NRS 372.680 would be a contested case because, in accordance with the statutory language added to NRS 372.680 by the Legislature in 1999,[10] by the time the case was brought in district court, the legal right of a claimant to a refund of taxes would have been required by law to have been determined by the Tax Commission after a hearing.[11] Thus, the decision of the Tax Commission referred to in NRS 372.680 is: (1) a final decision; and (2) a final decision in a contested case.

As to whether the provisions of NRS chapter 233B apply to the Department of Taxation (of which the Tax Commission is the head),[12] we note that NRS chapter 233B governs "agencies" and that the applicable definition of "agency" states that "'[a]gency' means an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases."[13] The Department of Taxation falls within the ambit of this definition because it is a "department . . . of the Executive Department of the State Government

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[9] NRS 372.680(1). In addition, NRS 360.245(5) provides that "[a] decision of the Nevada Tax Commission is a final decision for the purposes of judicial review."

[10] As discussed in Part II, *infra*, in 1999 the Legislature added the language requiring that a final decision of the Nevada Tax Commission must precede the action in district court.

[11] NRS 360.245, 360.247 and 372.680.

[12] NRS 360.120(2).

[13] NRS 233B.020(1), 233B.031 and 233B.130.

authorized by law to make regulations or to determine contested cases."[14] Further, neither the Department of Taxation nor NRS 372.680 nor an action governed by NRS 372.680 is exempt from NRS chapter 233B.[15] In short, NRS chapter 233B applies to the Department of Taxation, to NRS 372.680 and to actions governed by NRS 372.680.

Based on the foregoing, we know that: (1) the decision of the Tax Commission referred to in NRS 372.680 is a final decision in a contested case; and (2) NRS chapter 233B applies to the Department of Taxation. Therefore, pursuant to NRS 233B.130(6), the provisions of NRS chapter 233B are the exclusive means of judicial action regarding that case. Further, if the provisions of NRS chapter 233B are the exclusive means of judicial action regarding that case, then the procedural and other requirements of NRS chapter 233B governing the adjudication of contested cases, as found in NRS 233B.121 to 233B.150, inclusive, govern the judicial action regarding that case. Finally, if the provisions of NRS 233B.121 to 233B.150, inclusive, govern the judicial action regarding that case, then the judicial action regarding that case is an action for judicial review pursuant to NRS chapter 233B. This result allows the plain language of NRS 372.680 to be read in harmony with the entire statutory scheme described in the preceding paragraphs.[16] Specifically, by reading the word "action" in NRS 372.680(1) as

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[14] NRS 360.090 (authorizing the Tax Commission, as head of the Department of Taxation, to make regulations), 360.120 (creating the Department of Taxation with the Tax Commission as its head) and 360.245 (providing for determination of cases by the Tax Commission).

[15] NRS 233B.039 (setting forth agencies, statutes and actions which are exempt from NRS chapter 233B).

[16] Although NRS 233B.130(6) refers to the provisions of NRS chapter 233B as the "exclusive means of . . . judicial action concerning[] a final decision" (emphasis added) of the Tax Commission, provisions such as those in NRS 372.680 may also govern the judicial action because, pursuant to NRS 233B.020(2), "[t]he provisions of this chapter [NRS chapter 233B]

referring to an action for judicial review, the language of NRS 372.680 is harmonized with the other statutory provisions in the statutory scheme. However, if the word "action" in subsection 1 of NRS 372.680 is read to mean a trial de novo in district court, then the statutory scheme described in the preceding paragraphs is in conflict. For this reason, the plain language of NRS 372.680 can and should be read, as part of the statutory scheme in which it is embedded, to govern actions for judicial review of final decisions of the Tax Commission pursuant to NRS chapter 233B.

II. THE LEGISLATIVE HISTORY OF S.B. 362 CLEARLY AND CONSISTENTLY SHOWS THAT THE LEGISLATURE INTENDED NRS 372.680 TO GOVERN ACTIONS FOR JUDICIAL REVIEW OF FINAL DECISIONS OF THE TAX COMMISSION.

As shown in Part I, *supra*, the plain language of NRS 372.680, read in the context of the statutory scheme in which it is embedded, governs actions for judicial review of decisions of the Tax Commission pursuant to NRS chapter 233B. However, if we assume for the sake of argument that the plain language of NRS 372.680 is ambiguous on this point, then we turn to the rules for interpreting an ambiguous statute. According to this Court, "[w]hen construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance."[17] As stated in the treatise *Statutes and Statutory Construction*, "the history of

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are intended to supplement statutes applicable to specific agencies." *See Mineral County v. Bd. of Equalization*, 121 Nev. 533, 536 (2005) ("[W]e conclude that the provisions of NRS Chapter 361 supplement, rather than preempt, the provisions of NRS Chapter 233B . . . . This interpretation is optimal because it permits harmonious construction of NRS Chapter 233B and NRS Chapter 361.") (emphasis added).

[17] *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302 (2006); *Clark County Dist. Att'y v. Eighth Judicial Dist. Court*, 123 Nev. 337, 345 (2007) ("Since the statute

events during the process of enactment, from its introduction in the legislature to its final validation, has generally been the first extrinsic aid to which courts have turned in attempting to construe an ambiguous act."[18] Consistent with the treatise, this Court has often determined legislative intent using the testimony and documentation provided to legislative committees.[19] Also, as noted by a California court, "legislative staff analyses of a measure may be used to discover legislative intent where . . . the analysis is in accord with a reasonable interpretation of the enactment."[20]

Turning now to the legislative history, NRS 372.680 was amended into its present form in 1999 pursuant to S.B. 362. S.B. 362, as a bill introduced in the Senate concerning taxation, was first referred to the Senate Committee on Taxation.[21] *Compiled Legislative History of SB362 — 1999* at 1. After the intent and effect of the bill was explained to the Senate committee, the bill was passed out of the committee and approved by the Senate on a 21-0 vote

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is ambiguous, we look to its legislative history to understand its meaning.").

[18] 2A Norman J. Singer, *Statutes and Statutory Construction* § 48:4 (7th ed. 2007).

[19] *See, e.g., Att'y Gen. v. Nev. Tax Comm'n*, 124 Nev. ---, 181 P.3d 675, 682 (2008) (using a memorandum provided by Patrick Pine, Executive Director of the Department of Taxation, to the Assembly Committee on Taxation); *City Plan Dev., Inc. v. Office of the Labor Comm'r*, 121 Nev. 419, 435-36 (2005) (using testimony provided by the Labor Commissioner to the Assembly Committee on Government Affairs); *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548-49 (2005) (using testimony provided by Mary Lau, Executive Director of the Retailers Association of Nevada, to the Assembly Committee on Taxation).

[20] *Am. Tobacco Co. v. Superior Court*, 255 Cal. Rptr. 280, 283-84 (Cal. Ct. App. 1989).

[21] The Research Division of the Legislative Counsel Bureau compiled a legislative history of S.B. 362 of the 1999 Legislative Session (hereinafter referred to as the Compiled Legislative History of SB362 — 1999), which is available on the Legislature's website at http://www.leg.state.nv.us/lcb/research/library/1999/SB362,1999.pdf. The pages of the Compiled Legislative History of SB362 — 1999 were numbered from 01 to 104 by the Research Division using Bates stamp numbers in the lower right corner of each page. When referring to page numbers in the Compiled Legislative History of SB362 — 1999, the Legislature is referring to these Bates stamp numbers from the Research Division.

without any specific remarks entered into the Senate Daily Journal. *Id.* at 1, 95-98. S.B. 362 was then transmitted to and introduced in the Assembly and referred to the Assembly Committee on Taxation. *Id.* at 1. Here the effect and intent of the bill was explained in even greater detail before the bill was passed out of the committee and approved by the Assembly on a 40-0 vote (2 excused) without any specific remarks entered into the Assembly Daily Journal. *Id.* at 1, 99-104. According to the legislative history of S.B. 362, there was not any opposition to the bill nor was there any disagreement concerning the intent or effect of the relevant provisions of the bill. While there were alternative ideas as to what the bill should provide in some instances, the bill was amended accordingly and approved with virtually universal support.

A. **Proceedings before the Senate Committee on Taxation.**

When S.B. 362 was referred to the Senate Committee on Taxation, the bill was in its "as introduced" form, and section 33, which amended NRS 372.680, read as follows:

> 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ ***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 the grounds set forth in the claim in a court of competent jurisdiction in Carson City ***or Clark County*** 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.

Id. at 62. As introduced, section 33 made two substantive changes to NRS 372.680. (Similar amendments were made to various NRS sections throughout the bill.) First, section 33 changed the procedural step preceding an action in district court from the mailing of the notice of the Department of Taxation's action upon a claim to the date of the final decision of the Tax

Commission upon a claim. Second, section 33 authorized the action to be filed in Clark County in addition to Carson City.

In response to questioning concerning the bill, Senior Deputy Attorney General Azevedo, representing the Department of Taxation, provided for the record an explanation of the purpose of the substantive changes in the bill. According to the minutes of the Senate Committee on Taxation:

> [Mr. Azevedo] explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, <u>if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review.</u> He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.

Id. at 6 (emphasis added). Based on this testimony, every legislator at that committee meeting would have understood that the amendments contained in S.B. 362 would, and were intended to, provide for cases proceeding to a district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review.

The legislators had every reason to believe Mr. Azevedo's explanation of the intent and effect of S.B. 362. Mr. Azevedo worked for the Attorney General's Office and, in his capacity as a Senior Deputy Attorney General, he represented the Department of Taxation, so he spoke for the agencies which would enforce and administer these statutes and which should know these statutes better than any other agency. *Id.* at 4. Moreover, the legislators had no reason to doubt Mr. Azevedo's explanation. No one from the committee or the audience contradicted or even questioned Mr. Azevedo's explanation, despite the presence of several people who would have known if Mr. Azevedo was misstating the intent or effect of the bill. Specifically, Mr.

Azevedo's explanation was not contradicted or questioned by legislative staff, by Senator O'Connell, who was the sponsor of the bill, by David Pursell, who was the Executive Director of the Department of Taxation, or by Carole Vilardo, who represented the Nevada Taxpayers Association and who, as a proponent of the bill, had provided an overview of the bill to the committee earlier during the same hearing. *Id.* Shortly after Mr. Azevedo's explanation to the committee that S.B. 362 would provide for cases proceeding to district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review, the committee voted to pass the bill out of committee with various unrelated revisions. *Id.* at 6.

B. <u>Proceedings before the Assembly Committee on Taxation.</u>

When S.B. 362 was referred to the Assembly Committee on Taxation, the bill had incorporated the Senate amendment and so was in its "first reprint" form. However, the Senate had not revised section 33 (amending NRS 372.680), so in the first reprint of S.B. 362, section 33 appeared exactly as it had in the "as introduced" form of S.B. 362 and, therefore, section 33 as examined by the Assembly Committee on Taxation was identical to section 33 as examined by the Senate Committee on Taxation.

At the first hearing on S.B. 362 in the Assembly Committee on Taxation, legislative staff member Ted Zuend of the Fiscal Analysis Division of the Legislative Counsel Bureau provided to the committee a written bill explanation for S.B. 362. *Id.* at 20, 26-32. Mr. Zuend's bill explanation described section 33 (amending NRS 372.680) as follows:

> **<u>Section 33:</u>** Provides that <u>an action for judicial review</u> of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that <u>such action</u> may be brought in a court in Clark County as well as Carson City.

Id. at 30 (emphasis added). Here Mr. Zuend expressly explained that section 33 (amending NRS 372.680) provided that "an action for judicial review" followed a decision of the Tax Commission and that "such action" could be brought in Clark County or Carson City. This is significant for two reasons. First, Mr. Zuend communicated to the members of the committee that section 33 would amend NRS 372.680 to govern an action for judicial review in a district court of a decision of the Tax Commission, not a trial de novo in a district court. Second, Mr. Zuend's explanation of the language of section 33 indicated that the word "action" in the phrase "the claimant may bring an action" meant an action for judicial review.[22] The legislators had every reason to believe Mr. Zuend, as the members of the Legislature regularly depend upon their legislative staff to provide accurate and unbiased analyses of legislation. Also, the legislative history of S.B. 362 shows that no one contradicted or even questioned Mr. Zuend's bill explanation at the hearing at which it was provided to the committee or at any other hearing.

At the second hearing on S.B. 362 in the Assembly Committee on Taxation, Assemblyman Anderson advised the committee that the Attorney General's Office had provided him with a memorandum concerning S.B. 362 and that he had provided that memorandum to Assemblyman Goldwater, the Chairman of the Assembly Committee on Taxation. *Id.* at 37. Chairman Goldwater thereafter "referred the committee to the memorandum from the attorney general regarding S.B. 362, on which action would be taken

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[22] Use of the word "action" to mean an action for judicial review is not unique to NRS 372.680. Significantly, NRS 233B.130(6) states: "The provisions of this chapter [233B] 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.)

next meeting." *Id.* at 39.

This memorandum from the Attorney General's Office, to which the members of the committee were referred by Chairman Goldwater and told that it would be the subject of upcoming committee action, contained a detailed and unequivocal explanation of the effects of the amendments in section 33 of S.B. 362 (amending NRS 372.680). *Id.* at 46-47. The memorandum began by identifying the sections of S.B. 362 to which it applied. *Id.* at 46. Specifically, the memorandum indicated that its analysis applied to sections 13, 26, 30, 33 (amending NRS 372.680), 36 and 41. *Id.* These sections all contained provisions amending the procedure preceding an action in district court or amending the venue options for an action in district court, or both. *Id.* at 57-64. The memorandum then continued in relevant part as follows:

> For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised States, a taxpayer has the ability to file an action in one of three locations. These locations are: (1) Carson City, (2) the county in which the taxpayer resides, or (3) the county where the agency proceeding occurred. See NRS 233B.130(2)(b). The Nevada Department of Taxation has been governed by this venue provision since its passage in 1965. Historically, only audit deficiencies were subject to the application of Chapter 233B of the Nevada Revised Statutes.
>
> With the exception of Section 13 of S.B. 362, the remaining sections delineated above [i.e., sections 26, 30, 33 (amending NRS 372.680), 36 and 41] address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. 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. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. **In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a**

> **judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362.** Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.
>
> Accordingly, it would be advisable to make the venue provisions of S.B. 362 consistent with NRS 233B.130(2)(b).

Id. at 46-47 (emphasis added). This memorandum clearly and unequivocally communicated that the amendments contained in section 33 of S.B. 362 would, and were intended to, provide for cases proceeding to a district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review. Further, this memorandum was written and provided by Senior Deputy Attorney General Azevedo who, as previously discussed, the legislators had every reason to believe because he worked for the Attorney General's Office and, in his capacity as a Senior Deputy Attorney General, he represented the Department of Taxation. Thus, as previously discussed, Mr. Azevedo spoke for the agencies which would enforce and administer these statutes and which should know these statutes better than any other agency. Moreover, the legislators had no reason to doubt Mr. Azevedo's explanation as no one contradicted or even questioned Mr. Azevedo's explanation.

As a final note, when the Assembly Committee on Taxation voted to pass S.B. 362 out of committee, the committee took the advice Mr. Azevedo included in the memorandum, thereby further indicating that the committee both understood and gave consideration to the views expressed in the memorandum. *Id.* at 47. As Mr. Azevedo advised, the committee amended the venue provisions in NRS 372.680 to be consistent with NRS 233B.130(2)(b), thus making the venue provisions consistent among these statutes governing actions for judicial review of final decisions of agencies.

C. **Summary of the legislative history.**

The legislative history of S.B. 362 shows that knowledgeable and reliable sources explained clearly and consistently to the legislators that the amendments in S.B. 362 to NRS 372.680 would, and were intended to, provide for cases proceeding to a district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review. These explanations were provided by a senior deputy attorney general representing the Department of Taxation and by legislative staff. The legislative history also shows that no one at any hearing (or otherwise) contradicted or even questioned these explanations of the intent and effect of S.B. 362. Finally, after the legislators received these explanations, each house of the Legislature voted overwhelmingly to enact S.B. 362.

CONCLUSION

Based on the foregoing, the Legislature hereby respectfully requests that this Court interpret NRS 372.680 in accordance with the intent of the Legislature that NRS 372.680 should govern an action for judicial review of a final decision of the Tax Commission pursuant to NRS chapter 233B and not provide for a trial de novo in district court, and for this reason deny the Petition for Writ of Mandamus.

DATED: This 3rd day of March, 2010.

Respectfully submitted,
BRENDA J. ERDOES, Legislative Counsel

By: _____
WILLIAM L. KEANE, Senior Principal Deputy Legislative Counsel
Nevada Bar No. 6705
Legislative Counsel Bureau, Legal Division, 401 S. Carson St., Carson City, NV 89701
Telephone: (775) 684-6830 Facsimile: (775) 684-6761
Attorneys for the Legislature of the State of Nevada

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Legislature's Amicus Curiae Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that the Amicus Curiae Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the Amicus Curiae Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the Amicus Curiae Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This 3rd day of March, 2010.

Respectfully submitted,
BRENDA J. ERDOES, Legislative Counsel

By: _____
WILLIAM L. KEANE, Senior Principal Deputy Legislative Counsel
Nevada Bar No. 6705
Legislative Counsel Bureau, Legal Division, 401 S. Carson St., Carson City, NV 89701
Telephone: (775) 684-6830 Facsimile: (775) 684-6761
Attorneys for the Legislature of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 3rd day of March, 2010, I served a true and correct copy of the document:

AMICUS CURIAE BRIEF OF THE LEGISLATURE OF THE STATE OF NEVADA IN SUPPORT OF THE DEPARTMENT OF TAXATION OF THE STATE OF NEVADA AND IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

by depositing the same in the United States Mail, postage prepaid, addressed to the following:

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OFFICE OF THE ATTORNEY GENERAL
100 N. Carson Street
Carson City, NV 89701
Attorney for Real Party in Interest

THE HONORABLE JAMES T. RUSSELL
FIRST JUDICIAL DISTRICT COURT
885 E. Musser Street
Carson City, NV 89701
Respondent

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Attorney for Amici Curiae

Judy Wistock
An Employee of the Legislative Counsel Bureau

EXHIBIT “H”

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT OF TAXATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KENNETH C. CORY,
Respondents,
and
HARRAH'S OPERATING COMPANY, INC.,
Real Party in Interest.

No. 56722

FILED

JUL 07 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus and prohibition challenges a district court order determining that a use tax refund matter should proceed in the district court as an independent action subject to de novo review, rather than as a petition for judicial review under the Nevada Administrative Procedure Act, NRS Chapter 233B.[1]

Having reviewed the parties' filings, we conclude that writ relief is warranted. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). Recently, in Southern California Edison v. District Court, 127 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 22, May 26, 2011), reh'g pending, we concluded that as the result of several amendments over the past several years, "NRS 372.680 now contemplates

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from consideration of this matter.

judicial review, in accordance with NRS Chapter 233B, and a petition for judicial review under those statutes is the sole remedy after a final decision by the [Tax] Commission in regard to a sales and use tax refund matter." Accordingly, here, the district court improperly directed that the matter proceed as an independent action subject to de novo review; instead, the matter should proceed as a petition for judicial review under NRS Chapter 233B.

Petitioner argues that, in the event the court agrees that the matter must be brought as a petition for judicial review, this case must be dismissed because it was untimely filed under NRS Chapter 233B more than 30 days after service of the final agency decision. But even though NRS Chapter 233B applies generally, NRS 372.680 operates to provide a 90-day filing period; thus NRS 233B.130(2)(c)'s 30-day deadline to file a petition for judicial review does not apply here. A specific statute that conflicts with a general statute will take precedence over the general statute. Andersen Family Assocs. v. State Engineer, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008). Accordingly, because it specifically applies to tax refund claims while NRS Chapter 233B applies generally to judicial review proceedings, NRS 372.680's 90-day provision takes precedence over NRS 233B.130's 30-day provision. See NRS 233B.020(2) ("The provisions of this chapter are intended to supplement [not supplant] statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.").

Consequently, we grant this petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to allow real party in interest to take any steps necessary to comply with the

applicable provisions of NRS Chapter 233B and to thereafter proceed with its review of this matter under that chapter.[2]

It is so ORDERED.

Douglas, C.J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Kenneth C. Cory, District Judge
Attorney General/Las Vegas
John Bartlett, Attorney at Law
Eighth District Court Clerk

---

[2]In light of this order, petitioner's alternative request for a writ of prohibition is denied as moot.

EXHIBIT "I"

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT OF TAXATION,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE JANET J. BERRY,
Respondents,
and
SIERRA PACIFIC POWER COMPANY AND NEVADA POWER COMPANY, INC., JOINTLY DOING BUSINESS AS NV ENERGY,
Real Parties in Interest.

No. 56740

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order determining that a use tax refund matter should proceed in the district court as an independent action subject to de novo review, rather than as a petition for judicial review under the Nevada Administrative Procedure Act, NRS Chapter 233B.[1]

Having reviewed the parties' filings, we conclude that writ relief is warranted. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). Recently, in Southern California Edison v. District Court, 127 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 22, May 26, 2011), reh'g pending, we concluded that as the result of several

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from consideration of this matter.

11-20194

amendments over the past several years, "NRS 372.680 now contemplates judicial review, in accordance with NRS Chapter 233B, and a petition for judicial review under those statutes is the sole remedy after a final decision by the [Tax] Commission in regard to a sales and use tax refund matter." Accordingly, here, the district court improperly directed that the matter proceed as an independent action subject to de novo review; instead, the matter should proceed as a petition for judicial review under NRS Chapter 233B.

Consequently, we grant this petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to allow real parties in interest to take any steps necessary to comply with the applicable provisions of NRS Chapter 233B and to thereafter proceed with its review of this matter under that chapter.

It is so ORDERED.

_____, C.J.
Douglas

_____, J.
Saitta

_____, J.
Hardesty

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
John Bartlett, Attorney at Law
Washoe District Court Clerk

CODE 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SIERRA PACIFIC POWER COMPANY, INC. and NEVADA POWER COMPANY, INC., jointly doing business as NV ENERGY

Plaintiffs,

v.

STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION,

Defendant.
_____/

Case No. CV09-03554

Dept. No. 1

ORDER

On July 7, 2011, the Supreme Court of Nevada issued a *Writ of Mandamus* ordering this Court to allow the real parties in interest to take any steps necessary to comply with the applicable provisions of N.R.S. Chapter 233B.

Plaintiffs Sierra Pacific Power Company, Inc., and Nevada Power Company, Inc., jointly doing business as NV Energy (collectively, "NV Energy"), by and through counsel, John S. Bartlett, Esq., filed the *Complaint* in this matter on December 8, 2009. The *Complaint* seeks recovery of a refund of use taxes pursuant to N.R.S. 372.680.

Defendant State of Nevada, ex rel. Department of Taxation ("State"), by and through counsel Gina C. Session, Esq., filed a *Motion to Dismiss or in the Alternative Proceed Pursuant to N.R.S. Chapter 233B* on January 20, 2010. The State's *Motion* averred

Plaintiff's remedy was limited to a petition for judicial review rather than a trial de novo, because the matter had already been brought before the Nevada Tax Commission, which had rendered a decision in favor of the State.

Plaintiff filed an *Opposition to the Motion to Dismiss or in the Alternative Proceed Pursuant to N.R.S. Chapter 233B*, to which Defendant filed a *Reply*. On August 5, 2010, this Court entered an *Order* denying the State's *Motion*.

On August 19, 2010, the State filed a *Motion for Stay* while the State pursued a writ of mandamus with the Supreme Court of Nevada. The Court granted the State's *Motion for Stay* and entered an order staying the case pending judicial review on September 15, 2010.

On July 7, 2011, the Supreme Court of Nevada issued a writ of mandamus holding that Plaintiff's remedy is limited to a petition for judicial review.

Accordingly, and good cause appearing, the parties are hereby ORDERED to proceed under N.R.S. Chapter 233B, which governs judicial review of administrative agency decisions.

Plaintiff shall have thirty (30) days from the date of this *Order* to file a *Petition for Judicial Review* in accordance with N.R.S. 233B.130. The remaining deadlines shall be in accordance with N.R.S. Chapter 233B.

IT IS SO ORDERED.

DATED this 13th day of July, 2011.

Janet Berry

DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 13th day of July, 2011, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Gina C. Session, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, Nevada 89710
Attorney for Defendant/Respondent

John Bartlett, Esq.
1201 Stewart Street
Suite 130
Carson City, Nevada 89706
Attorney for Plaintiff/Petitioner

Christine Kuhl

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

APPELLANTS' APPENDIX
VOLUME 15, PAGES 2714-2916

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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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08/16/2011	Defendants Motion to Compel – Exhibit D Email to Roos from Rakowsky - Dated June 28, 2011	18	3505-3506
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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:

SUPPLEMENT TO MOTION TO RECONSIDER AND TO CLARIFY ORDER

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COME NOW, Plaintiffs by and through counsel, William H. Brown, Esq., and submit the following Supplement to their Motion to Reconsider and Clarify its ruling with respect to Plaintiffs' claims under 42 U.S.C. § 1983.

DATED: April 29, 2011

TURCO & DRASKOVICH

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

POINTS AND AUTHORITIES

A. INTRODUCTION

Currently, the order entered on April 5, 2011 dismisses all of Plaintiffs' claims under 42 U.S.C. § 1983, including the right to declaratory and injunctive relief. Plaintiffs have moved for clarification that the Court 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.

Attached as **Exhibit 1** is the transcript from the subject hearing, on March 15, 2011. After entertaining oral argument, the Court concluded as follows:

THE COURT:

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.

Transcript at 31:8-16.

Immediately beforehand, the Court asked Plaintiffs' counsel to address "the issue of damages under your 1983 action." Counsel replied: "Well, Your Honor, you know, when they're right, they're right. … But it doesn't apply to the injunctive and declaratory relief." Transcript at 29:17-20; 30:10-11.

Based on this, it appears clear that the Court only dismissed Plaintiffs' claim for damages under § 1983, not Plaintiffs' claims for injunctive and declaratory relief under § 1983.

Therefore, the Court should clarify that, contrary to the current language of the Order, the Court did not dismiss all of Plaintiffs' claims under § 1983.

Therefore, the Court should clarify that, contrary to the current language of the Order, the Court did not dismiss all of Plaintiffs' claims under § 1983.

B. 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 29 day of April, 2011

Respectfully submitted,

BY: _____

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Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011, service of the forgoing:

SUPPLEMENT TO 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:

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An employee of
TURCO & DRASKOVICH

EXHIBIT "1"

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

4/11/11

DATE

RECEIVED
MAY 18 2011
BY:

DISTRICT COURT
CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, ET AL,

Plaintiff(s),

vs.

NEVADA DEPARTMENT OF TAXATION, ET AL,

Defendant(s).

Case No. **06 A533273**
Dept. No. **XI**

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CLERK OF THE COURT

3rd AMENDED ORDER SETTING CIVIL NON-JURY TRIAL AND CALENDAR CALL

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried on a **Five week stack** to begin, **Monday, November 14, 2011, at 1:30p.m.**

B. A calendar call will be held on **Thursday, November 10, 2011, at 9:15a.m.** Parties must bring to Calendar Call the following:

(1) Typed exhibit lists;
(2) List of depositions;
(3) List of equipment needed for trial, including audiovisual equipment;[1] and
(4) Courtesy copies of any legal briefs on trial issues.

The Final Pretrial Conference will be set at the time of the Calendar Call.

C. The Pre-Trial Memorandum must be filed no later than **4:00p.m. on November 9, 2011**, with a courtesy copy delivered to Department XI. All parties, (attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of

[1] If counsel anticipate the need for audio visual equipment during the trial, a request must be submitted to the District Courts AV department following the calendar call. You can reach the AV Dept at 671-3205 or via E-Mail at SLATW@clarkcountycourts.us

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MAY - 6 2011
CLERK OF THE COURT

E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

D. All motions in limine, must be in writing and filed no later than **September 23, 2011. Orders shortening time will not be signed except in extreme emergencies.**

E. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the final Pre-Trial Conference commencement. Counsel shall advise the clerk prior to publication.

F. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk prior to the final Pre-Trial Conference. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

G. Each side shall provide the Court, at the final Pre-Trial Conference, proposed findings of facts and conclusions of law with an electronic copy in Word format.

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

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

DATED this 2nd day of May, 2011.

ELIZABETH GONZALEZ - DISTRICT JUDGE

Certificate of Service

I hereby certify that on the date filed, this document was E-Served, mailed or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper person as follows:

David J Pope, Esq. (Attorney General – Civil)

William H Brown, Esq. (Turco & Draskovich)

Bradley J Shafer, Esq.
Shafer & Assoc.
3800 Capital City Blvd., Suite 2
Lansing, MI 48906-2110

Dan Kutinac

DISTRICT COURT
CLARK COUNTY, NEVADA

K-KEL, INC, ET AL, Plaintiff(s), vs. NEVADA DEPARTMENT OF TAXATION, ET AL, Defendant(s).	)	Case No. **08 A554970** Dept. No. **XI**

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CLERK OF THE COURT

4th AMENDED ORDER SETTING CIVIL NON-JURY TRIAL AND CALENDAR CALL

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried on a **Five week stack** to begin, **Monday, November 14, 2011, at 1:30p.m.**

B. A calendar call will be held on **Thursday, November 10, 2011, at 9:15a.m.** Parties must bring to Calendar Call the following:

(1) Typed exhibit lists;
(2) List of depositions;
(3) List of equipment needed for trial, including audiovisual equipment;[1] and
(4) Courtesy copies of any legal briefs on trial issues.

The Final Pretrial Conference will be set at the time of the Calendar Call.

C. The Pre-Trial Memorandum must be filed no later than **4:00p.m. on November 9, 2011**, with a courtesy copy delivered to Department XI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of

[1] If counsel anticipate the need for audio visual equipment during the trial, a request must be submitted to the District Courts AV department following the calendar call. You can reach the AV Dept at 671-3205 or via E-Mail at SLATW@clarkcountycourts.us

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CLERK OF THE COURT

E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

D. All motions in limine, must be in writing and filed no later than **September 23, 2011. Orders shortening time will not be signed except in extreme emergencies**.

E. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the final Pre-Trial Conference commencement. Counsel shall advise the clerk prior to publication.

F. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk prior to the final Pre-Trial Conference. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

G. Each side shall provide the Court, at the final Pre-Trial Conference, proposed findings of facts and conclusions of law with an electronic copy in Word format.

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

DATED this 2nd day of May, 2011.

ELIZABETH GONZALEZ - DISTRICT JUDGE

Certificate of Service

I hereby certify that on the date filed, this document was E-Served, mailed or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper person as follows:

David J Pope, Esq. (Attorney General – Civil)

William H Brown, Esq. (Turco & Draskovich)

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Dan Kutinac

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CLERK OF THE COURT

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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

SUPPLEMENT TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER

. . .

. . .

. . .

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

COMES NOW Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS by and through their attorney CATHERINE CORTEZ MASTO, Attorney General, and DAVID POPE, Senior Deputy Attorney General, BLAKE A. DOERR, Senior Deputy Attorney General, and VIVIENNE RAKOWSKY, Deputy Attorney General and hereby submits their Supplement to Defendants' Response to Plaintiffs' Motion for Clarification of Order in support of its request that this Court order that the refund claims in this matter be dismissed because they should have proceeded as a Petition for Judicial Review and the time for that has expired. See attached as Exhibit "A", Nevada Supreme Court decision Southern Cal. Edison v. The First Judicial Dist. Court, 127 Nev.Adv.Op. 22 (May 26, 2011).

DATED this 26th day of May, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /S/ BLAKE A. DOERR
BLAKE A. DOERR
Senior 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 26th day of May, 2011, I served the **SUPPLEMENT TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, and via facsimile, 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

Exhibit “A”

127 Nev., Advance Opinion 22

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN CALIFORNIA EDISON,
Petitioner,
vs.
THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CARSON CITY, AND THE HONORABLE JAMES TODD RUSSELL, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA, DEPARTMENT OF TAXATION,
Real Party in Interest.

No. 55228

FILED

MAY 26 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Original petition for a writ of mandamus challenging a district court order determining that a use tax refund matter should proceed as a petition for judicial review under NRS Chapter 233B, rather than as an independent action.

Petition granted.

Norman J. Azevedo, Carson City; O'Melveny & Myers LLP and Charles C. Read, Christopher W. Campbell, and Ryan M. Austin, Los Angeles, California,
for Petitioner.

Catherine Cortez Masto, Attorney General, and Gina C. Session, Chief Deputy Attorney General, Carson City,
for Real Party in Interest.

David J. Roger, District Attorney, and Paul D. Johnson, Deputy District Attorney, Clark County,
for Amicus Curiae Clark County.

Legislative Counsel Bureau Legal Division and Brenda J. Erdoes, Legislative Counsel, and William L. Keane, Senior Principal Deputy Legislative Counsel, Carson City,
for Amicus Curiae Legislature of the State of Nevada.

McDonald Carano Wilson LLP and Debbie Leonard and Jeffrey A. Silvestri, Las Vegas,
for Amici Curiae Nevada Taxpayers Association, Nevada Manufacturers Association, and Council on State Taxation.

BEFORE THE COURT EN BANC.

OPINION

By the Court, DOUGLAS, C.J.:

In this writ proceeding, we are asked to clarify the proper method of challenging the refund claim decisions of the Nevada Tax Commission. Specifically, the parties dispute whether such challenges should be through an independent civil action in which the district court's review is de novo, or through a petition for judicial review, which provides for a more deferential review of the Commission's decision. While we conclude that a petition for judicial review is the proper vehicle for challenging the Commission's decisions on claims for sales and use tax refunds, the Nevada Department of Taxation is judicially estopped from requesting that the claimant here proceed in such a manner, and thus, mandamus relief is appropriate.

In this case, after the Nevada Tax Commission denied petitioner Southern California Edison's claims for refunds of use taxes, Edison filed a complaint in district court, seeking relief under NRS 372.680. The district court ordered that the matter would proceed on the administrative record as a petition for judicial review pursuant to the

Administrative Procedures Act (APA), codified in NRS Chapter 233B. Edison thus has filed the instant writ petition, asking this court to determine that the APA does not apply because NRS 372.680 allows for trial de novo. Edison requests that this court issue a writ of mandamus ordering the district court to treat Edison's complaint as an independent civil action or provide other appropriate relief.

We conclude that the APA applies to sales and use tax refund claims. Although NRS 372.680 allows claimants to "bring an action" in the district court and our prior decisions, including Saveway v. Cafferata, 104 Nev. 402, 760 P.2d 127 (1988), suggested that claimants receive a trial de novo there, the APA and general tax statutes were subsequently amended in a manner demonstrating that judicial review under the APA is now the exclusive means of proceeding with a refund claim. Therefore, when taxpayers challenge the Commission's decision on sales and use tax refund claims, the matter is subject to judicial review pursuant to the APA. NRS 372.680 permits a taxpayer to challenge the Commission's decision by filing an action; pursuant to NRS 233B.130, that action must be a petition for judicial review. However, in this case, real party in interest, the Nevada Department of Taxation, is judicially estopped from asserting that a petition for judicial review is the sole remedy because it specifically told Edison that trial de novo would be available if Edison was unhappy with the Commission's decision. Therefore, although we hold that the APA applies to sales and use tax refund claims, in this instance, we conclude that the district court erred when it ordered the action to proceed as a petition for judicial review, and we grant Edison's petition for a writ of mandamus.

PROCEDURAL HISTORY AND FACTS

Edison filed with the Department several claims for refunds of use taxes it paid between March 1998 and December 2000. The Department denied those claims, and Edison appealed to the Commission. The claims were consolidated, and an administrative law judge upheld the Department's denial of Edison's requested refunds. Edison then appealed the administrative law judge's decision to the Commission.

Ultimately, the Commission voted to deny Edison's claims and later issued a written decision doing so.[1] Edison filed a complaint in district court seeking trial de novo for its refund claim. The Department filed a motion to dismiss, arguing that Edison should have filed a petition for judicial review under the APA, not a complaint. Following a hearing and subsequent briefing on whether the APA applied, the district court ordered that, even though Edison had filed a complaint rather than a petition for judicial review, the matter would proceed under the APA's judicial review standards. The district court concluded that "NRS Chapter 233B applies to all administrative agencies within the state unless exempt. The [Department] and the [Commission] are not exempt from the provisions of NRS Chapter 233B. NRS 233B.039. All decisions by the Commission are therefore subject to NRS 233B.130(6)."

---

[1]The Commission originally granted Edison's tax refund claims during a closed session. This court reversed the Commission's decision because the Commission had violated Nevada's Open Meeting Law. Attorney General v. Nevada Tax Comm'n, 124 Nev. 232, 244-45, 181 P.3d 675, 683 (2008). The Commission subsequently conducted new hearings in open session, which led to the decision denying the claims.

The district court stayed the proceedings pending resolution of the instant petition for a writ of mandamus challenging the district court's decision.

DISCUSSION

Edison argues that NRS 372.680 applies to its tax refund claim and that the proper proceeding under that statute is a civil action in district court, proceeding as trial de novo. Edison argues that the judicial review standard in the APA is inapplicable and petitions this court to issue a writ of mandamus compelling the district court to treat its complaint as an independent civil action.

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); see also NRS 34.160. "The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law." Redeker, 122 Nev. at 167, 127 P.3d at 522; see also NRS 34.170. A writ of mandamus is an extraordinary remedy; therefore, a court's decision to entertain a petition for a writ of mandamus is discretionary. Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). In determining whether writ relief is available and appropriate, we will consider, among other things, whether the petition raises an important issue of law that requires clarification. Redeker, 122 Nev. at 167, 127 P.3d at 522. It is the petitioner's burden to demonstrate that such relief is warranted. American Home Assurance Co. v. Dist. Ct., 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006). Furthermore, we review

questions of law de novo. Saylor v. Arcotta, 126 Nev. ___, ___, 225 P.3d 1276, 1278 (2010); State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000).

Edison argues that the nature of the judicial remedy available in a tax refund action is an important issue of law requiring clarification. Edison argues that the Department has taken inconsistent positions from one case to the next, and that this court should ensure that all taxpayers are treated with uniformity and consistency. According to Edison, there are multiple cases that are working their way through the administrative appeals process and that have been filed in district court that will require district courts throughout the state to determine the appropriate standard of review and procedural posture for refund cases. Edison argues that we should definitively clarify the law so that all of those cases are treated equally.

It appears that the Department has adopted a new policy for refund cases. The Department and the Attorney General's office admitted at oral argument that, in the past, they had advised some taxpayers who contested the denial of a refund that trial de novo before the district court would be available. They also admitted that there was no consistent position taken regarding whether a taxpayer is entitled to trial de novo or a petition for judicial review. In one case, an administrative law judge stated in a letter that: "[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time." However, in its answer to the writ petition, the Department states that "going forward, [it] is challenging refund actions filed as civil actions in district court after an administrative proceeding."

Given this change in the Department's approach to refund actions, and the resulting confusion and potential disparate application of the law, we take this opportunity to clarify the proper procedure when a taxpayer challenges a Commission decision in a refund action.[2]

Whether a taxpayer can file a complaint in district court or is required to petition for judicial review when challenging a decision of the Commission

In an action for refund, there appears to be two applicable statutes governing the nature of the action: NRS 372.680 and NRS Chapter 233B, specifically NRS 233B.130 and 233B.135. These statutes seem to require different types of proceedings. In Saveway, we held that a statute similar to NRS 372.680 provided for trial de novo. 104 Nev. at 404-05, 760 P.2d at 128-29. NRS Chapter 233B, however, provides for a more deferential standard of review for the commission's decision. NRS 233B.135.

As currently drafted, NRS 372.680 establishes a right of action against the Department for the recovery of a disallowed refund claim and reads:

> 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 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 or her principal place of business or a county in which any relevant proceedings were

---

[2]We note that during oral argument, the parties indicated that there seems to be confusion at the district court level as to whether NRS Chapter 233B applies or whether NRS 372.680 applies.

> conducted by the Department, 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.

NRS 372.680, however, does not define the nature of the action to be brought against the department.

In Saveway, this court recognized that prior caselaw regarding a statutory refund claim "certainly implies that the burden is not that of showing a lack of substantial evidence, rather, it is to support the elements of an independent action for restitution." 104 Nev. at 404, 760 P.2d at 128 (emphases added). However, NRS Chapter 233B and NRS 372.680 have both been amended since this court decided Saveway, and we reconsider the nature of the action for a refund claim.

NRS 233B.130 provides for judicial review of an agency's decision. Additionally, included in the APA is a statement of legislative intent, which reads:

> 1. By this chapter, the Legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the Executive Department of the State Government and for judicial review of both functions, except those agencies expressly exempted pursuant to the provisions of this chapter. This chapter confers no additional regulation-making authority upon any agency except to the extent provided in subsection 1 of NRS 233B.050.
>
> 2. The provisions of this chapter are intended to supplement statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such

> agencies by statute or otherwise recognized by law.

NRS 233B.020.

NRS 233B.039 sets out which agencies are completely exempt from the application of NRS Chapter 233B. It also specifically enumerates the statutory provisions that prevail over the provisions of NRS Chapter 233B. The Department of Taxation and the Tax Commission are not included in NRS 223B.039's exemption provision and none of the statutory provisions listed as prevailing over NRS Chapter 233B apply.

In 1989, after the Saveway decision, the Legislature removed language from NRS 233B.130(1) that stated the APA "does not limit utilization of trial de novo to review a final decision [of the agency] where provided by statute, but this chapter provides an alternative means of review in those cases." 1989 Nev. Stat., ch. 716, § 6, at 1651. The Legislature also added NRS 233B.130(6), which provides: "[t]he 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." Id. at 1652.

Richard Campbell, the chairman of the state bar's administrative law committee explained the rationale for the changes:

> [Campbell] indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. [Campbell] also pointed out it is not clear whether NRS 233[B] or the agency's law applies thereby creating general confusion among practitioners and the courts. [Campbell] indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures.

Hearing on A.B. 884 Before the Assembly Governmental Affairs Comm., 65th Leg., (Nev., June 6, 1989).

Thereafter, in 1997, the Legislature also added the following language to NRS 360.245:[3] "A decision of the Nevada Tax Commission is a final decision for the purposes of judicial review. The Executive Director or any other employee or representative of the Department shall not seek judicial review of such a decision." (Emphasis added.) Thus, when NRS 360.245(5) is read together with NRS 233B.130(6), it indicates that it was the intent of the Legislature that all final decisions by the Commission be subject to the provisions of NRS Chapter 233B.

Senate Bill (S.B.) 362 amended the language of NRS 372.680 to reflect the need for a final decision from the Nevada Tax Commission before seeking judicial relief:

> 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ **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 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,** for the recovery of the whole or any

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[3]NRS Chapter 360 contains general provisions pertaining to Nevada's revenue and taxation statutes. When the quoted language was added, it was designated as NRS 360.245(4). 1997 Nev. Stat., ch. 547, § 4, at 2595. The language is now designated as NRS 360.245(5), and we will refer to it as such in this opinion. See 1999 Nev. Stat., ch. 484, § 4, at 2481.

> 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.

1999 Nev. Stat., ch. 484, § 33, at 2495 (bold indicates language added and strikethrough indicates language removed). A staff summary, prepared by a staff member of the committee, considered by the Assembly Committee on Taxation explained that the amendments to NRS 372.680 "[p]rovide[ ] that an action for judicial review of a claim for refund of sales tax follows a decision of the [Commission], not the [Department], and that such action may be brought in a court in Clark County as well as Carson City." Hearing on S.B. 362 Before the Assembly Taxation Comm., 70th Leg. (Nev., May 6, 1999), Exhibit G. S.B. 362 was approved by the Assembly and Senate without any specific remarks.

In a memorandum to the Assembly Judiciary Committee Chairman regarding S.B. 362, the Office of the Attorney General stated:

> Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. . . . In the event that S.B. 362 becomes law, . . . after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Memorandum dated May 7, 1999, to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary, from Norm Azevedo, Senior Deputy Attorney General.

The deputy attorney general who wrote the memorandum also gave testimony to the Senate Committee on Taxation:

> [He] said this particular provision was addressed in NRS chapter 23[3]B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.[4]

Hearing on S.B. 362 Before the Senate Taxation Comm., 70th Leg. (Nev., March 23, 1999). Based on this testimony, every legislator at that committee meeting was made aware that the amendment to NRS 372.680 would be interpreted by the Attorney General's office and the Department to include a judicial review standard for appealing a decision of the Commission and approved it.

It is clear from NRS 372.680, S.B. 362, and the larger statutory schemes that the intent of NRS 372.680, as amended, was to provide for judicial review of the Commission's final decisions. The legislative history indicates that the Legislature intended for the judicial remedies contemplated in NRS 372.680 to proceed under the standards set forth in NRS Chapter 233B. Based on the legislative history of S.B. 362,

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[4]The court is aware that Mr. Azevedo now represents Edison in this matter. However, his comments to the Legislature were made in his capacity as a deputy attorney general.

the statutory intent was clearly expressed in the memorandum and testimony that resulted in overwhelming approval of the bill. Appeals from decisions of the Commission should be by way of judicial review and not trial de novo.

Therefore, we conclude that NRS 372.680 now contemplates judicial review, in accordance with NRS Chapter 233B, and a petition for judicial review under those statutes is the sole remedy after a final decision by the Commission in regard to a sales and use tax refund matter.

Judicial estoppel

Although the proper means of seeking review of the Commission's decision is by means of a petition for judicial review, we conclude that, in this instance, Edison's refund claims should nevertheless proceed as a trial de novo. The Department is judicially estopped from asserting that the only remedy available to Edison is judicial review.

Judicial estoppel applies to protect the judiciary's integrity and prevents a party from taking inconsistent positions by "'intentional wrongdoing or an attempt to obtain an unfair advantage.'" NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (quoting Kitty-Anne Music Co. v. Swan, 4 Cal. Rptr. 3d 796, 800 (Ct. App. 2003)). This court may invoke the doctrine at its discretion. Id. Judicial estoppel, however, does not preclude a change in position that is not intended to sabotage the judicial process. Id. Judicial estoppel may apply when

> "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position . . . ; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."

Id. (quoting Furia v. Helm, 4 Cal. Rptr. 3d 357, 368 (Ct. App. 2003)).

Both now and in the past, the Department has taken totally inconsistent positions in quasi-judicial administrative proceedings regarding the proper procedure for a taxpayer who wishes to challenge the Department's denial of a refund claim. The Department took the position in its brief to the Commission that

> [i]f Edison believes, following the Commission's review of this matter, that the administrative record is deficient in some respect, it may exercise its right to file a law suit against the Department under NRS 372.680. Unlike NRS 361.420, which addresses appeals from decisions of the State Board of Equalization, NRS 372.680 in [no] way purports to limit the district court's review to the administrative record on appeal. Consequently Edison would have an opportunity before the district court to more fully develop the facts, if appropriate.

This position is further maintained by an administrative law judge from the Department stated in a letter to the parties' counsel that, "[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time." There is nothing in the record to suggest that the Department's original position was due to ignorance, fraud, or mistake.

Furthermore, it would be highly inequitable to now allow the Department to change its position with respect to this taxpayer. Therefore, although tax refund claims typically must proceed in the district court under the APA, we conclude that the district court erred when it allowed the Department to assert a position contrary to the one it

took earlier in this case when it stated that Edison would be allowed a trial de novo in the district court.[5]

Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order that provides that the matter will proceed as an NRS Chapter 233B petition for judicial review and to instead allow the matter to proceed as filed, an independent action.

Douglas, C.J.

We concur:

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

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[5]For the same reason, the Department's argument that res judiciata, or claim preclusion, bars Edison from seeking a refund in a district court trial de novo fails. If, as the Department indicated before, NRS 372.680 provided for a trial de novo, then claim preclusion could not be used to contravene the Legislature's policy decision. In any event, claim preclusion will not be applied when the party seeking its benefit has actively encouraged the actions of the party against whom it would be invoked. See Campbell v. State, Dep't of Taxation, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992) (refusing to apply claim preclusion when the taxpayers lost any opportunity to reclaim taxes paid by following the Tax Department's incomplete advice).

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	May 27, 2011

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

May 27, 2011 **3:00 AM** **Motion to Reconsider**

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

COURT CLERK: Sandra Harrell

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- Given the supplemental filing by the AG's office, counsel for plaintiff DIRECTED to respond within ten days. Matter continued to 6/17/11 chambers calendar.

CONTINUED TO: 6/17/11 (CHAMBERS)

SUPP

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A533273
Dept. No.: IX

Coordinated with:

Case No. A554970
Dept. No.: IX

PLAINTIFFS' SUPPLEMENTAL BRIEF IN REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER

INTRODUCTION AND SUMMARY

At oral argument on Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claim for Refund and Motion to Dismiss the As Applied Challenge to the Live Entertainment Tax, and the Claim for Damages Pursuant to 42 U.S.C. § 1983 ("Defendants' Motion," or "Def.Mot."), counsel for the Plaintiffs conceded that because Case No. 533273 ("Case 1") is an action against functionaries of the state, Plaintiffs could not, in fact, maintain a **damage** action under § 1983. That did not, of course, effect the relief requested in that suit for both declaratory and injunctive relief under that federal statute.[1] Plaintiffs' counsel left the hearing believing that the Court, therefore, dismissed out the damage claim, and consolidated the remaining portion of Case 1 (the request for declaratory and injunctive relief) with the action (Case No. 554970; "Case 2") regarding the administrative claims for refund denied by the Nevada Tax Commission ("Commission"). However, the written order therefrom (prepared by Defendants and not reviewed by Plaintiffs' counsel before it was submitted to this Court for entry) purports to dismiss the **entirety** of Plaintiffs' federal constitutional claims in Case 1. Order of April 5, 2011, p. 2 ("…Defendants' motion to dismiss is GRANTED and **all claims** asserted under 42 U.S.C. 1983 are hereby DISMISSED…").

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[1] Plaintiffs had provided this Court with indisputable authority from the United States Supreme Court that such relief could be maintained against the functionaries of a state as long as an individual (i.e., a human being) was identified as a defendant who could be enjoined. Plaintiffs are suing Michelle Jacobs in her official capacity for this purpose. Plaintiffs' Opposition to Nevada Department of Taxation's Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and to Dismiss the As Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. 1983 ("Plt.Opp."), pp. 40-41. Moreover, Plaintiffs further provided this Court with exhaustive precedent from the Supreme Court holding that a party is not required to exhaust administrative remedies as a prerequisite for bringing an action under 42 U.S.C. § 1983. **Id**., pp. 42-44. The Defendants, of course, did not, and could not, provide any authority to the contrary.

Because there was no basis to dismiss the declaratory and injunctive relief requested under § 1983 in Case 1 (Defendants had not even sought that; captioning their motion, rather, to dismiss "the Claim for **Damages** Pursuant to 42 U.S.C. 1983" (emphasis added)), Plaintiffs filed a motion for clarification to have the Court correct the order. During the consideration thereof (which Defendants initially did not oppose), the Nevada Supreme Court issued its ruling in **Southern California Edison v. The First Judicial Dist. Court**, 127 Nev.Adv.Op. 22 (May 26, 2011). This led to the filing of the Supplement to Defendants' Response to Plaintiffs' Motion for Clarification of Order ("Supplement," or "Supp.") -- where the Defendants ask the Court to dismiss Case 2 -- to which this Court has requested this response.

First, **Edison** does not relate, **in any regard**, to the legal matters dealing with the § 1983 claims (and, hence, the pending issues in the motion for clarification). Rather, the recent decision is, arguably, relevant to the claims in Defendants' Motion that **Case 2** should be dismissed because it was filed as a civil action and not as a petition for judicial review (rejected by this Court). Consequently, the Supplement is really an untimely motion for reconsideration[2] of the Court's ruling relating to the Defendants' request to dismiss Case 2.

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[2] Defendants' Supplement simply attached the Supreme Court's decision in **Edison**, and requested that "the refund claims in this matter be dismissed because they should have proceeded as a Petition for Judicial Review and the time for that has expired." Supp., p. 2. But that has nothing to do with Plaintiffs' motion for clarification. Moreover, in response to that Motion for Clarification of Order ("Def. Resp.," filed April 27, 2011), the State simply conceded and stated that the Defendants *"do not oppose the clarification of the Court's order*." Def.Resp., p.2 (emphasis added). Thus, while the Supplement relates to **Case 2**, the motion for clarification concerns rulings regarding **Case 1**. Consequently, the Defendants' Supplement must be deemed to be a subsumed motion for reconsideration, which is untimely. See EDCR 2.24(b) (which requires such motions to be filed within 10 days of the service of the written notice of entry of order). Even if **Edison** was relevant (which it is not, as discussed below), the State's submission is untimely and should be disregarded by this Court.

Second, **Edison** only resolves a conflict that existed in regard to the procedures that must be applied to other judicial actions of redress (either as a de novo action or as a petition for judicial review under the Administrative Procedures Act ("APA")), and does not, **in any way, shape or form**, hold that a timely-filed refund action such as Case 2[3] must be dismissed as being improperly filed. In fact, even if the ruling of the Supreme Court was relevant to the issues here, the District Court in **Edison** simply construed the civil complaint there as a petition for judicial review; ruling that to do otherwise would "give no meaning" to the very statute under which the judicial request for refund action was filed. The same result should apply here if this Court concludes that Case 2 must proceed as a petition for judicial review. Otherwise, this Court gives no meaning to NRS 368A.290; the judicial refund action provision under the Live Entertainment Tax ("LET"). Moreover, if the Court believes that the timely-filed complaint is deficient in any regard, it may permit amendment of the pleadings "when justice so requires," and given the clarification of the law here recently by the Supreme Court, justice would certainly mandate the same in these circumstances.

Third, and more importantly, is the simple fact that **Edison** is just not relevant to the tax refund statute at issue here under which Case 2 was filed (NRS 368A.290). Unlike the circumstance in **Edison** where the APA was amended subsequent to the enactment of the refund statute at issue there, here, NRS 368A.290 was enacted after the revisions to the APA; demonstrating legislative intention to provide for a specific (and different) remedy. All doctrines of statutory construction as recognized by the Nevada Supreme Court require this Court to apply the latter, and more specific, refund procedure, which is exactly the statutory

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[3] The Plaintiffs in Case 2 certainly timely filed their action within the 90-day period as required by NRS § 368A.290.

provision under which the Plaintiffs filed Case 2. In fact, the only way that this Court could justify dismissing Case 2 would be to conclude that NRS 368A.290 -- enacted with legislative knowledge of the various revisions to other statutes as noted by the court is **Edison** -- was literally a **nullity**; a conclusion that defies the cannons of statutory construction and the clear precedent of the Nevada Supreme Court. And, judicial decisions overruling procedural precedent (which is certainly the case with **Edison**) cannot be applied retroactively under Nevada Supreme Court precedent.

Fourth, and in any event, the Defendants are clearly judicially estopped from claiming either that Case 2 must be dismissed or that it must proceed as a petition for judicial review. Similar to the circumstances in **Edison**, the Department of Taxation ("Department") here represented in federal district court -- in order to obtain dismissal of Plaintiffs' action there predicated upon a finding that there was a "plain, speedy and efficient remedy in state court" -- that if the administrative claimants were aggrieved by a decision of the Commission, they would have a right to bring a judicial challenge pursuant to NRS 368A.290 (which is **exactly** what the Case 2 Plaintiffs did here) in the state district courts. The Department reiterated that position to the Ninth Circuit.[4] Predicated thereon, the federal district court concluded that there was such a "plain, speedy and efficient" remedy in state court and dismissed the federal action, and the Ninth Circuit affirmed. The State is judicially estopped to deny a de novo proceeding to these Plaintiffs, or to request dismissal of Case 2, in such circumstances.

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[4] This is in addition to the fact that the judicial estoppel ruling in **Edison** was predicated not necessarily on the fact that the Department had taken differing positions with regard to the plaintiff at issue there, but that the Department had taken contrary positions **with different litigants** and had no consistent position as to the type of proceeding that would have to be initiated to review a decision of the Commission. See further discussion, infra.

At best, **Edison** would simply require that Case 2 proceed from this point forward as a petition for judicial review.[5] Its holding does not require, imply, or even intimate, that an action like Case 2 should be dismissed. Consequently, the motion for reconsideration should be granted, and the request in the Supplement denied.

STATEMENT OF FACTS

Because the Defendants' Supplement conflate the motions that had been pending and makes a Herculean leap in the relief they request from this Court (that Case 2 be dismissed in its entirety and presumably, in light of their prior request, that Case 1 then also be dismissed in its entirety predicated upon administrative collateral estoppel), a short discussion of the circumstances involving the two actions here is in order.

There are two versions of Chapter 368A that are relevant to these two proceedings. The original statute was enacted in 2003 (Ex. 1), which constitute the statutory provisions that are applicable to the administrative appeals in the Commission that served as the basis for the filing of the claim for refund action that is Case 2. See, e.g., Ex. 2 (demonstrating that the appeals were for the tax months of January, February, March and April, 2004). Chapter 368A was, however, amended in 2005. Ex. 3. The statutory amendments added a slew of new exemptions (further demonstrating, Plaintiffs argue, the statutory gerrymandering of the Department portion of the tax so that it applies to gentlemen's clubs and to very little else), and reduced the threshold seating of a facility from 300 to 200 persons in order to make subject to the tax certain gentlemen's clubs that had not been captured by the initial statutory version. In

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[5] If this Court concludes that Case 2 should proceed from this point forward as a petition for judicial review, there is then the additional question of whether the Court's consolidation of Case 1 and Case 2 is now appropriate. Such a question goes far beyond the scope of the matters raised in Defendants' Supplement, and Plaintiffs would suggest that a hearing be scheduled by this Honorable Court to address that complicated issue.

fact, Plaintiffs have provided this Court on numerous occasions in the past with transcripts of the legislative proceedings in 2005 demonstrating just this targeting. See, e.g., Plaintiffs' Motion for Preliminary Injunction, June 5, 2008, pp. 20-23, Ex. 7 thereto; Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, October 23, 2008, pp. 44-48, Ex. 6 thereto.

Following the enactment of the amendments in 2005, **all** of the Case 1 Plaintiffs filed suit in federal district court under 42 U.S.C. § 1983 seeking to, among other things, declare Chapter 368A as it then existed in its amended form to be unconstitutional and to enjoin the enforcement of the same. Following the dismissal of that action by the federal court under the Tax Injunction Act (discussed more fully below), those Plaintiffs filed basically the same suit in this Court (that matter being Case 1 here). That action challenged Chapter 368A as it existed at the time (i.e., with the 2005 statutory amendments included). See Verified Complaint in Case 1, ¶ 1, and Ex. A thereto. Shortly thereafter, the Commission scheduled an appeal hearing for six of the eight Case 1 Plaintiffs (those being entities that had timely filed administrative claims for refund). Case 1 Plaintiffs Deja Vu Showgirls of Las Vegas, LLC ("Deja Vu"), and Little Darlings of Las Vegas, LLC ("Little Darlings"), were not part of the administrative claims for refund since they were not subject to the LET until the 2005 amendments to Chapter 368A, and had not then even filed claims for refunds (as they were statutorily not required to do at that time; there being a three year period to file such applications pursuant to NRS 368A.260(1)).

The administrative appeals before the Commission were only for the tax months January, February, March and April, 2004 (again, see Ex. 2), and therefore dealt with the 2003 version of Chapter 368A. Following the unsuccessful administrative appeal, those six entities

filed the proceeding that is Case 2. Neither Deja Vu nor Little Darlings have received any type of ruling from the Commission in regard to their administrative claims for refund because, during the pendency of this suit, the Commission is declining to hear any appeals related to the LET. See Ex. 4.

ARGUMENT

I. EDISON IS INAPPLICABLE TO THE QUESTION OF WHETHER CASE 2 SHOULD BE DISMISSED.

In **Edison**, our Supreme Court concluded that a petition for judicial review is the proper procedure to challenge the Commission's decisions related to certain sales and use tax statutes that existed **prior to** amendments to the APA and to those tax statutes, but refused to require the taxpayer to proceed with a petition for judicial review and ordered the lower court to hear the matter as an independent action. 127 Nev.Adv.Op. 22, at 2. The reason for the Court granting review was as a result of the conflict in the District Courts and the varying positions taken by the Department across different taxpayers of the proper procedures to apply.[6] Those inconsistent positions taken by the Department further resulted in the final conclusion that Edison's suit would proceed forward as a de novo original action. The Court stated:

> Edison argues that the nature of the judicial remedy available in a tax refund action is an important issue of law requiring clarification. Edison argues that the Department has taken inconsistent positions from one case to the next, and that this court should ensure that all taxpayers are treated with uniformity and

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[6] It is clear that the Department was telling different taxpayers that different judicial redress procedures applied in regard to decisions of the Commission, particularly as evidenced by an Administrative Law Judge's letter, referenced by the Supreme Court in **Edison**, which informs a taxpayer other than Edison that a trial de novo was judicially available. That letter (attached hereto as Ex. 5) was issued on May 29, 2009, which was five weeks after the Department moved to dismiss the district court action in **Edison**. Plaintiffs note that counsel for the State in this matter, Blake Doerr, was also sent the same letter and was, therefore, aware of the Department's position on this issue, although he still filed the motion for partial summary judgment and Supplement insisting that these Plaintiffs are not entitled to review de novo.

consistency. According to Edison, there are multiple cases that are working their way through the administrative appeals process and that have been filed in district court that will require district courts throughout the state to determine the appropriate standards of review and procedural posture for refund cases. Edison argues that we should definitively clarify the law so that all of those cases are treated equally.

It appears that the Department **has adopted a new policy**[7] for refund cases. The Department and the Attorney General's office admitted at oral argument that, in the past, they had advised some taxpayers who contested the denial of a refund that trial de novo before the district court would be available. They also admitted that there was no consistent position taken regarding whether a taxpayer is entitled to trial de novo or a petition for judicial review. In one case, an administrative law judge stated in a letter that "[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time." However, in its answer to the writ petition, the Department states that "going forward, [it] is challenging refund actions filed as civil actions in district court after an administrative proceeding."

> ***Given this change in the Department's approach to refund actions***, and the resulting confusion and potential disparate application of the law, we take this opportunity to clarify the proper procedure when a taxpayer challenges a Commission decision in a refund action [footnote omitted].

Id. at 6-7 (emphasis added).

The omitted footnote further stated: "We note that during oral argument, the parties indicated that **there seems to be confusion at the district court level as to whether NRS Chapter 233B applies, or whether NRS 372.680 applies**." **Id**. at 7, n. 2 (emphasis added).

Consequently, it is clear that the Supreme Court considered **Edison** merely to clarify the procedures that were to be used. Even though the Court was obviously very aware that many refund suits had been proceeding as original actions, it did not indicate, **in the least**, that such matters would have to be dismissed, and those litigants robbed of their ability to obtain judicial redress. While -- setting aside the judicial estoppel argument discussed below --

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[7] Defendants' request here is apparently pursuant to that "**new policy**."

Edison may be relevant to the question of whether Case 2 should now procedurally move forward as a petition for judicial review, it certainly does not require, or even intimate, that this properly and timely filed action should be dismissed.

In addition, the circumstances here are markedly different than those in **Edison** because the statutory provision under which Case 2 was filed (NRS 368A.290) was enacted **after** the revisions to the APA that led the Supreme Court to conclude that the judicial challenge procedures of a **previously-existing** tax statute would then have to proceed as a petition for judicial review in light of those amendments. Chapter 368A imposes a specialized tax on live entertainment, and contains **its own separate refund procedures** distinct from Chapter 360 and NRS 372.680. The Court in **Edison** discusses the amendments made to NRS 233B.130, NRS 360.245, and NRS 372.680 in **1989, 1997 and 1999** (127 Nev.Adv.Op. 22, at 9-13), and their effect on the general appellate procedures for sales and use tax claims. However, **after** those amendments were made, the Legislature then enacted Chapter 368A in 2003, which included **specific** provisions detailing an action for refund **of that tax**. NRS 368A.290 (1) and (2).

Our Supreme Court has long held that should the legislature subsequently enact a more specific law after a general law has been in effect, the more specific law controls:

> Where there is already a general act such as that of March 20, 1933, hereinbefore mentioned, it is sometimes argued that that fact alone shows that a general act would be applicable; but such is not the law. In **Hess v. Pegg**, [7 Nev. 23 (1871)], supra, the court said the inference was the other way, and that the very passage of the law raises the presumption that the general act was not and could not be made applicable.

Cauble v. Beemer, 64 Nev. 77, 100, 177 P.2d 677 – 678, (1947) (clarification added); See also, **Quilici v. Strosnider**, 31 Nev. 9, 115, p. 177, 179 (1911); and **Washoe Co. Water Conservation Dist. V. Beemer**, 56 Nev. 104, 45 P.2d 779, 784 (1935).

In addition, courts are to "presume that the Legislature enacted the statute 'with full knowledge of existing statutes relating to the same subject.'" **Nevada Attorney for Injured Workers v. Nevada Self Insurers Assn**, 126 Nev.Adv.Op. 7, 225 P.3d 1265, 1271 (2010) (citations omitted). See also **Destefano v. Berkus**, 121 Nev. 627, 631, 119 P.3d 1238, 1241 (2005) (accord, with the court noting that a subsequently enacted statute that did not "supplant or conflict" with the prior statute provided a "viable alternative method" of seeking relief). Consequently, this Court must presume that the Legislature acted intentionally when it enacted the specific refund action process set forth in NRS 368A.290, knowing that it conflicted with the amendments to the other general statutes discussed in **Edison**. At best, that demonstrates that NRS 368A.290 controls. At worst, under **Destefano**, it means that NRS 368A.290 provides a "viable alternative method" to seek judicial redress.

Clearly, if the Legislature had wanted the APA judicial review process to apply, **it simply could have refrained from enacting the specific refund action statute found at NRS 368A.290**; thereby demonstrating that judicial review was to be made via the APA (i.e., the general review statute). It did not. Rather, the Legislature adopted a specific refund action statute that undeniably conflicts with the APA.[8] Respectfully, this Court must assume that action to have been intentional.

Likewise, when interpreting statutes, a court must read their provisions "in a way that would not render words or phrases superfluous **or make a provision nugatory**." **Southern Nev. Homebuilders Ass'n v. Clark County**, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)

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[8] Of course, there can be no question but that there is an inherent conflict between the refund action language contained in NRS 368A.290 and the judicial review provisions found in NRS Chapter 233B. Review was granted in **Edison**, in fact, to resolve the conflict between the APA and NRS 372.680, which is, admittedly, similar to NRS 368A.290. And, were there to be no conflict, the Defendants would not be seeking to dismiss Case 2 on the basis that Plaintiffs had not brought that action under the rubric of a "petition for judicial review."

(emphasis added). Respectfully, were this Court to side with the Defendants on this issue, it would, indeed, render the specific refund action statute found in NRS 368A.290 (enacted after the statutory revisions that served as the basis for the decision in **Edison**) to be "nugatory." There is no doctrine of statutory construction that would permit such a result.

Moreover, even if **Edison** could be considered to theoretically apply to the statutory provision here (NRS 368A.290), the ruling cannot be applied retroactively to Case 2. While it may be that individuals who seek judicial redress from a decision by the Commission **after Edison** must repair through the process of a petition for judicial review under the APA (at least for sales and use taxes that are not subject to Chapter 368A), that does not mean that litigants "in the pipeline" should now be deprived of judicial review.

In **Nevis v. Fidelity New York**, our Supreme Court addressed the situation where, at the time a complaint was filed, existing law provided that guarantors of certain loans did not receive statutory "protection afforded obligors pursuant to NRS 40.451 . . . ." 104 Nev. 576, 579, 763 P.2d 345 (1988) (citations omitted). Subsequently, in **First Interstate Bank v. Shields**, 102 Nev. 616, 730 P.2d 429 (1986), the court overruled certain precedent, finding that the protections of NRS 40.451 did extend to guarantors. Nevis argued that since Fidelity failed to file their complaint within the time required pursuant to **Shields**, the Court should dismiss Fidelity's complaint. **Nevis**, 104 Nev. at 579, 763 P.2d at 347. The Court refused, finding that "courts give **prospective** effect to the overruling of a judicial precedent involving construction of a procedural statute." **Id**., (citing 20 Am.Jur.2d Courts § 233 (1965); 21 C.J.S. Court § 194 (1940)) (emphasis added). "Therefore," the court wrote, "we decline to give **Shields** retroactive effect to the extent of requiring compliance with the three month filing provision." **Id**.

Then same issue was presented in **Vogt v. Dennett**, 105 Nev. 303, 774 P.2d 1036 (1989), where **Shields** had been handed down after the event triggering the filing deadline (a foreclosure sale), but before plaintiff filed its complaint. 105 Nev. at 304, 774 P.2d at 1037. The Court recognized that "Jenkins failed to initiate a deficiency action within three months as mandated by a retroactive application of **Shields**. However, we reaffirm our holding in **Nevis**. We will not give retroactive effect to our decision in **Shields** 'to the extent of requiring compliance with the three month filing provision.'" 105 Nev. at 305, 774 P.2d at 1037.

Nevis and **Vogt** illustrate the extreme judicial reluctance of applying **procedural** rulings retroactively in a way that would have the consequent effect of barring a request for judicial relief. Nothing is different here. As the court recognized in **Edison** (127 Nev.Adv.Op. 22 at 3), its prior decision in **Saveway v. Cafferata**, 104 Nev. 402, 760 P.2d 127 (1988), suggested that claimants could bring a de novo action pursuant to NRS 372.680,[9] which is admittedly similar to NRS 368A.290. And, here, NRS 368A.290 was enacted after the legislative amendments relevant to the ruling in **Edison**.

In addition, Nevada's Taxpayers' Bill of Rights states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto **construed in favor of the taxpayer** if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable." NRS §360.291(1)(o) (emphasis

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[9] See also **Sparks Nugget v. Department of Taxation**, 179 P.3d 570, 573 (Nev. 2008) ("Following the denial of its claim, the Nugget administratively appeal the Tax Department's decision to the tax commission. That appeal proved unsuccessful, however and having exhausted its administrative remedies, the Nugget then **sued** the Tax Department in district court, again seeking a refund of use taxes . . .") (emphasis added). Hence, the **existing law** at the time the Case 2 Plaintiffs filed their complaint – even after the statutory amendments ultimately recognized to be controlling in **Edison** -- provided for a direct suit in district court following a denial by the Commission. Consequently, if this Court decides that the decision in **Edison** is applicable to the LET and NRS 368A.290, that decision should not be applied retroactively to procedurally bar the Case 2 Plaintiffs from having their case heard.

added).[10] Here, the Defendants assert that the provisions of NRS §368A.290 are meaningless, and that Plaintiffs should have **wholly ignored them**; filing, instead a petition for judicial review. Under the Nevada Taxpayers' Bill of Rights, Plaintiffs are entitled to have relied upon the plain and unequivocal language of the statute, which they followed **to the letter**.

II. PLAINTIFFS' COMPLAINT IN CASE 2 ADEQUATELY SERVES AS A PETITION FOR JUDICIAL REVIEW.

The Department asks the Court to dismiss Case 2 because it now asserts that a petition for judicial review should have been the proper course in seeking judicial redress, and because "the time for that has expired."[11] Supp., p. 2. Not only does such a comment wholly ignore the fact that Plaintiffs fully complied with the filing requirements under NRS 386A.290, but a dismissal on the grounds articulated by the Defendants would be highly inappropriate and inequitable, clearly prejudicial to the rights of the Plaintiffs, contrary to the district court ruling in **Edison**, and in derogation of comments by the Supreme Court in that case. Simply put, if this Court concludes that Case 2 should proceed as a petition for judicial review, this Court should, as the district court did in **Edison**, simply treat the complaint in Case 2 as a petition.

In **Edison**, the district court construed the civil complaint in that action to be a petition for judicial review, **which the Nevada Supreme Court did not disturb on appeal**:

> 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**

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[10] The Taxpayers' Bill of Rights further states that the provisions of Title 32 (which include the taxes challenged in these two lawsuits) "governing the administration and collection of taxes by the Department must not be construed in such a manner as to interfere or conflict with the provisions of this section [i.e., the Bill of Rights] or any applicable regulations." NRS 360.291(2) (clarification added).

[11] As discussed in subsection IV, infra, the Nevada Supreme Court's decision in **Scotsman**, demonstrates that untimeliness (although it does not exist here) cannot bar a refund action.

> **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.

Order Denying Defendant's Motion to Dismiss, Ex. 6, p. 2 (emphasis added).

Here, similarly, to dismiss this action would give no meaning to NRS § 368A.290 (1) and (2) -- the functional equivalent of NRS 372.680(1); a result that clearly cannot be gleaned from **Edison**. In fact, the Supreme Court extensively quoted from NRS 372.680, and did **not** invalidate its requirements. Rather, the Supreme Court merely stated that that statute, "however, does not define the nature of the action to be brought against the department." 127 Nev.Adv.Op. 22, at 7-8.[12] The Plaintiffs in Case 2 filed an action within the statutory time period allowed under NRS 368A.290(1), and there would be no basis to deprive them of their right to proceed with a refund action because the pleading was filed without the moniker of "Petition for Judicial Review."

Moreover, the Nevada Rules of Civil Procedure dictate that the complaint in Case 2 is procedurally sufficient, as they instruct that "all pleadings shall be construed as to do substantial justice." Rule 8(f). Interpreting the similar federal rule, the Ninth Circuit explained:

> . . . the purpose of the pleadings is to provide the opposing party with fair notice of the claim against it. [ ]. The Federal Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of the pleading is to facilitate a proper decision on the merits." **Usery v. Marquette Cement Mfg. Co.**, 568 F.2d 902, 906 (2d Cir. 1977) (quoting **United States v. Hougham**, 364 U.S. 310, 317, 81 S.Ct. 13, 18, 5 L.Ed.2d 8 (1960)). Courts should construe pleadings liberally so as to do substantial justice . . . .

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[12] In addition, as discussed in Section I, supra, NRS 368A.290 was enacted **after** the statutory amendments that led the Supreme Court in **Edison** to conclude that judicial relief from sales and use tax decisions would have to proceed as petitions for judicial review.

Lynn v. Sheet Metal Workers' Intern. Ass'n, 804 F.2d 1472, 1482 (9th Cir. 1986) (citations omitted).

> In addition, our Supreme Court has interpreted Rule 8(a) as follows:
>
> "Notice pleadings" require plaintiffs to set forth the facts which support a legal theory, but **does not require the legal theory relied upon to be correctly identified**. **Swartz v. Adams**, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977). A plaintiff who fails to use the precise legalese in describing his grievance but who sets for the facts which support his complaint thus satisfies the requisites of notice pleadings.

Liston v. Las Vegas Metro. Police Dept., 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (emphasis added).

Or, viewed through the standard applicable to a motion to dismiss, "a 'complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.'" **Grosjean v. Imperial Palace, Inc.**, 212 P.3d 1068, 1077 (Nev. 2009) (clarification in original; quotation omitted).

Plaintiffs' Case 2 complaint pleads all the facts necessary to constitute a valid petition for judicial review. See NRS 233B.130(2) (stating the requirements for a petition for judicial review). In the event this Court determines that this matter must proceed as a petition for judicial review, Plaintiffs' complaint in that action is legally sufficient, or at worst, this Court should grant Plaintiffs leave to amend their pleading to specifically plead such a petition.[13]

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[13] "When a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy." **Cohen v. Mirage Resorts, Inc.**, 119 Nev. 1, 22, 62 P.3d 720, 734 (Nev. 2003). "Leave to amend should be freely given when justice requires. . . ." **Id**. Typically, leave will be granted unless there is a finding of "undue delay, bad faith or dilatory motive." **Stephens v. Southern Nevada Music Co., Inc.**, 89 Nev. 104, 105-106, 507 P.2d 138, 139 (1973) (citations omitted). Here, any delay in attributed to the Department's failure to timely raise the contention that Case 2 should proceed by petition for judicial review. Plaintiffs have obviously not acted in bad faith, and have no reason to delay the prosecution of this action. And, any amendment would relate back to the original date of filing. NRCP Rule 15(c). See also **Frances v. Plaza Pacific Equities, Inc.**, 109 Nev. 91, 98, 847 P.2d 722, 726-27 (1993) ("If the original pleadings give fair notice of the fact situation from which the new claim for liability arises, the amendment should relate back for limitations purposes") (quoting **Scott v. Dep't of Commerce**, 104 Nev. 580, 586, 763 P.2d 341, 345 (1988)).

III. THE DEPARTMENT SHOULD BE ESTOPPED FROM ASSERTING PLAINTIFFS MAY ONLY PROCEED BY JUDICIAL REVIEW.

If the Court decides that the petition for judicial review ruling in **Edison** is relevant to the present case, then the Supreme Court's ultimate holding therein should be applied as well. Even though the Court there held that the taxpayers' refund remedy was via a petition for judicial review pursuant to the APA (specifically, NRS 233B.130), it ultimately held that inconsistent actions by the Department resulted in it being judicially estopped from asserting that the plaintiffs' sole remedy was pursuant to a petition for judicial review. 127 Nev.Adv.Op. 22, at 13. The same result is warranted here.

> As stated by the court in **Edison**:
>
> Judicial estoppel applies to protect the judiciary's integrity and prevents a party from taking inconsistent positions by "intentional wrongdoing or an attempt to obtain unfair advantage."
>
> * * *
>
> Judicial estoppel may apply when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi judicial administrative proceedings; (3) the party was successful in asserting the first position . . . ; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."

Id. at 13 (quoting **NOLM, LLC v. County of Clark**, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004)).

The **Edison** court began by noting that "[b]oth now and in the past, the Department has taken totally inconsistent positions in quasi-judicial administrative proceedings regarding the proper procedure for a taxpayer who wishes to challenge the Department's denial of a refund." **Id**. at 14. Moreover, the Department has even taken inconsistent positions with regard to Edison itself, and in a brief submitted to the Commission stated that the Edison "may file a law suit against the Department under NRS 372.680" and that "Edison would have an opportunity before the district court to more fully develop the facts, if appropriate." **Id**.

In addition to the Department taking inconsistent positions in numerous other cases, as discussed in **Edison**, its conduct in this series of proceedings aptly demonstrates that it is precluded from asserting that these Plaintiffs are limited to seeking redress from rulings of the Commission via a petition for judicial review. As stated above, Case 1 was filed with this Court after the Plaintiffs' federal action was dismissed by application of the federal Tax Injunction Act ("TIA"), 28 U.S.C., § 1341. See **Deja Vu Showgirls of Las Vegas, L.L.C., v. Nevada Dept. of Taxation**, 2006 WL 2161980 (D. Nev. July 28, 2006) (Ex. 5 hereto). Generally, the TIA divests the federal courts of jurisdiction over state tax matters when a "plain, speedy, and efficient remedy may be had in the courts of such State." In the federal action, the Department filed a motion to dismiss pursuant to the TIA, arguing that a "plain, speedy, and efficient" remedy existed in the Nevada courts because, if Plaintiffs sought an administrative refund:

> **Within ninety days** of denial by the NTC of a taxpayer's appeal of a claim for refund, the taxpayer may **bring an action in court**. **NRS 368A.290**.[14] By default, jurisdiction for such actions lies in the District Court. Nev. Const. art 6, § 6, NRS 4.370. Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Const., art. 6, § 4. See also, NRS 233B.150.[15]

Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed May 10, 2006, Ex. 8 hereto, p. 7 (emphasis added).

Further, in their reply, the Department notes that State v Scotsman Mfg. Co. Inc., 109 Nev. 252, 849 P.2d 317 (1993) "Would support the proposition that declaratory relief is

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[14] Again, the Case 2 Plaintiffs brought their action in this Court directly pursuant to, and within the time constraints as set forth in, this very statute (NRS 368A.290) **cited by the State to the federal district court as providing Plaintiffs their remedy for judicial redress.** If this Court were to dismiss Case 2, it would eviscerate the very legal challenge that **the Department represented to the federal district court that these Plaintiffs could initiate**. Judicial estoppel, as recognized in **Edison**, clearly precludes such a result.

[15] While it is true that the Defendants also cited NRS 233B.150, they did so as a "see also," and therefore referred to that provision as providing an **additional basis** for the seeking of judicial redress. And, as stated below, in the Court of Appeals they **deleted** this reference.

available notwithstanding NRS 358A.290(1)." Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006. Ex. 9, p. 3, n. 2.

The district court agreed with the Department, holding that NRS 368A.380(1) (the anti-injunction provision):

> . . . does not prevent a **judicial challenge** either to the collection of the tax or the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a case involving a statute which precluded any suit whatsoever unless an administrative claim had been filed, held that notwithstanding the statute, the California corporation could bring the suit to challenge the tax. **State v. Scotsman Mfg. Co. Inc.**, 109 Nev. 252, 849).2d [sic] 317 (1993).[16] This decision strongly suggest that **declaratory relief is available**[17] in State court notwithstanding NRS 368A.280(1).

Deja Vu Showgirls, 2006 WL 2161980 (Ex. 7), at *3 (emphasis added).

The Department got its way on its arguments, and the federal district court dismissed the Plaintiffs' action by concluding that, in light of the concessions made by the Department, a "plain, speedy and efficient" remedy existed in state court. **Id**. at pp. 5-6.

The Department took a similar position on appeal, arguing:

> **Within ninety days** of denial by the [Nevada Tax Commission] of a taxpayer's appeal of a claim for refund, the taxpayer may bring **an action in court**. **Nev. Rev. Stat. § 368A.290**. Jurisdiction for such action lies in the District Court. Nev. Const. art 6, § 6, [footnote omitted] Nev. Rev. Stat. § 4.370. Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Cost. art. 6 § 4.[18]

Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, Ex. 10 hereto, p.12 (emphasis added; footnote in original).

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[16] Discussed more fully in Section IV, infra.

[17] Declaratory relief would not be permissible, of course, in a petition for judicial review.

[18] It should be noted that in the Ninth Circuit, unlike in their comments to the federal district court, the Defendants omitted any reference to NRS 233B.150 on appeal.

The omitted footnote to this comment stated: "This section of the Nevada Constitution provides in the pertinent part: 'The District Courts in the several Judicial Districts of the State have **original jurisdiction** in all cases excluded by law from the original jurisdiction of the justices' courts'") (emphasis added). **Id**.

Notably, the Department's argument to the Ninth Circuit **omitted any** reference to NRS 233B. In addition, the Department then adopted the reasoning of the federal district court, arguing that the Nevada Supreme Court decision in **Scotsman** (discussed more fully in Section IV, infra) meant that the clubs could file their court action without even exhausting administrative remedies:

> The District Court further noted that the Nevada Supreme Court had specifically recognized a judicial remedy in the face of parallel language in Nev.Rev.Stat. Chapters 372 and 374. **State, Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.**, 109 Nev. 252, 849 P.2d 317 (1993), E.R. 48.
>
> **Scotsman** involved an action for declaratory relief by a taxpayer challenging application of the sales tax to it. **The various components of the sales tax in Nevada are governed by procedures set forth in Nev. Rev. Stat. Chapters 372 and 374, which contained provisions substantially identical to those in Nev. Rev. Stat. Chapter 368A**. For example, Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675, applicable to the sales taxes, **and Nev. Rev. Stat. § 368A.280(1), applicable to the Live Entertainment tax**, are substantially identical:
>
> * * *
>
> Applying the sales tax law to the matter before it, the Nevada Supreme Court in **Scotsman** found not only that the taxpayer was entitled to challenge the Constitutionality of the tax as applied to it, but, under the circumstances, it could do so without having exhausted administrative remedies. **Id**. at 255-6, 849 P.2d at 320-1.

Appellees' Answering Brief, Ex. 10, pp. 14-15 (emphasis added; footnote omitted).

The Department expanded its position in this regard in briefing to the Ninth Circuit after the Plaintiffs moved to supplement the record on appeal with a number of the Department's statements made before the Commission during the administrative appeals. The

Department then "clarified" that it was **not** taking the position "that the administrative refund remedy stands by itself as a plain, speedy and efficient remedy." Appellees' Opposition to Motion for Leave to Supplement the Appellate Record, 9th Cir., Case No. 06-16634, filed April 24, 2008, Ex. 11 hereto, p. 6. Rather, it asserted that even "[i]f Appellants are right in their contention that the administrative remedy is somehow futile, that would provide an additional basis for proceeding by **direct refund action** in Nevada courts under **Scotsman**, supra, at 225, 849 P.2d at 319." **Id**. at p. 7 (emphasis added). And, to make it clear to the Ninth Circuit that there exists a "plain, speedy, and efficient" remedy in the Nevada courts, the Department made sure to point out that the Plaintiffs "have brought two actions in the Eighth Judicial District Court for the State of Nevada to challenge the Constitutionality [sic] of the live entertainment tax. See Exhibits A and B (complaints in actions A533273 and A554970 …)." [19] **Id**. at p. 3. Of course, these are the very actions the Department now claims provide **no remedy at all**.

The forgoing makes clear that the Department, in this group of cases alone, has never taken the position that a petition for judicial review under the APA is either the correct remedy or the sole remedy available for Plaintiffs to obtain judicial redress. Instead, the Department painted the broadest possible picture of the remedies available in state court in order to secure dismissal of the federal action.

After the Department's victory in federal court and rejection by the Commission, the Plaintiffs in Case 2 initiated judicial relief according to the **very provision** (NRS 368A.290) **the Department cited to the federal courts as providing a remedy in the Nevada courts**. See

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[19] At no point did the Department indicate to the Ninth Circuit that it believed -- as it argues now -- that Case 2 was procedurally deficient in not having been filed as a petition for judicial review, or that as a consequent result of administrative res judicata, Case 1 was barred as well; a claim that the Defendants have also belatedly made to this Honorable Court. See Def.Mot., pp. 19-27. In fact, the Department made the same latter argument to the Nevada Supreme Court in **Edison**, which the court summarily **rejected.** 127 Nev.Ad.Op. 22, at 15 n. 5.

Amended Complaint in Case No. 554970, ¶'s 1, 2, and 4. Thus, like in **Edison**, "it would be highly inequitable to now allow the Department to change its position with respect to this taxpayer." 127 Nev.Adv.Op. 22, at 14. Similarly, "[t]here is nothing in the record to suggest that the Department's original position was due to ignorance, fraud, or mistake." **Id**. Rather, the prior position was calculated to obtain an order from the federal court dismissing the clubs' suit, and that is exactly what the Department achieved. Defendants are judicially estopped from claiming that Plaintiffs must have proceeded, or must now proceed, pursuant to a petition for judicial review.

Finally, whether subject to judicial or equitable estoppel, it must, of course, be pointed out that the Defendants never raised the claim in their affirmative defenses to the initial complaint filed in Case 2 that the complaint had been improperly filed and that the proper course of action was through a petition for judicial review, nor did they raise this issue in either their motion for summary judgment (filed September 17, 2008) or their motion to dismiss (filed April 18, 2008) filed before Judge Togliatti. In addition, they participated in extensive discovery in these two cases (which would arguably be inappropriate in a petition for judicial review), and just on May 25, 2011, the Defendants **propounded discovery** in **both** Case 1 and Case 2. See Ex. 12. It is only now, after the Department has "changed course" as recognized by the Supreme Court in **Edison**, that the Defendants assert that Case 2 cannot go forward. For all of these reasons, they are estopped from maintaining such a position at this late juncture in these coordinated (and now potentially consolidated) cases.

IV. THE NEVADA SUPREME COURT'S DECISION IN SCOTSMAN PRECLUDES DISMISSAL OF CASE 2.

Pursuant to the decision of the Nevada Supreme Court in **Nevada Department of Taxation v. Scotsman Manufacturing Company, Inc.**, 109 Nev. 252, 849 P.2d 317 (1993),

even if a plaintiff has missed the statutory deadline for filing of a refund action to obtain reimbursement of unlawfully collected taxes, the taxpayer can still seek judicial redress to obtain a refund, with the court identifying such an action as:

> …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.

109 Nev. at 255, 849 P.2d at 320 (citing **McKesson Corp. v. Division of Alcoholic Beverages and Tobacco**, 496 U.S. 18, 39 (1990)).

In **Scotsman**, 109 Nev. at 255-56, 849 P.2d 319-20, the court found that the plaintiffs were entitled to a refund despite the State's assertion that the claimants' failure to abide by the refund provisions of NRS 374.640(1) (similar to LET provisions) was a bar to subject matter jurisdiction. Not only had the plaintiff not filed claims for refund, but that litigant was actually past the limitations period for doing so. **Scotsman**, 109 Nev. at 254, 849 P.2d at 318. Still, the court recognized its obligation to provide relief and did so. 109 Nev. at 255-56, 849 P.2d at 320. See also **Campbell v. State**, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992) (district court, in equity, may order refund of taxes paid under protest despite claimants' failure to comply with statutory refund provisions).

As discussed above, the federal district court dismissed Plaintiffs' action there by finding, in part, that the potential for a direct action under **Scotsman**, without the necessity of administrative exhaustion of remedies, provided a "plain, speedy and efficient" remedy in Nevada courts. And, the Defendants rode **Scotsman** all through the federal appellate proceedings. In light of this clear precedent from the Nevada Supreme Court and the fact that the Department relied upon **Scotsman** to negate the federal proceedings, it would be

inequitable and unconscionable to dismiss Case 2 and deprive those Plaintiffs of their right to seek judicial relief on their refund claims predicated upon unconstitutionally collected taxes.

V. EDISON IS IRRELEVANT TO THE MOTION FOR RECONSIDERATION.

Plaintiffs' motion for reconsideration deals with the dismissal of the § 1983 claims in Case 1; while **Edison** deals, if at all, with Case 2. As set forth above, **Edison** does not require the dismissal of Case 2, and, consequently, has no effect on Case 1 or the motion for reconsideration. Moreover, the intimation by the Defendants, as expressly made in their original motion to dismiss, that the failure of Case 2 to have been filed as a petition for judicial review also bars (under administrative collateral estoppel) the litigation of Case 1 is clearly false.

First, Case 2 only involves Chapter 368A as it existed in its initial (2003) form, since the administrative appeals only related to the tax months January, February, March and April, 2004. Case 1, however, was filed after the 2005 statutory enactments, and challenges the **current** version of the statute. 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); **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 deficiency for such 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).

Second, as the Nevada Supreme Court has noted, constitutional issues (which are the sole issues here) are unsuited to resolution in administrative proceedings. **Malecon Tobacco, LLC v. State Dept. of Taxation**, 118 Nev. 837, 840-841, 59 P.3d 474, 476-77 (2002). Our State Supreme Court has further noted that the "United States Supreme Court has recognized that under federal administrative procedures, the 'adjudication of the constitutionality of congressional enactments has generally been thought to be beyond the jurisdiction of administrative agencies.'" 118 Nev. at 840, 59 P.3d at 876 (citing **Thunder Basin Coal Co. v. Reich**, 510 U.S. 200, 215, (1994) (other citations omitted)). Indeed, the Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." **Califano v. Sanders**, 430 U.S. 99, 109, (1977). The same circumstances apply here.

Third, neither Deja Vu nor Little Darlings have ever even had a hearing by, let alone a decision from, the Commission on their administrative appeals. Consequently, their right to litigate Case 1 (and the § 1983 claims therein) are not governed in the least with regard to what may occur in Case 2.

For all these reasons, **Edison** has no relevance or application to the ultimate question currently before the Court, which is whether the Court should modify its previous order and clarify that only the **damage** claims under 42 U.S.C. § 1983 have been dismissed in Case 1.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Honorable Court deny Defendants' request to dismiss Case 2 in its entirety and find that Case 2 may proceed as an original, de novo, action. In the event that this Court concludes that Case 2 must proceed as

a petition for judicial review, Plaintiffs respectfully request that this Honorable Court treat the complaint in Case 2 as such a pleading in accordance with the district court decision in **Edison**, and/or grant leave to allow Plaintiffs to amend their complaint in Case 2 to reflect the pleading to encompass a petition for judicial review. In addition, Plaintiffs respectfully request that this Honorable Court grant their motion for reconsideration and revise its prior order to reflect that only the damage claims under §1983 have been dismissed from Case 1.

DATED this 20th day of June, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June 2011, the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF IN REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER** was served on the party(ies) by email, faxing a copy, and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

COMES NOW Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS by and through their attorney CATHERINE CORTEZ MASTO, Attorney General, and DAVID J. POPE, Senior Deputy Attorney General, BLAKE A. DOERR, Senior Deputy Attorney General, and VIVIENNE RAKOWSKY, Deputy Attorney General and hereby submits their Second Supplement to Defendants' Response to Plaintiffs' Motion for Clarification of Order.

DATED this 23rd day of June, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /S/ BLAKE A. DOERR
BLAKE A. DOERR
Senior Deputy Attorney General
Attorneys for Defendants

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

ARGUMENT

In their Motion for Partial Summary Judgment/Motion to Dismiss and Reply, Defendants set forth why Case 1 should proceed as a facial challenge (declaratory relief action), without the 11 U.S.C. § 1983 claims, and why Case 2 should be dismissed. First, Case 2 should have been filed as a judicial review of the Nevada Tax Commission's (hereinafter "NTC") final decision pursuant to a harmonious reading of NRS 368A.290 and the provisions of NRS Chapter 233B. See Southern Cal. Edison v. The First Judicial Dist. Court, 127 Nev.Adv.Op. 22, 1 (May 26, 2011) (stating, "NRS 372.680 permits a taxpayer to challenge the Commission's decision by filing an action; pursuant to NRS 233B.130, that action must be a petition for judicial review."). Because Case 2 was not filed as a judicial review and the time for doing so has passed, Case 2 should be dismissed. NRS 233B.130(2). The NTC's decision is a final decision subject to review pursuant to NRS 233B.135. If Case 2 is dismissed, by application of administrative *res judicata* the original six Case 2 Plaintiffs are barred from seeking further review of this issue for the months of Jan, Feb, March and April of 2004 as judicial review was their sole means of review. 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 *res judicata*); see Campbell v. Nevada Tax Comm'n, 109 Nev. 512, 515, 853 P.2d 717, 719 (1993) ("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 on the same issues."). As Déjà vu and Little Darlings were not parties to the administrative record, they were not and are not properly part of Case 2. NRS 233B.130(1).

With regard to limiting Case 1 to a declaratory relief action regarding the facial constitutional challenge, that is all that the law entitles Plaintiffs to in Case 1. See National Private Truck Council, Inc. v. Oklahoma Tax Comm'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); see Department of Taxation v. Scottsman Mfg. Co., 109 Nev.

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252, 255, 849 P.2d 317, 319 (1993) (stating, "[t]he exhaustion doctrine will not deprive the court of jurisdiction 'where the issues relate solely to the interpretation or constitutionality of a statute." (citation omitted)); see Malecon Tobacco, LLC v. Dept. of Taxation, 118 Nev. 837, 841, 59 P.3d 474, 841 (2002) (providing that exhaustion of administrative remedies is required for "as applied" challenges but not "facial" challenges). The Malecon case was decided after the Scottsman case and requires exhaustion of administrative remedies for cases involving "as applied" constitutional challenges. 118 Nev. at 841, 59 P.3d at 841; see also Jordan v. Fayette County Bd. of Assessment Appeals, 782 A.2d 642, 646 (explaining that "as applied" constitutional challenges are properly heard by administrative bodies"). The National Private Truck case is cited and quoted at length in Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment/Motion to Dismiss and therefore, contrary to Plaintiffs' assertions, Defendants did provide authority for dismissal of all of Plaintiffs' 11 U.S.C. § 1983 claims (which is also from the United States Supreme Court).

The question before the federal courts was whether NRS 368A.290 provides for a plain, speedy and efficient remedy. The plain, speedy and efficient remedy described to the federal courts was the ability to have the issues reviewed in Nevada district courts pursuant to NRS 368A.290. See Gass v. County of Allegheny, 371 F.3d 134, 139 (3rd Cir. 2004) (stating, "[t]he Tax Injunction Act does not require that the state courts provide a favorable substantive outcome; instead, it only requires access to the state courts and an opportunity for meaningful review"). The question of whether the Plaintiffs complied with the procedural requirements of NRS 368A.290 was not before the federal courts.

According to the Supreme Court's decision in S. Cal. Edison, the statutory language of NRS 368A.290 provides for a judicial review of the NTC's final decisions regarding refunds. The Nevada Supreme Court declared that, following the amendments to both Chapters 372 and 233B, NRS 372.680 provides for a judicial review. S. Cal. Edison,127 Nev.Adv.Op. 22, 1. The amendments were completed as of the 1999 Legislative Session. When adopting NRS 368A.290 during the 2003 Legislative Session, the Nevada Legislature used the same

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language used in NRS 372.680. By using the same language, the Nevada Legislature intended that NRS 368A.290 have the same meaning as NRS 372.680. See Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 575, 580-581, 97 P.3d 1132, 1135-1136 (Nev. 2004) (stating, "[w]hen a legislature adopts language that has a particular [ ] meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language). The Nevada Supreme Court's decision in S. Cal. Edison states that through the changes that were completed in 1999, NRS 372.680 has since that time provided for a judicial review. Therefore, since its adoption in 2003, the Nevada Legislature intended that NRS 368A.290 provide for judicial review and because the cases at hand are still pending the proper procedure can be applied. See S. Cal. Edison ("NRS 372.680 permits a taxpayer to challenge the Commission's decision by filing an action; pursuant to NRS 233B.130, that action must be a petition for judicial review.")

Because Case 2 was commenced in District Court in 2008, the existing law was NRS 368A.290 which provides for a judicial review. The Defendants are not applying the S. Cal. Edison decision retroactively, as it declares what NRS 372.680 has meant since 1999 and, therefore, what NRS 368A.290 has meant since its adoption in 2003.

The Defendants do not assert that the provisions of NRS 368A.290 are meaningless. Rather, Defendants argue that when read harmoniously with NRS Chapter 233B, NRS 368A.290 provides for a judicial review the same as NRS 372.680.

With regard to Déjà vu and Little Darlings, by their own admission, they were subject to the LET as of 2005. As previously indicated, the claims for refund are related to the months of Jan, Feb, March and April of 2004. In addition, Case 2 was commenced in 2008, following the NTC's consideration of the appeal presented to it in July and August of 2007. As argued in the Motion for Partial Summary Judgment/Motion to Dismiss, Déjà vu and Little Darlings could have requested refunds immediately after the payment of any tax and prior to the expiration of the three year statute of limitations and could therefore have been a part of the

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administrative proceedings - but they didn't try - therefore this court does not have jurisdiction as to their claims for refund.

With regard to the NTC reviewing constitutional issues, pursuant to NRS 368A.200(5)(a) the LET does not apply to "[l]ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution." The Department is therefore statutorily and legislatively authorized to make such a determination. In addition, because the NTC reviews decisions of the Department, the NTC is similarly authorized to make such determinations. Moreover, the Nevada Supreme Court has stated that exhaustion of administrative remedies is required for "as applied" constitutional challenges. Malecon Tobacco, LLC v. Dept. of Taxation, 118 Nev. 837, 841, 59 P.3d 474, 841 (2002). Consequently, the NTC can issue a final decision regarding a constitutional issue.

With regard to the Defendants' recent discovery requests, the discovery period of this case remains open. The requests were served on or about May 25, 2011 which was prior to the Nevada Supreme Court's issuance of its decision in S. Cal. Edison on May 26, 2011. Moreover, the Defendants' motion seeking dismissal of Case 2 for failure to file it as a judicial review remained open pending a final written order indicating the same, as well as consolidating the declaratory relief actions, and therefore, the Defendants were working within the posture of the case.

Finally, 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." Regardless of what has transpired in Case 2 to date, having knowledge of the S. Cal. Edison decision, this Court should dismiss Case 2.

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For all of the above reasons, Defendants reiterate their request to have Case 2 dismissed in its entirety; to have all claims regarding refunds dismissed—either because the court lacks jurisdiction or because of Plaintiffs' failure to timely file a Petition for Judicial Review, resulting in Case 1 proceeding as a declaratory relief action on the facial constitutional challenge only, without the 11 U.S.C. §1983 claims[1].

DATED this 22nd day of June, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /S/ BLAKE A. DOERR
BLAKE A. DOERR
Senior Deputy Attorney General
Attorneys for Defendants

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[1] §1983 declaratory relief and injunctive relief are not allowed in tax cases. See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. at 589-591.

CERTIFICATE OF SERVICE

I, hereby certify that on the 23rd day of June, 2011, I served the **SECOND SUPPLEMENT TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION 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.
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Las Vegas, NV 89101

Bradley J. Shafer
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3800 Capital City Blvd., Ste. 2
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/s/ TRACI PLOTNICK
An employee of Office of Attorney General

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DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	June 24, 2011

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

June 24, 2011 **3:00 AM** **Motion to Reconsider**

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

COURT CLERK: Dameda Scott
RECORDER:
REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- A533273 and A554970 The Court, having reviewed Motion for Reconsideration and the related briefing and being fully informed, GRANTS the motion IN PART. The Order is to be amended to reflect dismissal only of damages claims.

Counsel for Plaintiff is directed to submit a Proposed Order consistent with the foregoing within ten (10) days and distribute a filed copy to all parties involved in this matter. Such order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. This Decision sets forth the Court s intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order.

Based upon the supplemental briefing the Court is inclined to reconsider the prior motion to dismiss related to the petition for judicial review issue based upon the recent Nv Sup Ct decision in Southern California Edison v. First Judicial District Court, 127 Nev Adv. Op. 22 (May 26, 2011). Counsel for the State to renotice the motion so an appropriate record can be made.

CLERKS NOTE: A copy of this minute order also placed in A554970. A copy of this minute order placed in Regional Justice Center attorney folders for William Brown, Esq. (TURCO & DRASKOVICH) and for Blake Doerr, Esq. and Vivienne Rakowsky, Esq. (DEPUTY ATTORNEY GENERAL, 555 E. Washington Ave., #3900, Las Vegas, NV 89101) (DS 7/1/11).

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing | COURT MINUTES | June 24, 2011

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

June 24, 2011 **3:00 AM** **Motion For Reconsideration**

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

COURT CLERK: Dameda Scott
RECORDER:
REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- A533273 and A554970 The Court, having reviewed Motion for Reconsideration and the related briefing and being fully informed, GRANTS the motion IN PART. The Order is to be amended to reflect dismissal only of damages claims.

Counsel for Plaintiff is directed to submit a Proposed Order consistent with the foregoing within ten (10) days and distribute a filed copy to all parties involved in this matter. Such order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. This Decision sets forth the Court s intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order.

Based upon the supplemental briefing the Court is inclined to reconsider the prior motion to dismiss related to the petition for judicial review issue based upon the recent Nv Sup Ct decision in Southern California Edison v. First Judicial District Court, 127 Nev Adv. Op. 22 (May 26, 2011). Counsel for the State to renotice the motion so an appropriate record can be made.

CLERKS NOTE: A copy of this minute order also placed in A533273. A copy of this minute order placed in Regional Justice Center attorney folders for William Brown, Esq. (TURCO & DRASKOVICH) and for Blake Doerr, Esq. and Vivienne Rakowsky, Esq. (DEPUTY ATTORNEY GENERAL, 555 E. Washington Ave., #3900, Las Vegas, NV 89101) (DS 7/1/11).

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A533273
Dept. No.: IX

Coordinated with:

Case No. A554970
Dept. No.: IX

PLAINTIFFS' SUPPLEMENTAL BRIEF IN REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER

ARGUMENT

In their Second Supplement to Defendants' Response to Plaintiffs' Motion for Clarification of Order (filed June 23, 2011) (Defendants' "Second Supplement"), Defendants assert more arguments that are incompatible with the positions they took before the federal courts. Defendants strategy in this matter has become clear: take one position before the federal court in support of the claim there exists a "plain, speedy, and efficient" remedy under state law, such that federal court lacks jurisdiction under the Tax Injunction Act ("TIA), 28 U.S.C. § 1341, then, once in state court, take a different position is support of the claim that there is no remedy. This litigation by gamesmanship should not be tolerated.

The Defendants' first about-face involves Plaintiffs' right to pursue a direct action in state court pursuant to **State v Scotsman Mfg. Co. Inc.**, 109 Nev. 252, 849 P.2d 317 (1993). As set forth in Plaintiffs' Supplemental Brief in Reply to Defendants' Supplemental Brief in Reply to Defendants' Supplemental Response to Plaintiffs' Motion for Clarification of Order (filed June 20, 2011) (Plaintiffs' "Reply to First Supplement"), the Defendants emphasized to the federal courts that **Scotsman** "[w]ould support the proposition that declaratory relief is available notwithstanding NRS 368A.290(1)." Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006. Ex. 9 to Plaintiffs' Reply to First Supplement, p. 3, n. 2.

More specifically, as to the relationship between **Scotsman** and the administrative process, the department asserted to the district court:

> … the Court in **Scotsman** affirmed a **direct refund action** of the tax, even though the taxpayer did not first pursue its remedy through 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 materia.

Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006. Ex. 9 to Plaintiffs' Reply to First Supplement, p. 5 (emphasis added; footnote omitted).

Similarly, they asserted to the United States Court of Appeals for the Ninth Circuit:

> Hypothetical concerns about the state administrative remedy under Nev. Rev. Stat. Chapter 368A disappear in light of Scotsman, supra, which the District Court found to be authority for a direct action to the state district court in the case of a challenge to the sales tax on Federal constitutional grounds. E.R. 47-48. If the remedy of a refund action directly brought in state district court is available under Nevada's sales tax provisions, it is available under Nev. Rev. State. Chapter 368A, which is in pari materia.

Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, Ex. 10 hereto, p. 20 (emphasis added).

In addition, **Scotsman** involved the situation where the Plaintiff had missed the applicable three-year limitations period. 109 Nev. at 255-56, 849 P.2d at 319-20. Nevertheless, the Court held, "[t]he State now attempts to procedurally bar Scotsman from obtaining a refund of the unlawfully enacted taxes. It may not do so." 109 Nev. at 255, 849 P.2d at 319. Indeed, the court found that the "statutory procedure offers Scotsman no relief at all given the three-year period of limitations invoked by the State. . . . Having forced Scotsman to pay the disputed tax, the State must now 'undo' the unlawful deprivation by refunding the tax." 109 Nev. at 256, 849 P.2d at 320 ("To relieve the State of its obligation to refund the unlawful and coerced tax payments would contravene the Fourteenth Amendment"). Thus, even if the Defendants were correct that Plaintiff's are now procedurally barred from pursuing the remedy they now argue to be proper, Scotsman still requires. Therefore, regardless of what position the Defendants are taking at this particular moment or the next, **Scotsman** mandates that a remedy be provided.

None of this is changed by **Malecon Tobacco, LLC v. Dept. of Taxation**, 118 Nev. 837, 59 P.3d 474 (2002) as the Defendants now assert. To begin with, Defendants never took the position in federal court that **Malecon** limited Plaintiffs' ability to bring a direct action in state court. Rather, as set forth above, Defendants asserted to the federal court that Plaintiffs could directly challenge Chapter 368A in state court, just as a taxpayer challenging application of the sales tax could do. Once again, the department is trying to have it both ways, arguing to the federal courts that the remedy is "plain, speedy and efficient," and arguing to this court that no remedy is available.

Moreover, **Malecon** involved a challenged to certain taxes on tobacco pursuant to "NRS 370.440 to NRS 370.450" and not the Live Entertainer Tax under Chapter 368A. **Malecon** likewise did not involve the sales tax provisions which the Defendants asserted to the Ninth Circuit, like Chapter 368A, provided for a "refund action directly brought in state district court," and which were further addressed in **Southern California Edison v. First Judicial District Court**, 127 Nev. Adv. Op. 22 (May 26, 2011).

In addition, **Malecon** cites **Scotsman** with approval, and cannot be read as expressly or impliedly limiting **Scotsman**. 118 Nev. at 839, 59 P.3d at 476 n. 8. In fact, both stand for the proposition that exhaustion is not necessary where the administrative process would be futile. **Id**. In this respect, **Scotsman** held that an administrative remedy would have been futile in "view of the State's position concerning the constitutionality of the tax". Despite all the different positions the Defendants have taken to date, their position that the LET is wholly constitutional has been unwavering. Thus, administrative review is futile under the **Scotsman** standard. Regardless, the Defendants should now be precluded from changing the position they asserted in federal court.

Lastly, as to Plaintiffs 42 U.S.C. § 1983 claims, the "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" (Defendants' "Motion"), as its name suggests, only sought to dismiss Plaintiffs' claims for damages pursuant to 42 U.S.C. § 1983 and not Plaintiffs § 1983 claims for injunctive and declaratory releif. This argument was contained in Section D of the Motion (pp. 23-24) entitled "The case 1 Claim for **Damages** Pursuant to 42 U.S.C. 1983 must be dismissed," (emphasis added) and which argued, "The Case 1 claim for **damages** pursuant to 42 U.S.C. 1983 must be dismissed . . . ." (Emphasis added). To the extent Defendants now seek to dismiss the remainder of Defendants' Section 1983 claims, that is beyond the scope of their original motion, and certainly far beyond the scope of the present motion to clarify. Plus, Defendants' Motion was premised on the principle that they were not "persons" within the meaning of Seciton 1983. For declaratory and injunctive relief. This simply isn't true. See, e.g., **Will v. Michigan State Dep't of State Police**, 491 U.S. 58, 71 n. 10 (1989) (state officials sued in their official capacity are persons for purposes of § 1983 injunctive and declaratory relief).

Similarly, Defendants' Response to Plaintiffs' Motion for Clarification of Order began by stating, "[t]he Defendants do not oppose the clarification of the Court's order and believe the same can be done without a hearing."

In any event, Supreme Courts holding in **National Private Truck Council v. Oklahoma Tax Comm'n**, 515 U.S. 582 (1995) is narrow and not applicable to the facts at bar. In particular, the Court was careful to note that its decision was limited to "where there exists an adequate remedy at law" (**Id**. at 587), but would not apply "even when an legal remedy exists," if "enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, [or]

throw a cloud upon title" (**Id**. at 591 & n. 6). Accord **Penrose v. Whitacre**, 62 Nev. 239, 245, 147 P.2d 887, 890 (1944) (a state court will enjoin the collection of taxes where "enforcement of the tax would lead to a multiplicity of suits, or **produce irreparable injury**; or, if the property is real estate, throw a cloud upon the title of the complainant, or there must be some allegation of fraud. . . .") (citing **Wells, Fargo & Co. v. Dayton**, 11 Nev. 161, 166 (1876) (other citations omitted)).

Such a situation is present here because: (1) enforcement of Chapter 368A will cause, and indeed has caused, Plaintiffs to suffer irreparable injury; and (2) Plaintiffs lack an adequate remedy at law. This LET's burden on First Amendment freedoms has caused, and until enjoined will continue to cause, irreparable injury to Plaintiffs and other providers of live entertainment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." **Brown v. California Dept. Of Transp.**, 321 F.3d 1217, 1125-126 (9th Cir. 2003), quoting **Elrod v. Burns**, 427 U.S. 347, 373 (1976) (plurality). Indeed, First Amendment violations are widely and regularly used to justify the issuance of preliminary injunctions. See, e.g., **Pacific Frontier v. Pleasant Grove City**, 414 F.3d 1221, 1235 (10th Cir. 2005); **Tucker v. City of Fairfield**, 398 F.3d 457, 464 (6th Cir. 2005); **Newsom ex rel. Newsom v. Albemarle County School Bd.**, 354 F.3d 249, 261 (4th Cir. 2003); **Iowa Right to Life Committee, Inc. v. Williams**, 187 F.3d 963, 970 (8th Cir. 1999). There is no remedy at law that will restore Plaintiffs' First amendment rights. Further, in light of the departments' continually vacillating position as to whether Plaintiffs have any remedy at all and what the remedy might be, which have yet to be fully resolved, such a dismissal would be premature. And, this issue is beyond the scope of the motion to clarify.

Again, in the Ninth Circuit, Defendants pointed to Case 1 and Case 2 as providing the plain, speedy and efficient remedy required by the TIA, asking the Ninth Circuit to take judicial notice of the complaints in both actions. Appellees' Opposition to Motion for Leave to Supplement the Appellate Record, 9th Cir., Case No. 06-16634, filed April 24, 2008, Ex. 11 to Plaintiffs' Supplemental Response, p. 1. As to the present cases, Defendant argued to the Ninth Circuit "there is a direct action remedy, under [**Scotsman**] . . . notwithstanding the failure to exhaust administrative remedy [sic] regarding pure constitutional issues." **Id**. at pp. 6-7. "Appellants [Plaintiffs here] are thus well-place to litigate the issue of the Constitutionality of the tax in Nevada state courts, something they have commenced already." **Id**. at p. 7 (clarification added) (referencing attached copies the complaints in Case 1 and Case 2). That being the case, it is completely duplicitous for the Defendants to seek dismissal of Plaintiffs § 1983 claims, under **National Private Trucking**, or otherwise.

CONCLUSION

WHEREFORE, for the forgoing reasons, Plaintiffs respectfully request the Honorable Court grant Plaintiffs' motion to clarify order and enter an order making explicit that Plaintiffs' 42 U.S.C. § 1983 claims for injunctive and declaratory relief are not dismissed. Plaintiffs also respectfully request the Court dismiss all Defendants improper subsumed motions and other requests for relief.

DATED this 1st day of July, 2011

Respectfully submitted,

BY: /s/ William Brown
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July 2011, the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF IN REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER** was served on the party(ies) by email, 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
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/s/ Erika Magana
An employee of TURCO & DRASKOVICH