IN THE SUPREME COURT FOR STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Supreme Court Case No. 59752

District Court Case No. A558787

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APPELLANTS' APPENDIX
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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. 06A533273
Dept. No. XI

Consolidated with:

Case No. 08A554970
Dept. No. XI

PLAINTIFFS' OPPOSITION TO NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTARTINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983 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 of Hearing: August 23, 2011
Time of Hearing: 9:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND SUMMARY

Pending before this Court is Case No. 533273, which is a request for declaratory and injunctive relief ("Case 1"), and Case No. 554970, which is a judicial complaint for tax refund filed specifically pursuant to NRS 368A.290 ("Case 2"). The two actions have now been consolidated by this Honorable Court,[1] and both relate to the alleged unconstitutionality of Title 37, Chapter 368A, of the Nevada Revised Statutes, which imposes taxes on certain aspects of "live entertainment." This statutory scheme and the tax mandated thereby are sometimes referred to hereinafter as "Chapter 368A," the "Live Entertainment Tax," or simply the "LET."

Pursuant to an Order of this Court, Defendants have re-filed their motion to dismiss and/or for summary judgment ("Renewed Mtn."),[2] basically seeking the dismissal of both actions predicated upon the recent Nevada Supreme Court decision in **Southern California Edison v. First Judicial District**, 127 Nev.Adv.Op. 22 (May 26, 2011) ("**Edison**"), which ruled that judicial challenges seeking refunds under other tax statutes must proceed as petitions for judicial review. Defendants claim that because Case 2 was not initiated as such,

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[1] In the Order entered on April 6, 2011, this Court held that "the claim for declaratory relief in Case 1 is now consolidated with the claim for declaratory relief in Case 2." Order, p. 3.

[2] Despite the title and language in the State's motion and brief, the State was supposed to limit their renewed "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)." Minute Order, June 24, 2011. Therefore, Plaintiffs are going to limit the briefing set forth in this Opposition to that particular issue, and incorporate their previous responses to the other issues improperly raised by the Defendants simply by referring to prior submissions, since those matters are technically not before this Court at this time.

but was filed rather as an original action under NRS 368A.290, Case 2 must be dismissed, and because of the doctrine of administrative res judicata (the Nevada Tax Commission ("Commission") having previously ruled on these claims), Case 1 must be dismissed as well.

Plaintiffs set forth in exhaustive detail below why this is not the case, but in reality this Court need look no further than to the Defendants' recently submitted renewed motion in order to know that the Nevada Supreme Court is not permitting the type of Draconian relief requested by the State here.

Exhibits H and I to the Defendants' renewed motion are rulings of the Nevada Supreme Court (and a district court order upon remand) issued **subsequent** to the decision in **Edison**, one of which concludes that so long as the judicial action arising from a ruling of the Commission was filed within the 90-day period specified in the judicial action provision of the tax statute at issue (which was undeniably done here by these Plaintiffs), the action is deemed to have been timely filed. The other decision simply permits the aggrieved taxpayer 30 days to file a petition for judicial review after the time the court ruled that the matter must proceed as a petition for judicial review (as opposed to an original action).

These recent rulings, which the Defendants were obviously ethically obligated to bring to the attention of this Court (and which directly **refute** their primary arguments here), alone compel that the requests for dismissal be denied.[3] And, because of this, the Defendants'

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[3] In fact, the District Court in **Edison** (in Carson City) similarly **refused** to dismiss the underlying action (and thereby deprive the aggrieved taxpayer of a refund remedy), finding that to do otherwise would "give no meaning" to the very refund statute under which the judicial action at issue there was filed. Despite the Supreme Court's opinion that such matters should normally proceed as petitions for judicial review, the Nevada Supreme Court did not disturb this aspect of the District Court's ruling. 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 LET.

request that Case 2 be dismissed with prejudice (and consequently Case 1 as well) is nothing short of frivolous. The Supreme Court has clearly shown, subsequent to **Edison**, that judicial refund actions filed as original suits under specific tax statutes are not to be dismissed simply because they were not originally filed as petitions for judicial review. Moreover and irrespective of this, the holding of **Edison** is simply not applicable to the specific facts and law at issue in these proceedings.

First, **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[4] must be dismissed as being improperly filed.

Second, 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 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

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

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.

Third, 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.[5] 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.

At best, **Edison** simply requires that other types of judicial challenges to administrative tax rulings proceed forward as petitions for judicial review.[6] This result is

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[5] 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.

[6] 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

supported by the State's alternative request for relief that this Court enter "an Order that case 2 proceed as a judicial review." Renewed Motion, p. 2. However, here, for the reasons summarized above and discussed in greater detail below, Case 2 should continue to proceed as an original, de novo, action, which is the way the State of Nevada has litigated it for the past three and a half years.

Defendants also continue to contend that the "as applied" aspect of the first lawsuit, which sets forth a constitutional challenge to the LET pursuant to, among other things, the federal civil rights statute, 42 U.S.C. §1983, should be dismissed because, prior to the filing of that action, the Plaintiffs had not exhausted their administrative remedies. They take this position even though this Court did not grant their previous motion regarding this issue, and even though **every United States Supreme Court decision that has addressed this issue has concluded that exhaustion of administrative remedies is not required when raising *constitutional claims (whether facial or "as applied") pursuant to 42 U.S.C. §1983.***[7]

Finally, the Defendants' argument that all "as applied" challenges should be dismissed and that Plaintiffs only be limited to their "facial" challenge must similarly be rejected. As Case 2 should not be dismissed, there is no preclusive effect to Case 1. And, not all of the Plaintiffs in Case 1 have even received rulings from the Commission.

Case 1 and Case 2 is now appropriate. Such a question goes far beyond the scope of the matters raised in Defendants' Renewed Motion.

[7] This matter was exhaustively briefed in Plaintiffs' initial opposition to this motion at pp. 42-45, and that briefing will not be repeated here. However, a summary of the United States Supreme Court cases holding as such include **Patsy v. Bd. of Regents of Florida**, 457 U.S. 496, 500, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); **Barry v. Barchi**, 443 U.S. 55, 63 n.10, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); **Gibson v. Berryhill**, 411 U.S. 564, 574, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); **Steffel v. Thompson**, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); **Mitchum v. Foster**, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).
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FACTS AND PROCEDURAL HISTORY

In large part, Plaintiffs adopt the Facts and Procedural History set forth in their initial Opposition to Defendants' Motion for Partial Summary Judgment and to Dismiss ("Int. Opp."), as the State's recitation of its claimed facts and procedural history in both of its motions are virtually identical. Renewed Mtn., pp. 4-8; Int. Opp., pp. 6-10. However, a few comments are in order.

First, Plaintiffs wish to point out a misrepresentation by the State in its recitation of the facts. The Defendants state that the only remaining requests for relief are a request for a declaration that the LET is unconstitutional and a request for refund. Renewed Mtn., p. 7. This is incorrect, as the as applied and facial constitutional claims seek both declaratory and injunctive relief, in part pursuant to 42 U.S.C. 1983.[8] Further, Case 2 requests that the determination of the Nevada Tax Commission be reversed.

Second, because this renewed motion requests that Case 2 be dismissed in its entirety and that Case 1 then also be dismissed 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 hereto), 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

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[8] The only claim that has been dismissed is Plaintiffs' claims for damages pursuant to 42 U.S.C. § 1983.

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 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 under NRS 368A.290. 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.

NRS 368A.290, the statutory provision pursuant to which the Plaintiffs filed the second action at issue here, states, in part, that: "1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by … (b) [t]he Nevada Tax Commission, the claimant **may bring an action against the department on the grounds set forth in the [administrative] claim**." (Clarification and emphasis added). The statute goes on to state that ***"[a]*n action** brought pursuant to subsection 1 must be brought in a court of competent jurisdiction "**for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed**."" NRS 368A.290(2) (emphasis added). "Failure to bring **an action** within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments." NRS 368A.290(3) (emphasis added).

The complaint for refund filed in, and pending before, this Court (as Case 2) is that "**action**." **Plaintiffs followed the statutory provisions for judicial requests for refund to the letter**, and there is no basis in law or fact for this Court to dismiss the timely filed "**action**" specifically provided for in the statutory scheme at issue. In addition, while referencing the

necessity of filing an **action** to obtain a refund, Chapter 368A is absolutely **silent** in regard to the filing of a petition for judicial review (even though other portions of the tax code specify the filing for such relief).

STANDARDS OF REVIEW

When considering a motion to dismiss[9] made under NRCP 12(b)(5), "a district court must construe the complaint liberally and draw every fair inference in favor of the plaintiff," and the complaint should not be dismissed "unless it appears **to a certainty** that the plaintiff could prove no set of facts that would entitle him or her to relief." **Cohen v. Mirage Resorts, Inc.**, 119 Nev. 1, 22 (2003) (emphasis added). See also **Buzz Stew, Inc. v. City of North Las Vegas**, 181 P.3d 670 (2008) (district courts' dismissals under NRCP 12(b)(5) receive "rigorous standard of review on appeal").

Summary judgment[10] is appropriate only where the movant can "demonstrate that no genuine issue of material fact exists, and the moving party in entitled to judgment as a matter of law." **Wood v. Safeway, Inc.**, 121 New. 724, 731, 121 P.3d 1026, 1031(2005).

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

Ottenheimer v. Real Estate Division of the Nevada Department of Commerce, 91 Nev. 338, 342, 535 P.2d 1284, 1286 (1975) (reversing the district court where "summary judgment

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[9] As stated above, the Minute Order entered June 24, 2011, stated that "the Court is inclined to reconsider the prior motion to dismiss related to the petition for judicial review," and requested counsel for the State to re-notice the motion. Therefore, it is Plaintiffs' understanding that this Court intended the State to only file a renewed motion to dismiss, and not a renewed motion for partial summary judgment.

[10] Summary judgment is further inappropriate at this time because discovery is still ongoing. In fact, the critical discovery to this litigation is being conducted later this month. See Int. Opp. Pp. 11-13.

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

ARGUMENT

I. THE DEPARTMENT HAS WAIVED ITS RIGHT TO RAISE THESE ARGUMENTS.

Plaintiffs filed Case 2 on January 9, 2008. Pursuant to agreement between the parties, Defendants filed their Answer and Affirmative Defenses on March 3, 2008. Int. Opp., Ex. 14. **Nowhere therein** did the Defendants raise the affirmative defense that the type of action brought by these Plaintiffs was improper, or that Plaintiffs should have filed a petition for judicial review instead. Int. Opp., Ex. 14, pp. 9-10. Moreover, Defendants' alternative request for relief for an "order that Case 2 proceed as a judicial review" has **never** been raised by the Defendants as an affirmative defense, even in response to the amended complaint in Case 2.[11] Therefore, Defendants have waived their right to raise these claims now. See **Pierce Lathing Co. v. ISEC, Inc.**, 114 Nev. 291 (1998) (if an affirmative defense is not pleaded, it is deemed waived and no evidence can be submitted relevant to that issue); and **Elliot v. Resnick**, 114 Nev. 25 (1998) (if affirmative defenses are not pleaded or tried by consent, they are waived).

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[11] The affirmative defenses that the Defendants raised to the amended complaint in Case 2 were just filed on April 6, 2011, and make absolutely no reference to this request for relief.

In fact, in their original motion to dismiss/for summary judgment (of which this is the motion for reconsideration thereof; supposedly specifically limited to the matters described by this Honorable Court), **the Defendants never raised or asserted a request for "alternative" relief in the event that the Court did not dismiss Case 2.** Nor did the Defendants raise this in their "**Edison**" supplemental memorandum. For this additional reason, the request for alternative relief (to convert Case 2 into a petition for judicial review) is not even properly before this Court.

Moreover, the Defendants have been litigating Case 2 for over three years as an original, de novo, action; they have participated in discovery; and they have never before invoked the specter that Case 2 is being improperly litigated and administered by the parties and by this Honorable Court. In fact, there are depositions scheduled in this case for later this month, and as this Court is aware, Case 1 must be concluded by early December in light of the five-year rule. The conduct of the Defendants in litigating this matter as an original de novo action and in failing to have **ever** timely raised this claim to convert Case 2 into a petition for judicial review, further constitutes waiver on the part of the State. See **Valley Health System, LLC v. Eighth Judicial District Court**, 127 Nev.Adv.Op. 15, 252 P.3d 676, 680 (May 6, 2011) (In holding that a party could not "advance additional" arguments to the district court after an adverse ruling by a discovery commissioner, and that parties should not be allowed to "change their strategy and present a different theory" to the district court, the court held that "[a]ll arguments, issues, and evidence **should be presented at the first opportunity and not held in reserve** to be raised after the commissioner issues his or her recommendation . . .") (emphasis added). If the State felt that a petition for judicial review - - which would arguably not permit discovery - - was the appropriate procedure in Case 2, it should have raised the issue

before the discovery commissioner (at the latest), and not for the first time before the district court after a protracted discovery battle. See also **Garcia v. Scolari's Food & Drug**, 200 P.3d 514, 519 (2009) (Court finding it is "generally inappropriate when a party . . . pursues one strategy at trial and then, after an adverse result, seeks to pursue another strategy with additional evidence.").

II. PLAINTIFFS ARE NOT LIMITED TO BRINGING A PETITION FOR JUDICIAL REVIEW, NOR ARE THEY REQUIRED TO FILE SUCH A PETITION IN ORDER TO SEEK A TAX REFUND.

As Plaintiffs have already set forth their argument against the necessity of bringing a petition for judicial review, they will simply incorporate those previous comments as though set forth herein. Int. Opp., pp. 14 - 38. Defendants' argument in this regard (Renewed Mtn, pp. 10-21) is identical except for the addition of citations to the Nevada Supreme Court's decision in **Edison**, which Plaintiffs will address below.

III. THE NEVADA SUPREME COURT'S DECISION IN EDISON DOES NOT MANDATE THE DISMISSAL OF CASE 2.

During the consideration of Plaintiffs' motion to clarify this Court's April 6, 2011, Order, the Nevada Supreme Court issued its ruling in **Edison**, 127 Nev.Adv.Op. 22 (May 26, 2011). This led to the State's filing of the Supplement to Defendants' Response to Plaintiffs' Motion for Clarification of Order, where the Defendants asked the Court to dismiss Case 2. Subsequently, the Court instructed Defendants to re-file their motion to dismiss based upon the issue of judicial review. Minute Order, June 24, 2011. The only change to the State's renewed motion (which should have been a simple motion to dismiss and not a motion for partial summary judgment, per this Court's Minute Order) is the addition of citations to the **Edison** decision, as well as a chart and discussion detailing why the State feels that a facial challenge is the only avenue left to the Plaintiffs in both cases (which goes beyond the scope of the re-

filed motion requested by this Court). For several reasons, **Edison** does not mandate the dismissal of Case 2 or, consequently, Case 1.

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.[12] 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 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.

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[12] 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, the Supplement, and this Renewed Motion, insisting that these Plaintiffs are not entitled to review de novo. See also Ex. 13 hereto, discussed infra.

It appears that the Department **has adopted a new policy**[13] 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**."[14] **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 -- **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.

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

[14] This Court should note that at no point did the Supreme Court state that there was confusion as to whether original actions for refund could proceed forward. Rather, the issue was only **what procedures applied to such actions**.

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 if the legislature subsequently enacts 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, 177, 179 (1911); and **Washoe Co. Water Conservation Dist. v. Beemer**, 56 Nev. 104, 45 P.2d 779, 784 (1935). It should be noted that in one of the cases relied upon by the Defendants, **Nevada v. Eighth Judicial District**, Case No. 56722 (Ex. H to Renewed Mtn.), the Supreme Court took the position asserted here by these Plaintiffs (Int. Opp. p. 25) and held that 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)." Consequently, even **Nevada v. Eighth Judicial District**, the case cited by the State supports Plaintiffs' contention that because the LET is a specific statute, the judicial action procedures in Chapter 368A take precedence over the general tax review procedures at issue in **Edison**.[15]

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.[16] Consequently, this Court must assume that

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[15] See also **Nevada v. Eighth Judicial District**, (Supreme Court noted that, subsequent to **Edison**, because NRS 372.680 provided a 90-day filing period, the 30-day deadline contained in NRS 233B.130(2)(c) "does not apply here").

[16] 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

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) (emphasis added). Very 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 simply no doctrine of statutory construction that would permit such a result**. In addition, although having been provided an opportunity to create a "new" motion on this issue, the State has been unable to argue around these indisputable cannons of statutory construction that were first raised in the Plaintiffs' "**Edison**" supplemental brief.

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**, 104 Nev. 576, 763 P.2d 345 (1988), 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 . . . ." **Id**. at 579 (citations omitted). Subsequently, in **First Interstate Bank v.**

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."

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**.

The 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,[17] which is admittedly

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[17] 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

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 added).[18] 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**.

IV. AS THE DISTRICT COURT'S RULING IN EDISON, AND SUPREME COURT DECISION SUBSEQUENT TO EDISON, DEMONSTRATE, PLAINTIFFS' COMPLAINT IN CASE 2 SHOULD NOT BE DISMISSED.

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 that "even if the complaint is deemed to be a petition for judicial review it was still undeniably filed

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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 or to convert it into a petition for judicial review.

[18] 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).

after the 30 day period for filing a petition for judicial review."[19] Renewed Mtn., p. 20. Not only does such a position 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**, merely 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 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, hereto, 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**

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[19] As noted in Section V, infra, in order to get the federal action dismissed, the Defendants asserted to both the federal district court and the Ninth Circuit U.S. Court of appeals that Plaintiffs' judicial remedy was to file a refund action within the 90 days as provided by NRS 368A.290. In addition, as discussed in Section VI, infra, the Nevada Supreme Court's decision in **Scotsman**, demonstrates that untimeliness (although it does not exist here) cannot bar a refund action.

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.[20] 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."

This result is supported by our Supreme Court's recent ruling, and subsequent implementation by the district court below, submitted by the State in its Renewed Motion (Ex.'s. H and I). Even though the State was ethically compelled to notify this Court of those decisions, it tries to mitigate their impact by noting that the decisions were not published. Both of these cases are highly relevant to this litigation, and indeed to the issue of how this Court should construe Case 2.

In **Nevada v. The Eighth Judicial Circuit**, Case No. 56722, the Supreme Court acknowledged its ruling in **Edison**, and held that an appeal from a decision of the Tax Commission regarding a sales and use tax refund should proceed as a petition for judicial review under the APA. However, the Supreme Court specifically rejected the State's request to dismiss the case because it was not filed within the 30 day time period prescribed by the APA (just as the State is requesting in regard to Case 2 here), holding that "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." **Id.**, Ex. H, p. 2. The Supreme Court further instructed the "district court to allow real

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

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." **Id.**, Ex. H, pp. 2-3. Even if this Court accepts the State's argument that a judicial review process is applicable to the specific provisions in Chapter 368A, it is clear that the Supreme Court does not intend that cases filed as de novo independent actions be dismissed as a result of its ruling in **Edison**, and this Court should permit Case 2 to proceed as a judicial review.

The other case cited by the State, **Sierra Pacific Power Company, Inc. v. State of Nevada**, Case No. CV09-03554 (Ex. I) appears to be the district court's order implementing the Writ of Mandamus issued by the Supreme Court. The district court there states that the parties are to proceed under Chapter 233B, and holds that the taxpayer "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." **Id.**, Ex. I, p. 2 (emphasis in original). Therefore, other district courts are implementing the Supreme Court's interpretation of the effect of **Edison** on independent de novo actions appealing Commission decisions, and permitting the actions to move forward despite not being originally filed as petitions 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 . . . .

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.[21]

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[21] "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 is 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

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

If this 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

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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)).

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. 7 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**.[22] 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.[23]

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).

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[22] 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.

[23] 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 the Defendants **deleted** this reference of additional relief.

Then, in its reply to its motion to dismiss filed in the federal court, the State noted that **State v Scotsman Mfg. Co. Inc.**, 109 Nev. 252, 849 P.2d 317 (1993)[24] "[w]ould support the proposition that declaratory relief is 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 hereto, p. 3 n. 2.

The district court **agreed with the Department in this regard**, 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). This decision strongly suggest that **declaratory relief is available**[25] in State court notwithstanding NRS 368A.280(1).

Deja Vu Showgirls, 2006 WL 2161980 (Ex. 7 hereto), 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**.[26] **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.[27]

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[24] Discussed in detail in Section IX, infra.

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

[26] The State makes no reference whatsoever to the filing of a petition for judicial review.

[27] 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.

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

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**. Nowhere did the State reference jurisdiction to hear a petition for judicial review.

Notably, the Department's argument to the Ninth Circuit **omitted any** reference to NRS 233B. In addition, the Department referenced the reasoning of the federal district court (adopted with the urging of the State itself), arguing that the Nevada Supreme Court decision in **Scotsman** (discussed more fully in Section IX, 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.
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> **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:
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> * * *
>
> 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 hereto, 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 existed 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 …)."[28] **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

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[28] 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 Renewed Mot., pp. 21-32. 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.

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 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 and July 26, 2011, the Defendants **propounded discovery** in **both**

Case 1 and Case 2. See Ex. 12, hereto.[29] 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, the State is estopped from maintaining such a position at this late juncture in these coordinated (and now consolidated) cases.

VI. 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

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[29] Additionally, the Defendants' discovery requests are in clear contradiction to their claim that "review is limited to the administrative record," and that this Court's "review of Case 2 therefore should not include a review of any of the discovery." Renewed Mtn., pp. 27-28. The Defendants not only previously propounded discovery requests in **both** Cases, but served discovery in **both** cases **after the filing of this renewed motion**. Ex. 12.

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.

VII. CASE 2 SHOULD REMAIN AS A DE NOVO ORIGINAL ACTION.

Based upon the arguments set forth herein, Case 2 should remain as a de novo action for numerous reasons. First, the State waived its right to assert this argument by waiting until late in the litigation to even contend that Case 2 should have been brought via a petition for judicial review. Second, the manner in which the State has litigated this lawsuit for years demonstrates that even the State felt that it was appropriate that Case 2 was proceeding as an independent de novo action, which included the conducting of discovery. Third, the doctrine of statutory construction clearly dictates that a subsequent specific statute controls over an earlier-enacted general statute, demonstrating that the de novo action provided for by Chapter 368A is the proper appeal method instead of the general petition for judicial review procedure

under the APA. Fourth, **Edison** should not be applied retroactively. Fifth, the statements made by the State to both the federal district court and the Ninth Circuit Court of Appeals indicated that Plaintiffs would have the opportunity to challenge the denial of a tax refund request in a de novo independent action in front of a district court. Finally, as demonstrated in the facts that surfaced during the **Edison** litigation, the Tax Department was taking different positions with different taxpayers regarding the procedure for tax appeals, and admitted that there was confusion on the part of the Department in deciding which appeal procedure to utilize.

Most telling, however, is the Department's own position taken in the early stages of the **Edison** administrative process. In a letter dated November 17, 2003, the Department assured Edison's counsel that a trial de novo was not only an option, but the best forum for claims of a constitutional nature (which are certainly involved in Case 2):

> NRS 372.680 does not limit the taxpayer to a review of the administrative record on appeal. Consequently, the failure to conduct an evidentiary hearing at the administrative level does not prejudice the taxpayer at the district court level. Quite frankly, given the nature of Edison's constitutional claims, it may be advantageous for Edison to place this matter before the district court as quickly as possible.

Ex. 13 hereto, p. 2.

For all of these reasons, not only should this Court deny the State's motion to dismiss Case 2, but this Court should decline - - as the Nevada Supreme Court did in **Edison** - - to convert Case 2 into a judicial review proceeding.

VIII. NEITHER CASE 1 NOR CASE 2 ARE BARRED BY THE DOCTRINES OF ADMINISTRATIVE RES JUDICATA, CLAIM PRECLUSION, OR ISSUE PRECLUSION.

The Department raises the same arguments that Case 2 is barred by the doctrines of administrative res judicata, claim preclusion and issue preclusion, contained on pages 21

through 25 of the Renewed Motion, and Plaintiffs incorporate their prior response to these arguments. Int. Opp., pp. 38 - 40. Further, this aspect of the State's initial motion for partial summary judgment was not granted, and was not included in the Court's minute order granting reconsideration solely on the issue of the petition for judicial review. Minute Order, June 24, 2011. In any event, since Case 2 should not be dismissed for the reasons set forth above, there is no preclusive effect in regard to Case 1.

IX. THE "FACIAL CHALLENGE" REGARDING THE CONSTITUTIONALITY OF THE LET IS NOT THE ONLY REMAINING ISSUE BEFORE THIS COURT.

The Department once again claims that the "six Case 2 Plaintiffs exhausted their administrative remedies but failed to pursue a petition for judicial review. Because they failed to timely file a petition for judicial review, the Case 2 Plaintiffs allowed the Commission's decision to become final and lost the ability to have this court review the Commission's decision which affirmed the Department's denial of the refund claims." Renewed Mtn., p. 27, identical to State's initial Motion, p. 24. Thus, the Department again claims that the Commission's decision facial challenge to the constitutionality of the LET is the only remaining issue before this Court, and added a chart that supposedly illuminates this conclusion for the Court. Renewed Mtn., pp. 29-31. The Court should again reject this argument.

The Department's argument is entirely premised on the Court first finding, inter alia, that **Edison** decision regarding the effect of amendments APA on existing sales and use tax refund provisions also applies to specific refund provisions (NRS 368A.290) enacted after those same APA amendments; that **Edison** should be applied retroactively despite the general judicial reluctance to apply procedural decisions retroactively and despite our Supreme Court

specifically declining to apply **Edison** to procedurally default existing claims; and that the Department should not be judicially estopped from changing its position regarding the availability of a direct refund action in district court from that asserted in federal court. Unless the Court agrees with Department on all these forgoing issues, there is no basis to dismiss the as applied challenges in Case 2, or to apply judicial estoppel (be it issue preclusion or claim preclusion) to preclude litigation of the as applied challenges raised through Case 1.

The Department's contention that Plaintiffs should have requested discovery from the Commission and since they did not, this Court cannot review any of the discovery conducted (Renewed Mtn., pp. 27-28), even though it was conducted under the auspices of both Case 1 and 2 (by both the Plaintiffs **and** the Defendants) is contrary to the Department's conduct in this litigation over the past years. Plaintiffs have expanded substantial efforts seeking discovery from Defendants. While the Defendants have disputed the scope of discovery available, they have never argued that no discovery was available because Plaintiffs were limited to a petition for judicial review. Counsel from Michigan has made no less than six trips to Nevada on discovery disputes alone. Defendants should not be allowed to cause Plaintiffs to spend years pursuing discovery and litigating their claims, only change their position at the last moment regarding the nature of the state remedy available – especially where that position is fundamentally inconsistent with their positions before the federal courts. If the Department believed that discovery was not available, it should have stated those reasons at the onset of this litigation and in opposition to the discovery sought by Plaintiffs. It did not, and it should be estopped from doing so now. See also Section X, infra.

In addition, Defendants add a new heading claiming that Plaintiffs cannot "simultaneously pursue the same declaratory relief in Case 1 and Case 2" (Renewed Mtn., p.

25), but make the same arguments as they previously had in their initial motion, which were denied by this Court. In fact, this Court specifically stated:

> With regard to Defendants' motion to dismiss and/or for partial summary judgment on the basis that Case 1 should be limited to a facial challenge because none of the Case 1 Plaintiffs exhausted administrative remedies before commencing Case 1 and therefore Case 1 should not contain an "as applied" challenge, Defendants' motion is GRANTED IN PART AND DENIED IN PART as **the claim for declaratory relief in Case 1 is now consolidated with the claim for declaratory relief in Case 2** . . ."

April 6, 2011, Order, pp. 2-3 (emphasis added).

Therefore, it is clear that this Court had no problem consolidating the claims for declaratory relief. Additionally, this Court's consolidation of the two cases is in conflict with Defendants' argument that the cases be bifurcated should this Court decide that Case 2 should not be dismissed and/or treated as a petition for judicial review. Until now, Defendants never contested the consolidation of the Cases, nor did they request that this Court reconsider that portion of the April 6, 2011, Order.

In addition, the **Public Service Commission v. Eighth Judicial District Court**, 107 Nev. 680, 818 P.2d 396 (1991) decision cited by the department has no application to this case. That case involved a plaintiff attempting to collaterally attack ongoing administrative proceedings by filing a declaratory action in district court regarding adverse rulings of the administrative body. 107 Nev at 682-83, 818 P.2d 398. This action involves no such collateral attack to rulings or defenses in a different action. The claims in Case 1 and Case 2 are proceeding simultaneously before the same Court. The Departments argument has no merit.

Although the Department has changed its position regarding the procedures available, the need for discovery and whether the case should be consolidated, its exhaustion argument is little different that the argument it raised before Judge Togliatti in Defendants' Motion to Dismiss, p. 5-8, filed on April 18, 2008. Judge Togliatti denied that motion. See Order of

December 10, 2010, 08:42:40 AM in (Case No. A533273). In addition, this issue is beyond the scope of this Court's minute order directing the Department to re-notice its motion in light of **Edison**. Plaintiffs do not desire to relitigate every ruling the Department is dissatisfied with. Nevertheless, since the Department has once again raised this issue, Plaintiffs will again respond.

First, the Nevada Supreme Court has determined that because of the importance of constitutional rights, a taxpayer may in fact bypass administrative remedies and seek judicial redress **directly in the state courts if the challenge relates to the constitutionality of the taxing law**. In **Nevada Dep't of Taxation v. Scotsman Mfg. Co., Inc.**, 109 Nev. 252, 849 P.2d 317 (Nev. 1993), the court stated that the "exhaustion doctrine will not deprive the court of jurisdiction 'where the issues relate solely to the interpretation or constitutionality of a statute." **Id**. at 255, citing **State of Nevada v. Glusman**, 98 Nev. 412, 419, 651 P.2d 639, 644 (Nev. 1992). See also **Malecon Tobacco, LLC v. State Dept. of Taxation**, 118 Nev. 837, 839-41, 59 P.3d 474, 476-77 (Nev. 2002) and Section VI, supra.

The Department also seeks to relitigate its claim that Plaintiffs' as applied challenges should be dismissed pursuant to **Malecon Tobacco, LLC**, 118 Nev. 837, 59 P.3d 474 (2002) despite the holding in **Scotsman**, because administrative agencies might make determinations relevant to as applied challenges. This position must be compared to the Departments representations to the Ninth Circuit that "judicial" remedy was available to Plaintiffs because "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. Appellees' Answering Brief, Ex. 10, pp. 14-15 (emphasis added). The Department represented to the federal courts that **all**

Plaintiffs constitutional claims could be brought in district court. Plaintiffs followed the letter of NRS 368A.290 and did just that. And, as set forth in Section VI, supra, the Court in **Scotsman** found that the a remedy was necessary even though the plaintiff missed 3-year limitations period. 109 Nev. at 255-56, 849 P.2d 319-20. ("Having forced Scotsman to pay the disputed tax, the State must now 'undo" the unlawful deprivation by refunding the tax. . . . To relieve the State of its obligation to refund the unlawful and coerced tax payments would contravene the Fourteenth Amendment").

Plaintiffs also find absurd Defendants' argument that the question of the constitutionality of a tax is better suited for the Tax Commission (most members who are not even lawyers, let alone judges), as opposed to the courts of this state, and that Plaintiffs be limited to the record before the Tax Commission. Renewed Mtn., pp. 26-27. Administrative agencies, however, are generally not the proper forum to evaluate the constitutionality of statutes.[30]

Indeed, the Department itself has recognized that it is "advantageous" to have constitutional attacks on tax statutes adjudicated by a district court in the first instance. See Department Letter of Nov. 17, 2003, p. 2 n. 1, Ex. 13. The Court in **Malecon** noted that the as applied claims before it "hinge[d] upon factual determinations." 118 Nev. at 841, 59 P. 2 at

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[30] **Malecon Tobacco**, 118 Nev. at 840-841, 59 P.3d at 476-77. 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.'" **Id**. at 840 (citing **Thunder Basin Coal Co. v. Reich**, 510 U.S. 200, 215, 114 S.Ct. 771, 127 L.Ed.2d 29 (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, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The same circumstances apply here, therefore the State's contention that the Commission is better suited to hear the constitutionality of the LET than this Court.

477. Specifically, the Nevada Supreme Court has recognized that it has found no state that does "not adhere to the principle that an exception to the exhaustion doctrine may exist when a determination of the constitutional issue does not depend upon factual findings by the agency." **Id**. at 841 n. 13. In fact, Plaintiffs' "as applied" challenge does not require any factual findings or other determination within the bailiwick of the Commission.[31] Exhaustion is not required.

Second, where the seeking of administrative redress would be futile, exhaustion of such a remedy is not a prerequisite to filing for legal redress in the courts of this state. See **Scotsman**, 109 Nev. at 255 (exhaustion under Nevada law is not required where "initiation of administrative proceedings would be futile"). This exception applies here as well (and is really only applicable to the Deja Vu Plaintiffs since all others have now undergone full administrative review).

Initially, the Nevada Supreme Court has recognized that if the State simply defends the constitutionality of a tax statute, the administrative proceedings will certainly then be futile. **Id**. (the taxpayer's compliance with the administrative remedies would have been futile in

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[31] A facial challenge (which Plaintiffs have certainly raised here) is, of course, adjudicated by mere reference to the challenged law. But Plaintiffs have also relied upon evidence of the "targeting," or "gerrymandering," of the LET so that it applies to, almost exclusively, the Gentlemen's clubs of Nevada. This evidence includes the legislative record relied upon in the briefing to this Honorable Court, and the "charts" and supporting documentation that the parties are currently fighting about in the discovery disputes pending before Your Honor. Although Plaintiffs put excerpts of the legislative record before the Commission (See Ex. 24 to Int. Opp., Reply Brief to Commission, pp. 15-17), the Commission made no "factual findings" regarding this aspect of the Appellants' (these Plaintiffs') arguments. Ex. 2, Ruling. Moreover, because of the evidence of legislative "targeting" and "gerrymandering," the Defendants are simply in error when they content that no "as applied" challenge can be brought as a result of their arguments concerning the invalidity of Case 2. The fact remains that the State of Nevada has, indeed, **applied** what the Plaintiffs contend is an unconstitutional tax **against them**. No one here disputes that, for years now, the Plaintiffs have had to pay the LET. Consequently, Plaintiffs' "as applied" claims are ripe for adjudication, and there is no reason or basis, whatsoever, to dismiss them.

"view of the State's position concerning the constitutional validity of the tax"). Because the Department here has not given any indication to this Court that it will now change its position and concede that the LET is unconstitutional, it is presumed that it (and the Commission in regard to the Deja Vu Plaintiffs) will take the position that Chapter 368A is, in fact, fully valid. Since the filing of the initial Complaint here, Defendants have done just that. Hence, any further administrative proceedings are futile pursuant to **Scotsman**.[32]

But there is an even more compelling basis to establish that any administrative remedy would be futile. That is because the Defendants have **themselves** argued to the Nevada Tax Commission the futility of the Plaintiffs' administrative remedies. During the first hearing that occurred before the Commission on July 9, 2007, the Department, through legal counsel (who is the **same attorney** that filed the motion to for partial summary judgment and to dismiss at bar), stated that it was:

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

Transcript (Ex. 14), page 30, lines 8-14.

N.A.C. § 368A.170 regulates the "over-collection" of the subject taxes, which is defined in part as "any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of N.R.S. 368A.200[33]." N.A.C. § 368A.170(1). The

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[32] Of course, there is no reason to believe the Commission would rule on the Deja Vu Plaintiffs any different than it decided the similar challenges raised by the K-Kel Plaintiffs or that further additional appeals on K-Kel would result in a different outcome.

[33] Subsection 5 of N.R.S. § 368A.200 states that the LET does not apply to, among other things, "[l]ive entertainment that this state is prohibited from taxing under the Constitution,

regulation states that any over-collection "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." N.A.C. § 368A.170(2). The taxpayer is required to "use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the **name and address** of the person to whom the refund is to be made." N.A.C. § 368A.170(3)(a) (emphasis added). If the taxpayer cannot do this, the refund goes to the Department! N.A.C. § 368A.170(4).

This was the first occasion that any of the Defendants raised the applicability of N.A.C. § 368A.170. When the hearing continued before the Commission on August 6, 2007, Bradley Shafer, counsel for the taxpayers and one of the attorneys for the Plaintiffs here, addressed N.A.C. § 368A.170 and the Department's insistence that in order to obtain a refund a taxpayer has to identify each patron who paid an admission charge, or for food, drink or merchandise, and also has to demonstrate that the taxpayer knows where the patron lives or works in order to "reimburse" the refund to that individual. He explained:

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

Transcript (Ex. 15), page 10, lines 14-21.

In addition to the arguments regarding the taxpayers' inability to locate each patron who paid an admission or who purchased food, drink or merchandise, the K-Kel Plaintiffs further informed the Commission that the tax was paid not by the patrons but, rather, by the clubs themselves. The K-Kel Plaintiffs introduced affidavits from four of the Plaintiffs which

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laws or treaties of the United States or the Nevada Constitution." N.R.S. § 368A.200(5)(a). Consequently, if Plaintiffs' arguments are correct that the LET violates both the federal and state Constitutions, the exemption under N.R.S. § 368A.200(5)(a) applies and there has then been an "over-collection" of the tax.

established that "none of the facilities have raised their admission fees in order to recoup the tax, the tax merely is deducted out of the general receipts of the business and it's the businesses' money that we're trying to get back." Transcript (Ex. 14), page 10-11, lines 22-25 and 1. The four affidavits submitted are attached hereto as Ex. 15.

Irrespective of these arguments of the K-Kel Plaintiffs, Senior Deputy Attorney General David Pope, **one the defense attorneys who has filed motions for summary judgment and to dismiss in both Cases 1 and 2**, replied as follows:

> To the extent that the tax is applicable ***it's to be collected from the patrons of the gentlemen's clubs***, and in fact, there is to be an accounting or should have been an accounting by the gentlemen's club six days after they indicated that they were entitled to a refund.
>
> I think that they may have some approach to that and it may lead to further argument, so I think it's still an issue that is applicable and we'll have to address.

Transcript (Ex. 15), page 9, lines 5-13 (emphasis added).

Although the argument of the applicability of N.A.C. § 368A.170 was thereafter reserved by the Commission for argument at a later time (if the Plaintiffs were found to be entitled to a refund in the first place), Mr. Pope subsequently stated in the hearing:

> I know we've reserved time to argue this, but **the law does require that that admission charge be collected from the patrons** and I believe it also requires that if it's included in the ticket or included in the admission charge, then there has to be some notification of that.
>
> To the extent that it's not included as was stated here today, that it's just being paid on behalf of the patrons, then I think ***it's difficult to say that the patrons aren't paying it even though they don't know that they are not.*** **The law requires** ***that it's being collected*** **from the patrons** and the appellants are paying it **on behalf of the patrons**.

Transcript (Ex. 15), pages 74-75, lines 19-25, 1-6 (emphasis added).

Commissioner Turner then verified this position:

> Counsel for the taxpayers, Mr. Shafer, argued that this is really a tax that's

being absorbed by the businesses he represents.

It is a pass-through tax, and the businesses if the tax did not exist could reduce what they're charging to their customers by the amount of the tax and have the same bottom line today.

Transcript (Ex. 15), pages 92-93, lines 21-25, 1-2 (emphasis added).[34]

Counsel for the Defendants expressed this same position before this very Court. During the hearing held just on December 9, 2010, all three of the attorneys for the Defendants articulated three different positions regarding the applicability of N.A.C. § 368A.170 to Plaintiffs' ability to even recover a refund of the LET unconstitutionally paid to the state. Transcript of Hearing on December 9, 2010, Ex. 23, pp. 30-46.

First, Vivienne Rakowsky, who was not involved in either the federal cases or the state administrative proceedings, explained her interpretation of the ability of Plaintiffs to recover any refund based upon N.A.C. § 368A.170:

> So in other words, they have to pay that tax on the admission. They can collect it separately from their patrons, or they can include it in the ticket price and then make out the check. It says any ticket for live entertainment must stay with the tax imposed by this sections [sic], including the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.
>
> [Mr. Shafer] says his - - his people have not been collecting the tax they've been paying it. So if he can verify the fact that the LET tax has come out of the pockets of his clients, he's entitled to - - he - - he will be entitled to refund if he wins this case, with interest.

Transcript, Ex. 17, p. 34 (clarification added).

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[34] In later commenting upon the bases for the ruling denying the claims for refunds, Commissioner Turner, in adhering to his "pass-through" conceptualization of the tax, stated that he would "find in addition that a refund to the taxpayers being the clients of Mr. Shafer at this point in time would constitute **an unjust enrichment** at the same time." Transcript (Ex. 15), page 93, lines 6-8 (emphasis added). That unjust enrichment claim was obviously predicated upon his belief that these Plaintiffs did not pay the tax and could not, then, equitably recoup it.

Next, Mr. Pope, who admitted that he was the only attorney of the trio present on behalf of the State on December 9, 2010, who was also involved in both the federal court and state administrative proceedings, made an argument disavowing his position in front of the Commission, as set forth, supra:

> MR. POPE: I think one of the things that plaintiffs are going to have to show is how they did handle that - - that issue. Did they include the tax and did they have a sign on the wall or did they not?
>
> And - - and, you know, we haven't gotten to that point yet.
>
> THE COURT: And because, if they did not, then the State's position would be what?
>
> MR. POPE: ***Well, I'm not sure***, and I don't know that we're here to say that today. But it depends on what they did and what evidence they have to show what they did.
>
> THE COURT: Well, let me ask you this. **If you took a position before in an administrative proceeding**, is it your - - is it your - -
>
> MR. POPE: ***I'm not sure if we took*** **it in administrative proceeding or, I mean, took a position, or if what Mr. Shafer just said, a commissioner** ***recited a regulation. I don't recall, Your Honor.*** I'm not - - I'm not sure.

Transcript, Ex. 17, pp. 35-36 (emphasis added).

Then, it was Mr. Doerr's turn to give this Court his interpretation of N.A.C § 368A.170:

> THE COURT: . . . You haven't taken a position on that one way or another you're saying to me?
>
> MR. DOERR: I'm not saying that. I'm saying that, in fact, I believe in our first argument, I argued that ***I don't think it could ever be construed*** **to have been <u>not</u> paid by their customer**. It's the customer who bears the burden of the tax, the retailer under sales and use tax, the club in this case, is the collection agent. ***They're not the payer, they're the remitter***. They remit the tax. They don't pay the tax, they get it from their client - -

Transcript, Ex. 17, p. 38 (emphasis added).

Finally, all three of the State's attorneys again gave their varying constructions of the ability of Plaintiffs to obtain a refund at all if Chapter 368A is found to be unconstitutional:

> MR. DOERR: And I think the commission said, we don't think this is unconstitutional, you don't get a refund. So that issue - - you know, again, I think that that question should be here on Judicial review.
>
> MR. POPE: What the - - what the statute says, Your Honor, is a business entity that collects any amount that is taxable, pursuant to the LET, is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.
>
> MS. RAKOWSKY: So they're paying - - it's a pay first. They're paying it. They're entitled to collect it if they want, but if they don't want it, they still have to pay it.
>
> MR. SHAFER: Your Honor - -
>
> MR. DOERR: **It comes from the customer**.
>
> MR. SHAFER: Your Honor - -
>
> MR. DOERR: **The receipts, it comes from the customer**.

Transcript, Ex. 16, p. 42 (emphasis added).

Despite their arguments to the contrary, Mr. Pope then tried to argue that Plaintiffs have not established irreparable harm: "You have to pay first, and sue later. It's not an irreparable harm. As long as you get your money back with interest you have not been harmed." Transcript, Ex. 16, p. 44.[35]

It is therefore clear that pursuant to the very arguments made by these Defendants before the Commission and this Court that it is their position that Plaintiffs can only obtain a refund of an unconstitutional tax if they are able to obtain and retain the name and address of

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[35] Of course, Defendants also now argue that the refund actions are null and void, that any further administrative actions by the K-Kel Plaintiffs would be barred, and that those Plaintiffs can **never**, therefore, seek reimbursement of any unconstitutionally collected taxes.

every patron who pays an admissions fee to enters their facility or who purchases any form of food, beverage, or merchandise. No entertainment venue could be expected to collect and maintain such records, particularly in light of the fact that the Constitution recognizes the right to view, hear, and engage in protected expression anonymously.[36] These privacy interests are particularly relevant here where the Plaintiffs are exotic dance facilities and where patrons may then have a specific interest in maintaining their anonymity. Particularly, then, in light of the applicability of N.A.C. § 368A.170, which the Defendants apparently **insist** applies in the circumstances at issue here, any administrative remedies would be futile since the Plaintiffs would **never** be entitled to obtain a refund even if the LET was declared unconstitutional. Administrative redress is then futile to adjudicating Plaintiffs' constitutional claims.

Third, 42 U.S.C. § 1983 jurisprudence confirms that exhaustion of administrative remedies is **not** a prerequisite for the filing of Case 1. As a general proposition United States Supreme Court has observed that a person suffering a deprivation of their federal constitutional rights should not have to exhaust state administrative remedies as a condition to bringing suit to protect those liberties. The Court has "on numerous occasions **rejected** the argument that a civil rights action under 42 U.S.C. § 1983 should be dismissed where the plaintiff has not exhausted state administrative remedies." **Patsy v. Bd. of Regents of Florida**, 457 U.S. 496, 500, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (emphasis added). See also **Barry v. Barchi**, 443 U.S. 55, 63 n.10, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); **Gibson v. Berryhill**, 411 U.S. 564,

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[36] See, e.g., **Talley v. California**, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); **Hynes v. Mayor and Council of Borough of Oradell**, 425 U.S. 610, 628, 96 S.Ct. 1755, 1764, 48 L.Ed.2d 243 (1976); **McIntyre v. Ohio Elections Comm.**, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); **Connection Distribution Co. v. Reno**, 154 F.3d 281, 293 (6th Cir. 1998); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 394-395 (6th Cir. 2001).

574, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). Plaintiffs have brought Case 1, in part, pursuant to the Federal Civil Rights Statute found at 42 U.S.C. § 1983. Complaint, at ¶¶ 3, 65, 66.

This exception to the exhaustion doctrine that has been carved out for claims under § 1983 is a result of the sensitive nature and supreme importance of constitutional rights. See **Steffel v. Thompson**, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("When federal claims are premised on [§ 1983] . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). The Court has also analyzed the intent of Congress in enacting § 1983, and observed that the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[37] **Mitchum v. Foster**, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) (quoting **Ex parte Virginia**, 100 U.S. 339, 346, 25 L.Ed. 676 (1879)). Requiring the Plaintiffs here to exhaust potentially lengthy – and as proven in this case, futile – repeated state administrative remedies would clearly go against the intent of Congress.

Correspondingly, state courts have recognized that the Supreme Court's decisions in **Pasty** and **Felder v. Casey**, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), mean that state courts, like federal courts, may not require exhaustion of state administrative remedies as a subject matter bar to hearing federal claims under 42 U.S.C. § 1983. See, e.g., **Maryland Reclamation Associates, Inc. v. Hartford County**, 677 A.2d 567, 575, 342 Md. 476, 492-493 (Md. 1996) ("The Supreme Court has held that a plaintiff is **entitled** to maintain an action

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[37] State courts have concurrent jurisdiction with the federal courts to adjudicate claims under 42 U.S.C. § 1983. See, e.g., **Miller v. County of Santa Cruz**, 39 F.3d 1030, 1038 n.10 (9th Cir. 1994); and **DeHorney v. Bank of America Nat. Trust and Sav. Ass'n**, 879 F.2d 459, 463 n.4 (9th Cir. 1989) (citing **Martinez v. California**, 444 U.S. 277, 283 n.7 (1980)).

under 42 U.S.C. § 1983 in a state court without having exhausted available administrative remedies") (citing **Felder**, 487 U.S. at 146-147) (emphasis added); **Farm Bureau Town and Country Ins. Co. of Mo. v. Angoff**, 909 S.W.2d 348, 354 (Mo. 1995) ("Generally, state administrative review need not be exhausted before a § 1983 claim may be brought in state or federal court") (citing **Patsy**, 457 U.S. at 516); **National Camera, Inc. v. Sanchez**, 832 P.2d 960, 966 (Colo. App. 1991); **Allen v. Bergman**, 400 S.E.2d 347, 348-349, 198 Ga.App. 57, 58 (Ga. App. 1990) ("In **Felder** [ ], the Supreme Court held that states may no longer require litigants to exhaust administrative remedies before asserting claims pursuant to 42 U.S.C. 1981 and 42 U.S.C. 1983 in state courts"); and **Zeigler v. Kirchner**, 781 P.2d 54, 60, 162 Ariz. 77, 82-83 (Az. App. 1989) ("**The holding in Felder clearly demonstrates that a state court may not condition a Plaintiff's *§ 1983 claim upon the exhaustion of state administrative* remedies**") (emphasis added).

> Of course, the best exposition of this doctrine comes from the Court itself:
>
> In **Patsy** [ ], we held that plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court. The Wisconsin Supreme Court, however, deemed that decision inapplicable to this state-court suit on the theory that States retain the authority to prescribe rules and procedures governing suits in their courts. [ ]. As we have just explained, however, that authority does not extend so far as to permit States to place conditions on the vindication of a federal right.

Felder, 487 U.S. at 147 (citation omitted).

> While the exhaustion required by Wisconsin's notice-of-claim statute does not involve lengthy or expensive administrative proceedings, **it forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place**.

Id. at 149 (emphasis added).

> In enacting 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. **A state law that conditions that right of recovery upon**

> **compliance with a rule . . . that directs persons to seek redress from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.** Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right **when that right is asserted in state court**.

Id. at 153 (emphasis added).

For all of these reasons, Plaintiffs are not required to exhaust any further administrative remedies as a prerequisite to bringing their claims before this Honorable Court. There is no basis for dismissing the as applied claims in either Case 1 or Case 2. Defendants' motion should be denied in full.

X. IF THE COURT DETERMINES CASE 2 MUST PROCEED AS A PETITION FOR JUDICIAL REVIEW, IT SHOULD REMAND THE CASE TO THE COMMISSION FOR FURTHER FINDINGS PURSUANT TO NRS 233B.131.

Plaintiffs assert, for the reasons set forth above, that **Edison** does not apply to NRS 368A.290, and Case 2 should continue before this Court as an original, de novo action. However, if this Court determines that Case 2 must proceed as a petition for judicial review, rather than limiting Plaintiffs to the present record before the Commission, it should remand the matter to the Commission for consideration of Plaintiffs' claims in light of the discovery developed in the coordinated cases, and any further discovery requested before the Commission.

NRS 233.131(1) (of the APA) requires that "within 30 days after the services of the petition for judicial review or such time as is allowed by the court," the agency that rendered the subject decision shall transmit the record to the reviewing court. Before submission of the record, a party may apply to the Court for leave to present additional evidence if it shows "to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it." NRS 233B.131(2).

Thus, if this Court decides to construe the Case 2 complaint as a petition for judicial review or directs Plaintiffs to file a petition for judicial review relating to Case 2 (as in the **Sierra Pacific Power Company v. State of Nevada**, Second Judicial District Court, Dept No. 1, Case no. CV09-03554 (July 13, 2011) submitted by the Department as Ex. I to its Renewed Mtn.), Plaintiffs immediately request the opportunity to submit additional evidence pursuant to NRS 233B.131(2).

Obviously, the discovery conducted in the coordinated cases is relevant, and there exists good reasons Plaintiffs did not present this evidence to the Commission. As to relevance, it must be remembered that discovery Plaintiffs have been able to conduct has been the result of battles before the Discovery Commissioner and before this Honorable Court. Rather than again setting forth those reasons and adding additional length to this brief, Plaintiffs submit that if the evidence they have sought and obtained in this action had not been relevant, the Court would not have ordered the Defendants to produce the same. See also note 31, supra.

Good cause exists for even more obvious reasons. As set forth in Section V, supra, in support of Plaintiffs' estoppel arguments, Plaintiffs relied on the Department's representations to the federal courts that Plaintiffs could file a "direct action" in district court pursuant to NRS 368A.290. See also Department Letter of Nov. 13, 2003, Ex. 13, p. 2 n. 1 ("the failure to conduct an evidentiary hearing at the administrative level does not prejudice the taxpayer at the district court level"). To be clear, the amount of discovery conducted by Plaintiffs before the Commission was the direct result of the positions taken by the Defendants in federal court and throughout this litigation – until only very recently.

Thus, even if the Court were to agree that a petition for judicial review is the proper course, Plaintiffs request the court immediately remand this matter to the Commission to allow Plaintiffs to present the materials obtained through discovery (and to conduct any necessary additional discovery) to the Commission. A contrary result would unjustly prejudice Plaintiffs due to their reliance on the Department's position before the federal courts and previously before this Court, and due to their reliance on and compliance with the plain letter of NRS 368A.290.

XI. RESPONSE TO THE REQUESTED RELIEF CHART.

On pp. 29-31 of their Renewed Mtn., the Department submits charts detailing its hopeful relief. None of the relief requested is appropriate. As to the "Case 1" chart on p. 29 of the Renewed Mtn., Plaintiffs are not required to exhaust administrative remedies to submit their as applied challenges to this Court for the reasons set forth in, inter alia, Sections VI and IX, supra. Plaintiffs' April 18, 2008, motion to dismiss Case 1 based on exhaustion has already been dismissed by the Court, and the issue is beyond the petition for judicial review issue this Court directed be renoticed for hearing. As to the "Case 2" chart on p. 30 of the Renewed Mtn., **Edison** does not require dismissal of this suit for the reasons stated in Section I – VII, supra. Even if **Edison** did require this matter to proceed as a petition for judicial review (which is does not), the appropriate remedy would be to construe the complaint as a petition for judicial review, or direct Plaintiffs to amend the complaint accordingly (and remand pursuant to NRS 233B.131(2) in either instance). Hence, res judicata (either claim preclusion or issue preclusion), which is improper in any event, does not attach, because there is no relevant final judgment. See also Section VII, supra. Further, this Court has consolidated the claims for declaratory relief, which are preceding simultaneously, both before this Court. Thus, the

Department's novel argument that one of the cases (it does not specify which) is an impermissible collateral attack on the other according to **Pub. Serv. Comm'n of Nev.** is nothing short of frivolous. Therefore, all of the draconian relief scenarios set forth in the "summary" chart (Renewed Mtn., p. 31) are improper. The Department's nefarious actions do not merit the unjust result it seeks.

XII. CONCLUSION.

For the reasons set forth above and in their initial Opposition, Plaintiffs respectfully request that this Honorable Court deny 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 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 Petition for Judicial Review. In the alternative, Plaintiffs request leave to amend their pleadings should any deficiencies be found.

Further, should this Honorable Court decide to convert Case 2 into a judicial review action, or to grant Plaintiffs 30 days in which to file a petition for judicial review, Plaintiffs respectfully alternatively request that this Court hold that action in abeyance until the resolution of Case 1. Since Plaintiffs are limited by the five-year litigation deadline on Case 1 (which expires this December), they need to devote all their resources and attorney time to concluding that litigation. Additionally, Plaintiffs would also alternatively request that, should this Court decide to convert Case 2 to a judicial review action, Case 2 be remanded to the Tax Commission pursuant to NRS 233B.131 so that the discovery can be presented to the Commission (or so that further discovery may be conducted pursuant to the State's recommendation (Renewed Mtn., pp. 27-28)).

DATED this 3rd day of August, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2011, the foregoing **PLAINTIFFS' OPPOSITION TO NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTARTINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983 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** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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WEST'S NEVADA REVISED STATUTES ANNOTATED
TITLE 32. REVENUE AND TAXATION
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
GENERAL PROVISIONS

➡**368A.**010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.110, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**040. "Business" defined

"Business" means any activity engaged in or caused to be engaged in by a business entity with the object of gain, benefit or advantage, either direct or indirect, to any person or governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this state or another jurisdiction and any other type of entity that engages in business.

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(b) A natural person engaging in a business if he is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**060. "Facility" defined

"Facility" means:

1. Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(a) An establishment that is not a licensed gaming establishment; or

(b) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.

2. Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**070. "Game" defined

"Game" has the meaning ascribed to it in NRS 463.0152.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**080. "Licensed gaming establishment" defined

"Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0169.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**090. "Live entertainment" defined

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"Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**100. "Slot machine" defined

"Slot machine" has the meaning ascribed to it in NRS 463.0191.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**110. "Taxpayer" defined

"Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.

2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person who collects the taxable receipts.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**120. Natural persons who are deemed to be business entities

A natural person engaging in a business shall be deemed to be a business entity that is subject to the provisions of this chapter if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, or a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, for the business.

[FN1] See Historical and Statutory Notes below for effective date information.

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ADMINISTRATION

➡**368A.**130. Adoption by Department of regulations for determining whether activity is taxable

The Department shall provide by regulation for a more detailed definition of "live entertainment" consistent with the general definition set forth in NRS 368A.090 for use by the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**140. Duties of Board and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall:

(a) Collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a). The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

(a) Collect the tax imposed by this chapter from all other taxpayers; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).

3. For the purposes of:

(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

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4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, the Board and the Department shall:

(a) Jointly, coordinate the administration and collection of that tax and the regulation of taxpayers who are liable for the payment of the tax.

(b) Upon request, assist the other agency in the collection of that tax.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**150. Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax

1. If:

(a) The Board determines that a taxpayer who is a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Board shall establish an amount upon which the tax imposed by this chapter must be based.

(b) The Department determines that a taxpayer who is not a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Department shall establish an amount upon which the tax imposed by this chapter must be based.

2. The amount established by the Board or the Department pursuant to subsection 1 must be based upon the tax liability of business entities that are deemed comparable by the Board or the Department to that of the taxpayer.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**160. Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty

1. Each person responsible for maintaining the records of a taxpayer shall:

(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution

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pursuant to this chapter is finally determined, whichever is longer; or

(2) At least 4 years if the taxpayer is not a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and

(c) Make the records available for inspection by the Board or the Department upon demand at reasonable times during regular business hours.

2. The Board and the Department may by regulation specify the types of records which must be kept to determine the amount of the liability of a taxpayer from whom they are required to collect the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.

4. A person who violates any provision of this section is guilty of a misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

➞**368A.**170. Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State

1. To verify the accuracy of any report filed or, if no report is filed by a taxpayer, to determine the amount of tax required to be paid:

(a) The Board, or any person authorized in writing by the Board, may examine the books, papers and records of any licensed gaming establishment that may be liable for the tax imposed by this chapter.

(b) The Department, or any person authorized in writing by the Department, may examine the books, papers and records of any other person who may be liable for the tax imposed by this chapter.

2. Any person who may be liable for the tax imposed by this chapter and who keeps outside of this state any books, papers and records relating thereto shall pay to the Board or the Department an amount equal to the allowance provided for state officers and employees generally while traveling outside of the State for each day or fraction thereof during which an employee of the Board or the Department is engaged in examining those documents, plus any other actual expenses incurred by the employee while he is absent from his regular place of employment to examine those documents.

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[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.**180. Confidentiality of records and files of Board and Department

1. Except as otherwise provided in this section and NRS 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

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

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

IMPOSITION AND COLLECTION

→**368A.**200. Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in

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this state where live entertainment is provided. If the live entertainment is provided at a facility with a maximum seating capacity of:

(a) Less than 7,500, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500, the rate of the tax is 5 percent of the admission charge to the facility.

2. Amounts paid for gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

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

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

5. The tax imposed by subsection 1 does not apply to:

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

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

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum seating capacity of less than 300.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum seating capacity of less than 300.

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

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

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

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

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

6. As used in this section, "maximum seating capacity" means, in the following order of priority:

(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;

(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or

(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.210**. Taxpayer to hold taxes in separate account

A taxpayer shall hold the amount of all taxes for which he is liable pursuant to this chapter in a separate account in trust for the State.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.220**. Filing of reports and payment of tax; deposit of amounts received in State General Fund

1. Except as otherwise provided in this section:

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form

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prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.

3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.**230. Extension of time for payment; payment of interest during period of extension

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.**240. Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable receipts reported for a previous reporting period; and

(b) Has taken a deduction on his federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which he is unable to collect,

he is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be

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used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

3. If a taxpayer collects all or part of an admission charge or charges for food, refreshments and merchandise for which he claimed a credit on a return for a previous reporting period pursuant to subsection 2, he shall include:

(a) The amount collected in the charges reported pursuant to paragraph (a) of subsection 1; and

(b) The tax payable on the amount collected in the amount of taxes reported,

in the first return filed with the Board or the Department after that collection.

4. Except as otherwise provided in subsection 5, upon determining that a taxpayer has filed a return which contains one or more violations of the provisions of this section, the Board or the Department shall:

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

(b) For the first or second return, other than a return described in paragraph (a), in any calendar year which contains one or more violations, assess a penalty equal to the amount of the tax which was not reported.

(c) For the third and each subsequent return in any calendar year which contains one or more violations, assess a penalty of three times the amount of the tax which was not reported.

5. For the purposes of subsection 4, if the first violation of this section by any taxpayer was determined by the Board or the Department through an audit which covered more than one return of the taxpayer, the Board or the Department shall treat all returns which were determined through the same audit to contain a violation or violations in the manner provided in paragraph (a) of subsection 4.

[FN1] See Historical and Statutory Notes below for effective date information.

OVERPAYMENTS AND REFUNDS

→**368A.**250. Certification of excess amount collected; credit and refund

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If the Department determines that any tax, penalty or interest it is required to collect has been paid more than once or has been erroneously or illegally collected or computed, the Department shall set forth that fact in its records and shall certify to the State Board of Examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. If approved by the State Board of Examiners, the excess amount collected or paid must be credited on any amounts then due from the person under this chapter, and the balance refunded to the person or his successors in interest.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**260. Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim

1. Except as otherwise provided in NRS 360.235 and 360.395:

(a) No refund may be allowed unless a claim for it is filed with:

(1) The Board, if the taxpayer is a licensed gaming establishment; or

(2) The Department, if the taxpayer is not a licensed gaming establishment.

A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made.

(b) No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Board or the Department within that period.

2. Each claim must be in writing and must state the specific grounds upon which the claim is founded.

3. Failure to file a claim within the time prescribed in this chapter constitutes a waiver of any demand against the State on account of overpayment.

4. Within 30 days after rejecting any claim in whole or in part, the Board or the Department shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**270. Interest on overpayments; disallowance of interest

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of

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any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, the interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the Department that a claim may be filed or the date upon which the claim is certified to the State Board of Examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**280. Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund

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

2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**290. Action for refund: Period for commencement; venue; waiver

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:

(a) The Nevada Gaming Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.

(b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.

2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City,

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the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

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

[FN1] See Historical and Statutory Notes below for effective date information.

➞**368A.**300. Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Gaming Commission within 30 days after the last day of the 6-month period.

2. If the Department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Tax Commission within 30 days after the last day of the 6-month period.

3. If the claimant is aggrieved by the decision of:

(a) The Nevada Gaming Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

4. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any tax due from the plaintiff.

5. The balance of the judgment must be refunded to the plaintiff.

[FN1] See Historical and Statutory Notes below for effective date information.

➞**368A.**310. Allowance of interest in judgment for amount illegally collected

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been

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illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**330. Action for recovery of erroneous refund: Jurisdiction; venue; prosecution

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**340. Cancellation of illegal determination

1. If any amount in excess of $25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding $25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

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MISCELLANEOUS PROVISIONS

➡**368A.**350. Prohibited acts; penalty

1. A person shall not:

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**360. Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the Nevada Gaming Commission.

[FN1] See Historical and Statutory Notes below for effective date information.

➡**368A.**370. Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

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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)

NEVADA 2005 SESSION LAWS
REGULAR SESSION OF THE 73RD LEGISLATURE

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Additions are indicated by **Text**; deletions by
~~Text~~. Changes in tables are made but not highlighted.

Ch. 484

A.B. No. 554

REVENUE AND TAXATION--ADMINISTRATION--BUSINESS, PROPERTY, AND ENTERTAINMENT

AN ACT relating to taxation; clarifying the definition of "employer" for the purpose of the tax on business; revising the provisions governing the applicability and administration of the tax on live entertainment; clarifying the provisions governing the administration of the use taxes on certain personal property acquired free of charge at public events; expanding the exemptions from the taxes on the transfer of real property; revising the provisions governing the application of sales and use taxes to retail sales of vehicles for which used vehicles are taken in trade; revising the provisions governing the application of sales and use taxes to retail sales of farm machinery and equipment; providing for the submission to the voters of the question whether the Sales and Use Tax Act of 1955 should be amended to provide an exemption from the tax for sales of vehicles for which used vehicles are taken in trade and for farm machinery and equipment; providing exemptions from certain analogous taxes; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 363B.030 is hereby amended to read as follows:

<< NV ST 363B.030 >>

"Employer" means any employer who is required to pay a contribution pursuant to NRS 612.535 for any calendar quarter, except a financial institution, an Indian tribe, a nonprofit organization **,** ~~or~~ a political subdivision ~~.~~ **or any person who does not supply a product or service, but who only consumes a service.** For the purposes of this section:

1. "Financial institution" has the meaning ascribed to it in NRS 363A.050.

2. "Indian tribe" includes any entity described in subsection 10 of NRS 612.055.

3. "Nonprofit organization" means a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).

4. "Political subdivision" means any entity described in subsection 9 of NRS 612.055.

Sec. 2. Chapter 368A of NRS is hereby amended by adding thereto the provisions set forth as sections 3, 4 and 5 of this act.

Sec. 3.

"Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their

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guests; or

2. Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

Sec. 4.

"Shopping mall" includes any area or premises where multiple vendors assemble for the primary purpose of selling goods or services, regardless of whether consideration is collected for the right or privilege of entering that area or those premises.

Sec. 5.

"Trade show" means an event of limited duration primarily attended by members of a particular trade or industry for the purpose of exhibiting their merchandise or services or discussing matters of interest to members of that trade or industry.

Sec. 6. NRS 368A.010 is hereby amended to read as follows:

<< NV ST 368A.010 >>

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.110, inclusive, **and sections 3, 4 and 5 of this act** have the meanings ascribed to them in those sections.

Sec. 7. NRS 368A.020 is hereby amended to read as follows:

<< NV ST 368A.020 >>

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. **The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.**

Sec. 8. NRS 368A.060 is hereby amended to read as follows:

<< NV ST 368A.060 >>

1. "Facility" means:

~~1.~~ **(a)** Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

~~(a)~~ **(1)** An establishment that is not a licensed gaming establishment; or

~~(b)~~ **(2)** A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.

~~2.~~ **(b)** Any area or premises where live entertainment is pr ovided if the live entertainment is provided at any other licensed gaming establishment.

2. "Facility" encompasses, if live entertainment is provided at a licensed gaming establishment that is licensed for:

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those

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respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

(b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

Sec. 9. NRS 368A.090 is hereby amended to read as follows:

<< NV ST 368A.090 >>

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

(1) Music or vocals provided by one or more professional or amateur musicians or vocalists;

(2) Dancing performed by one or more professional or amateur dancers or performers;

(3) Acting or drama provided by one or more professional or amateur actors or players;

(4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;

(5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);

(6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes or sportsmen;

(7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;

(8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and

(9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

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

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

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

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

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

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

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

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

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

(I) Does not constitute a performance;

(II) Is not advertised as entertainment to the public;

(III) Primarily serves to provide ambience to the facility; and

(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

Sec. 10. NRS 368A.200 is hereby amended to read as follows:

<< NV ST 368A.200 >>

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum seating capacity of:

(a) Less than 7,500, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500, the rate of the tax is 5 percent of the admission charge to the facility.

2. Amounts paid for gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed,

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but is entitled to collect reimbursement from any person paying that amount.

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

5. The tax imposed by subsection 1 does not apply to:

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

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c) - **or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.**

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum seating capacity of less than ~~300.~~ **200.**

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum seating capacity of less than ~~300.~~ **200.**

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

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

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

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

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

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

(1) Not the predominant element of the attraction; and.

(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

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

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

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

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

6. **The Nevada Gaming Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph (o) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chairman of the Board, provide a procedure for appealing that ruling to the Nevada Gaming Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.**

7. As used in this section, "maximum seating capacity" means, in the following order of priority:

(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;

(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or

(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

Sec. 11. NRS 368A.220 is hereby amended to read as follows:.

<< NV ST 368A.220 >>

1. Except as otherwise provided in this section:.

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month - **or the month in which the taxable events occurred.** The report must be in a form prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.

3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

Sec. 12. Chapter 372 of NRS is hereby amended by adding thereto a new section to read as follows:

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In its administration of the use tax imposed by NRS 372.185, the Department shall not consider the storage, use or other consumption in this State of tangible personal property which is:

1. Worth $100 or less; and

2. Acquired free of charge at a convention, trade show or other public event.

Sec. 13. NRS 372.7263 is hereby amended to read as follows:

<< NV ST 372.7263 >>

1. In administering the provisions of NRS 372.335, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

(a) The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

(b) The sale of farm machinery and equipment to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

(c) The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ **(c)** "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 14. NRS 372.7263 is hereby amended to read as follows:

<< NV ST 372.7263 >>

~~1.~~ In administering the provisions of NRS 372.335, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

~~(a)~~ **1.** The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

~~(b)~~ **2.** The sale of farm machinery and equipment **, as defined in section 30 of this act,** to a nonresident who sub-

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mits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

~~(c)~~ **3.** The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

~~2. As used in this section:~~

~~(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:~~

~~(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or~~

~~(2) Machinery or equipment only incidentally employed for agricultural purposes.~~

~~(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.~~

~~(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.~~

Sec. 15. Chapter 374 of NRS is hereby amended by adding thereto the provisions set forth as sections 16 and 17 of this act.

Sec. 16.

In its administration of the use tax imposed by NRS 374.190, the Department shall not consider the storage, use or other consumption in a county of tangible personal property which is:

1. Worth $100 or less; and

2. Acquired free of charge at a convention, trade show or other public event.

Sec. 17.

1. There are exempted from the taxes imposed by this chapter the gross receipts from the sale, storage, use or other consumption in a county of farm machinery and equipment.

2. As used in this section:

(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for agricultural purposes.

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

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(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 18. NRS 374.030 is hereby amended to read as follows:

<< NV ST 374.030 >>

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Department may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the county or has paid the use tax with respect to the property, and has resold the property before making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property before its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The sale price of property returned by customers when the full sale price is refunded either in cash or credit, but this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

~~(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.~~

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Department that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

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Sec. 19. NRS 374.070 is hereby amended to read as follows:

<< NV ST 374.070 >>

1. "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:.

(a) The cost of the property sold.

(b) The cost of the materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property before its purchase.

2. The total amount for which property is sold includes all of the following:

(a) Any services that are a part of the sale.

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The amount charged for property returned by customers when the entire amount charged therefor is refunded in cash or credit, except that this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The amount charged for labor or services rendered in installing or applying the property sold.

(d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

(e) The amount of any tax imposed by the State of Nevada upon or with respect to the storage, use or other consumption of tangible personal property purchased from any retailer.

(f) The amount of any allowance against the selling price given by a retailer for the value of a used ~~vehicle or~~ vessel which is taken in trade on the purchase of another ~~vehicle or~~ vessel.

Sec. 20. NRS 375.090 is hereby amended to read as follows:

<< NV ST 375.090 >>

The taxes imposed by NRS 375.020, 375.023 and 375.026 do not apply to:

1. A mere change in identity, form or place of organization, such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation if the affiliated corporation has identical common ownership.

2. A transfer of title to the United States, any territory or state or any agency, department, instrumentality or political subdivision thereof.

3. A transfer of title recognizing the true status of ownership of the real property.

4. A transfer of title without consideration from one joint tenant or tenant in common to one or more remaining joint

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tenants or tenants in common.

5. A transfer of title between spouses, including gifts, or to effect a property settlement agreement or between former spouses in compliance with a decree of divorce.

6. A transfer of title to or from a trust without consideration if a certificate of trust is presented at the time of transfer.

7. Transfers, assignments or conveyances of unpatented mines or mining claims.

8. A transfer, assignment or other conveyance of real property to a corporation or other business organization if the person conveying the property owns 100 percent of the corporation or organization to which the conveyance is made.

9. A transfer, assignment or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of **lineal** consanguinity or affinity.

10. A conveyance of real property by deed which becomes effective upon the death of the grantor pursuant to NRS 111.109.

11. The making, delivery or filing of conveyances of real property to make effective any plan of reorganization or adjustment:

(a) Confirmed under the Bankruptcy Act, as amended, 11 U.S.C. §§ 101 et seq.;

(b) Approved in an equity receivership proceeding involving a railroad, as defined in the Bankruptcy Act; or

(c) Approved in an equity receivership proceeding involving a corporation, as defined in the Bankruptcy Act,

if the making, delivery or filing of instruments of transfer or conveyance occurs within 5 years after the date of the confirmation, approval or change.

12. The making or delivery of conveyances of real property to make effective any order of the Securities and Exchange Commission if:

(a) The order of the Securities and Exchange Commission in obedience to which the transfer or conveyance is made recites that the transfer or conveyance is necessary or appropriate to effectuate the provisions of section 11 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k;

(b) The order specifies and itemizes the property which is ordered to be transferred or conveyed; and

(c) The transfer or conveyance is made in obedience to the order.

13. A transfer to an educational foundation. As used in this subsection, "educational foundation" has the meaning ascribed to it in subsection 3 of NRS 388.750.

14. A transfer to a university foundation. As used in this subsection, "university foundation" has the meaning ascribed to it in subsection 3 of NRS 396.405.

Sec. 21. NRS 374.265 is hereby amended to read as follows:

<< NV ST 374.265 >>

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"Exempted from the taxes imposed by this chapter," as used in NRS 374.265 to 374.355, inclusive, **and section 17 of this act** means exempted from the computation of the amount of taxes imposed.

Sec. 22. NRS 374.286 is hereby amended to read as follows:

<< NV ST 374.286 >>

1. There are exempted from the taxes imposed by this chapter the gross receipts from the sale **,** ~~of, and the~~ storage, use or other consumption in a county of ~~,~~ farm machinery and equipment **.** ~~employed for the agricultural use of real property.~~

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ **(c)** "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 23. NRS 374.7273 is hereby amended to read as follows:

1. In administering the provisions of NRS 374.340, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

(a) The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

(b) The sale of farm machinery and equipment to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

(c) The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

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(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(e)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ **(c)** "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 24. NRS 374.7273 is hereby amended to read as follows:

<< NV ST 374.7273 >>

~~1.~~ In administering the provisions of NRS 374.340, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

~~(a)~~ **1.** The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

~~(b)~~ **2.** The sale of farm machinery and equipment **, as defined in section 30 of this act,** to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

~~(c)~~ **3.** The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

~~2. As used in this section:~~

~~(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:~~

~~(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or~~

~~(2) Machinery or equipment only incidentally employed for agricultural purposes.~~

~~(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.~~

~~(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.~~

Sec. 25. Section 64 of Chapter 400, Statutes of Nevada 2003, at page 2374, is hereby amended to read as follows:

Sec. 64. NRS 374.070 is hereby amended to read as follows:

1. "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

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(b) The cost of the materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property before its purchase.

2. The total amount for which property is sold includes all of the following:

(a) Any services that are a part of the sale.

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or credit; but this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The amount charged for labor or services rendered in installing or applying the property sold.

(d) The amount of any tax , ~~(~~ not including ~~, however,~~ any manufacturers' or importers' excise tax , ~~)~~ imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

(e) The amount of any tax imposed by the State of Nevada upon or with respect to the storage, use or other consumption of tangible personal property purchased from any retailer.

(f) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

~~4. For the purpose of a sale of a vehicle by a seller who is not required to be registered with the Department of Taxation, the sales price is the value established in the manner set forth in NRS 374.112.~~

Sec. 26. Section 138 of Chapter 400, Statutes of Nevada 2003, at page 2409, is hereby amended to read as follows:

Sec. 138. NRS ~~374.107,~~ 374.112, 374.113, 374.286, 374.291, 374.2911, 374.322 and 374.323 are hereby repealed.

Sec. 27. Section 139 of Chapter 400, Statutes of Nevada 2003, at page 2409, is hereby amended to read as follows:

Sec. 139. 1. This section and section 102 of this act become effective upon passage and approval.

2. Sections 103 to 135, inclusive, of this act become effective on July 1, 2003.

3. Sections 1 to 29, inclusive, 32 to 38, inclusive, 40 to 50, inclusive, 52 to 57, inclusive, 66, 67, 69 to 72, inclusive, 74 to 80, inclusive, 83, 84, 85, 87 to 92, inclusive, 94 to 101, inclusive, 136 and 137 of this act become effective:

(a) Upon passage and approval for the purposes of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) On January 1, 2006, for all other purposes.

4. Sections 30 and 39 of this act become effective on January 1, 2006, only if the proposal submitted pursuant to

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sections 103 to 107, inclusive, of this act is approved by the voters at the General Election on November 2, 2004.

5. Sections 31, 51, ~~58~~ **60** to 65, inclusive, 68, 73, 81, 82, 86, 93 and 138 of this act become effective on January 1, 2006, only if the proposal submitted pursuant to sections 103 to 107, inclusive, of this act is not approved by the voters at the General Election on November 2, 2004.

Sec. 28.

At the General Election on November 7, 2006, a proposal must be submitted to the registered voters of this State to amend the Sales and Use Tax Act, which was enacted by the 47th session of the Legislature of the State of Nevada and approved by the Governor in 1955, and subsequently approved by the people of this State at the General Election held on November 6, 1956.

Sec. 29.

At the time and in the manner provided by law, the Secretary of State shall transmit the proposed Act to the several county clerks, and the county clerks shall cause it to be published and posted as provided by law.

Sec. 30.

The proclamation and notice to the voters given by the county clerks pursuant to law must be in substantially the following form:

Notice is hereby given that at the General Election on November 7, 2006, a question will appear on the ballot for the adoption or rejection by the registered voters of the State of the following proposed Act:

AN ACT to amend an Act entitled "An Act to provide revenue for the State of Nevada; providing for sales and use taxes; providing for the manner of collection; defining certain terms; providing penalties for violation, and other matters properly relating thereto." approved March 29, 1955, as amended.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. The above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 762, is hereby amended by adding thereto a new section to be designated as section 18.2, immediately following section 18.1, to read as follows:

Sec. 18.2. **"Vehicle" has the meaning ascribed to it in NRS 482.135.**

Sec. 2. The above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 762, is hereby amended by adding thereto a new section to be designated section 55.5, immediately following section 55 to read as follows:

Sec. 55.5. **1. There are exempted from the taxes imposed by this Act the gross receipts from the sale, storage, use or other consumption in a county of farm machinery and equipment.**

2. As used in this section:

(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

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(2) Machinery or equipment only incidentally employed for agricultural purposes.

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 3. Section 11 of the above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 764, is hereby amended to read as follows:

Sec. 11. **1.** "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

(b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property ~~prior to~~ **before** itspurchase.

2. The total amount for which property is sold includes all of the following:

(a) Any services that are a part of the sale.

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or credit ~~; but~~ **, except that** this exclusion ~~shall~~ **does** not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The amount charged for labor or services rendered in installing or applying the property sold.

(d) The amount of any tax , ~~(~~ not including ~~, however,~~ any manufacturers' or importers' excise tax , ~~)~~ imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

Sec. 4. Section 12 of the above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 764, is hereby amended to read as follows:

Sec. 12. **1.** "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

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(a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property ~~prior to~~ **before** making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cos t, interest paid, losses ~~,~~ or any other expense.

(c) The cost of transportation of the property ~~prior to~~ **before** its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits~~,~~ and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" ~~do~~ **does** not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) ~~Sale~~ **The sale** price of property returned by customers when the full sale price is refunded either in cash or credit , ~~;~~ but this exclusion ~~shall~~ **does** not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax , ~~(~~ not including ~~, however,~~ any manufacturers' or importers' excise tax , ~~)~~ imposed by the United States upon or with respect to retail sales , whether imposed upon the retailer or the consumer.

(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Tax Commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

Sec. 5. This Act becomes effective on January 1, 2007.

Sec. 31.

The ballot page assemblies and the paper ballots to be used in voting on the question must present the question in substantially the following form:

Shall the Sales and Use Tax Act of 1955 be amended to exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of any used vehicle taken in trade on the purchase of another vehicle and to exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of farm machinery and equipment?

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Yes (BOX) No (BOX)

Sec. 32.

The explanation of the question which must appear on each paper ballot and sample ballot and in every publication and posting of notice of the question must be in substantially the following form:

(Explanation of Question)

The proposed amendment to the Sales and Use Tax Act of 1955 would exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of any used vehicle taken in trade on the purchase of another vehicle and the value of farm machinery and equipment. The Legislature has amended the Local School Support Tax Law and the City-County Relief Tax Law to provide the same exemption for farm machinery and equipment if this proposal is adopted.

Sec. 33.

If a majority of the votes cast on the question submitted to the voters is yes, the amendment to the Sales and Use Tax Act of 1955 becomes effective on January 1, 2007. If less than a majority of votes cast on the question submitted to the voters is yes, the question fails and the amendment to the Sales and Use Tax Act of 1955 does not become effective.

Sec. 34.

All general election laws not inconsistent with this act are applicable.

Sec. 35.

Any informalities, omissions or defects in the content or making of the publications, proclamations or notices provided for in this act and by the general election laws under which this election is held must be so construed as not to invalidate the adoption of the act by a majority of the registered voters voting on the question if it can be ascertained with reasonable certainty from the official returns transmitted to the Office of the Secretary of State whether the proposed amendment was adopted by a majority of those registered voters.

<< Repealed: NV ST 368A.130, 368A.210, 374.107 >>

Sec. 36.

1. NRS 368A.130 and 368A.210 are hereby repealed.

2. NRS 374.107 is hereby repealed.

3. Sections 58 and 59 of Chapter 400, Statutes of Nevada 2003, at page 2371, are hereby repealed.

Sec. 37. 1. This section becomes effective upon passage and approval.

2. Section 22 of this act:

(a) Becomes effective upon passage and approval for the purpose of adopting regulations and on July 1, 2005, for all other purposes; and

(b) Expires by limitation on December 21, 2005.

3. Sections 1 to 12, inclusive, 15, 16, 20 and subsection 1 of section 36 of this act become effective on July 1, 2005.

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4. Sections 25 to 35, inclusive, and subsection 3 of section 36 of this act become effective on October 1, 2005.

5. Sections 13 and 23 of this act become effective on January 1, 2006.

6. Sections 14, 17, 21 and 24 of this act become effective on January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is approved by the voters at the General Election on November 7, 2006.

7. Sections 18, 19 and subsection 2 of section 36 of this act become effective on January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is not approved by the voters at the General Election on November 7, 2006.

Approved by the Governor June 17, 2005.

NV LEGIS 484 (2005)

END OF DOCUMENT

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

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January 9, 2009

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

Re: Déjà Vu Showgirls of Las Vegas, LLC
Request for Refund of Live Entertainment Tax

Dear Ms. Sullivan:

This letter is sent to acknowledge receipt of the notice of appeal filed on behalf of the above-referenced taxpayer (hereinafter "Taxpayer") in response to the Department's letter, dated December 8, 2008, denying Taxpayer's claim for refund. Taxpayer had requested a refund of Live Entertainment Tax for the period of October 2005.

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

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

Should you have any questions, please call me at (775) 684-2060.

Sincerely,

Dino DiCianno
Executive Director

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

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May 29, 2009

John S. Bartlett, Esq.
1201 Johnson St., Ste 130
Carson City, NV 89701
johnsbartlett@verizon.net

Blake Doerr, Deputy Attorney General
555 East Washington Ave. Suite 3900
Las Vegas, NV 89101
bdoerr@ag.nv.gov

Re:
Use Tax Refund Requests

Dear Mr. Bartlett and Mr. Doerr,

This letter is to serve as direction with regard to the discovery disputes between the parties in this matter which arose after the Department proposed to serve a large number of subpoenas on the .

The issue in this case is whether the are entitled to the use tax refunds they have requested. The sales tax Deficiency Notices issued by the Department to the in March 2009 are not within in the scope of this hearing.

The burden is on the to prove that they are entitled to the refunds they have requested. In other words, must show that tax was not due on the transactions in question. State v. Obexer & Son, Inc., 660 P.2d 981, 99 Nev. 233 (1983) and Sparks Nuggett, Inc. v. Department of Taxation, 179 P.3d 570, __ Nev. __ (2008). Despite the Department's original statements that the refunds were denied because the use tax was due per NRS 372.185, NRS 372.284, NRS 372.2841, NRS 372.727, and NAC 372.350, are on notice that the Department believes the transactions in question are subject to sales tax. Consequently, are also on notice that the Department questions whether the transactions in question are actually complimentary meals.

will either present the facts and legal authorities which conclusively establish that they are entitled to the use tax refunds as requested or they will fail to do so. The Department may present evidence in support of its denial of the use tax refunds, including facts to substantiate a theory that the transactions are not exempt from tax. NAC 372.765(5) and Sparks Nuggett, Inc. v. Department of Taxation, 179 P.3d 570, __ Nev. __ (2008). Consequently, the Department may present evidence that that meals in question were actually sold rather than given away as complimentary meals. However, the Department may not require extensive discovery from the or use the hearing regarding the issue of the use tax refund as a discovery process to

substantiate the sales tax deficiencies which have been issued but which are not at issue in this case. In 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.

With regard to the subpoenas requested by the Department, the request for information regarding compensation exchanged by members of the player's clubs and employees for the meals in question is within the scope of this hearing. However, requiring testimony from the Manager or Director Player Development, Programmer of slot machines, Table Games Floor Supervisor, Restaurant Cashier, Casino Host, Internal Auditor of Food and Beverage, a Slot Dept Manager, and an Employee of Human Resources, as well as all of the materials published by the on their complimentary food transactions, is burdensome and duplicative shall provide for the hearing the individuals who are most knowledgeable regarding the player's clubs and the employee meals and the complimentary meals for both groups. The request for the person most knowledgeable regarding the determination of when and how much use tax was due on the transactions in question is clearly within the scope of the hearing. However, the accounting source documents for those returns are irrelevant because the Department has not challenged the amount of use tax requested by

I would like to reschedule this matter for hearing at the earliest convenience of the parties. Originally, we had scheduled two days for this hearing. Unless you believe depositions are necessary prior to the hearing, I am available June 22 and 23, June 29 and 30, July 6, 7, 8, or July 16 and 17. Please inform me if depositions will be required or if you would like to proceed on one of the proposed dates in June or July. We will then set deadlines for the submission of exhibits, witness lists, and Prehearing Statements.

Sincerely,

/s/

Dena C. James
Administrative Law Judge
(702) 486-3347
denaj@tax.state.nv.us

DCJ/slf

cc: Gina Session, Senior Deputy Attorney General, to gsession@ag.nv.gov

Case No.: 09 RP 00016 1B

Dept. No.: I

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

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

v.

STATE OF NEVADA, EX REL.
DEPARTMENT OF TAXATION,

Defendants.
_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

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

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

///

> "1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on grounds set forth in the claim . . . for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments."

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

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

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

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

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

IT IS SO ORDERED.

Dated this 30th day of June, 2009

JAMES T. RUSSELL
District Judge

CERTIFICATE OF MAILING

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

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

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

Christine Erven
Judicial Assistant

Only the Westlaw citation is currently available.

United States District Court,
D. 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 Gentleman's Club; Olumpus Garden, Inc. d/b/a Olympic Garden; Shac, L.L.C. d/b/a Sapphire; The Power Company, Inc., d/b/a Crazy Horse Too Gentlemen's Club; D. Westwood, Inc. d/b/a Treasures; and D.I. Food and Beverage of Las Vegas, L.L.C ., d/b/a Scores, Plaintiff(s),
v.
Nevada Department of Taxation, Nevada Tax Commission and Nevada State Board of Examiners, Defendant(s).

No. 2:06-cv-0480-RLH-RJJ.
July 28, 2006.

Anthony P. Sgro, Patti & Sgro, Las Vegas, NV, for Plaintiffs.

Dennis L. Belcourt, Las Vegas, NV, for Defendants.

ORDER
(Motion to Dismiss-# 12)
ROGER L. HUNT, District Judge.

***1** Before the Court is Defendants' **Motion to Dismiss Amended Complaint** (# 12, filed May 10, 2006). Plaintiffs' Opposition (# 16) was filed June 5, 2006. Defendants' Reply (# 17) was filed June 14, 2006.

The Motion will be granted.

BACKGROUND

This suit arises from a statute enacted by the Nevada State legislature, 20th Special Session, in 2003, which, *inter alia,* replaced the casino entertainment tax with a tax on all live entertainment. The provisions of the live entertainment tax were placed in Chapter 368A of the Nevada Revised Statutes ("NRS") and were further amended by the Nevada State Legislature in 2005.[FN1]

FN1. The Live Entertainment Tax applies to certain gaming and non-gaming facilities. NRS 368A.060 AND 368A200. The Department of Taxation administers the tax with respect to entities without gaming licenses. The Gaming Commission administers the tax with regard to gaming licensees.

Plaintiffs, who operate establishments at which "live performance dance entertainment" is provided, contend that the Live Entertainment Tax violates their rights under the First and Fourteenth Amendments of the United States Constitution as a restraint on speech and a violation of substantive due process. They seek declaratory relief concerning the constitutionality of the tax and their non-obligation to pay it, and seek an injunction against its enforcement and seek damages under 42 U.S.C. § 1983, including a refund of taxes paid.

Defendants' Motion to Dismiss challenges this Court's jurisdiction, invoking 28 U.S.C. § 1341 (the "Tax Injunction Act" or "TIA"), which states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Defendants also contend, based upon the pleadings and requirements of the Tax Injunction Act, that Plaintiffs have failed to state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(1) and (6).

STANDARD OF REVIEW

Rule 8 (Fed.R.Civ.P.) requires every complaint to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." Local Rule LR 8-1 requires that, "The first

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allegation of any complaint ... shall state the statutory or other basis of claimed federal jurisdiction and the facts in support thereof. Federal courts are courts of *limited jurisdiction.* They have no inherent or general subject matter jurisdiction. They can adjudicate only those cases which the Constitution and Congress authorize. These are usually only those which involve a federal question, the United States is a party or where there is diversity of citizenship and certain criteria are met. *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375 (1994). The Plaintiffs bear the burden of proof by a preponderance of evidence that federal subject-matter jurisdiction exists. *Mortensen v. First Federal Sav. and Loan Ass'n,* 549 F.2d 884, 891 (3rd Cir.1977).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Yamaguchi v. U.S. Dept. of the Air Force,* 109 F.3d 1475, 1481 (9th Cir.1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v.. Washington Energy Co.,* 83 F.3d 1136, 1140 (9th Cir.1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir.1988).

DISCUSSION

***2** The United States Supreme Court has held, in a fairly recent decision, that the Tax Injunction Act "shields state tax collections from federal-court restraints," and "was designed expressly to restrict the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." *Hibbs v. Winn,* 542 U.S. 88, 104 (2004).

Drawing a clear distinction between tax credits (over which the district courts have jurisdiction) and actions seeking to avoid payment of taxes or to otherwise interfere with state tax collection, *Hibbs* took great pains to reaffirm a long line of its decisions which denied jurisdiction to U.S. district courts in cases where the purpose of the suit was to avoid the payment of taxes-usually on constitutional grounds-or seek a refund for taxes already paid. *See e.g., Rosewell v. LaSalle National Bank,* 451 U .S. 1011 (1981) (two-year delay of tax refund was still a plain, speedy and efficient remedy to preclude federal district court jurisdiction under Tax Injunction Act); *Fair Assessment in real Estate Association, Inc. v. McNary,* 454 U.S. 100 (1981) (comity and TIA barred taxpayers' suit for damages under § 1983); *California v. Grace Brethren Church,* 457 U.S. 393 (1982) (TIA prohibits federal district court from enjoining or declaring unconstitutional state tax laws where plain, speedy and efficient remedy available); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n,* 515 U.S. 582 (1995) (district court cannot enjoin, suspend or restrain the assessment or collection of taxes under State law, where plain, speedy and efficient remedy may be had in State courts).

The Ninth Circuit likewise has held that the Tax Injunction Act barred federal court consideration of a complaint involving the constitutionality of California Proposition 13. *Marvin F. Poer and Company, v. Counties of Alameda,* 725 F.2d 1234 (1984). In that case, the Circuit Court stated that, "federal courts have generally dismissed cases in which plaintiffs have sought both injunctive or declaratory relief and a refund or damages." *Citing Bland v. McHann,* 463 F.2d 21 (5th Cir.1972, *cert. denied,* 410 U.S. 966); *City of Burbank v. State of Nevada,* 548 F.2d 708 (9th Cir.1981); and *Dillon v. State of Montana,* 634 F.2d 463 (9th Cir.1980).

The *Hibbs* Court went to significant lengths to explain that it responds to State governments' need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial

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interference and the legal right that the disputed taxes be determined in a suit for refund. 542 U.S. at 103. The Court also noted that two of the purposes of the Act was to eliminate disparities between large out-of-state corporations and in-state taxpayers in what their remedies should be; and, to stop taxpayers, with the aid of a federal injunction, from withholding large sums thereby disrupting state government finances. *Id.* at 104. The Tax Injunction Act was "shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings," training "its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority ." *Id.* at 104-105. The Court noted that "federal-court relief would have operated to reduce the flow of state tax revenue," and acknowledged that "the principal purpose of the TIA was to 'limit drastically' federal-court interference with 'the collection of [state] taxes.' " *Id.* at 105-106.

***3** Plaintiffs' Opposition attempts to argue that First Amendments rights enjoy a special protection from improper taxation, fee assessment or licensing requirements. They cite cases in support of this argument, including Supreme Court cases. This Court does not question the decisions in those cases, but they are inapposite to the jurisdictional issue here. In their lead-off case, they cite *Fair Assessment in real Estate Ass'n, Inc. v. McNary,* which the *Hibbs* case cites as noted above. However, this case is contrary to Plaintiffs' argument. In *McNary,* the dismissal on jurisdictional grounds was affirmed.

The other cases cited either do not address taxation collection issues, or they involve cases where the proper jurisdictional route was taken, *i.e.,* they were pursued through *State courts,* up through State Supreme Courts and then to the Supreme Court of the United States. Those cases adopted the procedure mandated by the Tax Injunction Act!

Another argument attempted by Plaintiffs is that there is no remedy in the State courts. This argument is based upon NRS 368A.280(1), which states:

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of this State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

First, it should be noted that the foregoing statute does not preclude a taxpayer from pursuing the established procedures for contesting a tax or seeking a refund.

Second, the language of the statute does not, as Plaintiffs suggest, preclude judicial recourse in the State court. It merely prevents a preemptive strike, that is an action to enjoin the collection of the taxes. It 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 whatever 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 317 (1993). This decision strongly suggests that declaratory relief is available in State court notwithstanding NRS 368A.280(1).

At any rate, Plaintiffs have not alleged in their complaint, with specific facts, that there exists no "plain," speedy or efficient remedy available under the laws or through the courts of the State of Nevada. Accordingly, Plaintiffs have neither established jurisdiction nor stated a claim upon which relief can be granted by this Court. This case clearly is a case designed to enjoin or restrain the assessment or collection of a tax under a State law and further seeks damages, including a refund of taxes. It clearly falls within the purpose of the Tax Injunction Act and removes this Court's jurisdiction.

***4** Defendants also argue that they are not

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"persons" for the purposes of Section 1983 and therefore no claim under that section can lie against them. Although the Court need not address this argument, it notes that the assertion is correct.

Defendants also argue that they are immune from this suit pursuant to the provisions of the Eleventh Amendment of the Constitution. In this case the State of Nevada has not waived its Eleventh Amendment Immunity, nor is such a waiver alleged or pled. Nor do Plaintiffs allege that Congress has abrogated the State's Eleventh Amendment immunity under these circumstances. This is clearly a suit against the State of Nevada and its agencies.

For all the foregoing reasons, the Court finds that Defendants' Motion to Dismiss has merit and must be granted.

IT IS THEREFORE ORDERED that **Motion to Dismiss Amended Complaint** (# 12) is GRANTED.

D.Nev.,2006.
Deja Vu Showgirls of Las Vegas, L.L.C. v. Nevada Dept. of Taxation
Not Reported in F.Supp.2d, 2006 WL 2161980 (D.Nev.)

END OF DOCUMENT

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

MOTION TO DISMISS AMENDED COMPLAINT

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

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General George Chanos and Deputy Attorney General Dennis L. Belcourt, and move this Court for dismissal of the Amended Complaint for Declaratory and Injunctive Relief, Damages, and Attorney's Fees and Costs ("Amended Complaint"). This Motion is made under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the grounds that the Amended Complaint fails to state a claim for relief as to Defendants under 42 USC §1983, that assertion of the claims for damages in Federal Court is barred under the Eleventh Amendment to the United States Constitution, and that this Court lacks jurisdiction to consider the relief sought, by virtue of the Tax Injunction Act (28 USC §1381). This motion is based on the following memorandum of points and authorities and on the record herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

In 2003, the Nevada State Legislature, 20th Special Session, enacted Senate Bill No. 8 ("SB 8"), entitled in its enrolled form as follows:

> AN ACT relating to state financial administration; providing for the imposition and administration of certain excise taxes on financial institutions; providing for the imposition and administration of an excise tax on employers based on wages paid to their employees; replacing the casino entertainment tax with a tax on all live entertainment; eliminating the tax imposed on the privilege of conducting business in this state; revising the taxes on liquor and cigarettes; imposing a state tax on the transfer of real property and revising the provisions governing the existing tax; revising the fees charged for certain gaming licenses; establishing the Legislative Committee on Taxation, Public Revenue and Tax Policy; requiring the Legislative Auditor to conduct performance audits of certain school districts; requiring the Department of Education to prescribe a minimum amount of money that each school district must expend each year for textbooks, instructional supplies and instructional hardware; revising provisions governing the purchase of retirement credit for certain educational personnel; apportioning the State Distributive School Account in the State General Fund for the 2003-2005 biennium; making appropriations to the State Distributive School Account for purposes relating to class-size reduction; making various other changes relating to state financial administration; authorizing certain expenditures; making an additional appropriation; providing penalties; and providing other matters properly relating thereto.

Act of July 22, 2003, 1985, ch. 5, 2003 Nev.Stat 133 (Emphasis added).

As can be seen from its title, SB 8 replaced the casino entertainment tax with a tax on all live entertainment ("the Live Entertainment Tax"). The provisions of the Live Entertainment

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Tax were placed in NRS Chapter 368A, which was further amended by the Nevada State Legislature in the 2005 Regular Session and the 20th Special Session. The Live Entertainment Tax applies to certain gaming and non-gaming facilities. NRS 368A.060 and 368A.200.[1]

Plaintiffs[2] allege that they operate commercial establishments at which "live performance dance entertainment" is provided. Amended Complaint, ¶¶ 31-38. They further allege that the Defendants take the position that Plaintiffs are subject to the tax. *Id.*

Plaintiffs contend that the Live Entertainment Tax violates their rights under the First and Fourteenth Amendments of the United States Constitution and under Article I, sections 9 and 10 of the Nevada Constitution, as a restraint on speech and a violation of substantive due process. Amended Complaint, ¶ 55. Plaintiffs further note that since the Live Entertainment Tax contains an exemption for expression protected by the United States and Nevada Constitution, they should be exempt from the tax. Amended Complaint, ¶¶ 50, 55, referring to NRS 368A.200(5)(a).

The Amended Complaint contains a claim for declaratory relief concerning the unconstitutionality of the Live Entertainment Tax and their non-obligation to pay it under NRS 368A.200(5)(a). Amended Complaint, ¶59. It claims entitlement to an injunction against enforcement. Amended Complaint, ¶¶61-64. It further seeks damages for violations of Plaintiffs' Constitutional rights under 42 USC § 1983 and based on common law rights to damages. Amended Complaint, ¶¶66-69. It further contains a claim for attorneys' fees and costs under 42 USC section1988, in the event Plaintiffs are prevailing parties. Amended Complaint, ¶71.

. . .

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---

[1] The Department of Taxation administers the tax with respect to entities without gaming licenses; the Gaming Commission does so with regard to gaming licensees. *See, e.g.*, NRS 368A.140.

[2] "Plaintiffs," as used herein unless indicated otherwise, refers to all Plaintiffs listed in the caption, to wit: Déjà vu Showgirls of Las Vegas, LLC, Little Darlings of Las Vegas, LLC, K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, the Power Company, Inc., D. Westwood, Inc., and DI Food & Beverage of Las Vegas, LLC.

Plaintiffs seek the following relief:

1. Declaratory relief that the Live Entertainment Tax is unconstitutional on its face and as applied to Plaintiffs and that they need not pay the tax because of its unconstitutionality and the exemption in NRS 368A.200(5)(a). Amended Complaint, Prayer, ¶ A.

2. Preliminary and permanent injunctive relief against enforcement of NRS Chapter 368A against them or the collection of the Live Entertainment Tax from them. Amended Complaint, Prayer, ¶ B.

3. A permanent injunction that the Commission, through the Board, effect refunds of payments that have been involuntarily made by Plaintiffs. Amended Complaint, Prayer, ¶ C.

4. An award of damages against Defendants in the amount to which the Plaintiffs are found to be entitled. Amended Complaint, Prayer, ¶ D.

5. Attorneys' fees and costs. Amended Complaint, Prayer, ¶ E.

II. STANDARD FOR MOTIONS TO DISMISS

A. Failure to State a Claim

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of the complaint. *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir 1983). A dismissal under Rule 12(b)(6) is essentially a ruling on a question of law. *Id.* at 580. Rule 12(b)(6) provides trial courts with an important tool to terminate lawsuits "that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burden of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys.*, Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993).

In considering a motion to dismiss for failure to state a claim for which relief can be granted, the complaint must be read in the light most favorable to the non-moving party. *Russell v. Landrieu*, 621 F.2d 1037,1039 (9th Cir. 1980). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."

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Fed.R.Civ.P. 8(a)(2). "Accordingly, a pleading must 'give [ ] fair notice and state [ ] the elements of the claim plainly and succinctly.'" *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984)(citation omitted). However, the court need not "accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-5 (9th Cir. 1994).

"Matters that lie within a party's pleadings include: (1) documents physically attached to the complaint; (2) documents of undisputed authenticity that are merely alleged or referenced within the complaint; and (3) public records and other judicially noticeable evidence." *Meadow Valley Contractors, Inc. v. Johnson*, 89 F.Supp.2d 1180, 1183 (D. Nev. 2000). For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proved under the allegations of the complaint. *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987). Conclusory allegations, unsupported by the evidence, must be rejected. Such allegations are insufficient to state a civil rights claim. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Jones v. Community Redevelopment Agency*, *supra*, 733 F.2d at 649.

B. Lack of Subject Matter Jurisdiction

The plaintiff bears the burden of proof by a preponderance of evidence that federal subject-matter jurisdiction does in fact exist. *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977), *Aurecchione v. Schoolman Transp. System, Inc.*,S 426 F.3d 635, 638 (2nd Cir. 2005). Allegations of the complaint are liberally construed favorably to the pleader. *Aurecchione v. Schoolman Transp. System, Inc.*, *supra*, 426 F.3d at 638.

III. ARGUMENT

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

Section 1341 of title 28 of the United States Code, hereinafter referred to as the "Tax Injunction Act," states that "(t)he district courts shall not enjoin, suspend or restrain the

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assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

1. The Relief Requested By Plaintiffs is Subject to the Tax Injunction Act

Plaintiffs seek injunctive and declaratory relief and damages in the form of refunds.

The Tax Injunction Act "is broadly interpreted to prohibit the use of the equity powers of federal courts in cases involving state tax matters." *Berry v. Alameda Board of Supervisors*, 753 F.Supp.1508, 1511 (N.D.Cal.1990), and it prohibits civil actions grounded on Section 1983 of Title 42 of the United States Code for declaratory and injunctive relief. *Id.*, at p. 1511. Under the broad interpretation given the Tax Injunction Act, there is no exception for actions challenging a tax as infringing free speech or other First Amendment activities. *Gasparo v. City of New York*, 16 F.Supp.2d 198, 216 (E.D.N.Y.1998). The Tax Injunction Act not only bars injunctive and declaratory relief actions, but also precludes actions for refunds based on the alleged invalidity of taxes. *Marvin F. Poer & Co. v. Counties of Alameda*, 725 F.2d 1234, 1236 (9th Cir.1984). Thus, the full extent of the relief requested by Plaintiffs is subject to a jurisdictional challenge under the Tax Injunction Act.

Plaintiffs have the burden of pleading sufficient allegations to show a proper basis for the court to assert subject matter jurisdiction over an action. *Wilkerson v. Butler*, 229 F.R.D. 166, 169 (E.D.Cal. 2005). Since the Tax Injunction Act is a limit on Federal Court jurisdiction and since, by virtue of the relief sought, the Amended Complaint triggers application of the Tax Injunction Act, Plaintiffs therefore have the burden of pleading that they fall within the exception, i.e., that there is no plain, speedy and efficient remedy under state law.

Plaintiffs have not pled a proper basis for exempting the Amended Complaint from the Tax Injunction Act. It is further submitted, as discussed below, that they cannot meet their burden of proving the lack of a plain, speedy and efficient remedy under state law.

2. Plaintiffs have a Plain, Speedy and Efficient Remedy under State Law

The plain, speedy and efficient exception to the injunction act is given a narrow interpretation by the Courts, calling for review of a state's remedies for procedural, not

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substantive, sufficiency. *Age Intern, Inc. v. Miller*, 830 F.Supp. 1484, 1492 (1993). State remedies must afford an opportunity for a hearing and judicial determination at which Constitutional challenges to the tax may be raised, but may require exhaustion of administrative remedies. *Id.*

a. The Remedy is Plain

A remedy is plain if it is not uncertain. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 516-517, 101 S.Ct. 1221, 1231 (1981). NRS Chapter 368A provides a well-defined remedy.

The Department is required to cause a refund of taxes that have been paid more than once or have been erroneously or illegally collected. NRS 368A.250.

A taxpayer has 3 years after the last day of the month following the reporting period to file a claim for a refund with the Department. NRS 368A.260(1). Filing a timely claim is a prerequisite to maintaining a suit for refund or credit. NRS 368A.280(2). A taxpayer may appeal to the Commission a denial of his claim by the Department. NRS 360.245. If the Department does not mail a decision within six months of when a claim is filed, the taxpayer may treat the claim as denied and appeal to the Commission within thirty days after the last day of the six month period. NRS 368A.300(2).

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

If it were not otherwise crystal clear that the issue of constitutionality of the Live Entertainment Tax may be raised in court, it is made clear by an exemption in NRS 368A.200(5)(a). That provision exempts live entertainment that the State of Nevada "is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."

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Plaintiffs have a clear opportunity to be heard at the administrative level and in court by making a claim for a refund. If judgment is rendered for the Plaintiffs, they would be entitled to a credit against amounts they owe and a refund of the balance. NRS 368A.300(4) and (5). With certain exceptions, prevailing taxpayers are entitled to interest from the date of payment.[3]

The Amended Complaint cites NRS 368A.280(1) as indicating lack of a remedy. That provision states that

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

The foregoing provision has not yet been construed by the Nevada Supreme Court. Even were it construed to prohibit every remedy other than the refund procedures allowed under NRS 368A.250-.320, the refund procedures are adequate. There is no requirement that taxpayers be afforded more than that. The United States Supreme Court has stated:

> Because we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available, we decline to find an exception in the Tax Injunction Act for the appellees' claims. Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act, and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.

California v. Grace Brethren Church, 457 U.S. 393, 417, 102 S.Ct. 2498, 2512-3 (1982).

(b) The Remedy is Speedy

As noted above, the fact that a state remedy requires administrative exhaustion does not exempt it from the Tax Injunction Act. *Age Intern, Inc. v. Miller*, 830 F.Supp. at 1492.

The U.S. Supreme Court found that a remedy that had a median interval of nearly two years' delay, with no interest payable to the debtor on refund, did not fall outside the boundary

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[3] The rates are (a) six per cent, if by way of judgment (NRS 369A.310) and (b) the Nevada prime lending rate plus two per cent, under other circumstances (NRS 360.3295.). Exceptions are found in NRS 368A.270.

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of what constitutes a speedy remedy. *Rosewell v. LaSalle National Bank*, *supra*, 450 U.S. at 520-1, 101 S.Ct. at 1233.

Plaintiffs do not allege any delay in this matter, let alone an amount of delay akin to that that found acceptable in *Rosewell*. Further, there is a mitigating factor present here and not in *Rosewell*, in that interest is in most circumstances available to the taxpayer under NRS Chapters 360 or 368A.

(c) The Remedy is Efficient

A remedy may be inefficient if it imposes unusual hardship on a taxpayer, requiring ineffectual activity or an unnecessary expenditure of time or energy, such as would require a taxpayer to institute a multiplicity of lawsuits to protect the single federal claim being asserted. *Rosewell v. LaSalle National Bank*, *supra*, 450 U.S. at 517-8, 101 S.Ct. at 1231. Plaintiffs do not allege any such inefficiency. As described above, the procedure is efficient. To assert his rights, each taxpayer would need to file a refund claim to the Department, pursue an appeal to the Commission if the Department denied the claim or failed to act on it within six months, and, if the Commission denied the appeal, bring an action in District Court. This is not a multiplicity of lawsuits. On the contrary, it is on par with the procedure for filing for a sales tax refund under Nevada law. *See* NRS 372.630-.695.

In summary, the Tax Injunction Act denies subject-matter jurisdiction to actions that might otherwise be within the jurisdiction of this Court. The relief requested by the Amended Complaint triggers application of that prohibition of jurisdiction. Plaintiffs have failed to plead, and cannot prove, a sufficient basis for exempting the matter from the prohibition of the Tax Injunction Act. Therefore, the Amended Complaint must be dismissed for lack of subject-matter jurisdiction.

B. Eleventh Amendment Immunity Bars Plaintiffs Action For Damages and Certain Portions of Declaratory Relief

The Eleventh Amendment to the United States Constitution reads as follows:

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> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

All of the Defendants are state agencies. Amended Complaint, ¶¶22-24. Plaintiffs are suing them for damages under 42 USC 1983 and under common law. Amended Complaint, ¶¶66-69.

The Eleventh Amendment prohibits actions for damages against a state in Federal Court in circumstances in which the state has not waived such immunity or such immunity has not been abrogated by law under section 5 of the Fourteenth Amendment to the United States Constitution. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 237-41, 105 S.Ct. 3142, 3145-6(1985)(superseded by statute on other grounds) *Meadow Valley Contractors, Inc. v. Johnson*, *supra*, 89 F.Supp.2d at 1183. The immunity has been interpreted to apply to suits against a state by its own citizens, even though the express terms of the Eleventh Amendment do not so provide. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890), cited in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906 (1984).

A state will be deemed to have waived Eleventh Amendment Immunity only where so stated by the most express language or by such overwhelming implication from the text as leaves no room for any other reasonable construction. *Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347,1361 (1974). Plaintiffs do not allege any such waiver. Rather, the State of Nevada has specifically retained Eleventh Amendment immunity by statute. NRS 41.031(3) provides that "(t)he State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States."

Congress will be deemed to have abrogated Eleventh Amendment immunity pursuant to subsection (d) of the Fourteenth Amendment of the United States Constitution only when Congress has unequivocally expressed its intention to do so. *Atascadero State Hospital v.*

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Scanlon, *supra*, 473 U.S., at 242, 105 S.Ct. at 3147. Plaintiffs do not allege any such abrogation by Congress.

Additionally, Plaintiffs' claims for declaratory relief are barred under the Eleventh Amendment to the extent that they seek a determination of their rights under State law, specifically NRS 368A.200(5)(a). *Pennhurst State School and Hospital v. Halderman*, *supra*, 465 U.S. at 106, 104 S.Ct. at 911 (prospective relief exemption to Eleventh Amendment inapplicable to relief sought under state law).

Therefore, by virtue of the Eleventh Amendment, the Amended Complaint fails to state claims for damages that are within the jurisdiction of this Court and further fails to state a claim for declaratory relief concerning application of the exemption under NRS 368A.200(5).

C. *The Amended Complaint Fails to State a Claim for Relief Under 42 U.S.C. §1983.*

Section 1983 of the United States Code provides in pertinent part as follows:

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

Plaintiffs have sued only state agencies in this matter. *See* Amended Complaint, ¶¶ 22-24. States and state officials in their official capacity are not persons under Section 1983 of Title 42 of the United States Code. *Will v. Michigan State Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989).

Under a reading of the Amended Complaint most favorable to Plaintiffs, they do not have a claim for relief against Defendants under section 1983 of title 42 of the United States Code.

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IV. CONCLUSION

Plaintiffs' action should be dismissed in its entirety based on lack of subject-matter jurisdiction due to application of the Tax Injunction Act; their claim for damages and request for declaratory relief as to state law issues should be dismissed for failure to state a claim that is exempt from the Eleventh Amendment; and their 42 U.S.C. Section 1983 damage claims and their requests for prospective relief under state law should be dismissed on the grounds that the state agencies are not "persons" under that law.

It is respectfully submitted that Plaintiffs' actions should be dismissed in their entirety.

DATED THIS 10th day of May, 2006.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 10th day of May, 2006, I served the foregoing document via ECF to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *DÉJÀ VU SHOWGIRLS*; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *LITTLE DARLINGS*; K-KEL, INC. d/b/a *SPEARMINT RHINO GENTLEMAN'S CLUB*; OLYMPUS GARDEN, INC. d/b/a *OLYMPIC GARDEN*; SHAC, L.L.C. d/b/a *SAPPHIRE*; THE POWER COMPANY, INC., d/b/a *CRAZY HORSE TOO GENTLEMEN'S CLUB*; D. WESTWOOD, INC. d/b/a *TREASURES*; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *SCORES*. Plaintiffs, v. **NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS**, Defendants.	**Case No. CV-S-06-00480-RLH-RJJ** **Reply To Plaintiffs' Opposition to Motion to Dismiss**

REPLY TO MOTION TO DISMISS AMENDED COMPLAINT

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

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

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

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

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

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

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

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

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

a. Plainness of Remedy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Speediness

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

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

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

c. Efficiency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED THIS 14th day of June, 2006.

/s/ Dennis L. Belcourt
DENNIS L. BELCOURT

CERTIFICATE OF SERVICE

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

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DOCKET NO. 06-16634

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Appellants,

v.

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

Appellees.

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

APPELLEES' ANSWERING BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 06-16634
D.C. No. CV-S-06-00480 (RLH)(RJJ)

APPELLEES' ANSWERING BRIEF

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

I.

STATEMENT OF JURISDICTION

A. Statutory Basis of Subject Matter Jurisdiction of the District Court

Appellees Nevada Department of Taxation ("the Department"), Nevada Tax Commission ("the NTC"), and the Nevada State Board of Examiners, agencies of the State of Nevada, (hereinafter collectively referred to as "the State of Nevada") disagree with the statement of statutory basis for district court subject matter jurisdiction of Appellants (hereinafter collectively referred to as "the Clubs"[1]) in one critical respect: the District Court lacked subject matter jurisdiction by virtue of the Tax Injunction Act, section 1341 of title 28 of the United States Code.

B. Basis for Appellate Jurisdiction

The State of Nevada agrees with the Clubs' basis for appellate jurisdiction.

C. Filing Dates That Establish the Timeliness of the Appeal

The State of Nevada agrees with the Clubs' statement in this regard.

II.

STATEMENT OF THE ISSUES

The primary issue is whether the Amended Complaint invokes jurisdiction of the District Court in light of applicability of the Tax Injunction Act, 28 U.S.C.A. § 1341, which curtails District Court

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[1] "The Clubs," as used herein, unless indicated otherwise, refers to all Plaintiffs listed in the caption, to wit: Déjà vu Showgirls of Las Vegas, L.L.C., Little Darlings of Las Vegas, L.L.C., K-Kel, Inc., Olympus Garden, Inc., SHAC, L.L.C., the Power Company, Inc., D. Westwood, Inc., and D.I. Food & Beverage of Las Vegas, L.L.C.

jurisdiction. Specifically at issue is whether the Clubs sufficiently pled that the remedy afforded by Nevada for the Clubs to raise their Federal Constitutional law claims is not "plain, speedy and efficient" under the Tax Injunction Act.

Also at issue is whether the Clubs' claims under section 1983 of title 42 of the United States Code are barred because the State of Nevada is not a person and whether the Clubs' claims for damages are barred by the Eleventh Amendment to the United States Constitution.

III.

STATEMENT OF THE CASE

The State of Nevada adds to the Clubs' statement of the case that the District Court also found the allegations of the complaint deficient with respect to the existence of a plain, speedy or efficient remedy.

IV.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

In 2003, the Nevada State Legislature, 20th Special Session, enacted Senate Bill No. 8 ("SB 8"), entitled in its enrolled form as follows:

> AN ACT relating to state financial administration; providing for the imposition and administration of certain excise taxes on financial institutions; providing for the imposition and administration of an excise tax on employers based on wages paid to their employees; replacing the casino entertainment tax with a tax on all live entertainment; eliminating the tax imposed on the privilege of conducting business in this state; revising the taxes on liquor and cigarettes; imposing a state tax on the transfer of real property and revising the provisions governing the existing tax; revising the fees charged for certain gaming licenses; establishing the Legislative Committee on Taxation, Public Revenue and Tax Policy; requiring the Legislative Auditor to conduct performance audits of certain school districts; requiring the Department of Education to prescribe a minimum amount of money that each school district must

> expend each year for textbooks, instructional supplies and instructional hardware; revising provisions governing the purchase of retirement credit for certain educational personnel; apportioning the State Distributive School Account in the State General Fund for the 2003-2005 biennium; making appropriations to the State Distributive School Account for purposes relating to class-size reduction; making various other changes relating to state financial administration; authorizing certain expenditures; making an additional appropriation; providing penalties; and providing other matters properly relating thereto.

Act of July 22, 2003, ch. 5, 2003 Nev. Stat 133 (Emphasis added). See the Clubs' Addendum A.

As can be seen from its title, SB 8 replaced the casino entertainment tax with a tax on all live entertainment ("the Live Entertainment Tax"). The provisions of the Live Entertainment Tax were placed in Nev. Rev. Stat. Chapter 368A, which was further amended by the Nevada State Legislature in the 2005 Regular Session and the 20th Special Session. The Live Entertainment Tax applies to certain gaming and non-gaming facilities. Nev. Rev. Stat. § 368A.060 and § 368A.200.[2] Amended Complaint. None of the Clubs is a licensed gaming establishment. Amended Complaint, ¶ 21 (Excerpts of Record ("ER") 5).

The Clubs contend that the Live Entertainment Tax violates their rights under the First and Fourteenth Amendments of the United States Constitution and under Article I, sections 9 and 10 of the Nevada Constitution, as a restraint on speech and a violation of substantive due process. Amended Complaint, ¶ 55 (ER 11). The Clubs further note that

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[2] The Department administers the tax with respect to entities without gaming licenses; the Gaming Control Board and the Gaming Commission do so with regard to gaming licensees. Nev. Rev. Stat. § 368A.140, Nev. Rev. Stat. § 368A.260. The NTC decides appeals from denials of refunds by the Department. Nev. Rev. Stat. § 360.245(1) and Nev. Rev. Stat. § 368A.300.

since the Live Entertainment Tax contains an exemption for live entertainment protected by the United States and Nevada Constitutions, they should be exempt from the tax. Amended Complaint, ¶¶ 50, 55 (ER 10-11), referring to Nev. Rev. Stat. § 368A.200(5)(a).

The Amended Complaint contains a claim for declaratory relief concerning the unconstitutionality of the Live Entertainment Tax and for exempt status under Nev. Rev. Stat. § 368A.200(5)(a). Amended Complaint, ¶59 (ER 12). It claims entitlement to an injunction against enforcement. Amended Complaint, ¶¶61-64 (ER 13). It further seeks damages for violations of the Clubs' Constitutional rights under 42 U.S.C. § 1983 and rights to damages based on common law. Amended Complaint, ¶¶66-69 (ER 14). It further contains a claim for attorneys' fees and costs under 42 U.S.C. § 1988, in the event the Clubs are prevailing parties. Amended Complaint, ¶71 (ER 15).

The Clubs seek the following relief:

1. Declaratory relief that the Live Entertainment Tax is unconstitutional on its face and as applied to The Clubs and that they need not pay the tax because of its unconstitutionality and the exemption in Nev. Rev. Stat. § 368A.200(5)(a). Amended Complaint, Prayer, ¶ A (ER 15).

2. Preliminary and permanent injunctive relief against enforcement of Nev. Rev. Stat. Chapter 368A against them or the collection of the Live Entertainment Tax from them. Amended Complaint, Prayer, ¶ B (ER 16).

3. A permanent injunction that the NTC, through the Board, effect refunds of payments that have been involuntarily made

by The Clubs, plus interest. Amended Complaint, Prayer, ¶ C (ER 17).

4. An award of damages against Defendants in the amount to which the Clubs are found to be entitled. Amended Complaint, Prayer, ¶ D (ER 17).

5. Attorneys' fees and costs. Amended Complaint, Prayer, ¶ E (ER 17).

A taxpayer under Nev. Rev. Stat. Chapter 368A is entitled to a refund of taxes erroneously or illegally collected. Nev. Rev. Stat. § 368A.250. A taxpayer who is not a licensed gaming establishment may seek a refund or credit by filing a claim with the Department within three years after the last day of the month following the reporting period for which the overpayment was made. Nev. Rev. Stat. § 368A.260(1).

If the Department decides against the taxpayer, the taxpayer has thirty days to appeal to the NTC. Nev. Rev. Stat. § 360.245(1)(b). If the Department fails to mail notice of action on a claim within six months, the taxpayer may consider the claim disallowed and appeal to the NTC within thirty days after the last day of the six month period. Nev. Rev. Stat. § 368A.300(2). A taxpayer aggrieved by a decision of the NTC has ninety days to file an action on the claim in state court. Nev. Rev. Stat. § 368A.290 and Nev. Rev. Stat. § 368A.300.

V.

SUMMARY OF THE ARGUMENT

The Clubs have the burden of pleading and proving subject-matter jurisdiction. Given the nature of this action, the Clubs must plead and show the inapplicability of the Tax Injunction Act, section 1341 of title 28 of the

United States Code, which withdraws federal jurisdiction from actions seeking to restrain state court collection of taxes if the taxpayer has a plain, speedy, and efficient remedy under state law. The Clubs fail to allege that the procedure available to them under Nevada law is not plain, speedy, and efficient. The State of Nevada contends that the Clubs, by failing to allege, either generally or with the support of specific facts, the lack of a plain, speedy and efficient remedy, have failed to meet their burden of pleading jurisdiction. The State of Nevada further contends that the remedy available to taxpayers under Chapter 368A is in fact plain, speedy, and efficient. As a result, this action is barred by the Tax Injunction Act.

The State of Nevada finds no legal authority for the Clubs' contention that there is a facial constitutional challenge exemption to the Tax Injunction Act, which allows Federal district court jurisdiction over tax injunction actions notwithstanding the existence of a plain, speedy and efficient remedy under state law.

The State of Nevada is clearly not a person under 42 U.S.C.A. § 1983 and has not waived its immunity to damages under the Eleventh Amendment to the United State Constitution. Furthermore, the State of Nevada's immunity has not been abrogated by act of Congress.

VI.

LEGAL ARGUMENT

A. AUTHORITY OF DISTRICT COURT TO GRANT MOTION TO DISMISS

The State's motion to dismiss was based on lack of jurisdiction and failure to state a claim, pursuant to Rule 12(b), paragraphs (1) and (6).

. . .

1. Failure to State a Claim

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. *North Star Intern. v. Arizona Corp. Com'n*, 720 F.2d 578, 581 (9th Cir 1983). A dismissal under Rule 12(b)(6) is essentially a ruling on a question of law. *Id.* at 580. Rule 12(b)(6) provides trial courts with an important tool to terminate lawsuits "that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burden of unnecessary pretrial and trial activity." *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems*, Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993).

In considering a motion to dismiss for failure to state a claim for which relief can be granted, the complaint must be read in the light most favorable to the non-moving party. *Russell v. Landrieu*, 621 F.2d 1037,1039 (9th Cir. 1980). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed.R.Civ.P. Rule 8(a)(2). "Accordingly, a pleading must 'give [ ] fair notice and state [ ] the elements of the claim plainly and succinctly.'" *Jones v. Community Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984)(citation omitted). However, the court need not "accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-5 (9th Cir. 1994).

"Matters that lie within a party's pleadings include: (1) documents physically attached to the complaint; (2) documents of undisputed authenticity that are merely alleged or referenced within the complaint; and (3) public records and other judicially noticeable evidence." *Meadow Valley*

Contractors, Inc. v. Johnson, 89 F.Supp.2d 1180, 1183 (D. Nev. 2000). For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proved under the allegations of the complaint. *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987). Conclusory allegations, unsupported by the evidence, must be rejected. Such allegations are insufficient to state a civil rights claim. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Jones v. Community Redevelopment Agency of City of Los Angeles*, *supra*, 733 F.2d at 649.

2. Lack of Subject Matter Jurisdiction

The plaintiff bears the burden of proof by a preponderance of evidence that federal subject-matter jurisdiction does in fact exist. *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977), *Aurecchione v. Schoolman Transp. System, Inc.*, 426 F.3d 635, 638 (2nd Cir. 2005). The Complaint must include "a short and plain statement of the grounds upon which the court's jurisdiction depends . . ." Fed.R.Civ.P. 8(a)(1) (in pertinent part).

Allegations of the complaint are liberally construed favorably to the pleader. *Aurecchione v. Schoolman Transp. System, Inc.*, *supra*, 426 F.3d at 638.

B. THE DISTRICT COURT WAS CORRECT IN DISMISSING THE ACTION BASED ON THE TAX INJUNCTION ACT

Section 1341 of title 28 of the United States Code, hereinafter referred to as the "Tax Injunction Act," states that "(t)he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax

under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

1. The Relief Requested by The Clubs is Subject to the Tax Injunction Act

The Clubs seek injunctive and declaratory relief and damages in the form of refunds.

The Tax Injunction Act "is broadly interpreted to prohibit the use of the equity powers of federal courts in cases involving state tax matters." *Berry v. Alameda Board of Supervisors*, 753 F.Supp.1508, 1511 (N.D.Cal.1990). Further, it prohibits civil actions grounded on 42 U.S.C.A. 1983 for declaratory and injunctive relief. *Id.*, at p. 1511. Under the broad interpretation given the Tax Injunction Act, there is no exception for actions challenging a tax as infringing free speech or other First Amendment activities. *Gasparo v. City of New York*, 16 F.Supp.2d 198, 216 (E.D.N.Y.1998). The Tax Injunction Act not only bars injunctive and declaratory relief actions, but also precludes actions for refunds based on the alleged invalidity of taxes. *Marvin F. Poer and Co. v. Counties of Alameda, et al.*, 725 F.2d 1234, 1236 (9th Cir.1984). The full extent of the relief requested by the Clubs is therefore subject to a jurisdictional challenge under the Tax Injunction Act.

The Clubs have the burden of pleading sufficient allegations to show a proper basis for the court to assert subject matter jurisdiction over an action. *Wilkerson v. Butler*, 229 F.R.D. 166, 169 (E.D.Cal. 2005). The Tax Injunction Act is a limit on Federal Court jurisdiction. Since, by virtue of the relief sought, the Amended Complaint triggers application of the Tax Injunction Act, the Clubs therefore have the burden of pleading that they fall

within the exception, i.e., that there is no plain, speedy and efficient remedy under state law.

The Clubs have not pled a proper basis for exempting the Amended Complaint from the Tax Injunction Act. It is further submitted, as discussed below, that they cannot meet their burden of proving the lack of a plain, speedy and efficient remedy under state law.

2. The Clubs have a Plain, Speedy and Efficient Remedy Under State Law

The Complaint does not allege the lack of a plain, speedy and efficient remedy. The remedy is measured by procedural, not substantive, sufficiency. *Age Intern, Inc. v. Miller*, 830 F.Supp. 1484, 1492 (N.D.Ga. 1993). State remedies must afford an opportunity for a hearing and judicial determination at which Constitutional challenges to the tax may be raised, but may require exhaustion of administrative remedies. *Id.*

(a.) The Remedy is Plain

The Amended Complaint does not allege the lack of a plain remedy. At most, it cites to Nev. Rev. Stat. § 368A.280(1), which, when read with the other provisions of Nev. Rev. Stat. Chapter 368A, appended to the Amended Complaint as an exhibit, and case law, do not indicate the lack of a plain remedy.

A remedy is plain if it is not uncertain. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 516-517, 101 S.Ct. 1221, 1231 (1981). Nev. Rev. Stat. Chapter 368A provides a well-defined remedy.

The Department is required to cause a refund of taxes that have been paid more than once or have been erroneously or illegally collected. Nev. Rev. Stat. § 368A.250.

A taxpayer has 3 years after the last day of the month following the reporting period to file a claim for a refund with the Department. Nev. Rev. Stat. § 368A.260(1). Filing a timely claim is a prerequisite to maintaining a suit for refund or credit. Nev. Rev. Stat. § 368A.280(2). A taxpayer may appeal to the NTC a denial of his claim by the Department. Nev. Rev. Stat. § 360.245. If the Department does not mail a decision within six months of when a claim is filed, the taxpayer may treat the claim as denied and appeal to the NTC within thirty days after the last day of the six month period. Nev. Rev. Stat. § 368A.300(2).

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. Nev. Rev. Stat. § 368A.290. Jurisdiction for such actions lies in the District Court. Nev. Const., art. 6, § 6,[3] Nev. Rev. Stat. § 4.370.[4] Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Const., art. 6, § 4.

If it were not otherwise crystal clear that the issue of constitutionality of the Live Entertainment Tax may be raised in court, it is made clear by an exemption in Nev. Rev. Stat. § 368A.200(5)(a). That provision exempts live entertainment that the State of Nevada "is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."

The Clubs have a clear opportunity to be heard at the administrative level and in court by making a claim for a refund. If judgment is rendered

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[3] This section of the Nevada Constitution provides in pertinent part: "The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts.")

[4] Action for tax refund not among listed bases for justice court jurisdiction.

for the Clubs, they would be entitled to a credit against amounts they owe and a refund of the balance. Nev. Rev. Stat. § 368A.300(4) and (5). With certain exceptions, prevailing taxpayers are entitled to interest from the date of payment.[5]

The Amended Complaint cites Nev. Rev. Stat. § 368A.280(1) as indicating lack of a remedy. That provision states as follows:

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

The foregoing provision has not yet been directly construed by the Nevada Supreme Court.[6] Even were it construed to prohibit every remedy other than the refund procedures allowed under Nev. Rev. Stat. §§ 368A.250—368A.320, the refund procedures are efficient. There is no requirement that taxpayers be afforded more than that. The United States Supreme Court has stated:

> Because we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available, we decline to find an exception in the Tax Injunction Act for the appellees' claims. Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act, and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.

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[5] The rates are (a) six percent, if by way of judgment (Nev. Rev. Stat. § 368A.310) and (b) the Nevada prime lending rate plus two per cent, under other circumstances (Nev. Rev. Stat. § 360.2935.). Exceptions are found in Nev. Rev. Stat. § 368A.270.

[6] Nev. Rev. Stat. § 368A.280(1) was manifestly drawn from provisions in the Nevada sales tax chapters, Nev. Rev. Stat. Chapter 372 and 374. *See* Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675.

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

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

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

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

Sales Tax

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

Sales Taxes

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

Live Entertainment Tax

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

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

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

of their position. The Clubs' instead attempt to apply Tax Injunction Act decisions to interpret Nev. Rev. Stat. § 368A.280(1) in order to preclude any judicial remedy whatsoever. However, the Tax Injunction Act has its own unique gloss, which is heavily based on legislative history. *See, e.g., California v. Grace Brethren Church, supra*, 457 U.S. at 417, 102 S.Ct. at 2512-3 (1982). The Clubs provide no basis for applying this gloss to Nev. Rev. Stat. § 368A.280(1).

Under the circumstances, the District Court's interpretation of Nev. Rev. Stat. § 368A.280(1) as merely preventing "preemptive strikes" (E.R. 47) is clearly more in accord with Nevada law. It does no violence to the judicial remedy laid out in Nev. Rev. Stat. § 368A.290. It is wholly consistent with *Scotsman*.

In summary, it is incumbent on the Clubs to demonstrate that their remedy is uncertain. *Franchise Tax Board v. Alcan Aluminum Limited, supra,* 493 U.S. at 341, 110 S.Ct. at 667. They have failed to do so.

(b.) The Remedy is Speedy

In the Amended Complaint, the Clubs fail to allege that the remedy afforded them under Nev. Rev. Stat. Chapter 368A is not speedy.

The Clubs argue that the remedy afforded under Nev. Rev. Stat. Chapter 368A cannot be speedy, primarily based on the fact that there is no time limit on action by the NTC in the event that the Department denies their refund claims. Appellants' Opening Brief ("AOB"), p. 26. The Clubs have not made any offer of proof that the NTC would in fact delay in making a decision; nor do they allege that they have even tried to pursue their State law remedies. In making the pronouncement that the remedy under Nev. Rev. Stat. Chapter 368A is not speedy, the Clubs would convict the

proceedings without even trying them.[8] In short, their conclusions have no basis in fact. They are mere speculation that the state procedures will be insufficiently speedy, and cannot be a justification for evading the prohibitions of the Tax Injunction Act.

Turning to the case law on the Tax Injunction Act, it is more reasonable to conclude that the remedy available to the Clubs is speedy, as that term has been interpreted and applied. The U.S. Supreme Court has found that a remedy that had a median interval of nearly two years' delay, with no interest payable to the debtor on refund, does not fall outside the boundaries of what constitutes a speedy remedy. *Rosewell v. LaSalle National Bank*, *supra*, 450 U.S. at 520-1, 101 S.Ct. at 1233.

The Clubs fail to allege any delay, actual or prospective, in this matter. There is no basis to conclude there would be delay akin even to that that found acceptable in *Rosewell*. Further, there is a compensating factor present here and not in *Rosewell*, in that interest is in most circumstances available to the taxpayer under Nev. Rev. Stat. Chapters 360 or 368A.

The fact that a state remedy requires administrative exhaustion does not exempt it from the Tax Injunction Act. *Age Intern, Inc. v. Miller*, 830 F.Supp. at 1492. Moreover, the Clubs are not without options with respect to administrative delay. If the Clubs can demonstrate that administrative proceedings are a futility or are inappropriate because of the Constitutional issue involved, they could seek to invoke the holding in *Scotsman, supra*. An agency's arbitrary refusal to decide could form a basis for mandamus.

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[8] The Clubs claim that "Defendants admit" the state refund procedure "could take years." AOB 32. There has been no such admission, and the Clubs cite to nothing in the record in this regard.

See Close v. Second Judicial District, 73 Nev. 194, 196, 314 P.2d 379, 380 (no mandamus where court not arbitrary in failure to decide). *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974)(availability of writ of mandate a consideration in Tax Injunction Act case).

(c.) The Remedy is Efficient

The Clubs fail to allege that the remedy afforded them under Nev. Rev. Stat. Chapter 368A is inefficient.

A remedy may be inefficient if it imposes unusual hardship on a taxpayer, such as by requiring ineffectual activity or an unnecessary expenditure of time or energy, such as would require a taxpayer to institute a multiplicity of lawsuits to protect the single federal claim being asserted. *Rosewell v. LaSalle National Bank*, *supra,* 450 U.S. at 517-518, 101 S.Ct. at 1231. The Clubs do not allege any such inefficiency in the Amended Complaint. As described above, the procedure laid out in Nevada law is efficient. To assert his rights, each taxpayer would need to file a refund claim to the Department, pursue an appeal to the NTC if the Department denies the claim or failed to act on it within six months, and, if the NTC denies the appeal, bring an action in state district court. This is not a multiplicity of lawsuits. On the contrary, it is on par with the procedure for filing for a sales tax refund under Nevada law. *See, e.g.,* 372.630—.695.

The Clubs contend that because the State of Nevada has not conceded the unconstitutionality of the Live Entertainment Tax, the administrative proceedings for claiming a refund under Nev. Rev. Stat. Chapter 368A are somehow rendered ineffectual. This contention is an obfuscation of the facts. As of filing this appeal, the Clubs have yet to present a refund claim to the Nevada State Department of Taxation. They merely filed suit in

Federal court. If they were to actually present a refund claim, the Nevada Department of Taxation could accept the refund claim. If the Clubs do not succeed at this level, they can seek review by the NTC. The State of Nevada has only taken the position that this matter needs to be decided in the right forum, at State level. The Clubs offer no credible basis for disqualifying the Department or the NTC from giving fair consideration to the Clubs' claims of unconstitutionality.

Citing to decisions pertaining to 42 U.S.C.A. § 1983, the Clubs seem to contend that when constitutional issues are involved, there should be no need to exhaust administrative remedies. However, this has not been the analysis applied in Tax Injunction Act cases. Witness the following excerpt from *California Grace Brethren*, *supra*, which involved a challenge to a tax on constitutional grounds:

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

Id., at p. 413-414, 102 S.Ct. 2510-2511 (citation omitted)(emphasis added).

The Clubs further suggest that the requirements of filing monthly returns and pursuing a claim for a refund within three years somehow render the state remedy inefficient, by necessitating a number of lawsuits. Returns and requests for refunds are not lawsuits. Plaintiffs did not allege, and do not now substantiate, a "real risk of 'numerous suits between the same

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

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

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

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

485 (2000).[11] Under *Scotsman,* the requirement of exhaustion of administrative remedies is excused if (1) the challenge is based on constitutional grounds, or (2) such remedies are futile. The Clubs could try to make their case to a state district court for exemption on both grounds, but have simply chosen not to do so.

In summary, the Tax Injunction Act denies subject-matter jurisdiction to actions that might otherwise be within the jurisdiction of the District Court. The relief requested by the Amended Complaint triggers application of that prohibition of jurisdiction. The Clubs have failed to plead, and cannot prove, a sufficient basis for exempting the matter from the prohibition of the Tax Injunction Act. Therefore, the Amended Complaint must be dismissed for lack of subject-matter jurisdiction.

3. There is No Exemption to the Tax Injunction Act for Facial Constitutional Challenges

The Clubs assert that there is a facial challenge exception to the Tax Injunction Act. However, they marshal no support from its legislative history. Rather they cite to *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1946), a decision that does not apply the Tax Injunction Act but rather looks to the equity rules in force before the Tax Injunction Act was

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[11] Furthermore, the fact that the Legislature enacted S.B. 8 (the Live Entertainment Tax) after the Nevada Supreme Court's decision in *Scotsman* could be viewed by the Nevada Supreme Court as indicating that the Legislature intended *Scotsman*'s holding concerning exhaustion of administrative remedies to be applicable to the Live Entertainment Tax. *State ex rel. Brennan v. Bowman*, 88 Nev. 582, 585, 503 P.2d 454, 456 (1972)(The legislature is presumed to know the construction placed upon an adopted statute by the highest court of the state from which it was taken, and such construction is an aid in ascertaining the legislative intent.)

enacted. Moreover, scrutiny of the facts before the *Hillsborough* court reveals that there were significant deficiencies in the state proceedings rendering that decision not at all analogous to these facts nor supportive of the Clubs' thesis concerning facial constitutional challenges. The Clubs also quote *Dows v. City of Chicago*, 78 U.S. 108 (1870) (by way of *Grace Brethren Church)*, which dates back long before the Tax Injunction Act.

Plaintiffs' reliance on pre-Tax Injunction Act era case law as determinative of the Act's scope and meaning suffers from at least one major defect. The Tax Injunction Act was enacted to cut back on federal equity jurisdiction. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 526, 101 S.Ct. 1221, 1236 (1981)(court refused to equate "plain, speedy and efficient" remedy with "plain, adequate and complete" standard of equity). As support for that departure from prior law, the *Rosewell* court noted the persistent reasons for federal noninterference—a concern that if federal injunctive relief were unavailable that the following may occur:

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

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

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

In *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, cited by the Clubs, the U.S. Supreme Court applied principles of comity so as to avoid reaching the issue whether the Tax Injunction Act precluded a damages action in Federal Court under 42 U.S.C. § 1983. The language from *Fair Assessment* cited by the Clubs does not stand for the proposition that the Tax Injunction Act cannot be a bar to Federal district court actions for damages based on alleged facial unconstitutionality of a state tax law. *Cf.*, *Marvin F. Poer & Co. v. Counties of Alameda*, *supra*, 725 F.2d at 1236 (holding that refund suits in Federal court inconsistent with Tax Injunction Act). *A fortiorari*, it does not support the proposition that a request for injunctive relief may be maintained in Federal court based on alleged facial unconstitutionality of a tax statute when there is a plain, speedy and efficient state remedy available under state law.

The decisions cited by the Clubs concerning irreparable harm do not add any weight to their argument. The Tax Injunction Act has as its most clear aim the prevention of injunctive relief in Federal court, and as such the actions it addresses will almost without exception be concerned with claims of irreparable harm pending the litigation. *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1013 (9th Cir. 2001)(factors for an injunction include irreparable harm). As such, Congress must have given due weight to the possibility of irreparable harm and determined that Federal actions should nonetheless be prohibited where there is a reasonable state remedy.

Over all, none of the decisions cited by the Clubs establish an exception to the Tax Injunction Act for facial constitutional challenges. In asserting such an exception now, the Clubs are therefore requesting that this Court make new law, in disregard of the U.S. Supreme Court's already-stated refusal to carve

"out a special exception for taxpayers raising First Amendment claims. ..." *California v. Grace Brethren Church, supra,* 457 U.S. at 416-7, 102 S.Ct. at 2512.

C. **THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER 42 U. S. C. § 1983** Amended Complaint Fails to State a Claim for Relief Under 42 U.S.C. **AND FAILS TO PASS MUSTER UNDER THE ELEVENTH AMENDMENT**

Section 1983 of the United States Code provides in pertinent part as follows:

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

(Emphasis added.)

The Clubs have sued only state agencies in this matter. States and state officials in their official capacity are not persons under Section 1983 of Title 42 of the United States Code. *Will v. Michigan State Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989).

Under a reading of the Amended Complaint most favorable to the Clubs, they do not have a claim for relief against Defendants under section 1983 of title 42 of the United States Code. Even without the jurisdictional bar of the Tax Injunction Act, dismissal was appropriate based on the failure of the Clubs to state a claim for relief under 42 U.S.C. 1983. Further, were the Clubs to amend to include a named

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

VII.

CONCLUSION

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

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

Dated this 5th day of January, 2007.

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

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

DATED THIS 5th day of January, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

X 1. Pursuant to Fed.R.App.P.32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is less than thirty pages.

__ 2. Proportionately spaced, has a typeface of 14 points or more and contains 7,487 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words.)

Dated this 3rd day of January, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 5th day of January, 2007, I served the **Appellee's Answering Brief** by mailing true copies thereof addressed as follows, postage thereon prepaid:

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

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

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

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

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

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

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

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

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

(Emphasis added.)

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

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

(Emphasis added.)

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

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

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

---

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

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

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

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

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

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

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

---

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

4. Conclusion.

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

Dated this 23rd day of April, 2008.

Respectfully submitted,

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Nevada Attorney General

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

CERTIFICATE OF SERVICE

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

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Boulevard,
Suite 2
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An Employee of the Attorney General's Office

EXHIBIT A

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ORIGINAL

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FILED
Dec 19 12 34 PM '06
Shirley B. Parraguirre
CLERK

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*,	**CASE NO.: A533273** **DEPT. NO.: IX** **DOCKET NO.:** **VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY FEES AND COSTS**

Plaintiffs,

v.

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

Defendants.

RECEIVED
DEC 16 2006
COUNTY CLERK

NOW COMES Plaintiffs, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu Showgirls*, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings*, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club*, Olympus Garden, Inc., d/b/a *Olympic Garden*, SHAC, L.L.C., d/b/a *Sapphire*, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*, D. Westwood, Inc., d/b/a *Treasures*, and D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (collectively referred to herein as the "Plaintiffs"), by and through their attorneys, and state for their complaint against Defendants Nevada Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michelle Jacobs in her official capacity only (collectively referred to herein as the "Defendants"), as follows:

INTRODUCTION

1. This is a civil action wherein Plaintiffs pray for a declaratory judgment, damages, attorney fees and costs, as well as both a preliminary and permanent injunction to restrain and enjoin the Defendants, as well as their agents, employees and representatives, from acting under color of state law to deprive the Plaintiffs of their rights, privileges and immunities secured to them by the Constitution of the State of Nevada and the Constitution of the United States. Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face, and to enjoin, all aspects of the Nevada Tax on Live Entertainment (referred to herein as the "Live Entertainment Tax," or simply the "Tax") as established by Title 32, Chapter 368A, of the Nevada Revised Statutes ("Chapter 368A"), as being an impermissible tax on constitutionally protected expression. A copy of that statute is attached hereto as Ex. "A," and is incorporated herein by reference.

JURISDICTION AND VENUE

2. This Court has jurisdiction and power to grant the injunctive relief requested pursuant to Rule 65 of the Nevada Rules of Civil Procedure and N.R.S. § 33.010, and jurisdiction and authority to grant the declaratory judgment prayed for here pursuant to Rule 57 of the Nevada Rules of Civil Procedure and N.R.S. 33.040.

3. The federal statutory law which further authorizes the institution of this suit is 42 U.S.C.

§ 1983, which provides, in part:

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

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

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

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

PARTIES

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

8. Plaintiff, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu Showgirls* ("*Deja Vu*"), is a Limited Liability Company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

9. Plaintiff, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings* ("*Little Darlings*"), is a Limited Liability Company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

10. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

11. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*")is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

12. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a Limited Liability Company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

13. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club* ("*Crazy Horse*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

14. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* ("*Treasures*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

15. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* ("*Scores*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

16. None of the Plaintiffs operate their facilities as licensed gaming establishments under the laws of the State of Nevada.

17. Defendant, Nevada Department of Taxation (hereinafter sometimes referred to simply as the "Department") is a governmental entity created under the laws of the State of Nevada, which administers and enforces the statutory provisions challenged herein, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers.

18. Defendant, Nevada Tax Commission (hereinafter sometimes referred to simply as the "Commission") is a governmental entity created under the laws of the State of Nevada, which administers and enforces some of the statutory provisions challenged herein, and is authorized to consider and rule upon, among other things, appeals of claims under Chapter 368A.

19. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to simply as the "Board of Examiners") is a governmental entity created under the laws of the State of Nevada, and consists of the governor, the secretary of state, and the attorney general. Pursuant to N.R.S. § 368A.250, the Board of Examiners is authorized to approve, among

other things, refunds with regard to any erroneously or illegally collected or computed tax under Chapter 368A.

20. Defendant, Michelle Jacobs, who is named in this lawsuit in her official capacity only, is an employee of the Nevada Department of Taxation, and is responsible for the administration of Chapter 368A.

STATEMENT OF FACTS

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

22. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous exceptions, an excise tax on admission to any facility within the State of Nevada that provides defined "live entertainment."

23. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is obligated to collect the tax imposed by Chapter 367A from taxpayers who/which are not licensed gaming establishments, and is also obligated to adopt such regulations as are necessary to carry out those functions.

24. Upon information and belief, one of the primary purposes for the enactment of Chapter 368A was to impose an excise tax upon those establishments in the State of Nevada that provide live so-called "adult" entertainment in the form of exotic dancing, "topless" dancing, and fully nude performance dance entertainment.

25. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided had a maximum occupancy of less than 300 persons.

26. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which - - among other things - - reduced the scope of the exception as contained in N.R.S. § 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Upon information and belief, the

purpose of the July 17, 2005, amendments to Chapter 368A, and in particular those to N.R.S. § 368A.200(5)(d), was to specifically extend the tax obligation as contained in Chapter 368A to "adult" entertainment establishments which were not then subject to the Live Entertainment Tax, including a number of the Plaintiffs in this action.

27. *Deja Vu* operates a commercial establishment at 3247 Industrial Road, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Deja Vu* is subject to Chapter 368A, as amended, and have required *Deja Vu* to pay the Live Entertainment Tax as mandated therein.

28. *Little Darlings* operates a commercial establishment at 1514 Western Avenue, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Little Darlings* is subject to Chapter 368A, as amended, and have required *Little Darlings* to pay the Live Entertainment Tax as mandated therein.

29. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Spearmint Rhino* is subject to Chapter 368A, as amended, and have required *Spearmint Rhino* to pay the Live Entertainment Tax as mandated therein.

30. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas Boulevard, Las Vegas, Nevada, 89104, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Olympic Garden* is subject to Chapter 368A, as amended, and have required *Olympic Garden* to pay the Live Entertainment Tax as mandated therein.

31. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Sapphire* is subject to Chapter 368A, as amended, and have required *Sapphire* to pay the Live Entertainment Tax as mandated

therein.

32. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Crazy Horse* is subject to Chapter 368A, as amended, and have required *Crazy Horse* to pay the Live Entertainment Tax as mandated therein.

33. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Treasures* is subject to Chapter 368A, as amended, and have required *Treasures* to pay the Live Entertainment Tax as mandated therein.

34. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Scores* is subject to Chapter 368A, as amended, and have required *Scores* to pay the Live Entertainment Tax as mandated therein.

35. All of the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500 persons.

36. The Plaintiffs all present upon their business premises some form of live "exotic" performance dance entertainment. Some of the Plaintiffs present live clothed and "topless" female performance dance entertainment, and others of the Plaintiffs present live clothed, "topless" and fully nude female performance dance entertainment; all of which is non-obscene. The non-obscene performance dance entertainment presented on the establishments operated by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by not only Article I, §§ 9 and 10, of the Nevada Constitution, but the First and Fourteenth Amendments to the United States Constitution, as well.

37. The Defendants take the position that pursuant to the definitions set forth in Chapter 368A,

Plaintiffs are obligated to pay the Live Entertainment Tax since their establishments fall within the definition of "live entertainment" found in N.R.S. § 368A.090, and since they are not otherwise exempted from having to pay that tax.

38. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is both illegal and unconstitutional, and for those reasons they do not desire to pay those taxes. Nevertheless, under threat of criminal prosecution and/or the imposition of fines and other penalties against them, Plaintiffs have all, beginning at various times, paid the Live Entertainment Tax mandated by Chapter 368A.

39. Plaintiffs have filed this action in order to protect their fundamental constitutional rights from infringement by the enforcement of Chapter 368A, which they contend is unconstitutional on its face as it imposes a tax directly on "live entertainment;" an activity which is protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and Fourteenth to the United States Constitution. Chapter 368A is therefore a direct tax on "First Amendment" freedoms, and in particular on live exotic performance dance entertainment.

40. Plaintiffs have suffered, and will continue to suffer, irreparable harm due to the enforcement of Chapter 368A in that their constitutional rights have been infringed upon, as well as their ability to provide constitutionally protected entertainment.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

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

42. Chapter 368A states, at N.R.S. § 368A.200(1), that "[e]xcept as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided." If the live entertainment is provided at a facility with a maximum occupancy of less than 7,500, the rate of tax is 10% of the admission charge to the facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the facility. If the live entertainment is provided at a facility with a maximum occupancy of

at least 7,500, the rate of the tax is 5% of the admission charged to the facility.

43. Chapter 368A defines an "[a]dmission charge" in N.R.S. § 368A.020 as:

> [T]he total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

44. Chapter 368A defines a "facility" in N.R.S. § 368A.060 as:

> "(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:
>
> > (1) An establishment that is not a licensed gaming establishment; or
> > (2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.
>
> (b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment."

45. "[L]ive entertainment" is defined in § 368A.090 as:

> "[A]ny activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar pupose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present."

This definition includes, among other activities, "[d]ancing performed by one or more professional or amateur dancers."

46. Chapter 368A states, at N.R.S. § 368A.142(2), that the Department shall collect the Live Entertainment Tax from non-gaming licensed taxpayers, such as is the case of the Plaintiffs here, and is empowered to "adopt such regulations are necessary to carry out" that collection.

47. Pursuant to N.R.S. § 368A.200(5), the tax imposed by Chapter 368 is not applicable to a variety of circumstances. Some of the exemptions include live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitution; live entertainment that is not provided at a licensed gaming establishment if the facility has a maximum seating capacity of less than 200; live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games

within those limits, if the facility has a maximum seating capacity of less than 200; merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment; and music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.

48. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S. § 368A.250, which provides that if the Department determines that any tax has been "erroneously or illegally collected or computed," the Department must record the fact and certify the amount owed and from whom it was collected to Defendant Board of Examiners. If the amount is approved by the Board of Examiners, it is then credited on any amount that is due from that person under Chapter 368A, with the balance refunded to that person.

49. Chapter 368A provides, at N.R.S. § 368A.280(1), that "[n]o injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected." Accordingly, Plaintiffs have no ability to seek injunctive relief in state court against collection of the Live Entertainment Tax.

50. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Nevada Tax Commission is authorized to render a final decision upon claims for refunds under that chapter. Further, at N.R.S. § 368A.300(2), Chapter 368A provides that a claim thereunder that is disallowed by the Department may be appealed to the Nevada Tax Commission.

COUNT I - DECLARATORY RELIEF

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

52. Chapter 368A is unconstitutional on its face under Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, for numerous and various reasons, including, but not limited to, the fact that:

a. It effectuates an impermissible prior restraint on speech and expression;

b. It fails to further any important, substantial or compelling governmental interest;

c. It permits restrictions on speech and expression that are greater than are essential to further any asserted governmental interests;

d. It permits restrictions on speech and expression that are not the least restrictive means available;

e. It contains criteria that are both arbitrary and capricious and which are not supported by any legislative record;

f. It contains numerous and various terms and phrases which are impermissibly vague, and ambiguous, and the applicable definitions as contained therein are impermissibly and substantially overbroad judged in relation to their plainly legitimate sweep;

g. It imbues the Defendants with unbridled discretion;

h. It impermissibly singles out constitutionally protected businesses for certain regulations;

i. It violates the substantive due process rights of the Plaintiffs and others;

j. It violates Plaintiffs' equal protection rights in that it unconstitutionally discriminates against expressive businesses based upon the content of speech, and it further creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Nevada, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;

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

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

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

n. It violates the separation of powers doctrine.

53. Because the Live Entertainment Tax is an impermissible and/or unconstitutional direct tax upon expression protected by Article 1, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the United States Constitution, Plaintiffs are not subject to payment of the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

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

55. Because of the questioned constitutionality of the Live Entertainment Tax as required by

Chapter 368A, and because of the potential application of the exemption as contained in N.R.S. § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to these Plaintiffs, Plaintiffs are entitled to a declaration by this Court in regard to the constitutionality of Chapter 368A as well as the applicability of the exemption as contained in N.R.S. § 368A.200(5)(a).

56. For the reasons as set forth above, this Court should declare that the Live Entertainment Tax as mandated by Chapter 368A is unconstitutional on its face. Also for the reasons as set forth above, this Court should declare that Plaintiffs need not pay the Live Entertainment Tax as required by Chapter 368A both as a result of the constitutional violations as enumerated above as well as the specific exemption as set forth in N.R.S. § 368A.200(5)(a). In addition, this Court should declare that the Defendants have violated the constitutional rights of the Plaintiffs by requiring them to have paid the Live Entertainment Tax in the past.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court declare the Live Entertainment Tax under Chapter 368A unconstitutional on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by having required them to have paid the Live Entertainment Tax in the past.

COUNT II - INJUNCTIVE RELIEF

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

58. Any action taken or to be taken by the Defendants to enforce any portion of Chapter 368A against Plaintiffs has been taken and will be taken under color of law, and has deprived and will deprive Plaintiffs of their constitutional rights as set forth herein, and will cause them irreparable harm for which compensatory damages are an inadequate remedy as a matter of law.

59. The threat of enforcement of Chapter 368A is both great and immediate. In addition, Chapter 368A is both flagrantly and patently violative of Plaintiffs' constitutional rights. There is no other remedy at law which would suffice to protect Plaintiffs' interests for the reasons above numerated.

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

61. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims against Chapter 368A, in that it is blatantly and patently unconstitutional. The Defendants will suffer no harm by the entry of such an injunction, as there can be no legitimate governmental interest in enforcing an unconstitutional law. In addition, the "balancing" of the equities tips in favor of the Plaintiffs and in the entry of a preliminary injunction, due to the paramount position of rights afforded under the First Amendment in comparison to the lack of harm occasioned to the Defendants if such an injunction is granted.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter both a preliminary and permanent enjoining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs. Further, Plaintiffs respectfully request that this Honorable Court enter a permanent injunction ordering Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs under Chapter 368A, together with interest as required by N.R.S. § 368A.310.

COUNT III - DAMAGES AGAINST DEFENDANTS

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

63. All of the actions of Defendants, by and through their agents, employees and representatives,

have been undertaken, and will be undertaken, in the course and scope of official duties and under the color of state law.

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

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

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

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

COUNT IV - ATTORNEY FEES AND COSTS

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

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

WHEREFORE, Plaintiffs respectfully request this Honorable Court to award costs and attorney fees incurred herein pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court enter judgment against Defendants, which would include:

A. A declaration that the Live Entertainment Tax under Chapter 368A is unconstitutional on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by having required them to have paid the Live Entertainment Tax in the past;

B. A preliminary and permanent injunction restraining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs;

C. A permanent injunction ordering Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs under Chapter 368A, together with interest as required by N.R.S. § 368A.310;

D. Entry of an award of damages against Defendants and in favor of the Plaintiffs in amounts to which the Plaintiffs are found to be entitled;

E. Entry of an award of costs and attorney fees incurred herein pursuant to 42 U.S.C. § 1988; and,

F. Entry of such other and further relief as the Court deems just and proper.

Dated: December 19, 2006

Respectfully Submitted:

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*Pending Admission *Pro Hac Vice*

Exhibit A

EXHIBIT B

ORIGINAL

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* *Pending Admission Pro Hac Vice*

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CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club;* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden;* SHAC, LLC, d/b/a *Sapphire;* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club;* D. WESTWOOD, INC., d/b/a *Treasures;* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores;*

Plaintiffs,

vs.

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

Defendants.

Case No.: A554970
Dept. No.: IX

COMPLAINT FOR REFUND, PURSUANT TO N.R.S. 368A.290(1)(b) AND N.R.S. 368A.300(3)(b), DECLARATORY RELIEF, INJUNCTIVE RELIEF AND DAMAGES

RECEIVED
JAN 09 2008
CLERK OF THE COURT

NOW COME Plaintiffs K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club*, Olympus Garden, Inc., d/b/a *Olympic Garden*, SHAC, L.L.C., d/b/a *Sapphire*, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*, D. Westwood, Inc., d/b/a

Treasures, and D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (collectively referred to herein as the "Plaintiffs"), by and through their attorneys, and state for their complaint pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b) against Defendant Nevada Department of Taxation, Defendant Nevada Tax Commission, and Defendant Nevada State Board of Examiners (collectively referred to herein as the "Defendants"), as follows:

INTRODUCTION

1. This is a civil action brought pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b), wherein Plaintiffs pray for a refund of the Live Entertainment Tax paid for the tax periods of January, February, March, and April, 2004, as well as for declaratory judgment, injunctive relief, and damages. Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face, and enjoin, the Nevada Tax on Live Entertainment (referred to herein as the "Live Entertainment Tax," or simply the "Tax") as established by Title 32, Chapter 368A, of the Nevada Revised Statutes ("Chapter 368A"), and the regulations promulgated in furtherance thereof, as being an impermissible tax on constitutionally protected expression. A copy of the statute as originally enacted is attached hereto as Exhibit 1, and a copy of the current codified version of Chapter 368A is attached hereto as Exhibit 2, and both are incorporated herein by reference. A copy of the administrative regulations promulgated in furtherance of Chapter 368A is attached hereto as Exhibit 3, and is incorporated herein by reference.

JURISDICTION AND VENUE

2. This Court has jurisdiction and power to grant the refund requested pursuant to N.R.S. 368A.290, as well as jurisdiction and authority to grant the declaratory judgment

prayed for here pursuant to Rule 57 of the Nevada Rules of Civil Procedure and N.R.S. 33.040. Additionally, this Court has jurisdiction and power to grant the injunctive relief requested pursuant to Rule 65 of the Nevada Rules of Civil Procedure and N.R.S. § 33.010.

3. This suit is authorized by law to redress deprivations under color of state law of the rights, privileges, and immunities secured by Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution, as well as the First and Fourteenth Amendments to the United States Constitution, and for declaratory and injunctive relief.

4. Venue resides in this Court and is proper and appropriate as relevant proceeds were conducted, and the Plaintiffs maintain their principal place of business, within Clark County in the State of Nevada, pursuant to N.R.S. 368A.290(2).

PARTIES

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

6. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*") is a corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

7. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*") is a corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

8. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a limited liability company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

9. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club* ("*Crazy Horse*") is a corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

10. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* ("*Treasures*") is a corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

11. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* ("*Scores*") is a corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

12. None of the Plaintiffs operate their facilities as licensed gaming establishments under the laws of the State of Nevada.

13. Defendant Nevada Department of Taxation (hereinafter sometimes referred to simply as the "Department") is a governmental entity created under the laws of the State of Nevada, which administers and enforces the statutory provisions challenged herein, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers. It is a required Defendant in this action pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b).

14. Defendant Nevada Tax Commission (hereinafter sometimes referred to simply as the "Commission") is a governmental entity created under the laws of the State of Nevada, which administers and enforces some of the statutory provisions challenged herein, and is authorized to consider and rule upon, among other things, appeals of claims under Chapter 368A. It is named as a Defendant herein as it rendered the decision which the Plaintiffs challenge by way of this action.

15. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to simply as the "Board of Examiners") is a governmental entity created under the laws of the State of Nevada, and consists of the governor, the secretary of state, and the attorney general. Pursuant to N.R.S. § 368A.250, the Board of Examiners is authorized to approve, among other things, refunds with regard to any erroneously or illegally collected or computed tax under Chapter 368A, which the Plaintiffs seek here.

STATEMENT OF FACTS

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

17. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous exceptions, an excise tax on admission to any facility within the State of Nevada that provides defined "live entertainment."

18. Shortly after the enactment of Chapter 368A, numerous and various administrative regulations were promulgated regarding the administration and enforcement of Chapter 368A. These regulations, which set forth definitions, applicability and methods of calculating the Live Entertainment Tax, and procedures, can be found at NAC 368A.010 through NAC 368.540, and are attached hereto as Exhibit 3. As utilized herein, the phrase "Chapter 368A" encompasses both the statute and these regulations promulgated in furtherance thereof attached as Exhibit 3.

19. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is obligated to collect the tax imposed by Chapter 368A from taxpayers who/which are not licensed gaming establishments, and is also obligated to adopt such regulations as

are necessary to carry out those functions.

20. Upon information and belief, one of the primary purposes for the enactment of Chapter 368A was to impose an excise tax upon those establishments in the State of Nevada that provide live so-called "adult" entertainment in the form of exotic dancing, "topless" dancing, and fully nude performance dance entertainment.

21. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided had a maximum occupancy of less than 300 persons.

22. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which -- among other things -- reduced the scope of the exception as contained in N.R.S. § 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Upon information and belief, the purpose of the July 17, 2005, amendments to Chapter 368A, and in particular those to N.R.S. § 368A.200(5)(d), was to specifically extend the tax obligation as contained in Chapter 368A to "adult" entertainment establishments which were not then subject to the Live Entertainment Tax, including a number of the Plaintiffs in this action. The same amendments changed the language of some provisions of Chapter 368A. Unless stated otherwise, all references herein to the statutory provisions of Chapter 368A are to the current codified version attached hereto as Exhibit 2.

23. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that

Spearmint Rhino is subject to Chapter 368A, as amended, and have required *Spearmint Rhino* to pay the Live Entertainment Tax as mandated therein.

24. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas Boulevard, Las Vegas, Nevada, 89104, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Olympic Garden* is subject to Chapter 368A, as amended, and have required *Olympic Garden* to pay the Live Entertainment Tax as mandated therein.

25. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Sapphire* is subject to Chapter 368A, as amended, and have required *Sapphire* to pay the Live Entertainment Tax as mandated therein.

26. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Crazy Horse* is subject to Chapter 368A, as amended, and have required *Crazy Horse* to pay the Live Entertainment Tax as mandated therein.

27. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Treasures* is subject to Chapter 368A, as amended, and have required *Treasures* to pay the Live Entertainment Tax as mandated therein.

28. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las

Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Scores* is subject to Chapter 368A, as amended, and have required *Scores* to pay the Live Entertainment Tax as mandated therein.

29. All of the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500 persons.

30. The Plaintiffs all present upon their business premises some form of live "exotic" performance dance entertainment. Some of the Plaintiffs present live clothed and "topless" female performance dance entertainment, and others of the Plaintiffs present live clothed, "topless" and fully nude female performance dance entertainment; all of which is non-obscene. The non-obscene performance dance entertainment presented on the establishments operated by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by not only Article I, §§ 9 and 10, of the Nevada Constitution, but by the First and Fourteenth Amendments to the United States Constitution as well.

31. Chapter 368A is a lengthy and complex statute containing numerous and various provisions affecting the constitutionally protected conduct of the Plaintiffs, their agents, representatives, entertainers and employees, as well as those individuals from the consenting adult audience who would seek to view the entertainment provided by the Plaintiffs. Plaintiffs assert the constitutional rights of their patrons as well in this action.

32. The Defendants take the position that pursuant to the definitions set forth in Chapter 368A, Plaintiffs are obligated to pay the Live Entertainment Tax since their

establishments fall within the definition of "live entertainment" found in N.R.S. 368A.090, and since they are not otherwise exempted from having to pay that tax.

33. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is both illegal and unconstitutional, and for those reasons they do not desire to pay those taxes. Nevertheless, under threat of criminal prosecution and/or the imposition of fines and other penalties against them, Plaintiffs have, beginning at various times, paid the Live Entertainment Tax mandated by Chapter 368A.

34. Pursuant to N.R.S. § 368A.260, Plaintiffs each filed timely requests for refunds of the Live Entertainment Tax they had paid, together with claims for the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310.

35. To date, each request for refund has been denied by the Defendant Nevada Department of Taxation, pursuant to a one page letter. Each letter informed the Plaintiffs that the denial may be appealed to Defendant Nevada Tax Commission pursuant to N.R.S. § 360.245 by filing a written notice of appeal with the Defendant Department within thirty days of the service of the denial letter.

36. Each Plaintiff has filed a timely written notice of appeal with the Defendant Department of Taxation. After the Plaintiffs and the Defendant Department had an opportunity to submit briefing to the Defendant Nevada Tax Commission, a hearing was scheduled on July 9, 2007, before the Defendant Commission to hear the appeal of the denials of the requests for refunds of the Live Entertainment Tax paid by the Plaintiffs for the tax periods of January, February, March, and April, 2004.

37. After the hearing commenced on July 9, 2007, the Defendant Commission voted to continue the hearing until August 6, 2007, in order to give the parties an opportunity to

submit supplemental materials and information.

38. The Defendant Commission, after considering the testimony, argument, and materials submitted on July 9, 2007, and on August 6, 2007, issued a written decision denying Plaintiffs' appeals on October 12, 2007. That ruling is attached hereto as Exhibit 4.

39. Pursuant to N.R.S. § 368A.290, "[w]ithin 90 days after a final decision upon a claim filed pursuant to this chapter is rendered" by the Commission, "the claimant may bring an action against the Department on the grounds set forth in the claim." It is pursuant to this provision that Plaintiffs have filed this action.

40. Pursuant to N.R.S. 368A.300(3)(b), if the claimant is aggrieved by the decision of the "Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment."

41. Plaintiffs further filed this action in order to protect their fundamental constitutional rights from infringement by the enforcement of Chapter 368A, which they contend is unconstitutional on its face as it: 1) imposes a tax directly on "live entertainment;" an activity which is protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and Fourteenth to the United States Constitution, therefore constituting a direct tax on "First Amendment" freedoms and in particular on live exotic performance dance entertainment; 2) applies only to a small number and category of speakers; 3) it is in violation of Article 10, §1 of the Nevada Constitution; and 4) it is an impermissible discriminatory tax which discriminates based upon the content of speech and expression. In addition, N.R.S. 368A.200(5)(a) precludes the taxation of

live entertainment that "the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution." Because the Plaintiffs cannot be so taxed under either the United States or Nevada Constitutions, Plaintiffs are exempt from having to pay the Live Entertainment tax pursuant to this exemption. These are the grounds which Plaintiffs set forth in their requests for refunds.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

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

43. Chapter 368A states, at N.R.S. 368A.200(1), that "[e]xcept as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided." If the live entertainment is provided at a facility with a maximum occupancy of less than 7,500, the rate of tax is 10% of the admission charge to the facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the facility. If the live entertainment is provided at a facility with a maximum occupancy of at least 7,500, the rate of the tax is 5% of the admission charged to the facility.

44. Chapter 368A defines an "[a]dmission charge" in N.R.S. 368A.020 as:

> [T]he total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

45. Chapter 368A defines a "facility" in N.R.S. 368A.060 as:

> "(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(1) An establishment that is not a licensed gaming establishment; or
(2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment."

46. "[L]ive entertainment" is defined in N.R.S. § 368A.090 as:

> "[A]ny activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present."

This definition includes, among other activities, "[d]ancing performed by one or more professional or amateur dancers."

47. Chapter 368A states, at N.R.S. § 368A.140(2), that the Defendant Department shall collect the Live Entertainment Tax from non-gaming licensed taxpayers, such as is the case of the Plaintiffs here, and is empowered to "adopt such regulations are necessary to carry out" that collection.

48. N.R.S. § 368A.090(b) specifically excludes certain types of entertainment from the definition of "live entertainment," such as: instrumental or vocal music if it "does not routinely rise to the volume that interferes with casual conversation" and would not "generally cause patrons to watch as well as listen"; occasional performances by employees who have primary job functions other than performing; performances in certain licensed gaming establishments "as long as performers stroll continuously throughout the facility" or if they "enhance the theme of the establishment or attract patrons to the areas of the performances"; entertainment that is provided by patrons; animal behaviors for the purpose of education and scientific research; and occasional dancing which, among other things, "primarily serves to provide ambience to the

facility."

49. Pursuant to N.R.S. 368A.200(5), the tax imposed by Chapter 368 is not applicable to a variety of circumstances. Some of the exemptions include live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitution; live entertainment that is not provided at a licensed gaming establishment if the facility has a maximum seating capacity of less than 200; live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those limits, if the facility has a maximum seating capacity of less than 200; merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment; and music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.

50. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S. 368A.250, which provides that if the Defendant Department determines that any tax has been "erroneously or illegally collected or computed," the Defendant Department must record the fact and certify the amount owed and from whom it was collected to Defendant Board of Examiners. If the amount is approved by the Defendant Board of Examiners, it is then credited on any amount that is due from that person under Chapter 368A, with the balance refunded to that person.

51. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Defendant Nevada Tax Commission is authorized to render a final decision upon claims for refunds under that chapter. Further, at N.R.S. § 368A.300(2), Chapter 368A provides that a claim there

under that is disallowed by the Defendant Department may be appealed to the Defendant Commission.

COUNT I - DECLARATORY RELIEF

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

53. Chapter 368A is unconstitutional on its face under Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, for numerous and various reasons, including, but not limited to, the fact that:

a. It effectuates an impermissible prior restraint on speech and expression;

b. It fails to further any important, substantial or compelling governmental interest;

c. It permits restrictions on speech and expression that are greater than are essential to further any asserted governmental interests;

d. It permits restrictions on speech and expression that are not the least restrictive means available;

e. It contains criteria that are both arbitrary and capricious and which are not supported by any legislative record;

f. It contains numerous and various terms and phrases which are impermissibly vague, and ambiguous, and the applicable definitions as contained therein are impermissibly and substantially overbroad judged in relation to their plainly legitimate sweep;

g. It imbues the Defendants with unbridled discretion;

h. It impermissibly singles out constitutionally protected businesses for certain regulations;

i. It violates the procedural and substantive due process rights of the Plaintiffs and others, including but not limited to the customers and patrons who frequent Plaintiffs' establishments;

j. It violates the privacy rights of the customers and patrons who frequent

Plaintiffs' establishments;

k. It violates Plaintiffs' equal protection rights in that it unconstitutionally discriminates against expressive businesses based upon the content of speech, and it further creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Nevada, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;

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

m. It is a discriminatory tax that only impacts upon a small number and category of speakers;

n. It is an impermissible discriminatory tax that discriminates based upon the content of speech and expression;

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

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

q. It violates the separation of powers doctrine.

54. Because the Live Entertainment Tax is an impermissible and/or unconstitutional tax upon in violation of Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, Plaintiffs are not subject to payment of the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

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

56. Because of the questioned constitutionality of the Live Entertainment Tax as required by

Chapter 368A, and because of the potential application of the exemption as contained in N.R.S. § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to these Plaintiffs, Plaintiffs are entitled to a declaration by this Court in regard to the

constitutionality of Chapter 368A as well as the applicability of the exemption as contained in N.R.S. § 368A.200(5)(a).

57. For the reasons as set forth above, this Court should declare that the Live Entertainment Tax as mandated by Chapter 368A is unconstitutional on its face. Also for the reasons as set forth above, this Court should declare that Plaintiffs need not pay the Live Entertainment Tax as required by Chapter 368A both as a result of the constitutional violations as enumerated above as well as the specific exemption as set forth in N.R.S. § 368A.200(5)(a). In addition, this Court should declare that the Defendants have violated the constitutional rights of the Plaintiffs by requiring them to have paid the Live Entertainment Tax for the tax period of January 2004 through April 2004, which are at issue in this action.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court declare the Live Entertainment Tax under Chapter 368A unconstitutional on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by having required them to have paid the Live Entertainment Tax for the tax period of January 2004 through April 2004, which are at issue in this action.

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. . .

COUNT II - REQUEST FOR REFUND

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

59. Plaintiffs should not have been required to pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

60. Both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax Commission erred in not granting Plaintiffs' requests for refunds.

61. This Court has the power to grant Plaintiffs' requests for refunds pursuant to N.R.S. § 368A.290 and N.R.S. § 368A.300, and should do so here.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court vacate the decisions of both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax Commission, and enter an order directing Defendant Nevada Department of Taxation to refund the Live Entertainment Taxes paid by the Plaintiffs for the tax periods of January, February, March and April, 2004, and to pay the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310. Further, Plaintiffs respectfully request that this Honorable Court enter an order requiring Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs during those periods and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs during

those periods under Chapter 368A, together with interest as required by N.R.S. § 368A.270 and § 368A.310.

COUNT III - INJUNCTIVE RELIEF

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

63. Any action taken or to be taken by the Defendants to enforce any portion of Chapter 368A against Plaintiffs has been taken and will be taken under color of law, and has deprived and will deprive Plaintiffs of their constitutional rights as set forth herein, and will cause them irreparable harm for which compensatory damages are an inadequate remedy as a matter of law.

64. The threat of enforcement of Chapter 368A is both great and immediate. In addition, Chapter 368A is both flagrantly and patently violative of Plaintiffs' constitutional rights. There is no other remedy at law which would suffice to protect Plaintiffs' interests for the reasons above numerated.

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

66. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims against Chapter 368A, in that it is blatantly and patently unconstitutional. The Defendants will suffer no harm by the entry of such an injunction, as there can be no legitimate governmental interest in enforcing an unconstitutional law. In addition, the "balancing" of the equities tips in favor of the Plaintiffs and in the entry of a preliminary injunction, due to the paramount position of rights afforded under the First Amendment in comparison to the lack of harm occasioned to the Defendants if such an

injunction is granted.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter both a preliminary and permanent enjoining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs. Further, Plaintiffs respectfully request that this Honorable Court enter a permanent injunction ordering Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs for the tax periods of January, February, March and April 2004, and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments
that have been involuntarily made by the Plaintiffs under Chapter 368A during those periods, together with interest as required by N.R.S. § 368A.270 and § 368A.310.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court enter judgment against Defendants, which would include:

A. A declaration that the Live Entertainment Tax under Chapter 368A is unconstitutional on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by having required them

to have paid the Live Entertainment Tax in the past;

B. A preliminary and permanent injunction restraining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs;

C. Entry of an order vacating the determinations of the Nevada Department of Taxation and the Defendant Nevada Tax Commission denying Plaintiffs' requests for refunds;

D. Entry of an order directing Defendant Nevada Department of Taxation to refund the Live Entertainment Taxes paid by the Plaintiffs for the tax periods of January, February, March and April 2004, together with the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310;

E. A permanent injunction requiring Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs during those tax periods and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs under Chapter 368A during those tax periods, together with interest as required by N.R.S. § 368A.270 and § 368A.310; and

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F. Entry of such other and further relief as the Court deems just and proper.

DATED this 9th day of January, 2008.

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*Pending Admission *Pro Hac Vice*