IN THE SUPREME COURT FOR STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Supreme Court Case No. 59752

District Court Case No. A658870

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CHAIR MCGINNESS:
We will close the hearing on S.B. 127 and open the hearing on S.B. 247.

SENATE BILL 247: Revises provisions governing tax on live entertainment. (BDR 32-680)

SENATOR TITUS:
After two Special Sessions, many late nights, a lot of political battles, some Supreme Court decisions and some pretty messy compromises, we came up with a tax package that was quickly found to be full of problems. One of those problems was with the entertainment tax, which turned out to be a bookkeeping nightmare. It also failed to generate the anticipated revenue, and it did not adequately bring in a group some of us intended to be included, namely, the striptease clubs which have proliferated in southern Nevada. For those reasons, I introduce a reform for the entertainment tax, which is what is before you today in S.B. 247. Since I was one of the ones who pushed to include the striptease clubs, I felt some obligation to try to clean up the mess made in that last bill.

I have handed out an amendment, which is, in effect, a rewrite of S.B. 247 (Exhibit H, original is on file at the Research Library). I have also handed out a packet of letters in support of the new entertainment tax (Exhibit I). These letters come from people who produce sporting events, which will be excluded from the entertainment tax under the new bill, as I will explain. There are letters from the Las Vegas 51's baseball team, Las Vegas Motor Speedway, Wranglers hockey team and Feld Entertainment, Incorporated, which sponsors circuses.

Under the new bill, you will virtually take the old entertainment tax and divide it into two parts, or, two taxes. We will call one live entertainment and the other, adult entertainment. We will go over the details of the live-entertainment tax first, which is a continuation of the old tax, but with some revisions. The live-entertainment tax would apply only to nonrestricted gaming facilities, and would be administered by the Gaming Control Board. Sporting events that occur in gaming facilities would be exempt, but the bill would leave in place the 10-percent charge on admissions, drink, food, and souvenirs. This would eliminate the seating requirement and eliminate any facilities other than gaming facilities with nonrestricted licenses.

Senator Titus:
The second part of the bill deals with the adult-entertainment tax, which is defined in section 11. It would charge the same 10 percent on everything; drinks, admissions and souvenirs, in nonrestricted gaming and in non-gaming facilities that provide adult entertainment. It would be administered by the Department of Taxation and would include houses of prostitution.

This new approach is better than the old live-entertainment tax for several reasons. It eliminates the seating requirements which were problematic in the old bill. It also eliminates sporting events, which are family-oriented and have a lot of local attendance. Having this exemption will help us get a second National Association for Stock Car Auto Racing, Incorporated, (NASCAR) race, which everybody seems to love, as well as a professional baseball team in Las Vegas. It also eliminates taverns and restaurants, which often have weekend entertainment. It will provide a better way of capturing adult live entertainment, which is an industry that puts additional burdens on our society, and therefore, is justified in being taxed. One of those burdens is more need for law enforcement because of the activities often surrounding the neighborhoods in these areas. Also, these facilities do not provide any kind of workmens' compensation or benefits, so the people who work in them often become a burden on the State. Any loss in revenue that might occur from eliminating sporting events, which were only charged 5 percent on admission anyway, will be more than made up for in an increase in revenue from adult entertainment.

GEORGE W. TREAT FLINT (Nevada Brothel Owners Association):
Before the 2003 Session, I was approached with the question of whether the brothels would be willing to be included in the live-entertainment tax. We have always been willing to participate, and through the last Session, and right up to the end, in S.B. No. 8 of the 20th Special Session, we felt we were included in the bill. There was a concern, at that time, about what would happen with the small venues that only had live entertainment on Friday and Saturday nights consisting of, maybe, an accordion or guitar player. The result was to create a 300-seat threshold, which effectively not only exempted my client, but probably about 90 percent of those other venues Senator Titus has addressed here today.

We had made plans all through last Session to institute an admissions fee into the brothel live-entertainment area. It was not our intention to be exempted. As a matter of fact, we were surprised by it. During the interim, a couple of

Legislators asked if we would fulfill the agreement we had made before, and we said we would. We are the only sex-related business in the State that has been up front and forward and asked to be included in the tax. As we were willing before, we are willing again.

The section in which the proposed amendment includes us is at the top of page 31 of Exhibit H. There will be an admission fee created, not for those persons coming in to have a drink or buy a souvenir, but for those who come into the bedroom area. Additionally, we will start charging a 10-percent excise fee on our bars, souvenirs and restaurants. Restaurants are becoming fairly common in some of the brothels. I sat down a couple days ago and tried to figure what fiscal advantage this would have for the State, and I came up with a figure of $1,640,000. It turned out to be close to the figure estimated by the Department of Taxation, which was $1,600,000. Much of that, of course, depends on how good business is. Business continues to be better in southern Nevada than it is in the northern part of the State.

We are anxious to participate for several reasons. One of those is ultimately, possibly next Session, we may come back and ask you to give us some benefits we do not have now, such as limited advertising. I hope this will send a message to those other sexually oriented businesses, particularly in southern Nevada, it is time to come on board and pay their fair share.

Additionally, we are appearing tomorrow before the Assembly with a similar bill, which only includes us and does not expand, as this bill does, into other areas. It is Assembly Bill (A.B.) 317 and is completely contained within the lines to which I alluded on page 31 of the amendment proposed by Senator Titus.

ASSEMBLY BILL 317: Provides for imposition of tax on live entertainment provided by all houses of prostitution. (BDR 32-926)

SENATOR CARE:
What are your motives for wanting to be included in this tax?

MR. FLINT:
I would be less than honest if I did not say we feel the State will become used to our contribution and, maybe, even look forward to it. Then, when someone comes along and says it is time to take a look at continuing to keep us legal,

you may be the first to point out that we are not creating any problems for the State and are contributing quite a bit.

SENATOR TITUS:
In the past, there has been some discussion whether limiting adult entertainment would be contrary to the First Amendment of the U.S. Constitution. The First Amendment is not an absolute freedom. It has been interpreted to exclude certain things, and I believe you could make a good argument that adult entertainment puts a special kind of burden on the State, which justifies its being taxed in this way. Also, there is a severability clause in the bill that says if the American Civil Liberties Union (ACLU), or somebody decides to challenge this tax on adult entertainment, and it is found to be unconstitutional, we would just go back to the old tax.

H. NORTH SWANSON, (Naturist Action Committee):
The language in S.B. 247 is disturbing to the Naturist Action Committee, particularly section 10. Live adult entertainment means "any activity provided for pleasure, enjoyment, recreation, relaxation, diversion," et cetera. That language would adversely affect a legitimate business like a naturist resort, which is a family-oriented resort and in no way resembles adult entertainment. Body parts do show in these places, but every effort is made to make it nonsexual. That language needs to be changed.

SENATOR TITUS:
The bill was not intended to get at family nudist colonies.

SENATOR LEE:
If this were my bill, I would probably outlaw brothels, but I understand you are leaving them in to make money off of them. How much revenue do you think this is going to generate?

SENATOR TITUS:
The calculations made last Session were tremendous. It was $75.4 million in fiscal year 2005. This is a huge business in southern Nevada, and they make a lot of money, mostly from tourists. This tax would be paid mostly by tourists, and not so much by local people. Because they are enjoying the climate of our State, it just seems appropriate for them to be paying their share. The new theme for Las Vegas of "What happens in Las Vegas, stays in Las Vegas," promotes even more of this kind of activity.

SENATOR LEE:
This money would go into the State General Fund. Is that correct?

SENATOR TITUS:
Yes.

SENATOR LEE:
We mentioned the responsibility lies at the local level to maintain and correct the problems and challenges this industry creates. Would it not be best for the money to stay at the local level, where these activities are managed rather than the State benefiting?

SENATOR TITUS:
At the local level, they do have specialized licenses. We do not have specialized licenses at the State level for these facilities. I would point out to you, while the local law enforcement would be involved, it is a burden on State services when it comes to lack of unemployment benefits and lack of health care. All of those are provided for by State social services, not local.

SENATOR LEE:
I know this bill is very important, but it seems like we are selectively going after a group or a business. No matter what business it is, I have a challenge with understanding that type of activity.

TAYLOR DEW: (National Hula Girls)
As you recall, the live-entertainment tax last Session was meant only to tax adult entertainment, but unintentionally affected us Hula Girls, Elvis impersonators, jugglers, singers, bands and virtually every type of entertainer. Obviously, the wording will need to be changed. There have been some compromises proposed by the Nevada Gaming Control Board, the State Gaming Commission and the Department of Taxation, but those were shot down.

If both of these bills are passed, S.B. 247 and A.B. 317, they would be very contradictory, which also worries me. Senate Bill 247 would be far superior because it defines adult entertainment as A.B. 317 does not. Senate Bill 247 taxes only a facility where live adult entertainment is provided and removes the tax on all other forms of live entertainment. This bill cleans up the language and, legislatively, makes a clear distinction between entertainment and adult

entertainment. This is absolutely vital to solving this serious and seemingly endless problem.

On page 1 of S.B. 247, lines 9 through 12 clearly state that if this were to go to judiciary, it is not clear whether the courts would require uniformity on appealing the tax. Also, it is difficult to tell if it goes to the courts, if live entertainers would even have a means to fight the expensive court battles. Entertainers would really like "adult entertainers" and "entertainers" to be defined. The State has an ample surplus of money, and I am not looking forward to any more taxes, but if a bill does pass, I would be in favor of S.B. 247.

ALLEN LICHTENSTEIN (General Counsel, American Civil Liberties Union of Nevada): I am here to speak against S.B. 247. We at the ACLU have a great deal of respect for the hard work and the contributions of Senator Titus. However, in this particular case, this bill is way off base from a constitutional standpoint. She mentioned if it is challenged and if it is declared unconstitutional, it would revert back to the existing situation. Clearly, it will be challenged, and it will be declared unconstitutional. The courts, including the U.S. Supreme Court, have made it very clear we are dealing with First Amendment-protected activities. These adult businesses, such as strip clubs and the like, are clearly involved in First Amendment-protected activity. You cannot single them out, based on content, for special treatment in terms of taxes. One of the Committee members asked how much revenue this would generate, and the figure was $75.4 million. This is not revenue neutral. Its purpose, as testimony suggests, is to generate revenue for the State. You justify it by saying dancers do not have workmens' compensation or health care. You cannot justify it on that basis unless you treat all businesses not providing workers' compensation or health care in the same way. You cannot single out a business to generate revenue because you do not like it. This is not a new issue. It may be new in this State, but there is considerable case law when it comes to First Amendment issues.

Section 29 of S.B. 247 says this cannot be challenged in court. Again, there is case law that says you have laws that burden First Amendment rights. Federal courts have jurisdiction to look at the constitutionality of those particular laws and enjoin, temporarily and permanently, provisions that do violate the U.S. Constitution. Certainly, businesses involved in adult entertainment can be part of the general tax. However, that is not what we have here. This specifies these businesses on the basis of content and, frankly, that just will not fly.

SENATOR COFFIN:
You may be right in your assertion there will be some challenge. If we were to designate these businesses as a privileged business like we do with the gaming business, would your same constitutional protest apply?

MR. LICHTENSTEIN:
There are two points to make. One is unless there is some privileged activity, such as gaming or the sale of alcohol, these cannot be privileged businesses because you have a right to First Amendment activity. The court cases are quite clear. Gaming is an activity the State could choose to ban completely. Gaming is not a right. Alcohol sales and prostitution could also be banned by the State under Amendment XXI of the U.S. Constitution. On the other hand, erotic dance cannot be banned completely. If the Legislature were to say we do not want erotic dance any more, or we do not like it, so we are going to ban it, it would be unconstitutional because erotic dance is a right and not a privilege. There can be regulation of those businesses, but they cannot be banned and, therefore, cannot be considered privileged.

SENATOR TITUS:
I see this as a regulation and not a ban, so I think what you are saying is rather contradictory. I know local governments have special-privilege licenses or special-privilege charges and those seem to have stood. I am a strong supporter of the First Amendment, but there are exceptions to the First Amendment. Obscenity is not protected by the First Amendment, nor is sedition, subversion or fighting words. It is not an absolute right. It is subject to interpretation and, I think, in a case like this, we can interpret it in such a way to be able to deal with certain burdens these types of businesses put on the State. If this Committee is worried about constitutionality, I hope you would at least use this bill to clean up some of the problems with regard to entertainers like the Hula Girls, the sporting activities and those types of things.

MR. LICHTENSTEIN:
On the local level, there are business-license fees, as there are for all businesses. They have to be revenue neutral in the sense they cannot unduly burden any particular types of businesses. There may be a yearly fee of a few hundred dollars, but it is not the $75.4-million kind of cash cow being suggested here as a way of gaining revenue from particular businessas.

Your second point, regarding the First Amendment not being absolute, is true, but we are not talking about activities or businesses or expressions that are obscene, or fighting words or something else illegal. We are talking about licensed, legal businesses offering constitutionally protected expression. The U.S. Supreme Court has said we are dealing with the First Amendment, and you cannot unduly tax expression based on the content. That is exactly what is being offered here.

SENATOR TITUS:
I will just remind this Committee, this is not an undue tax or a different tax. This will be applied the exact same way as the live-entertainment tax in the nonrestricted-gaming areas. It is the same 10-percent tax and not some special higher tax that is an extra burden. It is the same one being applied to other businesses.

SENATOR LEE:
Would it be possible, if the State did not want proliferation of this type of business but also realizes it is here, for the State to then charge a fee? In other words, could the State say, "If you are going to be in this type of business, there will be a $250,000 fee for you to be in business in the State of Nevada?"

MR. LICHTENSTEIN:
No. Legal businesses can be regulated in terms of separation requirements, or in terms of not having density, but you cannot tax them or put extra fees on businesses because you do not like the content. That is the U.S. Constitution, and it is the same Constitution that protects your, my and everyone's right to speak.

SENATOR CARE:
Two years ago, we levied a tax on banks. Banks were distinguished in two ways. There is an additional payroll tax as well as a branch tax. Those do not apply to any other industry in the State. Yet, there is no First Amendment implication. It only applies to the banks. Is it your position what we did with banks is okay because it does not involve the First Amendment expression, but we may not do it with the establishments set forth in part of this bill?

MR. LICHTENSTEIN:
It is not my position. As a lawyer yourself, you know we follow case law, and the case law is pretty clear on this. For example, say the State Legislature

decides it wants to go after the newspapers, for whatever reason, and levy an extra tax on newsprint, which was an actual case in Minnesota. The court said it could not be done because of the First Amendment. So, yes, it is different when you have constitutionally protected expression as opposed to other types of businesses. I am not going to suggest whether what you do with banking is right or wrong. I have not looked at that, but again, I do know, very clearly, in the First Amendment area, that cannot be done.

SENATOR TITUS:
I appreciate the argument for newsprint. I think there is a difference between newsprint and striptease clubs, and the court has made that kind of distinction in some of its rulings over the years. This is worth doing, and it is worth taking a chance in court. It would probably go to federal court, but maybe also to the State Supreme Court. I cannot see the Nevada Supreme Court turning over this kind of tax.

TERRY GRAVES (The Beach):
As Senator Townsend can attest, we spent a lot of time during the interim working on the regulatory process with both the tax and gaming commissions. We applied what Senator Titus is trying to do here, though I have not seen the proposed amendment. I would like to ask the maker of the bill if issues like disc jockeys, celebrity disc jockeys, singing song-leader waiters and waitresses have been addressed in the bill.

SENATOR TITUS:
Yes, that would be my intent.

MR. GRAVES:
In that case, we would support S.B. 247.

BOB WILLIAMS:
I am a local entertainer who plays the piano and sings. However, since this original tax was passed in 2003, I have been prohibited from singing because singing is classified as entertainment. Entertainers in a regular casino, such as the place I work, are considered taxable. Is that correct?

SENATOR TITUS:
Yes, entertainment in casinos would still be covered by the entertainment tax.

MR. WILLIAMS:
Am I correct in saying the entertainment tax is not affected by this amendment?

SENATOR TITUS:
It depends on where you sing. If you are singing in the showroom of a casino, you would still be covered by this tax. If you are singing in a restaurant or a lounge, you would not be covered.

MR. WILLIAMS:
What about an entertainer in a lounge, or in an area adjacent to, or heard by people playing slot machines? There is a lot of gray area here.

SENATOR TITUS:
Yes, I know. This is a very difficult bill to work out.

MR. NEILANDER:
The existing law was patterned, somewhat, after the old casino-entertainment tax. Conceptually, under the old tax there was no distinction made between areas where there is an admission charge and those where there is not. In Mr. Williams' example, if it was a free area, it did not matter under the old law. The tax was applicable whether there was an admission fee or not. If I understand what Senator Titus is suggesting, she is proposing to amend it so the tax would only be applicable in a nonrestricted casino environment if there was an admission fee to get into that particular venue. What you are talking about are principally showrooms and ticketed events, but not necessarily lounges, where people can come for free. If that is what her intention was, it would address that situation.

MR. WILLIAMS:
This I can understand. The differentiation between a ticketed event and a non-ticketed event is clear for most of the casinos to understand. Entertainment is the lifeblood of Las Vegas, not gambling. People can gamble in their living rooms on the Internet. They come to Las Vegas to get good entertainment. Entertainment in open, non-ticketed lounges and entertainment in dining rooms is what vintage Las Vegas was all about.

NORMAN KAYE (Poet Laureate of Nevada):
I serve Nevada as its poet laureate. I was with the Mary Kaye Trio since we came here in 1947. We were the first entertainers in the lounge at the Frontier

Hotel. The tax on entertainers in the lounges is not correct. There is a different variation of talent within every person who works in the lounge. A 10-percent tax on entertainment, which in a sense is passive, is wrong.

SENATOR TITUS:
I love live music, too. As a matter of fact, I am a member of the Jazz Society. I want to be sure we understand what is happening here. There has been an entertainment tax for many years on all entertainment in casinos, including the lounges. It was originally a federal tax called the rooftop-cabaret tax. Congress repealed it, and the State picked it up in 1961. Then, last Session, there was some tinkering done to it. What I am trying to do now is not to impose a new tax, but clean up an old tax and take it away from some of the places where it used to apply. I want to be sure everyone understands this is not a new 10-percent tax on entertainment that would bring in the non-showroom aspects of entertainment. It is just the opposite.

CHAIR MCGINNESS:
We will close the hearing on S.B. 247 and open the hearing on S.B. 388.

SENATE BILL 388: Revises provisions governing applicability of requirements for state business license and certain taxes on businesses. (BDR 32-821)

MS. VILARDO:
By nature of whom we represent and the issues with which we are involved, we followed S.B. No. 8 of the 20th Special Session through the process and through all of the hearings as was indicated on the earlier bill. Our members kept calling about different issues. One of the most interesting issues was the fact everybody realized it was to be a tax on business. However, there was never a definition of a business in the bill. In S.B. 392, heard earlier today, you accommodated one of the issues that arose, which was a health-care provider. Two different cases were specified. In one case was an invalid, and the other case was a woman who had full-time medical care for her mother. These were people who hired and paid employment security on the wages they paid because they were full-time employees of the person. Both of them had to pay over $700 in payroll tax. They were not providing a service, but were consuming a service.

We found the same issue where a couple both worked and they had children. Because the children were young, the couple employed a sitter for enough hours

MINUTES OF THE
SENATE COMMITTEE ON TAXATION

Seventy-third Session
June 5, 2005

The Senate Committee on Taxation was called to order by Chair Mike McGinness at 2:05 p.m. on Sunday, June 5, 2005, in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:
Senator Mike McGinness, Chair
Senator Sandra J. Tiffany, Vice Chair
Senator Randolph J. Townsend
Senator Dean A. Rhoads
Senator Bob Coffin
Senator Terry Care
Senator John Lee

GUEST LEGISLATORS PRESENT:
Assemblyman David R. Parks, Assembly District No. 41

STAFF MEMBERS PRESENT:
Chris Janzen, Deputy Fiscal Analyst
Ardyss Johns, Committee Secretary
Tanya Morrison, Committee Secretary

OTHERS PRESENT:
Anthony F. Sanchez, Las Vegas Motor Speedway
George W. Treat Flint, Nevada Brothel Owners Association
Charles Chinnock, Executive Director, Department of Taxation
William Bible, Nevada Resort Association

CHAIR MCGINNESS:
We will open the hearing on Assembly Bill (A.B.) 554. The bill has not been officially received and we are unable to take a motion on it, but we will take testimony and hold a Committee meeting on the Senate Floor to consider a motion.

ASSEMBLY BILL 554 (2nd Reprint): Makes various changes to provisions governing taxation. (BDR 32-1344)

ANTHONY F. SANCHEZ (Las Vegas Motor Speedway):
You have before you an issue previously heard by this Committee. It was Senator Titus's bill, Senate Bill (S.B.) 247.

SENATE BILL 247 (1st Reprint): Revises provisions governing tax on live entertainment. (BDR 32-680)

MR. SANCHEZ:
Due to the lack of progress on S.B. 247, we have been working to add a provision in A.B. 554. This was passed out of the Assembly this morning.

The bottom of Page 6 has an exemption regarding the National Association for Stock Car Auto Racing (NASCAR). The way it is currently written indicates if there are two or more races in a calendar year, the second race is exempt. The concern on the part of the Las Vegas Motor Speedway is due to an administrative inefficiency. The track sells its tickets all at the same time, so the Speedway would have to tax all races except the second one.

We have worked with and spoken to leadership in the Assembly as well as the Senate and are proposing an amendment (Exhibit C) which would delete the second race exemption and propose both races be exempt for the next biennium. The first race that would impact would probably be a March 2008 race.

CHAIR MCGINNESS:
Will this take effect July 2007?

MR. SANCHEZ:
It would take effect now, but they would not avail themselves of this until March 2008. I am not sure if it would affect a race in the fall of 2007.

SENATOR RHOADS:
How much would the fiscal impact be on this State?

MR. SANCHEZ:
The money raised in March 2005 was between $1.5 million and $1.8 million. In Exhibit C, the race had a 20-percent jump in economic impact in the southern Nevada economy, even over last year. It is approximately $167million. In 2004, it was $143 million, so it is continuing to grow. That is why we are hoping to send a loud signal to NASCAR that Las Vegas deserves a second car race.

SENATOR RHOADS:
What would the fiscal impact be on this State?

MR. SANCHEZ:
It would be between $1.5 million and $1.9 million.

SENATOR RHOADS:
Do they generate $167 million?

MR. SANCHEZ:
That is correct.

SENATOR RHOADS:
Are most NASCAR racetracks throughout the country exempt?

MR. SANCHEZ:
California and Arizona do not have live entertainment taxes. Those are the markets we compete against.

SENATOR RHOADS:
Do other states impose entertainment taxes like this one?

MR. SANCHEZ:
Some of them do. I believe Tennessee does. I am trying to remember when this issue was before you in the last Session. That was when the 5 percent was first imposed. Tennessee and South Carolina had entertainment taxes at that time. The only way to get a second NASCAR race is through Bruton Smith, the owner of the Las Vegas Motor Speedway. He owns several tracks around the country. The only way to get another race in Las Vegas is for him to buy another facility which has an existing race and bring that race to Las Vegas. That is a $200-million-plus investment because there are so few.

SENATOR COFFIN:
Does this bill contain anything about the topless clubs?

MR. SANCHEZ:
Assembly Bill 554 does have live entertainment aspects, but more to entertainment places inside casinos.

SENATOR COFFIN:
Does A.B. 554 include everything but the topless clubs?

MR. SANCHEZ:
There was a lot more in S.B. 247 not contained in A.B. 554 which is much more streamlined and condensed. It has less information than S.B. 247.

SENATOR COFFIN:
Where are the topless clubs in this bill?

GEORGE W. TREAT FLINT (Nevada Brothel Owners Association):
I have an intimate relationship with this bill and its verbiage since the last Session. On page 6 of A.B. 554, the topless clubs would be covered under lines 1 through 3, unless they have an occupancy capacity of less than 300. The major men's cabarets are covered under that section. I have been told by the Department of Taxation that the major places create approximately $7 million a year. Most of the smaller clubs could probably be brought into A.B. 554 if you amend the section to read a total occupancy of 200 rather than 300. To protect my client, I do not want you to bring the occupancy number down too much lower than 200 or you will have my clients back in this tax law.

SENATOR COFFIN:
It is my understanding that some of the topless clubs get out of being taxed by removing a few seats. We should consider the possibility of reducing the seating capacity so these highly profitable, legitimate businesses could help pay their share of the budget. Has there been any discussion about that?

ASSEMBLYMAN DAVID R. PARKS (Assembly District No. 41):
Assembly Bill 554 was heard in the Assembly Committee on Commerce and Labor. As far as specific numbers and discussion on the number of seats, I am not sure there was any detailed discussion on that issue.

CHAIR MCGINNESS:
Is the Assembly agreeable to proposed changes by NASCAR representatives?

MR. PARKS:
I have not had a full briefing on what they are proposing. In general, I am aware there has been a request for a change on that part of the bill.

CHAIR MCGINNESS:
Mr. Sanchez, will there be no fiscal impact if we make the effective date July 1, 2007?

MR. SANCHEZ:
We are fine with that date. We would not be prepared to have that race by that time anyway.

SENATOR RHOADS:
Mr. Sanchez, does this bill have any affect on the National Finals Rodeo?

MR. SANCHEZ:
No, it does not. The National Finals Rodeo is held on the university property.

SENATOR CARE:
How will this bill affect the Nextel Cup Series? Do they have a long-term contract for the spring race?

MR. SANCHEZ:
The contract is with Bruton Smith, owner of the raceway and NASCAR.

SENATOR CARE:
How long does that contract run?

MR. SANCHEZ:
They are currently in negotiations for that contract. I am not sure about the length of the contract, but I can get that information for you.

SENATOR CARE:
In negotiations for the second race, are you at liberty to discuss whether the subject of the tax impact of an entertainment tax has come up in these negotiations? Is anybody posturing about having a second race?

MR. SANCHEZ:
Mr. Smith owns five tracks around the country, and if he gets the rights to another race, he could put it in California, Arizona or wherever. He is looking for the best economic portfolio for him to place it in. This bill is a sign the State of Nevada wants another race.

SENATOR COFFIN:
I would like to ask Charles Chinnock from the Tax Department a few questions on this legislation. Mr. Chinnock, what happened after the last Session with regard to the men's cabarets?

CHARLES CHINNOCK (Executive Director, Department of Taxation):
Many jurisdictions, whether fire marshals or the building code departments that oversee these facilities, found increased safety concerns with the 300-seating capacity. From the building and safety officials' standpoint, they would much rather see less occupancy than greater occupancy. If you had 300 or greater seating capacity, they were willing to adjust that seating capacity from the standpoint it was a safer venue to reduce that capacity. It became an easy issue for them to reduce the seating capacity.

SENATOR COFFIN:
Are you saying they reduced the seating number to avoid the tax in the interest of safety?

MR. CHINNOCK:
Yes, it was in the interest of safety.

SENATOR COFFIN:
If we changed the language to lower the amount, would we unintentionally include entities we do not want to tax?

MR. CHINNOCK:
I do not know how to answer that. We did not do a study of a breaking point below the 300-seating capacity. The other bills were all or nothing with respect to adult entertainment.

SENATOR COFFIN:
If we are going to take action on A.B. 554 on the Senate Floor, would it be possible to amend it at that time to lower the 300-seat capacity to 200?

WILLIAM BIBLE (Nevada Resort Association):
I really cannot assist you with this issue because the taxes would apply to venues associated with gaming. The seating capacity in A.B. 554 is for areas not on gaming premises.

SENATOR TOWNSEND:
With regard to the 300 seating and the budget, the lower we make it, the more revenue we would generate as opposed to having an effect on them. There should be no fiscal note. My limited knowledge of this corresponds with Senator Coffin. This puts our Department of Taxation and the auditors in a tough situation. We have to remember, at the end of the day, we have those individuals who will be responsible for implementing this law. Senator Coffin's proposal meets the original intent of what this Committee and the Assembly debated. Obviously, we do not want to create a problem for Mr. Flint's clients. That was never the issue.

MR. FLINT:
This is not official, but I spoke with someone in the Department of Taxation, and I do not have Mr. Chinnock's permission to say this on the record. I was told if you brought this number down to 200, you may pick up those who are avoiding or evading this at the moment. I have been in enough of these places to know there are very few with less than 200 seats. There is a wide area you would pick up at 200, and you will still keep me harmless at that number.

SENATOR LEE:
I would like to go on record saying we have a $1-billion machine called the Speedway. We seem to be doing quite well because of this. I am not for the second taxation; though in talking with Mr. Sanchez, it has no merit now. In the future I am going to work to see that does not happen, and we continue to work toward removing that law and enticing these individuals to come to our community for the next race. I would be supportive of Bruton Smith bringing that other race to us, and I will do what I can to see it gets here.

CHAIR MCGINNESS:
Mr. Sanchez, please come forward and clarify your proposed amendment which would take effect July 1, 2007, and remove the tax from the Speedway. Am I correct in saying that?

MR. SANCHEZ:
Yes, that is correct. Some of the language would be used, but it would just indicate the beginning to be July 1, 2007. This would clarify NASCAR races in Nevada would be exempt. It does not necessarily have to be Las Vegas Motor Speedway; although, that is the only facility we currently have to accommodate this type of race. The speedways understand they have the drag racing championships there also, and this would not apply to them.

SENATOR TOWNSEND:
I did not understand the issue of the date. The proposal would be in effect July 1, 2007, for the removal of the tax. Then it would be the intention of the Speedway to have both races after that so neither one would be affected. Is that my understanding?

MR. SANCHEZ:
That is correct, Senator Townsend.

CHAIR MCGINNESS:
We will close the hearing on A.B. 554. The Senate Committee on Taxation is adjourned at 2:27 p.m.

RESPECTFULLY SUBMITTED:

Tanya Morrison,
Committee Secretary

APPROVED BY:

Senator Mike McGinness, Chair

DATE:

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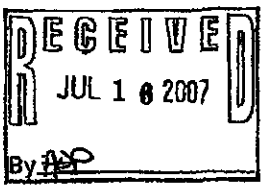
STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, JULY 9, 2007

CARSON CITY AND LAS VEGAS, NEVADA



THE BOARD:	THOMAS SHEETS, Chairman HANK VOGLER, Member JOHN MARVEL, Member JOAN LAMBERT, Member ROBERT BARENGO, Member GEORGE KELESIS, Member ANN BERSI, Member
FOR THE DEPARTMENT:	DINO DiCIANNO Executive Director TOM SUMMERS Deputy Executive Director CHRISTOPHER NIELSEN Deputy Executive Director ERIN FIERRO Management Assistant
FOR THE BOARD:	JENNIFER CRANDALL Senior Deputy Attorney General
REPORTED BY:	CAPITOL REPORTERS BY: MARY E. CAMERON, RPR, CP Nevada CCR #98 410 East John Street, Ste. A Carson City, Nevada, 89706 (775) 882-5322

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facility where live entertainment is provided, and the Department maintains that the LET is a generally applicable content neutral tax that presents no danger of suppressing particular ideas.

As such, the LET is subject to a rational basis review and passes constitutional muster because it's a reasonable means of raising revenue.

It's also important to mention NAC 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 the 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.

With that, the Department has nothing further.

MR. SHAFER: Thank you, Mr. Chairman and Members of the Commission. I guess I want to go back in regard to something that you said at the very end when you were talking to me about possibly supplementing the record, and I would just like to go through very briefly what we had discussed off the record a few moments ago, and that is the fact that Mr. Pope and I were having a discussion at approximately 3:30 eastern time Friday afternoon in regard to whether the Commission had in front of it the original version of the statute because the current version is different, the

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STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, AUGUST 6, 2007

CARSON CITY AND LAS VEGAS, NEVADA

THE BOARD:	THOMAS SHEETS, Chairman HANK VOGLER, Member JOHN MARVEL, Member JOAN LAMBERT, Member DAVID TURNER, Member ROBERT BARENGO, Member GEORGE KELESIS, Member ANN BERSI, Member
FOR THE DEPARTMENT:	DINO DiCIANNO Executive Director CHRISTOPHER NIELSEN Deputy Executive Director ERIN FIERRO Management Assistant
FOR THE BOARD:	JENNIFER CRANDALL Senior Deputy Attorney General
REPORTED BY:	CAPITOL REPORTERS BY: MARY E. CAMERON, RPR, CP Nevada CCR #98 410 East John Street, Ste. A Carson City, Nevada, 89706 (775) 882-5322

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the taxes back to the people who paid them. I actually intended to address that first but they have not raised that in this presentation, so am I to assume that I do not have to address that?

MR. POPE: 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.

CHAIRMAN SHEETS: You ought to go ahead and address that, then.

MR. SHAFER: Thank you, Mr. Chairman. I think we are basically in the position where this NAC has never been utilized before because I think these are the first appeals of the live entertainment tax, and as I read this and all the NACs, all regulations are in our materials as I see it, it only applies when there is a determination of an over collection, number one, and I think what we're here to determine is whether we're entitled to a refund as opposed to what happens with that refund.

And to the extent that a refund is ordered, a

reversal is ordered by this Commission, I think we can address that issue, it would be appropriate to address that issue at that time if the Department still took that position.

However, in an effort just to make sure that I had an appropriate record, what I did and I gave this to Mr. Belcourt this morning, I have prepared affidavits on behalf of four of the clients in the time period that we had for the taxpayers, in the time period we had that talks about the fact that the tax is taken out of the receipts of the business for the admissions which, depending upon the way the tax operates and the definition of admission, also includes merchandise, food and refreshments.

Now, I guess what the Commission, I'm sorry, what 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 anytime where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

What the affidavits say is 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.

Now, irrespective of the fact that I don't believe this NAC even applies in these proceedings, you can take that representation of me as a matter of fact. I can submit the affidavits or I can put on one or two witnesses to talk about that, and I'd defer to the Commission how they want to handle that.

MR. POPE: May I respond?

CHAIRMAN SHEETS: All right.

MR. POPE: First of all, I would object even if it's just for the record to the extent that we just got these affidavits today and I'd object to the affidavits as well as any testimony.

CHAIRMAN SHEETS: Just to cut this short, we're going to accept counsel's representations with respect to the matter. That will solve the issue of the affidavits. We don't need testimony from the witnesses today.

And if as a result of the Commission's action this were to become an issue, we can come back another time and we can talk about this, even whether it's applicable or not. So let's not get caught up in a side issue. Let's talk about what we're really here to talk about this morning.

MR. POPE: So further comments should be reserved for another time on that issue?

CHAIRMAN SHEETS: That's right. If this becomes

way with --

MEMBER BARENGO: We're not regulating the dancers here.

MR. SHAFER: No, I understand, but your tax isn't on the dancers either. We have to pay the tax. We're the ones paying the tax.

MEMBER BARENGO: You collect the tax.

MR. SHAFER: I think we're paying the tax.

MEMBER BARENGO: You collect it from the person that seeks admission.

MR. SHAFER: Well, you can go through those gymnastics, but the charges as I pointed out at the very introduction of my presentation, we have not increased any of our fees in order to collect that tax. That tax is coming out of what would be the profits of the establishments.

MR. POPE: Chairman Sheets, may I make a quick comment to that?

CHAIRMAN SHEETS: Sure. Go ahead.

MR. POPE: 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.

MR. SHAFER: And because of our size we're also paying it on food, beverage and merchandise as well, and like I said at the beginning of my presentation, I'm sure you have not been in a store in your entire life where someone asked you your name or address to buyy a Coca-Cola, nor do I believe you've ever for the purchase of a Coca-Cola gotten a segregated tax bill for it.

CHAIRMAN SHEETS: Commissioner Bersi.

MEMBER BERSI: Mr. Shafer, I wasn't going to ask this question, but you are relying on legislative history a lot to make your points in your argument, and I notice in your Minneapolis Star case, the United States Supreme Court said we don't want to, and it's not our intent to, infringe on the motives of the Minnesota legislature because the illicit intent, and I think I'm getting this pretty close, the illicit intent of the legislature is not the sine qua non of a violation of the first amendment, so what do you make of that?

MR. SHAFER: Right, but respectfully I believe

problem with the legislature expanding their tax base.

In light of all that, reading the cases, the portions that I read from the cases, as well as reading the portions of the briefs I referred to, I would move that, I hope I get this correct here, I would move that we deny the refund claims; isn't that correct?

It would be a motion to deny the taxpayers' claim for refund.

CHAIRMAN SHEETS: It's a motion to deny the taxpayers' appeal of the Hearing Officer's decision or the Department's denial, I'm sorry.

MEMBER KELESIS: It would be a motion to uphold the Department's denial of the taxpayers' claims of refund.

CHAIRMAN SHEETS: There's a motion to uphold the Department's denial of the taxpayers' refund. Is there a second?

MEMBER LAMBERT: Second.

CHAIRMAN SHEETS: There's a motion and a second. Any discussion?

MEMBER TURNER: Mr. Chair, I would put one additional comment on the record. 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.

Even though we didn't deal with this really in any depth during the course of our discussions with the Attorney General's office or the taxpayers' counsel, I 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.

CHAIRMAN SHEETS: There's a motion and a second. Further discussion? I guess before we vote, I just want to say a couple things and I'll let Commissioner Barengo speak too.

The Commission appreciates the depth of the materials that were provided to it and we appreciate the arguments you've made today. This is the first time since I've been on the Commission that I believe the Commission finds itself as a defendant in a lawsuit already filed attacking the same law that we are being asked to now administratively decipher.

Not that that has made any difference to the Chairman or I think to any other Commissioner, but it is a unique situation to be put into, to be a named defendant in a lawsuit and then after the fact be asked to make a determination about the underlying law.

There might have been a different way to do this,

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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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:

---

[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

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 part 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,

[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.

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,
CATHERINE CORTEZ MASTO
Nevada Attorney General

By: [signature] Deputy for NV BAR #1876

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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,

CATHERINE CORTEZ MASTO NV Dr #8704
Nevada Attorney General

By: [signature] for
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Deputy Attorney General
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Attorneys for Nevada Department of Taxation, the Nevada Tax Commission, and the Nevada Board of Examiners

BEFORE THE NEVADA TAX COMMISSION

IN RE:

OLYMPUS GARDEN, INC., D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C., , D. WESTWOOD, INC., K-KEL, INC., THE POWER COMPANY, INC.,

Appellants.

AFFIDAVIT OF KEVIN KELLY

Kevin Kelly, being first duly sworn, deposes and says:

1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal knowledge.

2. I am the President of K-Kel, Inc., doing business as *Spearmint Rhino Gentlemen's Club*, located at 3344 S. Highland Avenue, Las Vegas, Nevada, 89109.

3. Since the Live Entertainment Tax was imposed upon K-Kel, Inc., in 2004, it has not raised its admission charge, or its costs for food, refreshments or merchandise, in amounts equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live Entertainment Taxes owed on such charges/purchases. In addition, K-Kel, Inc., has never assessed, and the customers of K-Kel, Inc., have never paid, an "add on" fee, whether segregated or not, for admission charges, food, refreshments and merchandise, in order to account for the Live Entertainment Taxes owed on such charges/purchases.

4. K-Kel, Inc., pays the Live Entertainment Tax by simply determining the amount of revenues for taxable admission charges, food, refreshments and merchandise, and remitting the appropriate statutory percentage of those charges/purchases to the Nevada Tax Department. As such, the Live Entertainment Taxes that have been paid by K-Kel, Inc., have come out of the revenues that the club would have otherwise realized, have reduced the profits of the club commensurately, and do not represent some sort of additional charge to the customer

as a separate fee for the amount of the Live Entertainment Tax due. Consequently, any refund of the Live Entertainment Taxes that have been paid to date are owed exclusively to K-Kel, Inc., and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: July 27, 2007

Kevin Kelly

Subscribed and sworn to before me this 27 day of July, 2007.

Notary Public, Clark County, Nevada
My commission expires 1-13-11

NOTARY PUBLIC
M. KELLEY MURPHY
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. JANUARY 13, 2011
No: 94-0478-1

BEFORE THE NEVADA TAX COMMISSION

IN RE:

OLYMPUS GARDEN, INC., D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C., , D. WESTWOOD, INC., K-KEL, INC., THE POWER COMPANY, INC.,

Appellants.

AFFIDAVIT OF PETER FEINSTEIN

Peter Feinstein, being first duly sworn, deposes and says:

1. I am an adult resident of the State of California, and I make this affidavit based upon personal knowledge.

2. I am the Managing Member of SHAC, LLC, doing business as *Sapphire*, located at 3025 Industrial Road, Las Vegas, Nevada, 89109.

3. Since the Live Entertainment Tax was imposed upon SHAC, LLC, in 2004, it has not raised its admission charge, or its costs for food, beverage or merchandise, in amounts equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live Entertainment Taxes owed on such charges/purchases. SHAC, LLC has, however, raised the prices on such charges/purchases in amounts equivalent to its competitors in the Las Vegas area, but this increase was not based on the Live Entertainment Tax. In addition, SHAC, LLC, has never assessed, and the customers of SHAC, LLC, have never paid, an "add on" fee, whether segregated or not, for admission charges, food, refreshments and merchandise, in order to account for the Live Entertainment Taxes owed on such charges/purchases.

4. SHAC, LLC, pays the Live Entertainment Tax by simply determining the amount of revenues for taxable admission charges, food, refreshments and merchandise, and remitting the appropriate statutory percentage of those charges/purchases to the Nevada Tax Department. As such, the Live Entertainment Taxes that have been paid by SHAC, LLC, have come out of the revenues that the club would have otherwise realized, have reduced the profits of the club commensurately, and do not represent some sort of additional charge to the customer as a separate fee for the amount of the Live Entertainment Tax due. Consequently, any

refund of the Live Entertainment Taxes that have been paid to date are owed exclusively to SHAC, LLC, and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: ~~August~~ July 31, 2007

Peter Feinstein

Subscribed and sworn to before me this 1 day of August, 2007.

Notary Public, Clark County, Nevada
My commission expires May 9, 2009

DAVID STARRETT
Notary Public, State of Nevada
Appointment No. 97-3473-1
My Appt. Expires May 9, 2009

BEFORE THE NEVADA TAX COMMISSION

IN RE:

OLYMPUS GARDEN, INC., D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C., , D. WESTWOOD, INC., K-KEL, INC., THE POWER COMPANY, INC.,

Appellants.

AFFIDAVIT OF ALSON LEE

Alson Lee, being first duly sworn, deposes and says:

1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal knowledge.

2. I am the General Manager of D. Westwood, Inc., doing business as *Treasures*, located at 2801 Westwood, Las Vegas, Nevada, 89109.

3. Since the Live Entertainment Tax was imposed upon D. Westwood, Inc., in 2004, it has not raised its admission charge, or its costs for food, refreshments or merchandise, in amounts equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live Entertainment Taxes owed on such charges/purchases. In addition, D. Westwood, Inc., has never assessed, and the customers of D. Westwood, Inc., have never paid, an "add on" fee, whether segregated or not, for admission charges, food, refreshments and merchandise, in order to account for the Live Entertainment Taxes owed on such charges/purchases.

4. D. Westwood, Inc., pays the Live Entertainment Tax by simply determining the amount of revenues for taxable admission charges, food, refreshments and merchandise, and remitting the appropriate statutory percentage of those charges/purchases to the Nevada Tax Department. As such, the Live Entertainment Taxes that have been paid by D. Westwood, Inc., have come out of the revenues that the club would have otherwise realized, have reduced the profits of the club commensurately, and do not represent some sort of additional charge to the customer as a separate fee for the amount of the Live Entertainment Tax due. Consequently, any refund of the Live Entertainment Taxes that have been paid to date are owed exclusively to D. Westwood, Inc., and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: July ___, 2007

Alson Lee

Subscribed and sworn to before me this 26th day of July, 2007.

Derek M. Nero

Notary Public, Clark County, Nevada
My commission expires 4/28/2009

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
DEREK M. NERO
No: 05-96555-1
My Appointment Expires April 28, 2009

BEFORE THE NEVADA TAX COMMISSION

IN RE:

OLYMPUS GARDEN, INC., D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C., , D. WESTWOOD, INC., K-KEL, INC., THE POWER COMPANY, INC.,

Appellants.

AFFIDAVIT OF DOLORES ELIADES

Dolores Eliades, being first duly sworn, deposes and says:

1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal knowledge.

2. I am the General Manager of Olympus Garden, Inc., doing business as *Olympic Garden*, located at 1531 S. Las Vegas Boulevard, Las Vegas, Nevada, 89104.

3. Since the Live Entertainment Tax was imposed upon Olympus Garden, Inc., in 2004, it has not raised its admission charge, or its costs for food, refreshments or merchandise, in amounts equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live Entertainment Taxes owed on such charges/purchases. In addition, Olympus Garden, Inc., has never assessed, and the customers of Olympus Garden, Inc., have never paid, an "add on" fee, whether segregated or not, for admission charges, food, refreshments and merchandise, in order to account for the Live Entertainment Taxes owed on such charges/purchases.

4. Olympus Garden, Inc., pays the Live Entertainment Tax by simply determining the amount of revenues for taxable admission charges, food, refreshments and merchandise, and remitting the appropriate statutory percentage of those charges/purchases to the Nevada Tax Department. As such, the Live Entertainment Taxes that have been paid by Olympus Garden, Inc., have come out of the revenues that the club would have otherwise realized, have reduced the profits of the club commensurately, and do not represent some sort of additional charge to the customer as a separate fee for the amount of the Live Entertainment Tax due. Consequently, any refund of the Live Entertainment Taxes that have been paid to date are owed exclusively to Olympus Garden, Inc., and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

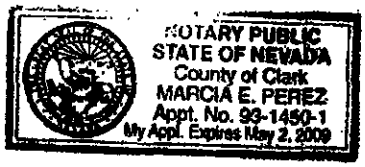
Dated: July 31, 2007

Dolores Eliades

Subscribed and sworn to before me this 30 day of July, 2007.

Marcia E Perez

Notary Public, Clark County, Nevada
My commission expires May 2, 2009



DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

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

THURSDAY, DECEMBER 9, 2010

APPEARANCES:

FOR THE PLAINTIFFS:	WILLIAM H. BROWN, ESQ. 330 S. Third St., Ste. 860 Las Vegas, NV 89101 BRADLEY J. SHAFER, ESQ. 3800 Capitol City Blvd, Ste. 2 Lansing, MI 48906
FOR DEPT. OF TAXATION:	VIVIENNE RAKOWSKY, ESQ. BLAKE DOERR, ESQ. DAVID J. POPE, ESQ. Attorney General's Office 555 E. Washington Ave., #3900 Las Vegas, NV 89101

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Through Wikileaks.

MS. RAKOWSKY: May I please respond?

THE COURT: Yes.

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

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

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

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

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

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

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

THE COURT: Have you done discovery on that?

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

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

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

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

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

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

THE COURT: So was that argued?

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

the wall or did they not?

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

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

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

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

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

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

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

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

THE COURT: Well -- I have --

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

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

MR. DOERR: Well --

THE COURT: Anyway.

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

THE COURT: But let me just --

MR. DOERR: Okay.

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

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

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

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

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

MR. DOERR: Well --

THE COURT: -- of the ticket --

MR. DOERR: Well, Your Honor --

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

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

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

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

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

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

MR. SHAFER: And -- and --

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

MR. SHAFER: I don't think so.

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

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

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

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

MR. DOERR: I understand.

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

MR. SHAFER: Just like every other state.

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

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

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

MS. RAKOWSKY: Right.

THE COURT: -- who paid or not.

MS. RAKOWSKY: Because -- because the statute -- and that's what --

THE COURT: Or maybe it does. Does it?

MR. SHAFER: Unless you can't enjoin it.

THE COURT: How many -- how many tax -- how many tax law -- how many -- how many states have collected tax on something that's been later declared unconstitutional and that the -- the state said, you know, we know it wasn't -- it wasn't supposed to be your money so we're not giving it back to you, we'll have an abandoned property fund or a -- you know, we'll -- I mean, how -- how -- has that ever happened --

MR. POPE: Your Honor --

THE COURT: -- in the history of ever and -- and how was it managed?

MR. POPE: I don't have statistics, but it goes to who has the right to request the refund. So in -- in the sales and used tax context, the incidents of the tax is ultimately on the consumer, but the retailer has the burden to collect and remit the tax. And so if -- if the retailer has collected the tax, then they have to show that they've given it back to the customer before they can request the refund.

In this case, you know, I don't know that it's been so clearly decided with the LET. I don't know that it's ever

gone there.

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

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

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

MR. SHAFER: Your Honor --

MR. DOERR: It comes from the customer.

MR. SHAFER: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DOERR: -- their first amendment activity.

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

MR. SHAFER: Yes.

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

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

MR. SHAFER: Yes.

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

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

MR. DOERR: We agree.

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

MR. DOERR: Is that relevant?

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

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

MR. SHAFER: And our affidavits --

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

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

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

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

THE COURT: Okay. Are you --

MR. DOERR: We've said enough.

MR. POPE: Thank you, Your Honor.

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

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

MS. RAKOWSKY: Yes.

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

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

MS. RAKOWSKY: There was a chart --

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	October 20, 2011

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

October 20, 2011 **1:15 PM** **Request of Court**

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

COURT CLERK: Billie Jo Craig

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
	Attorney
Doerr, Blake A.	Attorney
Ferrario, Mark E., ESQ	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney

JOURNAL ENTRIES

- All parties appeared telephonically.

Colloquy regarding extension of time to respond to the Cross-Judgment and reply by Mr. Hoffer. Upon inquiry of counsel, Court advised it would not move the Calendar Call or the Trial start date due to the 5 year rule deadline. Court noted counsel could stipulate to extend the 5 year rule. Counsel advised it would work out a schedule between themselves. COURT ORDERED, all future dates STAND.

Electronically Filed
11/01/2011 03:24:01 PM

CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

ORDER

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. . .

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*; Plaintiffs, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

ORDER

DEFENDANTS' RE-NOTICED 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 DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

The Court having first requested that Defendants' motion for partial summary judgment and motion to dismiss be re-noticed and having considered the papers and pleadings regarding the re-noticed motion and the motion to compel, as well as the oral argument presented by all parties, hereby orders:

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

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 is granted in part and denied in part.

With regard to Defendants' motion to dismiss and/or motion for partial summary judgment in Case #08A554970 ("Case 2"), this Court finds that the Defendants timely raised the question regarding the procedural posture of the case and based on the Nevada Supreme Court's decision in *Southern California Edison*, 127 Nev.Adv.Op. 22 (2011) all claims are dismissed and Case 2 shall proceed as a petition for judicial review pursuant to Chapter 233B of the NRS. The Court having tolled the statute of limitations for thirty (30) days to allow Plaintiffs thirty (30) days to file a petition for judicial review, Plaintiffs shall have thirty (30) days from August 23, 2011 to file a petition for judicial review pursuant to NRS 233B.130, *et seq.*

With regard to Defendants' motion to dismiss and/or for partial summary judgment in Case #06A533273 ("Case 1"), the motion is granted and all other claims including the "as applied" challenge, the refund claims and the official capacity claim against Michelle Jacobs are dismissed and Case 1 shall proceed as a facial challenge for declaratory relief only. Briefs are to be filed within thirty (30) days.

With regard to Defendants' motion to dismiss and/or for partial summary judgment regarding all 42 U.S.C. §1983 damages claims, the motion is granted and all such damages claims are dismissed from Case 1 and Case 2.

With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied.

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

With regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.

IT IS SO ORDERED.

DATED this 27th day of October, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Senior Deputy Attorney General

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

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CLERK OF THE COURT

NEOJ
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
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Las Vegas, NV 89101

DISTRICT COURT

CLARK COUNTY, NEVADA

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

NOTICE OF ENTRY OF ORDER

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. . .

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*; Plaintiffs, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order was entered on 27th day of October, 2011, and e-filed on the 1st day of November, 2011, a copy of which is attached hereto.

DATED this 2nd day of November, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

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

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 2nd day of November, 2011, I served the **NOTICE OF ENTRY OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
Law Offices of William H. Brown, Ltd.
6029 S. Ft. Apache Rd.
Las Vegas, NV 89148
Attorneys for Plaintiffs

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

Mark E. Ferrario, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N.
Las Vegas, NV 89169
Attorneys for Shac LLC, dba Sapphire (only)

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

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

ORDR
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar No. 009001
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Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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. . .

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*; Plaintiffs, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

ORDER

DEFENDANTS' RE-NOTICED 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 DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

The Court having first requested that Defendants' motion for partial summary judgment and motion to dismiss be re-noticed and having considered the papers and pleadings regarding the re-noticed motion and the motion to compel, as well as the oral argument presented by all parties, hereby orders:

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. . .

. . .

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

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 is granted in part and denied in part.

With regard to Defendants' motion to dismiss and/or motion for partial summary judgment in Case #08A554970 ("Case 2"), this Court finds that the Defendants timely raised the question regarding the procedural posture of the case and based on the Nevada Supreme Court's decision in *Southern California Edison,* 127 Nev.Adv.Op. 22 (2011) all claims are dismissed and Case 2 shall proceed as a petition for judicial review pursuant to Chapter 233B of the NRS. The Court having tolled the statute of limitations for thirty (30) days to allow Plaintiffs thirty (30) days to file a petition for judicial review, Plaintiffs shall have thirty (30) days from August 23, 2011 to file a petition for judicial review pursuant to NRS 233B.130, *et seq.*

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With regard to Defendants' motion to dismiss and/or for partial summary judgment regarding all 42 U.S.C. §1983 damages claims, the motion is granted and all such damages claims are dismissed from Case 1 and Case 2.

With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied.

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

With regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.

IT IS SO ORDERED.

DATED this 27th day of October, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Senior Deputy Attorney General

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	November 08, 2011

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

November 08, 2011 **9:00 AM** **All Pending Motions**

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

COURT CLERK: Billie Jo Craig

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

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

JOURNAL ENTRIES

- PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON FACIAL CHALLENGE, FOR PERMANENT INJUNCTION, AND FOR RETURN OF TAXES...MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON FACIAL CHALLENGE, FOR PERMANENT INJUNCTION AND FOR RETURN OF TAXES...PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON FACIAL CHALLENGE, FOR PERMANENT INJUNCTION, AND FOR RETURN OF TAXES

Court ADMONISHED counsel that there was a new local rule limiting pleadings to 30 pages.

AS TO TWO MOTIONS FOR SUMMARY JUDGMENT: Arguments by counsel. Court stated its findings, and ORDERED, live entertainment content was neutral and not unconstitutional. Mr. Shafer inquired if the Calendar Call date was vacated. Court noted counsel to go to Carson City. The facial challenge was resolved and there were no remaining issues to try. COURT ORDERED, Trial date is VACATED.

AS TO PLTFS' MOTION TO STRIKE: COURT ORDERED, Motion to Strike is DENIED.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	November 08, 2011

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

November 08, 2011 **9:00 AM** **Motion to Strike**

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

COURT CLERK: Billie Jo Craig

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

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

JOURNAL ENTRIES

- Mark Ferrario also present.

Arguments by counsel. Court stated its findings, and ORDERED, Plaintiffs' Motion to Strike is DENIED. Trial date is VACATED. See further Minutes on this date under Case No. A533273.

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CLERK OF THE COURT

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TUESDAY, NOVEMBER 8, 2011

APPEARANCES:

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

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

LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 8, 2011, 10:56 A.M.

(Court was called to order)

THE COURT: If I could go to the live entertainment tax issues.

All right. You guys are the reason that I'm grumpy, your case in particular. Do you know that there is a local rule that your briefs cannot be longer than 30 pages.

MR. SHAFER: I do know now.

THE COURT: Gosh, Judge, we're really sorry.

MR. SHAFER: I apologize profusely. It happened to me once in the North Carolina Court of Appeals. The rule was passed three days before my appeal brief was filed.

THE COURT: Well, one of the judges that I mentioned this to suggested I just strike your brief. I'm not doing it.

MR. SHAFER: Thank you.

THE COURT: I'm scolding you.

All right.

MR. SHAFER: So scolded.

THE COURT: Who wants to go first on the variety of issues? And does anybody really want to argue the motions to strike?

MR. SHAFER: No.

THE COURT: Okay. They're both denied.

MR. SHAFER: Thank you, Your Honor.

THE COURT: Could you all identify yourselves for

purposes of the record.

MR. SHAFER: Bradley Shafer appearing pro hac vice on behalf of the plaintiffs.

MR. BROWN: William Brown, local counsel for plaintiffs, except Shac LLC.

MR. FERRARIO: Mark Ferrario appearing on behalf of Shac LLC only.

MR. DOERR: Blake Doerr from the Attorney General's Office on behalf of the Department of Taxation.

MR. POPE: Good morning, Your Honor. David Pope also with the AG's Office on behalf of the defendants.

MS. RAKOWSKY: Good morning, Your Honor. Vivienne Rakowsky also with the AG's Office on behalf of the Department of Taxation.

THE COURT: Good morning. You can all be seated, except Mr. Shafer.

(Off-record colloquy - Court and Mr. Ferrario)

THE COURT: All right. It's your motion.

MR. SHAFER: Your Honor, we've briefed these issues on multiple occasions to Your Honor. Your Honor has a ton of briefing on not only our motion that you ordered, but they then filed their cross-motion. A lot of duplication there. Are there any specific areas you would like me to cover? Because I really do not -- I'm assuming you've read everything, because you've scolded me for the length of my

brief, and I do not plan on being very long at all. And I'd really like to -- I've flown in all this way, I'd like to address any specific concerns you may have or questions you may have, Your Honor.

THE COURT: Can you discuss with me your Footnote Number 2 in your reply brief -- no, in your opposition to the defendant's motion for summary judgment. Page 10, Footnote Number 2.

MR. SHAFER: Footnote 2?

THE COURT: Uh-huh. It reads, "Currently plaintiffs are entitled to and do challenge," but the note I wrote with quotation marks is primarily, "which will then take us back to the exclusions for -- or exceptions from the statute."

MR. SHAFER: Okay. Hold on. If I could just take a minute to read it.

THE COURT: Sure.

(Pause in the proceedings)

MR. SHAFER: Sure. What this refers to, Your Honor, is the fact that they have made an argument that your analysis is subject to intermediate scrutiny, as opposed to strict scrutiny of all the U.S. Supreme Court cases that we've cited to Your Honor.

THE COURT: Because nude dancing has the lowest of First Amendment protections of all the forms of entertainment, according to Professor Tominski [phonetic]?

MR. SHAFER: Well, no, I wouldn't -- I wouldn't classify it that way. But the fact remains, Your Honor, you've limited this now to a facial challenge.

THE COURT: I have.

MR. SHAFER: We're not here -- and there are additional payees for not adult entertainment, and therefore the Court can't impose a lower level of scrutiny on a facial challenge, because the Court isn't look at my client -- my clients --

THE COURT: Okay.

MR. SHAFER: -- in regard to adult entertainment.

THE COURT: That's correct. So can I ask you how you -- what you mean when you use the term in this particular footnote, "'Collateral damage,'" in quotation marks, "payors."

MR. SHAFER: The non-adult payors.

THE COURT: So all of the other groups that fall within the ambit of paying the live entertainment tax.

MR. SHAFER: Yes. That are not --

THE COURT: I just wanted to make sure that I understood that.

MR. SHAFER: Correct, that are not adult entertainment.

THE COURT: And those begin, at least for purposes o your brief, I believe, on like page 26 is where the list of exemptions or exceptions --

MR. SHAFER: Well, it would be everybody who isn't those.

THE COURT: Right.

MR. SHAFER: Correct.

THE COURT: Correct.

MR. SHAFER: Yes.

THE COURT: I was trying to say the exemptions or the exclusions.

MR. SHAFER: Yes, Your Honor.

THE COURT: Right. Okay. I just wanted to try and work that through real quick to make sure I understood what you were saying in there.

MR. SHAFER: Appreciate that. Your Honor, just very --

THE COURT: So clearly I have read your brief.

MR. SHAFER: Thank you. Very briefly, Your Honor, under U.S. Supreme Court precedent there are three ways that a tax can be violative of the First Amendment if it directly taxes First Amendment expression. Here this one does. It specifically taxes live entertainment. Going way back to 1966, the United States Supreme Court in Shad versus Borough of Mt. Efram, they say that live entertainment is constitutionally protected. We've even cited Scripps versus -- or Zichini versus Scripps Howard, Your Honor, that says that human cannonball activities are First Amendment

entertainment. We've cited Winters versus New York that says that entertainment is constitutionally protected. This is a direct tax on First Amendment activity, and therefore is not a general, content-neutral tax. This is not the general sales tax of the State of Nevada. Had we been challenging the general sales tax of the State of Nevada, that law would come with a presumption of constitutionality, and the burden would be on us to prove it to be unconstitutional. This is a direct tax on First Amendment activity, is presumed unconstitutional, and it is subject to strict scrutiny.

Now, Your Honor, I would always -- I would also point out, as we have in our briefing, in addition to the U.S. Supreme Court precedent on this, the very recent comments of the Nevada Supreme Court in the Serras [phonetic], when the Nevada Supreme Court said, once it becomes content specific we really probably don't even need to go with the strict scrutiny, it just is per se unconstitutional. Now, they did not resolve that issue in that case, because they said no one raised that. But we do point that out a footnote, that that would be an alternative approach for this Court to take.

The third way -- and I'll get back to the second in a moment, but the third way a tax can be unconstitutional, Your Honor, if it is content based. And we have pointed out in elaborate detail, Your Honor, the various exceptions and exemptions that are content based. Not all of them are, but

many of them are, NASCAR, minor league baseball, boxing, which becomes very important, Your Honor, as to whether that's content based because of the satellite TV case that we've cited, Your Honor, where in that particular case there was a specific tax on boxing contests, and that -- I believe it was a Federal Court in California, that court said because that was a content-based tax that was unconstitutional.

Interestingly, here it's just the opposite, but it still makes the tax content based, because the administrators of the tax, the Department of Taxation, would have to determine whether or not something is subject to an exemption or exception based upon knowing what the content of the expression is. We've talked about the -- you know, the dog shows, the food, the food demonstrations, all of that. There are probably 12 of the exemption exceptions that are specifically content based and therefore it is violative of the First Amendment for that additional reason. And there is no level of scrutiny in regard to that. If it's a content-based tax, it is unconstitutional.

The third -- or, I'm sorry, the second way that a tax can be unconstitutional is if it targets a narrow area of taxpayers. And, Your Honor, setting aside everything we've done in discovery, setting aside your personal calculations that pointed out that my clients were paid 82 percent of this tax, setting all that aside because of the issues on

discovery, and so we didn't submit any of that. All we did --

THE COURT: Right. Because we're looking at a facial challenge now.

MR. SHAFER: That's right. And so we didn't submit any of that. But a facial challenge can look at the legislative history, because the legislative history always informs what the statute is. And so --

THE COURT: If it's ambiguous.

MR. SHAFER: Pardon me?

THE COURT: If it's ambiguous.

MR. SHAFER: I don't agree with that, Your Honor --

THE COURT: Okay.

MR. SHAFER: -- because if you take a look at what the United States Supreme Court said in Minneapolis Star, they said -- and there wasn't any allegation there that that tax was ambiguous. The question was how many of the, you know, the people did it, you know, rely on. And they said, had there been legislative history we would have looked at this. And, Your Honor, the legislative history -- we've cited it in elaborate detail. The legislative history clearly shows that the exact purpose of this tax was the tax the gentlemen's clubs and in fact they specifically noted in 2005, when they come up with the, quote, "family oriented" exemption of NASCAR and they exempt out baseball, as well, and they reduce the seating capacity because they want to make sure that the --

more of the gentlemen's clubs are captured, because the intent of the tax was to capture them all, and the original version of the tax in 2003 didn't do that. And that's all acknowledged in the legislative history.

And, Your Honor, for all three of those reasons -- like I say, there are three basic reasons under the Federal Constitution, there's the additional basis under Serras, for all those reasons we contend the tax is blatantly facially unconstitutional.

Your Honor, that then begs the question, you know, what happens. We've cited not only our reliance on Scotsman Manufacturing, but the fact that -- and, Your Honor, this is on pages 49 and 50, and I won't go over this again, of our original motion and brief, way beyond the page limit, but hopefully you went on there, as well. The Court will recall --

THE COURT: I read your whole brief, even though it was beyond the page limit.

MR. SHAFER: Thank you. I've been in front of judges that say, you know, the page limit's this and I'll stop reading. And I know you didn't do that.

THE COURT: I thought about it.

MR. SHAFER: I had a judge based on a page limit -- a very lengthy brief I filed one time in Nashville, Tennessee, who called me a puddin' head. And he said, who's the puddin'

head -- he didn't know me, this was my first appearance in front of him, he said, who's the puddin' head who filed the 178-page brief. So -- but he ruled in my favor.

So, Your Honor, what we point out here, as this Court will recall, at your suggestion I refiled our motion for preliminary injunction, and at that hearing this whole issue of whether we are the remitter or the tax -- or whether the customers were the remitter and whether we had the ability under the statute and the regulations to get the tax because recalling they had gone forward and had changed their story in regard to whether we could get the tax back or whether we had to give it directly back to the customers and only the customers had standing. Your Honor, this is the quote from their opposition to our renewed motion for summary -- I'm sorry, for preliminary injunction where they point out in exhaustive detail their concession that the NAC does not apply and therefore we get the tax back.

And, Your Honor, we not only have cited Scotsman Manufacturing, but, Your Honor, you will see that they've cited Scotsman Manufacturing. And this is at the top of page 50 of their block quote -- of the block quote from their brief. They cited Scotsman Manufacturing, and they cited the McKesson case, as well, and, you know, the language directly from the courts, that the State takes the position that the taxpayer should pay the tax and then challenge the tax

statute, and the taxpayer prevails because the tax is inherent unconstitutional, the due process clause in the Fourteenth Amendment requires the State to refund the tax already paid. This is what they said. You know, this is their conceptualization of this, and this is, of course, what they argue to the Federal District Court in order to get my original lawsuit dismissed so that we could then proceed on this plain, speedy and efficient remedy in State Court, which were are now three weeks away from the five-year rule -- but be that as --

THE COURT: I've only had your case for about nine months.

MR. SHAFER: I know that. I know that. And I'm not saying anything different. But it's been a long road, Your Honor, to get here. There aren't any questions of fact. They have made this concession. We are entitled to the return of the tax not only under Scotsman Manufacturing and McKesson, but the live entertainment tax statute, as well. The live entertainment tax statute says that we can get interest on the return, and that's what we ask Your Honor. We ask the Court to, A, declare it unconstitutional facially; B, enjoin the State from enforcing it against my clients; C, return the tax; and, D, granting us interest on the return of the tax. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Ferrario, is there anything you want to add?

MR. FERRARIO: Just very briefly. And I've been in front of you enough to know that when you ask a question it kind of highlights where you're leaning. I can understand why you may not want to look at the legislative history, because I think it would be troubling to Your Honor if you're really going to give this matter a fair shake. And when you're -- it's difficult in these tough economic times to handle these tax cases. We were all musing outside that everybody needs revenue, and we're coming in and trying to say, hey, we need to shut off a source of revenue. But we bring to this Court very serious arguments. And you may not like the fact that adult entertainment is protected by the First Amendment, but that decision --

THE COURT: No, it is. It keeps me busy in Business Court.

MR. FERRARIO: Well, that decision's already been made, and I agree with Mr. Shafer. I think they did an excellent job on the briefing on this, and we didn't add to it because we didn't want to burden the record any further. But it is protected, and these are serious claims. And when you look at the statute and you look how it evolved and you look at the legislative history behind it, there is no question this is aimed at protected expression. And really I think you just need to look at page 33 of the pleadings. And, you know,

every time I see legislative history like this I'm always enthused when I'm arguing the constitutionality of the statute when Chairman Buckley says, my biggest concern with the bill is its constitutionality, I'm concerned that if we just put "live entertainment" that might be held unconstitutional.

So what do they do? They play a shell game. They don't say "live entertainment," then they exempt everything else so that it only applies to live entertainment. I mean, continue down. Read Titus's -- Senator Titus's comments. I mean, it just keeps getting better and better all the way through our brief through page 36, where the focus is live entertainment.

So as much people would like to generate revenue for the State, that desire doesn't give this Court the right to run roughshod over important First Amendment protections no matter what your view of what is being protected might be. And I --

THE COURT: But, Mr. Ferrario, you recognize that there are collateral damage payors as referenced in Footnote 2 of the reply brief which are non-adult entertainment entities.

MR. FERRARIO: And I think, you know, Mr. Shafer addressed that and it's in the brief, and you're correct. And Your Honor I think addressed that with the 82 percent calculation.

THE COURT: Yeah.

MR. FERRARIO: But that doesn't change the fact of what this bill was targeted to do. And the fact that there might be 18 percent collateral damage payors that might have been left there to perhaps hide the true intent doesn't change what I just read to you and what the thrust of this bill was. And that's really the issue. And if you look at the cases, the fact that one or two people might be impacted doesn't save those other unconstitutional statutes. And that's what's important here. And Your Honor really gave us that calculation the last time, 82 percent adult entertainment, 18 percent let's call it collateral people. But that doesn't change what the legislature was doing at that time. Maybe they just weren't fine enough with their exemptions and the altering of the definitions. But there's no question as to what was in the mind of the legislature when you read through that. And that is what renders this statutory scheme unconstitutional. They were visiting this upon a group of people that are engaged in constitutionally protected activities. That's what causes the problem.

And with that, Your Honor, I think you do have to look at that and you have to give careful consideration to the expression of the legislature, because it was kind of a shell game. When they realized, well, we can't say it directly so we'll do indirectly what we don't think we can do directly. But that's why we have courts to look through that charade,

and that's why Your Honor must declare this scheme unconstitutional.

THE COURT: Thank you, Mr. Ferrario.

MR. DOERR: Good morning, Your Honor.

THE COURT: Team AG. Whoever wants to argue, please feel free to.

MR. DOERR: I'll just address some of their points, and then I would sort of ask Your Honor if you have any more -- any specific questions.

First of all, I think it's important to understand what this tax is on. And it's on the business transaction, it's not on the constitutionally protected activity. In the same way that sales and use tax on a book is a transaction tax on the sale of the book and not on the message that's within the pages, the live entertainment tax is a tax on the transaction. It's not on the message.

THE COURT: But it's only on live entertainment, all of which is protected First Amendment speech.

MR. DOERR: Some entertainment -- some entertainment I don't believe would constitute speech. But if the argument that it is on speech is -- and it is strict scrutiny, then there would be no tax on the book, either. Everyone could argue --

THE COURT: But the sales tax applied to every good and service. Well, every good except for groceries, and most

services.

MR. DOERR: There can be separate taxes on the same transaction. A real estate property transfer tax, there's tax on that real estate, there's tax on the transfer. It's a tax on the transaction. And in fact if the plaintiffs choose not to charge an admission fee, there's no tax at all. So they're in control of that. So I'll just go and address their points.

So their arguments assume that we're talking about a regulatory measure where the -- what's sought to be limited is the message or the activity. So that's the direct tax that they're speaking of. This is not a tax on the activity, it's a tax on the transaction. In Murdock, the case that we cited, they talked about the tax on the income or the property of the priest, as opposed to the tax on the license fee that they were enacting. What we have here is more like the tax on the income or the property of the preacher and not on the licensing fee. Also, if you look at the Jimmy Swaggart Ministries case, the tax is like the sales and use tax there. And they say that if it is says and use tax they'd have no argument. They say that in their briefs.

I want to take you to the Clean Water Coalition case that I've cited in my brief where the Nevada Supreme Court set out the distinction between a tax and a regulatory fee, and they talked about the difference -- and they talked about the difference in those two things. What we're talking about with

the live entertainment tax is tax and not a regulatory fee. And I've given you that in the brief.

They talk about the tax that targets the narrowly defined group of speakers. It's not a narrowly defined group. It's a narrowly defined group of speakers with the intent of limiting their message. I don't think that they can point to anything where this tax prohibition of their message. In fact, they can continue to practice their message whether the tax is collected or not. It's only when they decide to charge the admission charge that the tax becomes applicable. So they can continue their activity before -- whether there's tax on the transaction or not.

Then when we talk about the content and a content-based regulation versus a content-neutral regulation it's important to understand that those two analyses are when we're speaking about a regulation and not a tax. So like content-based tax or regulation, we understand the level of scrutiny involved in that. Also, if it's content-neutral, time, place and manner restriction, we understand that. But those two analyses are -- assume that this is a regulatory measure and something that inhibits or prohibits their message, not merely a taxing statute which is designed to raise revenue.

So those were their three points. So if you have any questions, I'll be happy to respond.

THE COURT: Did any of the other people from Team AG

want to make any points?

I'm trying to make sure they finish before I get back to your side.

MR. SHAFER: That's fine.

MR. DOERR: I would just address the legislative history portion. As you point out, it's inappropriate to look at that where the statute is clear. We've cited cases that say courts, you know, should not look at what individual legislators say because if that's the way that -- if that determines the constitutionality of the statute, all the legislature would need to do was to come back the next session and change the record. That in and of itself does not make the -- determine what the Court should look at.

I'll also point out, and we pointed it out in our brief, that some of the things they're discussing were on a bill that wasn't even passed. It was a later -- a later -- a later bill.

Also, discussing the 82 percent, that 82 percent isn't a number that we've ever given anybody.

THE COURT: No. It was my rough calculation.

MR. DOERR: Well, I don't think that that -- that the numbers that we gave you --

THE COURT: And it was on a discovery dispute.

MR. DOERR: Right. It's really a separate -- a separate issue. What this group of these taxpayers pay in

terms of the entire live entertainment tax is somewhere on the order of 2 to 3 percent. The Department only administers 7 percent of the entire live entertainment tax for all taxpayers combined. So their -- the percentage is really more demonstrative that this -- that they're not targeted.

And with that --

THE COURT: Anybody else from Team AG?

MR. SHAFER: He would have a point if every one of the U.S. Supreme Court decisions that I cited to you was decided exactly the opposite of the way that the U.S. Supreme Court ruled on those cases. But we're stuck with the precedent of the United States Supreme Court. There's not one tax case that we cited that has an evidentiary burden that you have to prove that the expression itself was inhibited. More importantly, you don't have to prove that the tax is right on the expression itself. The best example of that, Your Honor, of course, is Minneapolis Star & Tribune. The tax was on paper and ink, it wasn't on printing a newspaper. And the U.S. Supreme Court nevertheless said that it's an illegal tax under the First Amendment. As Mr. Ferrario pointed out to me in his whispers and he wanted to convey unto you, Your Honor, this isn't the live admissions tax, this is the live entertainment tax. That's what they called it, that's what they're taxing. If there's live entertainment, they're imposing the tax. It's the same thing, Your Honor, as

Minneapolis Star & Tribune.

He talks about that we're arguing that this is some type of regulatory provision. We are not arguing that this is any type of regulatory provision, because I don't have to get into that caselaw. As I've said, Your Honor, we fit four square within the United States Supreme Court decisions and Serras from the Nevada Supreme Court dealing with the constitutionality of a tax. This tax is unconstitutional for the three reasons that we've laid out.

Your Honor, their comments about not looking at the comments of individual legislators, then -- if they were right in regard to that general proposition, a court would never look at legislative history to inform it in regard to the constitutionality of a law. And as we pointed out, Your Honor, there are scores of cases all over the country where courts on facial challenges look at legislative history because it informs what the intent of the case was.

And let me give you the best example of why you have to look at that, Your Honor. As I've stated, because this is a tax on First Amendment expression as Your Honor noted, it is not my burden to prove the unconstitutionality under the applicable caselaw. They have to establish what the substantial, in the words of the United States Supreme Court, the substantial governmental interest is of having a differential tax on First Amendment expression, as this is,

because some First Amendment live entertainment is taxed, and some is not. Courts look at the legislative history in order to determine what that substantial governmental interest is.

Now, interestingly, in the five years -- four years, eleven months and one week of litigation they've never attempted to utilize the legislative history to convince either Your Honor or Judge Togliatti as to what that important -- that substantial governmental interest is. And we know, we know from the U.S. Supreme Court decisions that I've cited to Your Honor simply raising revenue cannot satisfy that burden.

Your Honor, his statement about the 3 percent, again, that's on both taxes. This is not only differential in regard to content, it's differential as to the rate of tax. The 82 percent, as Your Honor noted, was on the tax paid under the Department, the non-gaming tax, which is the 10 percent, as opposed to the 5 percent for the larger establishments. Thank you, Your Honor.

THE COURT: Thank you.

MR. FERRARIO: Your Honor, one point I want to make.

THE COURT: Certainly, Mr. Ferrario.

MR. FERRARIO: It has to do with looking just beyond the words of the statute. They've actually done that when they've tried to justify the boxing exemption and the other thing.

THE COURT: Well, but the boxing exemption right on

its face references the other chapter that boxing is regulated.

MR. FERRARIO: And they're going into what the purpose is. And you don't know what the purpose is. The one thing -- one thing we do know from a review of the legislative history as to what the purpose of this scheme was, and I think Senator Titus said it best. The intent of the live entertainment tax -- and that's entertainment, not admission -- was not to get nudist colonies, but to get striptease clubs. Continuing on to show that it's content based, it eliminates sporting events which the legislature determined would be family oriented, things such as NASCAR. I don't know how much clearer it could be.

And also when you read the legislative history it's pretty clear that the legislature's making a choice here, and what they're doing is they're making an irresponsible choice. They're talking a broad swipe at First Amendment expression, and then they're punting it to the courts, and they reference that in the legislative history, hoping that some judge somewhere might stretch or contort the Constitution. Well, as Mr. Shafer has said and pointed out in his brief, you can't do that if you're going to give deference to the innumerable cases we've cited on First Amendment jurisprudence in this area. And with that, Judge, we'll rest. Thank you.

THE COURT: Thank you.

The Court finds that it is inappropriate where a statute is clear on its face to consider the legislative history. Here Chapter 368(a) is not unclear. Therefore, the Court will not consider the comments of the legislators made during the hearings.

While the exemptions are numerous, the live entertainment tax is content neutral as a taxing measure, and I find that facially it is not unconstitutional.

So you're going to get me an order --

MR. SHAFER: I assume we don't have to show up on Thursday, then. Is that correct?

THE COURT: You do not need to show up on Thursday.

MR. SHAFER: Thank you.

THE COURT: You may now all go to Carson City.

MR. POPE: Your Honor, I have a draft order that would simply say that you granted a motion, that the trial date is vacated, and that the order will be supplemented with findings of fact and conclusions of law.

THE COURT: Unfortunately, you have to have the findings of fact and conclusions of law and your motion that grants the summary judgment.

MR. POPE: Okay.

THE COURT: So --

MR. DOERR: We'll take care of that.

MR. POPE: Trial date's vacated?

THE COURT: The trial date is vacated.

MR. POPE; Thank you, Your Honor.

THE COURT: The facial challenge has been resolved on briefings. There is no remaining issue in this case that would need to be tried. You can now go litigate someplace where they're smarter than I am.

MR. SHAFER: Thank you, Judge.

THE COURT: Have a nice day. And I want to compliment counsel again on the very thorough nature of your briefs throughout my limited history with this case.

THE PROCEEDINGS CONCLUDED AT 11:30 A.M.

* * * * *

CERTIFICATION

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

AFFIRMATION

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

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt — 12/12/11

FLORENCE HOYT, TRANSCRIBER — DATE

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	November 10, 2011

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

November 10, 2011 **9:00 AM** **Motion to Strike**

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

COURT CLERK: Billie Jo Craig

RECORDER: Jill Hawkins

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- Court noted matter heard on 11/8/11.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Case No.: 06A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

CASE APPEAL STATEMENT

Plaintiffs,

vs.

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

Defendants.

CASE APPEAL STATEMENT

1. This case appeal statement is filed by the following parties: 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.*

2. The order appealed from was issued by Judge Elizabeth Gonzalez.

3. Appellants are represented by the counsel listed below them as follows:

Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC:

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4. The trial counsel for Respondents Nevada Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiners are:

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5. Attorney Bradley J. Shafer, counsel for Appellants Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas,

LLC, is not licensed to practice law in the State of Nevada. Mr. Shafer was granted permission to appeal under SCR 42 by the district Court by an order entered on April 23, 2008 (attached hereto as Exhibit 1).

6. All appellants were represented by retained counsel in the District Court.

7. All appellants are represented by retained counsel on appeal.

8. No appellant was granted permission to proceed *in forma pauperis*.

9. Proceeding commenced in the District Court on January 09, 2008, the date the Complaint was filed.

10. This appeal arises out of an action for refund, pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b), and for declaratory relief, for injunctive relief and for damages filed with the district court. Appellants all filed claims for refunds of amounts paid to the Nevada Department of Taxation pursuant to Nevada's Live Entertainment Tax (NRS 368A.010 *et seq.*) (the "LET"). Appellants claims for refunds were denied by the Department of Taxation. Appellants appealed to the Nevada Tax Commission. The Nevada Tax Commission denied the appeals of Appellants K-Kel, Inc.; Olympus Garden, Inc.; SHAC, LLC; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC, while the appeals to the tax commission later filed by Deja Vu Showgirls of Las Vegas, L.L.C. and Little Darlings of Las Vegas, L.L.C. have been held in abeyance pending the outcome of the District Court action (Case No. 08A554970). Plaintiff-Appellants claim that the LET is unconstitutional under the First and Fourteenth Amendments to the United States Constitution is unconstitutional under Article I, Sections 9 and 10 of the Nevada Constitution, and that the Defendant-Appelles are prohibited from imposing the LET upon Plaintiff-

Appellants pursuant to NRS 368A.200(5)(a) (exempting from taxation "[l]ive entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution"). The case was coordinated with Case No 06A533273 and the request for declaratory relief was later consolidated with the request for declaratory relief in Case No. 06A533273. On November 1, 2011, the District Court entered an order dismissing all claims asserted in Case No. 08A554970 from the coordinated/consolidated action, holding that the case must be filed as a petition for judicial review pursuant to Chapter 233B of the Nevada Revised Statutes. The District Court further ordered that the dismissed case/claims be re-filed as a petition for judicial review.

11. This case (Case No. 08A554970) has not been previously subject to an appeal or an original writ proceeding in the Supreme Court.

12. This appeal does not involve child custody or visitation.

13. This appeal presently little to no possibility for settlement.

DATED this 28th day of November 2011

BY: /s/ WILLIAM H. BROWN

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CERTIFICATE OF SERVICE

I hereby certify that on the 28the day of November, 2011, the foregoing **CASE APPEAL STATEMENT** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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2. The order appealed from was issued by Judge Elizabeth Gonzalez.

3. Appellants are represented by the counsel listed below them as follows:

Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC:

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**Admitted Pro Hac Vice by the District Court*

SHAC, LLC

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4. The trial counsel for Respondents Nevada Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiners are:

Catherine Cortez Masto
Attorney General
David J. Pope
Senior Deputy Attorney General
Nevada Bar No. 008617
Blake A. Doerr
Senior Deputy Attorney General
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5. Attorney Bradley J. Shafer, counsel for Appellants Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas,

LLC, is not licensed to practice law in the State of Nevada. Mr. Shafer was granted permission to appeal under SCR 42 by the district Court by an order entered on April 23, 2008 (attached hereto as Exhibit 1).

6. All appellants were represented by retained counsel in the District Court.

7. All appellants are represented by retained counsel on appeal.

8. No appellant was granted permission to proceed *in forma pauperis*.

9. Proceeding commenced in the District Court on January 09, 2008, the date the Complaint was filed.

10. This appeal arises out of an action for refund, pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b), and for declaratory relief, for injunctive relief and for damages filed with the district court. Appellants all filed claims for refunds of amounts paid to the Nevada Department of Taxation pursuant to Nevada's Live Entertainment Tax (NRS 368A.010 *et seq.*) (the "LET"). Appellants claims for refunds were denied by the Department of Taxation. Appellants appealed to the Nevada Tax Commission. The Nevada Tax Commission denied the appeals of Appellants K-Kel, Inc.; Olympus Garden, Inc.; SHAC, LLC; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC, while the appeals to the tax commission later filed by Deja Vu Showgirls of Las Vegas, L.L.C. and Little Darlings of Las Vegas, L.L.C. have been held in abeyance pending the outcome of the District Court action (Case No. 08A554970). Plaintiff-Appellants claim that the LET is unconstitutional under the First and Fourteenth Amendments to the United States Constitution is unconstitutional under Article I, Sections 9 and 10 of the Nevada Constitution, and that the Defendant-Appelles are prohibited from imposing the LET upon Plaintiff-

Appellants pursuant to NRS 368A.200(5)(a) (exempting from taxation "[l]ive entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution"). The case was coordinated with Case No 06A533273 and the request for declaratory relief was later consolidated with the request for declaratory relief in Case No. 06A533273. On November 1, 2011, the District Court entered an order dismissing all claims asserted in Case No. 08A554970 from the coordinated/consolidated action, holding that the case must be filed as a petition for judicial review pursuant to Chapter 233B of the Nevada Revised Statutes. The District Court further ordered that the dismissed case/claims be re-filed as a petition for judicial review.

11. This case (Case No. 08A554970) has not been previously subject to an appeal or an original writ proceeding in the Supreme Court.

12. This appeal does not involve child custody or visitation.

13. This appeal presently little to no possibility for settlement.

DATED this 28th day of November 2011

BY: /s/ WILLIAM H. BROWN

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Counsel for SHAC, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 28the day of November, 2011, the foregoing **CASE APPEAL STATEMENT** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

Catherine Cortez Masto
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David J. Pope
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Attorneys for the Defendant-Appellees

/S/ ARLEEN VIANO
an employee of LAW OFFICES OF WILLIAM H. BROWN, ESQ., LTD

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Counsel for SHAC, LLC

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.: 06A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

NOTICE OF APPEAL

Plaintiffs,

vs.

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

Defendants.

NOTICE OF APPEAL

Notice is hereby given that all the Plaintiffs named above hereby appeal to the Supreme Court of Nevada from the Order entered in this action (Case No. 08A554970 only) on the 1st Day of November, 2011, on DEFENDANTS' RE-NOTICED 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, whereby the District Court dismissed Case No. 08A554970 from the coordinated action. This order appealed from was signed by District Court Judge Elizabeth Gonzalez on October 27, 2011, and was electronically filed (entered) on November 1, 2011. The notice of entry of this order was served on November 2, 2011.

DATED this 28th day of November 2011

BY: /s/ WILLIAM H. BROWN

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CERTIFICATE OF SERVICE

I hereby certify that on the 28the day of November, 2011, the foregoing **NOTICE OF APPEAL** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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. . .

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*; Plaintiffs, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

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

ORDER

DEFENDANTS' RE-NOTICED 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 DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

The Court having first requested that Defendants' motion for partial summary judgment and motion to dismiss be re-noticed and having considered the papers and pleadings regarding the re-noticed motion and the motion to compel, as well as the oral argument presented by all parties, hereby orders:

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. . .

. . .

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 is granted in part and denied in part.

With regard to Defendants' motion to dismiss and/or motion for partial summary judgment in Case #08A554970 ("Case 2"), this Court finds that the Defendants timely raised the question regarding the procedural posture of the case and based on the Nevada Supreme Court's decision in *Southern California Edison*, 127 Nev.Adv.Op. 22 (2011) all claims are dismissed and Case 2 shall proceed as a petition for judicial review pursuant to Chapter 233B of the NRS. The Court having tolled the statute of limitations for thirty (30) days to allow Plaintiffs thirty (30) days to file a petition for judicial review, Plaintiffs shall have thirty (30) days from August 23, 2011 to file a petition for judicial review pursuant to NRS 233B.130, *et seq.*

With regard to Defendants' motion to dismiss and/or for partial summary judgment in Case #06A533273 ("Case 1"), the motion is granted and all other claims including the "as applied" challenge, the refund claims and the official capacity claim against Michelle Jacobs are dismissed and Case 1 shall proceed as a facial challenge for declaratory relief only. Briefs are to be filed within thirty (30) days.

With regard to Defendants' motion to dismiss and/or for partial summary judgment regarding all 42 U.S.C. §1983 damages claims, the motion is granted and all such damages claims are dismissed from Case 1 and Case 2.

With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied.

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. . .

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

With regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.

IT IS SO ORDERED.

DATED this 27th day of October, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Senior Deputy Attorney General

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** Pending Admission Pro Hac Vice*

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, NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No.: A554970 Dept. No.: IX

ORDER ADMITTING TO PRACTICE

BRADLEY J. SHAFER, ESQ. having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of

Counsel, a Certificate of Good Standing for the states of Michigan and Arizona, and the State Bar of Nevada Statement; said application having been noticed, no objections having being made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby

ORDERED, that said application is hereby granted, and Bradley J. Shafer, Esq. is hereby admitted to practice in the above-entitled Court for the purposes of the above entitled matter only.

DATED this 21st day of April, 2008.

DISTRICT COURT JUDGE

Submitted by:

GHANEM & SULLIVAN, LLP

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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,*

Case No.: 06A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

NOTICE OF APPEAL

Plaintiffs,

vs.

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

Defendants.

NOTICE OF APPEAL

Notice is hereby given that all the Plaintiffs named above hereby appeal to the Supreme Court of Nevada from the Order entered in this action (Case No. 08A554970 only) on the 1st Day of November, 2011, on DEFENDANTS' RE-NOTICED 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, whereby the District Court dismissed Case No. 08A554970 from the coordinated action. This order appealed from was signed by District Court Judge Elizabeth Gonzalez on October 27, 2011, and was electronically filed (entered) on November 1, 2011. The notice of entry of this order was served on November 2, 2011.

DATED this 28th day of November 2011

BY: /s/ WILLIAM H. BROWN

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**Admitted Pro Hac Vice*

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Counsel for SHAC, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 28the day of November, 2011, the foregoing **NOTICE OF APPEAL** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

Catherine Cortez Masto
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Attorneys for Nevada Department of Taxation

DISTRICT COURT

CLARK COUNTY, NEVADA

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

. . .

. . .

. . .

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*; Plaintiffs, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

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

ORDER

DEFENDANTS' RE-NOTICED 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 DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

The Court having first requested that Defendants' motion for partial summary judgment and motion to dismiss be re-noticed and having considered the papers and pleadings regarding the re-noticed motion and the motion to compel, as well as the oral argument presented by all parties, hereby orders:

. . .

. . .

. . .

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 is granted in part and denied in part.

With regard to Defendants' motion to dismiss and/or motion for partial summary judgment in Case #08A554970 ("Case 2"), this Court finds that the Defendants timely raised the question regarding the procedural posture of the case and based on the Nevada Supreme Court's decision in *Southern California Edison*, 127 Nev.Adv.Op. 22 (2011) all claims are dismissed and Case 2 shall proceed as a petition for judicial review pursuant to Chapter 233B of the NRS. The Court having tolled the statute of limitations for thirty (30) days to allow Plaintiffs thirty (30) days to file a petition for judicial review, Plaintiffs shall have thirty (30) days from August 23, 2011 to file a petition for judicial review pursuant to NRS 233B.130, *et seq.*

With regard to Defendants' motion to dismiss and/or for partial summary judgment in Case #06A533273 ("Case 1"), the motion is granted and all other claims including the "as applied" challenge, the refund claims and the official capacity claim against Michelle Jacobs are dismissed and Case 1 shall proceed as a facial challenge for declaratory relief only. Briefs are to be filed within thirty (30) days.

With regard to Defendants' motion to dismiss and/or for partial summary judgment regarding all 42 U.S.C. §1983 damages claims, the motion is granted and all such damages claims are dismissed from Case 1 and Case 2.

With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied.

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

With regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.

IT IS SO ORDERED.

DATED this 27th day of October, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Senior Deputy Attorney General

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** Pending Admission Pro Hac Vice*

FILED

Apr 23 11 08 AM '08

CLERK OF THE 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, NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No.: A554970 Dept. No.: IX

ORDER ADMITTING TO PRACTICE

BRADLEY J. SHAFER, ESQ. having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of

Clerk of Court
RECEIVED
APR 23 2008

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MAR 14 2008
DEPT IX

Counsel, a Certificate of Good Standing for the states of Michigan and Arizona, and the State Bar of Nevada Statement; said application having been noticed, no objections having being made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby

ORDERED, that said application is hereby granted, and Bradley J. Shafer, Esq. is hereby admitted to practice in the above-entitled Court for the purposes of the above entitled matter only.

DATED this 21st day of April, 2008.

DISTRICT COURT JUDGE

Submitted by:

GHANEM & SULLIVAN, LLP

DIANA L. SULLIVAN, ESQ.
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930 South Fourth Street, Suite 210
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Attorneys for Plaintiffs

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Counsel for SHAC, LLC

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.: 06A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

AMENDED
CASE APPEAL STATEMENT

Plaintiffs,

vs.

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

Defendants.

AMENDED CASE APPEAL STATEMENT

1. This case appeal statement is filed by the following parties: 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*.

2. The order appealed from was issued by Judge Elizabeth Gonzalez.

3. Appellants are represented by the counsel listed below them as follows:

Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC:

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SHAC, LLC

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4. The trial counsel for Respondents Nevada Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiners are:

Catherine Cortez Masto
Attorney General
David J. Pope
Senior Deputy Attorney General
Nevada Bar No. 008617
Blake A. Doerr
Senior Deputy Attorney General
Nevada Bar No. 009001
Vivienne Rakowsky
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Facsimile: (702) 486-3416

5. Attorney Bradley J. Shafer, counsel for Appellants Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas,

LLC, is not licensed to practice law in the State of Nevada. Mr. Shafer was granted permission to appeal under SCR 42 by the district Court by an order entered on April 23, 2008 (attached hereto as Exhibit 1).

6. All appellants were represented by retained counsel in the District Court.

7. All appellants are represented by retained counsel on appeal.

8. No appellant was granted permission to proceed *in forma pauperis*.

9. Proceeding commenced in the District Court on January 09, 2008, the date the Complaint was filed.

10. This appeal arises out of an action for refund, pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b), and for declaratory relief, for injunctive relief and for damages filed with the district court. Appellants all filed claims for refunds of amounts paid to the Nevada Department of Taxation pursuant to Nevada's Live Entertainment Tax (NRS 368A.010 *et seq.*) (the "LET"). Appellants claims for refunds were denied by the Department of Taxation. Appellants appealed to the Nevada Tax Commission. The Nevada Tax Commission denied the appeals of Appellants K-Kel, Inc.; Olympus Garden, Inc.; SHAC, LLC; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC, while the appeals to the tax commission later filed by Deja Vu Showgirls of Las Vegas, L.L.C. and Little Darlings of Las Vegas, L.L.C. have been held in abeyance pending the outcome of the District Court action (Case No. 08A554970). Plaintiff-Appellants claim that the LET is unconstitutional under the First and Fourteenth Amendments to the United States Constitution is unconstitutional under Article I, Sections 9 and 10 of the Nevada Constitution, and that the Defendant-Appelles are prohibited from imposing the LET upon Plaintiff-

Appellants pursuant to NRS 368A.200(5)(a) (exempting from taxation "[l]ive entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution"). The case was coordinated with Case No 06A533273 and the request for declaratory relief was later consolidated with the request for declaratory relief in Case No. 06A533273. On November 1, 2011, the District Court entered an order dismissing all claims asserted in Case No. 08A554970 from the coordinated/consolidated action, holding that the case must be filed as a petition for judicial review pursuant to Chapter 233B of the Nevada Revised Statutes. The District Court further ordered that the dismissed case/claims be re-filed as a petition for judicial review.

11. This case (Case No. 08A554970) has not been previously subject to an appeal or an original writ proceeding in the Supreme Court.

12. This appeal does not involve child custody or visitation.

13. This appeal presently little to no possibility for settlement.

DATED this 29th day of November 2011

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**Admitted Pro Hac Vice*

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Counsel for SHAC, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2011, the foregoing **AMENDED CASE APPEAL STATEMENT** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

Catherine Cortez Masto
Attorney General
David J. Pope
Sr. Deputy Attorney General
Blake A. Doerr
Deputy Attorney General
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Facsimile: (702) 486-3420
Attorneys for the Defendant-Appellees

/S/ ARLEEN VIANO
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Email: shaferassociates@acd.net
** Pending Admission Pro Hac Vice*

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, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
Dept. No.: IX

ORDER ADMITTING TO PRACTICE

BRADLEY J. SHAFER, ESQ. having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of

Counsel, a Certificate of Good Standing for the states of Michigan and Arizona, and the State Bar of Nevada Statement; said application having been noticed, no objections having being made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby

ORDERED, that said application is hereby granted, and Bradley J. Shafer, Esq. is hereby admitted to practice in the above-entitled Court for the purposes of the above entitled matter only.

DATED this 21st day of April, 2008.

DISTRICT COURT JUDGE

Submitted by:

GHANEM & SULLIVAN, LLP

DIANA L. SULLIVAN, ESQ.
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Counsel for SHAC, LLC

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.: 06A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

AMENDED
CASE APPEAL STATEMENT

Plaintiffs,

vs.

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

Defendants.

AMENDED CASE APPEAL STATEMENT

1. This case appeal statement is filed by the following parties: 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*.

2. The order appealed from was issued by Judge Elizabeth Gonzalez.

3. Appellants are represented by the counsel listed below them as follows:

Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC:

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4. The trial counsel for Respondents Nevada Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiners are:

Catherine Cortez Masto
Attorney General
David J. Pope
Senior Deputy Attorney General
Nevada Bar No. 008617
Blake A. Doerr
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5. Attorney Bradley J. Shafer, counsel for Appellants Deja Vu Showgirls of Las Vegas, L.L.C.; Little Darlings of Las Vegas, L.L.C.; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas,

LLC, is not licensed to practice law in the State of Nevada. Mr. Shafer was granted permission to appeal under SCR 42 by the district Court by an order entered on April 23, 2008 (attached hereto as Exhibit 1).

6. All appellants were represented by retained counsel in the District Court.

7. All appellants are represented by retained counsel on appeal.

8. No appellant was granted permission to proceed *in forma pauperis*.

9. Proceeding commenced in the District Court on January 09, 2008, the date the Complaint was filed.

10. This appeal arises out of an action for refund, pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b), and for declaratory relief, for injunctive relief and for damages filed with the district court. Appellants all filed claims for refunds of amounts paid to the Nevada Department of Taxation pursuant to Nevada's Live Entertainment Tax (NRS 368A.010 *et seq.*) (the "LET"). Appellants claims for refunds were denied by the Department of Taxation. Appellants appealed to the Nevada Tax Commission. The Nevada Tax Commission denied the appeals of Appellants K-Kel, Inc.; Olympus Garden, Inc.; SHAC, LLC; The Power Company, Inc.; D. Westwood, Inc.; and D.I. Food & Beverage of Las Vegas, LLC, while the appeals to the tax commission later filed by Deja Vu Showgirls of Las Vegas, L.L.C. and Little Darlings of Las Vegas, L.L.C. have been held in abeyance pending the outcome of the District Court action (Case No. 08A554970). Plaintiff-Appellants claim that the LET is unconstitutional under the First and Fourteenth Amendments to the United States Constitution is unconstitutional under Article I, Sections 9 and 10 of the Nevada Constitution, and that the Defendant-Appelles are prohibited from imposing the LET upon Plaintiff-

Appellants pursuant to NRS 368A.200(5)(a) (exempting from taxation "[l]ive entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution"). The case was coordinated with Case No 06A533273 and the request for declaratory relief was later consolidated with the request for declaratory relief in Case No. 06A533273. On November 1, 2011, the District Court entered an order dismissing all claims asserted in Case No. 08A554970 from the coordinated/consolidated action, holding that the case must be filed as a petition for judicial review pursuant to Chapter 233B of the Nevada Revised Statutes. The District Court further ordered that the dismissed case/claims be re-filed as a petition for judicial review.

11. This case (Case No. 08A554970) has not been previously subject to an appeal or an original writ proceeding in the Supreme Court.

12. This appeal does not involve child custody or visitation.

13. This appeal presently little to no possibility for settlement.

DATED this 29th day of November 2011

BY: /s/ WILLIAM H. BROWN

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Facsimile: (702) 792-9002
Counsel for SHAC, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2011, the foregoing **AMENDED CASE APPEAL STATEMENT** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

Catherine Cortez Masto
Attorney General
David J. Pope
Sr. Deputy Attorney General
Blake A. Doerr
Deputy Attorney General
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Facsimile: (702) 486-3420
Attorneys for the Defendant-Appellees

/S/ ARLEEN VIANO
an employee of LAW OFFICES OF WILLIAM H. BROWN, ESQ., LTD

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** Pending Admission Pro Hac Vice*

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, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
Dept. No.: IX

ORDER ADMITTING TO PRACTICE

BRADLEY J. SHAFER, ESQ. having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of

Counsel, a Certificate of Good Standing for the states of Michigan and Arizona, and the State Bar of Nevada Statement; said application having been noticed, no objections having being made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby

ORDERED, that said application is hereby granted, and Bradley J. Shafer, Esq. is hereby admitted to practice in the above-entitled Court for the purposes of the above entitled matter only.

DATED this 21st day of April, 2008.

DISTRICT COURT JUDGE

Submitted by:

GHANEM & SULLIVAN, LLP

DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	December 16, 2011

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

December 16, 2011 **9:00 AM** **Motion to Toll Five-Year Rule Pending Entry of Dispositive Order on Order Shortening Time**

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

COURT CLERK: Tiffany Lawrence

RECORDER: Jill Hawkins

PARTIES PRESENT:	Brown, William H.	Attorney for Plaintiffs
	Doerr, Blake A.	Attorney for Defendants
	Ferrario, Mark E.	Attorney for Plaintiffs
	Pope, David J.	Attorney for Defendants
	Rakowsky, Vivienne	Attorney for Defendants
	Shafer, Bradley J.	Attorney for Plaintiffs

JOURNAL ENTRIES

- Colloquy regarding when the deadline for filing of the Order. COURT ORDERED, motion GRANTED to permit filing of the Order to within 30 days from entry of order.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	December 16, 2011

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

December 16, 2011 **3:00 AM** **Motion**

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

COURT CLERK: Billie Jo Craig

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- As matter taken care of on the Oral Calendar, COURT ORDERED, matter OFF CALENDAR.

CLERK'S NOTE: Counsel to be notified by way of minute order and to notify appropriate parties. A copy of this minute order was placed in the attorney folder(s) of:
William H. Brown, Esq. (Brown Law Firm); David J. Pope, Deputy Attorney General (Attorney General's Office).

Electronically Filed
12/16/2011 02:18:19 PM

FFCL

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*;

Plaintiffs,

v.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No. 08A554970
Dept. No. XI

DEFENDANT'S Motion for Summary Judgment in the above-captioned matter came on for hearing on November 8, 2011;

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

William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs; and, Mark E. Ferrario appeared on behalf of Plaintiff SHAC, LLC.

PROCEDURAL BACKGROUND

PLAINTIFFS are owners of a number of exotic dancing establishments. Pursuant to NRS 368A.140(2), the Nevada Gaming Control Board along with the Nevada Gaming Commission administer the Live Entertainment Tax (LE Tax) with regard to licensed gaming establishments and the Department of Taxation administers the LE Tax with regard to all other establishments. DEFENDANTS are the various agencies of the State of Nevada that administer the LE Tax as to non gaming establishments.

On December 19, 2006, PLAINTIFFS filed a Complaint under case No. 06A533273 in the 8th Judicial District for Clark County Nevada. In their Complaint, the PLAINTIFFS alleged that the LE Tax, established by Title 32, Chapter 368A of the Nevada Revised Statutes was an impermissible, unconstitutional infringement by the State of Nevada on constitutionally protected expression. PLAINTIFFS sought as their remedy: (1) an injunction enjoining the DEFENDANTS from enforcing the provisions of the LE Tax; (2) a refund of all LE Tax payments which they paid for January, February, March and April 2004; (3) a declaration that the LET is unconstitutional; and (4) an award for damages, costs and fees pursuant to 42 U.S.C. §1988.

In January 2007, apparently realizing that claims for refund of taxes must be submitted to the administering agency, a certain group of PLAINTIFFS made a request for a refund of the LE Tax which they paid for January, February, March and April 2004. The Department of Taxation denied the refund requests. The PLAINTIFFS who had requested refunds appealed the Department's denial to the Nevada Tax Commission on the grounds that the LE Tax was unconstitutional. The Nevada Tax Commission affirmed the Department's decision.

In late 2007, a separate, nearly-identical Complaint was filed and assigned Case No. 08A554970. As the matters progressed, the claims for injunctive relief were consolidated while the

remaining claims were coordinated. Pursuant to this Court's Order from the hearing held on August 23, 2011, PLAINTIFFS claims were all dismissed except for the facial challenge to the LE Tax.

History of the Tax

Admission charges, food, drink, and merchandise sales in establishments where exotic dancing takes place have been taxed in Nevada for many years. The LE Tax was enacted in 2003, when the 20th Special Session of the Nevada State Legislature approved and the Governor signed Senate Bill No. 8 ("SB 8"). The LE Tax replaced the Casino Entertainment Tax which replaced the Federal Cabaret Tax. *See* Nevada State Attorney General's Opinion No. 85-17, which states in pertinent part:

> The original casino entertainment tax was passed in 1965 at the urging of Governor Grant Sawyer as a revenue measure. Journal of the Senate, 53d Sess., at 619-26 (Nev. Apr. 3. 1965). The original casino entertainment tax was based upon the federal cabaret tax. NRS 463.401(1) (1965) was very similar in language to 26 U.S.C. § 4232(b) (1964), which provided the definition of "roof garden, cabaret, and other similar places" for the imposition of the federal cabaret tax.

See also, Cashman Photo Concessions and Labs, Inc. v. Nev. Gaming Comm'n, 91 Nev. 424, 427, 538 P.2d 158, 159 (1975) (casino entertainment tax was derived from federal cabaret tax statute).

The statutory provisions governing the former Casino Entertainment Tax were contained in chapter 463 of NRS and were repealed in 2003 by the enactment of the LE Tax. S.B. 8 expanded the Casino Entertainment Tax to include non-gaming establishments. Cabarets where nude and semi-nude dancing occurs have existed in Las Vegas for many years and the Casino Entertainment Tax was applied to the admission, food, beverage and merchandise charges to those facilities. Thus, prior to the enactment of the LE Tax, admission charges to nude dancing establishments were only being taxed when the activity was performed in a gaming establishment.

As a result of the 2003 enactment of the Live Entertainment Tax, Plaintiffs K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc., and D.I. Food & Beverage of Las Vegas, LLC, became subject to the tax as of January 1, 2004, and have paid the tax thereafter. In 2005, the State of Nevada enacted certain modifications to the Live Entertainment Tax by way of Assembly Bill No. 554 (Regular Session of the 73rd Legislature) and Senate Bill No. 9 (22nd Special Session), which collectively modified the language of NRS 368A.200(5)(e) to thereafter

provide that the Live Entertainment Tax did not apply to live entertainment provided at a facility that "has a maximum occupancy of less than 200 persons." As a result of the 2005 modifications to the Live Entertainment Tax, Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC, became subject to the tax as of July 1, 2005, and have paid the tax thereafter. All of Plaintiffs' facilities have a maximum occupancy and a maximum seating capacity of less than 7,500 persons, and, at all relevant times, Plaintiffs have been subject to the Live Entertainment Tax at a rate of "10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility," pursuant to NRS 368A.200(1)(b).

ISSUE

Is the LE Tax a facially unconstitutional regulatory measure which infringes on the PLAINTIFFS constitutionally-protected rights of freedom of speech and/or expression?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legislation Is Presumed Constitutional

All acts passed by the Legislature are presumed to be valid until the contrary is clearly established, and courts will only interfere when the Constitution is clearly violated. *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). Even "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *Id.*

The LE Tax statute was duly enacted by the Nevada Legislature and is presumed constitutional until the contrary is clearly established. Here, the Plaintiffs did not demonstrate that LE Tax statute was unconstitutional.

The Facial Validity of a Statute is a Question of Law

A statute will be declared facially invalid only if it is void in all of its applications. *Wash. State Grange*, 552 U.S. at 449-50. If a statute has a plainly legitimate sweep, it must be upheld against a facial challenge even if the statute hypothetically could raise constitutional questions when applied to a specific set of circumstances. *Id.; Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202 (2008); *Flamingo Paradise Gaming*, 125 Nev. Adv. Op. 39, 217 P.3d at 558 n.14. The Court may decide a facial challenge on summary judgment as a matter of law. *See Flamingo Paradise Gaming*, 125 Nev.

Adv. Op. 39, 217 P.3d at 549-51.

When deciding a facial challenge to the constitutionality of a statute, the Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50. Even if the statute "may be subject to as-applied challenges once the statute is enforced against a particular party . . . it is improper in the context of a facial challenge review to consider these hypothetical situations." *Flamingo Paradise Gaming*, 125 Nev. Adv. Op. 39, 217 P.3d at 558 n.14. As further explained by the United States Supreme Court:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987).

Because the remaining issue in this matter was the facial challenge, the matter before the court was a pure question of law.

Summary Judgment is Appropriate Where No Material Issues of Fact Exist

Under NRCP 56, the Court must grant the moving party summary judgment when the allegations in the complaint and other evidence on file, after being viewed in a light most favorable to the non-moving party, demonstrate that no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. *Turner v. Mandalay Sports Entm't*, 124 Nev. Adv. Op. 20, 180 P.3d 1172, 1174 (2008).

The Court may decide a facial challenge to the constitutionality of a statute on summary judgment because such a challenge does not present any issues of material fact, but presents only issues of law. *Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. Adv. Op. 39, 217 P.3d 546, 549-51 (2009). The Court finds that there exists no genuine issue as to any material fact relative to Plaintiffs' facial constitutional challenges to the Live Entertainment Tax. Because Plaintiffs' remaining claims are limited to a facial challenge to the Live Entertainment Tax, this Court finds that it is limited to a review of the language of the Live Entertainment Tax statute, only, and is precluded from reviewing and/or considering any legislative history or other documentation submitted by the Plaintiffs in support

of their motion for summary judgment.

While Nude Dancing is Entitled to Some Level of Constitutional Protection, Exactly What That Level Is Has Not Been Clearly Established

The US Supreme Court has addressed the issue of constitutional protection of nude dancing in a number of cases. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991), the Court addressed a statute that required go-go dancers to wear pasties and a G-string. The *Barnes* court held that "go-go dancing" was expressive conduct within the outer perimeters of the First Amendment. In *City of Erie*, the Court stated that, while being "in a state of nudity" is not an inherently expressive condition, nude dancing is entitled to some level of constitutional protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000).

> Scholars have grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment. Professor Lawrence Tribe noted that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed.1988). Although his comment was made prior to *Barnes*, the observation continues to be accurate today. Professor Erwin Chemerinsky views Supreme Court precedent as according sexually explicit expression "low-value" status. Chemerinsky, *Constitutional Law* § 11..3.4.4, p. 836-41 (1st Ed.1997). Professors Gerald Gunther and Kathleen Sullivan suggest that even in cases where courts do not explicitly treat sexual expression as lower-value speech, the decisions have implicitly treated such speech as a "subordinate species" in their tolerance of content-specific regulation.

Gunther and Sullivan, *Constitutional Law* § 5(D), p. 1155-56 (13th Ed.1997). *See also* Chemerinsky, *Constitutional Law Principles and Policies*, Second Edition, 2002, at p. 989 et seq. (explaining that nude dancing is protected by the First Amendment but is treated as being "low value" expression and thus the government has latitude to regulate such expression).

PLAINTIFFS argued that their activities are entitled to full First Amendment protection. That position is not supported by the above cited authority. Because the LE Tax is not a tax on nude dancing or other First Amendment protected activity, PLAINTIFFS assertion that the LE Tax statute should be subjected to the highest level of statutory scrutiny is erroneous.

. . .

THE LE TAX IS NOT A REGULATORY FEE

The LE Tax is not a regulatory measure at all and it does not tax speech but rather the privilege of entering an establishment where any form of live entertainment is performed. The determination of whether a charge is characterized as a "fee" or a "tax" requires the court to consider the "true purpose" of the charge. *Clean Water Coalition v. The M Resort, LLC*, ___ Nev. ___, 255 P.3d 247, 257 (2011). A tax is intended to increase overall revenue, or be used to provide a general public benefit. *Id.* at 256, 258. A "fee," on the other hand, is a charge that "(1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received." *Id.* at 257. Even an "incidental" regulatory feature of a charge will not overcome the "true purpose" of the charge as a revenue generator for the general fund. *Id.* at 258, citing *Douglas County Contractors v. Douglas County*, 112 Nev. 1452 (1996) (invalidating ordinance as impermissible tax despite being held out as regulatory fee when charge had effect of generating revenue for public improvement project).

Here, the statutory language of NRS 368A.200 clearly and unambiguously states that the tax which is being imposed is an "excise tax on admission to any facility in this State where live entertainment is provided." Consequently, the true purpose of the LE Tax is to tax.

The LE Tax is not a direct tax on constitutionally protected activity

The LE Tax is a tax on the price of admission, food, drink, and merchandise charges at facilities where live entertainment is performed and not a direct tax on constitutionally protected activity.

For LE Tax purposes, live entertainment is statutorily defined as "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." NRS 368A.060. But, the LE Tax taxable event occurs only when the business collects an admission charge or other payment when admission charges are collected. NRS 368A.200(1) provides: [T]here is hereby imposed an excise tax on admissions to any facility in this State where live entertainment is provided.

Thus, while the label of the tax, 'Live Entertainment Tax,' might suggest that what is being taxed is live entertainment, as stated in the statute, the LE Tax is a tax on admissions and other charges at certain establishments.

Regulatory Statutes are Subject to Different Review than Taxing Statutes

The Plaintiffs cited to numerous cases where courts subjected statutes to strict scrutiny. Those statutes were regulatory statutes whose purpose was to regulate behavior. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991), the Court addressed a statute that required go-go dancers to wear pasties and a G-string. The *Barnes* court held that "go-go dancing" was expressive conduct within the outer perimeters of the First Amendment. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000), the Court stated that, while being "in a state of nudity" is not an inherently expressive condition, nude dancing is entitled to some level of constitutional protection. And in *Colacurcio v. City of Kent*, 163 F.3d 545, 550 (9th Cir. 1998), the City of Kent, Washington enacted an ordinance which required nude dancers to perform their dances at least 10 feet away from patrons. The various courts in those matters applied strict scrutiny analysis to those statutes because their goal was to regulate behavior. This is in contrast to the LE Tax which is merely a taxing statute.

In *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (Pa.Cmwlth. 1995), the Commonwealth Court of Pennsylvania addressed the distinction between a regulatory statue and a taxing statute in the First Amendment context. In *Adams Outdoor Advertising, Ltd.*, the borough of Stroudsburg, Pennsylvania enacted an ordinance

which taxed off-premise signs based upon the size of the sign. *Id.* The *Adams Outdoor Advertising, Ltd.* court held that the tax was not a constitutional violation. In their analysis, the Court distinguished taxes from regulations. "[U]nlike a license fee, the purpose of which is to offset the costs of regulation, a tax is imposed for the purpose of raising revenue." *Id.* at 24. "[T]he primary purpose of taxes is always to raise money for the taxing authority." Id. There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. When dealing with a tax versus a regulation, the issues presented are whether the tax is uniform and whether it is an unlawful infringement upon the First Amendment rights. *Id.* When dealing with a tax, the court need not address the fact that the tax amount exceeds the reasonable costs of administration because that is not applicable to tax legislation; it only applies to challenges to license fees. *Id.*

In the instant case, the facts are even further distinguishable from those in the *Adams Outdoor Advertising, Ltd.* case in that an incidental purpose of that statute was to limit the size of signs and not solely to generate revenue. The sole purpose of the LE Tax is to generate revenue and not to regulate First Amendment protected behavior. Evidence of this is the fact that nothing in chapter 368A of NRS authorizes the Department to supervise or regulate the PLAINTIFFS' First Amendment activities and the payment of the tax is not a condition precedent to exercise any constitutionally protected act. Further evidence that chapter 368A of NRS is strictly a tax and not a regulatory measure is the fact that the US District Court dismissed the PLAINTIFFS' Complaint on the grounds that the federal court lacked jurisdiction based on the Tax Injunction Act because the issue presented was strictly a taxing measure. That decision was later affirmed by the 9th Circuit Court of Appeals.

Because the LE Tax is strictly a taxing statute, it is subject to rational basis review.

The State May Tax Admission to Taxpayers' Businesses, Therefore PLAINTIFFS are not Exempt from Taxation Pursuant to NRS 368A.200(5)

There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. With respect to taxing statutes, "[a]ny reasonable doubt about the applicability of an exemption must be construed against the taxpayer." *Sierra Pac. Power Co. v. Dep't of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980).

Pursuant to NRS 368A.200(5)(a), "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions" is exempt from the LE Tax. Since the State of Nevada is not prohibited by the Constitution, law or treaties of the Untied States or the Nevada Constitution from taxing the admissions and other charges at issue in this case, the exemption is not applicable.

Nevada's LE Tax Is A Broad-Based, Content-Neutral Generally Applicable Tax And Is Not A Facially Unconstitutional Direct Tax On The Exercise Of Constitutional Freedoms

Where a regulatory measure is a regulation of speech, it may either be content neutral or content based. The U.S. Supreme Court has articulated the following as the test for whether a regulation is content neutral:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . The government's purpose is the controlling consideration. A regulation
> that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added). "In determining whether a governmental regulation of speech is content based, our principal inquiry is whether the government adopted the regulation because of its disagreement with the message to be conveyed by the speech." *Adams Outdoor Adver., Ltd.*, 667 A.2d 21 at 27, *citing Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984). The government's purpose in enacting the legislation is the Court's controlling consideration and if that purpose is unrelated to the content of the speech, then the regulation is content neutral. *Ward*, 491 U.S. 781. If on the other hand, the purpose of the regulation is related to the content of the speech, or if, in determining whether the regulation applies, one must look to the content

of the speech, then, absent a compelling reason offered by the government, it will be found to be unconstitutional. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Pursuant to NRS 368A.200, the LE Tax is imposed on admission to any facility in the state of Nevada where live entertainment is provided regardless of the content of that entertainment and, therefore, the LE Tax is content-neutral.

Taxing Statutes Which Contain Exemptions and Exceptions are Not Per Se Invalid

There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. There is no indication that the classifications set forth in NRS chapter 368A are for purposes other than optimizing tax revenues. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* (citations omitted). In *Madden*, 309 U.S. at 87-88, 60 S.Ct. at 408, the United States Supreme Court announced the following rule:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized...[T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

(citations omitted).

The LE Tax, on its face, is not directed at, nor does it present the danger of, suppressing particular ideas. Nevada's LE Tax was enacted to raise revenues. It cannot be argued that the LE Tax limits the ability of exotic dancers or for that matter any other entertainers, to express themselves. Nor does it prevent patrons from attending.

With regard to the exemptions, the Nevada Legislature has chosen simply to exclude or exempt certain establishments from the LE Tax. Nothing about the choice to exempt certain live entertainment from the tax suggests an interest in censoring the expressive activities of either nude dancing or clothed

entertainment. *See Leathers v. Medlock*, 499 U.S. 439, 453, 111 S.Ct. 1438, 1447 (1991) ("[t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax").

Nevada's LE Tax Classifications Are Not Unconstitutionally Overbroad or Vague

A statute is void for vagueness and therefore in violation of the Due Process Clause of the Fourteenth Amendment if it "(1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited and (2) authorizes or encourages arbitrary and discriminatory enforcement." *City of Las Vegas v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 122 Nev. 1041, 146 P.3d 240, 245 (2006).

The LE Tax does not seek to prohibit any type of conduct and therefore it cannot be argued that taxing statute is void for vagueness because ordinary people can't understand what conduct it prohibits. Nor does the LE Tax authorize or encourage arbitrary or discriminatory enforcement. Moreover, this issue was not raised by the PLAINTIFFS and PLAINTFFS presented no facts or argument that the LE Tax was either overbroad or vague.

The Court finds that because Plaintiffs have not succeeded on the merits, there is no basis for the Court to grant injunctive relief, and the Court makes no findings or conclusions regarding whether, as contended by Plaintiffs, the anti-injunction provision contained in N.R.S. §368A.280(1) is contrary to the authority granted to the district courts by Article 6, Section 6, of the Nevada Constitution or the separation of powers set forth in Article 3, Section 1, of the Nevada Constitution.

The Court hereby orders Defendants' Motion for Summary Judgment is GRANTED and, the matter having been disposed of, the trial date is hereby vacated.

IT IS SO ORDERED.

DATED this 16th day of December, 2011.

DISTRICT COURT JUDGE

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

PLEASE TAKE NOTICE that an Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Counter-Motion for Summary Judgment was entered on

. . .

16th day of December, 2011, and e-filed on the 16th day of December, 2011, a copy of which is attached hereto as Exhibit "A".

DATED this 19th day of December, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ BLAKE A. DOERR
BLAKE A. DOERR
Senior Deputy Attorney General

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

CERTIFICATE OF MAILING

I, hereby certify that on the 19th day of December, 2011, I served the foregoing **NOTICE OF ENTRY OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

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EXHIBIT “A”

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Admission charges, food, drink, and merchandise sales in establishments where exotic dancing takes place have been taxed in Nevada for many years. The LE Tax was enacted in 2003, when the 20th Special Session of the Nevada State Legislature approved and the Governor signed Senate Bill No. 8 ("SB 8"). The LE Tax replaced the Casino Entertainment Tax which replaced the Federal Cabaret Tax. *See* Nevada State Attorney General's Opinion No. 85-17, which states in pertinent part:

> The original casino entertainment tax was passed in 1965 at the urging of Governor Grant Sawyer as a revenue measure. Journal of the Senate, 53d Sess., at 619-26 (Nev. Apr. 3. 1965). The original casino entertainment tax was based upon the federal cabaret tax. NRS 463.401(1) (1965) was very similar in language to 26 U.S.C. § 4232(b) (1964), which provided the definition of "roof garden, cabaret, and other similar places" for the imposition of the federal cabaret tax.

See also, Cashman Photo Concessions and Labs, Inc. v. Nev. Gaming Comm'n, 91 Nev. 424, 427, 538 P.2d 158, 159 (1975) (casino entertainment tax was derived from federal cabaret tax statute).

The statutory provisions governing the former Casino Entertainment Tax were contained in chapter 463 of NRS and were repealed in 2003 by the enactment of the LE Tax. S.B. 8 expanded the Casino Entertainment Tax to include non-gaming establishments. Cabarets where nude and semi-nude dancing occurs have existed in Las Vegas for many years and the Casino Entertainment Tax was applied to the admission, food, beverage and merchandise charges to those facilities. Thus, prior to the enactment of the LE Tax, admission charges to nude dancing establishments were only being taxed when the activity was performed in a gaming establishment.

As a result of the 2003 enactment of the Live Entertainment Tax, Plaintiffs K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc., and D.I. Food & Beverage of Las Vegas, LLC, became subject to the tax as of January 1, 2004, and have paid the tax thereafter. In 2005, the State of Nevada enacted certain modifications to the Live Entertainment Tax by way of Assembly Bill No. 554 (Regular Session of the 73rd Legislature) and Senate Bill No. 9 (22nd Special Session), which collectively modified the language of NRS 368A.200(5)(e) to thereafter

provide that the Live Entertainment Tax did not apply to live entertainment provided at a facility that "has a maximum occupancy of less than 200 persons." As a result of the 2005 modifications to the Live Entertainment Tax, Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC, became subject to the tax as of July 1, 2005, and have paid the tax thereafter. All of Plaintiffs' facilities have a maximum occupancy and a maximum seating capacity of less than 7,500 persons, and, at all relevant times, Plaintiffs have been subject to the Live Entertainment Tax at a rate of "10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility," pursuant to NRS 368A.200(1)(b).

ISSUE

Is the LE Tax a facially unconstitutional regulatory measure which infringes on the PLAINTIFFS constitutionally-protected rights of freedom of speech and/or expression?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legislation Is Presumed Constitutional

All acts passed by the Legislature are presumed to be valid until the contrary is clearly established, and courts will only interfere when the Constitution is clearly violated. *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). Even "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *Id.*

The LE Tax statute was duly enacted by the Nevada Legislature and is presumed constitutional until the contrary is clearly established. Here, the Plaintiffs did not demonstrate that LE Tax statute was unconstitutional.

The Facial Validity of a Statute is a Question of Law

A statute will be declared facially invalid only if it is void in all of its applications. *Wash. State Grange*, 552 U.S. at 449-50. If a statute has a plainly legitimate sweep, it must be upheld against a facial challenge even if the statute hypothetically could raise constitutional questions when applied to a specific set of circumstances. *Id.; Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202 (2008); *Flamingo Paradise Gaming*, 125 Nev. Adv. Op. 39, 217 P.3d at 558 n.14. The Court may decide a facial challenge on summary judgment as a matter of law. *See Flamingo Paradise Gaming*, 125 Nev.

Adv. Op. 39, 217 P.3d at 549-51.

When deciding a facial challenge to the constitutionality of a statute, the Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50. Even if the statute "may be subject to as-applied challenges once the statute is enforced against a particular party . . . it is improper in the context of a facial challenge review to consider these hypothetical situations." *Flamingo Paradise Gaming*, 125 Nev. Adv. Op. 39, 217 P.3d at 558 n.14. As further explained by the United States Supreme Court:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987).

Because the remaining issue in this matter was the facial challenge, the matter before the court was a pure question of law.

Summary Judgment is Appropriate Where No Material Issues of Fact Exist

Under NRCP 56, the Court must grant the moving party summary judgment when the allegations in the complaint and other evidence on file, after being viewed in a light most favorable to the non-moving party, demonstrate that no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. *Turner v. Mandalay Sports Entm't*, 124 Nev. Adv. Op. 20, 180 P.3d 1172, 1174 (2008).

The Court may decide a facial challenge to the constitutionality of a statute on summary judgment because such a challenge does not present any issues of material fact, but presents only issues of law. *Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. Adv. Op. 39, 217 P.3d 546, 549-51 (2009). The Court finds that there exists no genuine issue as to any material fact relative to Plaintiffs' facial constitutional challenges to the Live Entertainment Tax. Because Plaintiffs' remaining claims are limited to a facial challenge to the Live Entertainment Tax, this Court finds that it is limited to a review of the language of the Live Entertainment Tax statute, only, and is precluded from reviewing and/or considering any legislative history or other documentation submitted by the Plaintiffs in support

of their motion for summary judgment.

While Nude Dancing is Entitled to Some Level of Constitutional Protection, Exactly What That Level Is Has Not Been Clearly Established

The US Supreme Court has addressed the issue of constitutional protection of nude dancing in a number of cases. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991), the Court addressed a statute that required go-go dancers to wear pasties and a G-string. The *Barnes* court held that "go-go dancing" was expressive conduct within the outer perimeters of the First Amendment. In *City of Erie*, the Court stated that, while being "in a state of nudity" is not an inherently expressive condition, nude dancing is entitled to some level of constitutional protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000).

> Scholars have grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment. Professor Lawrence Tribe noted that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed.1988). Although his comment was made prior to *Barnes*, the observation continues to be accurate today. Professor Erwin Chemerinsky views Supreme Court precedent as according sexually explicit expression "low-value" status. Chemerinsky, *Constitutional Law* § 11..3.4.4, p. 836-41 (1st Ed.1997). Professors Gerald Gunther and Kathleen Sullivan suggest that even in cases where courts do not explicitly treat sexual expression as lower-value speech, the decisions have implicitly treated such speech as a "subordinate species" in their tolerance of content-specific regulation.

Gunther and Sullivan, *Constitutional Law* § 5(D), p. 1155-56 (13th Ed.1997). *See also* Chemerinsky, *Constitutional Law Principles and Policies*, Second Edition, 2002, at p. 989 et seq. (explaining that nude dancing is protected by the First Amendment but is treated as being "low value" expression and thus the government has latitude to regulate such expression).

PLAINTIFFS argued that their activities are entitled to full First Amendment protection. That position is not supported by the above cited authority. Because the LE Tax is not a tax on nude dancing or other First Amendment protected activity, PLAINTIFFS assertion that the LE Tax statute should be subjected to the highest level of statutory scrutiny is erroneous.

. . .

THE LE TAX IS NOT A REGULATORY FEE

The LE Tax is not a regulatory measure at all and it does not tax speech but rather the privilege of entering an establishment where any form of live entertainment is performed. The determination of whether a charge is characterized as a "fee" or a "tax" requires the court to consider the "true purpose" of the charge. *Clean Water Coalition v. The M Resort, LLC*, ___ Nev. ___, 255 P.3d 247, 257 (2011). A tax is intended to increase overall revenue, or be used to provide a general public benefit. *Id.* at 256, 258. A "fee," on the other hand, is a charge that "(1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received." *Id.* at 257. Even an "incidental" regulatory feature of a charge will not overcome the "true purpose" of the charge as a revenue generator for the general fund. *Id.* at 258, citing *Douglas County Contractors v. Douglas County*, 112 Nev. 1452 (1996) (invalidating ordinance as impermissible tax despite being held out as regulatory fee when charge had effect of generating revenue for public improvement project).

Here, the statutory language of NRS 368A.200 clearly and unambiguously states that the tax which is being imposed is an "excise tax on admission to any facility in this State where live entertainment is provided." Consequently, the true purpose of the LE Tax is to tax.

The LE Tax is not a direct tax on constitutionally protected activity

The LE Tax is a tax on the price of admission, food, drink, and merchandise charges at facilities where live entertainment is performed and not a direct tax on constitutionally protected activity.

For LE Tax purposes, live entertainment is statutorily defined as "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." NRS 368A.060. But, the LE Tax taxable event occurs only when the business collects an admission charge or other payment when admission charges are collected. NRS 368A.200(1) provides: [T]here is hereby imposed an excise tax on admissions to any facility in this State where live entertainment is provided.

Thus, while the label of the tax, 'Live Entertainment Tax,' might suggest that what is being taxed is live entertainment, as stated in the statute, the LE Tax is a tax on admissions and other charges at certain establishments.

Regulatory Statutes are Subject to Different Review than Taxing Statutes

The Plaintiffs cited to numerous cases where courts subjected statutes to strict scrutiny. Those statutes were regulatory statutes whose purpose was to regulate behavior. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991), the Court addressed a statute that required go-go dancers to wear pasties and a G-string. The *Barnes* court held that "go-go dancing" was expressive conduct within the outer perimeters of the First Amendment. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000), the Court stated that, while being "in a state of nudity" is not an inherently expressive condition, nude dancing is entitled to some level of constitutional protection. And in *Colacurcio v. City of Kent*, 163 F.3d 545, 550 (9th Cir. 1998), the City of Kent, Washington enacted an ordinance which required nude dancers to perform their dances at least 10 feet away from patrons. The various courts in those matters applied strict scrutiny analysis to those statutes because their goal was to regulate behavior. This is in contrast to the LE Tax which is merely a taxing statute.

In *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (Pa.Cmwlth. 1995), the Commonwealth Court of Pennsylvania addressed the distinction between a regulatory statue and a taxing statute in the First Amendment context. In *Adams Outdoor Advertising, Ltd.*, the borough of Stroudsburg, Pennsylvania enacted an ordinance

which taxed off-premise signs based upon the size of the sign. *Id.* The *Adams Outdoor Advertising, Ltd.* court held that the tax was not a constitutional violation. In their analysis, the Court distinguished taxes from regulations. "[U]nlike a license fee, the purpose of which is to offset the costs of regulation, a tax is imposed for the purpose of raising revenue." *Id.* at 24. "[T]he primary purpose of taxes is always to raise money for the taxing authority." Id. There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. When dealing with a tax versus a regulation, the issues presented are whether the tax is uniform and whether it is an unlawful infringement upon the First Amendment rights. *Id.* When dealing with a tax, the court need not address the fact that the tax amount exceeds the reasonable costs of administration because that is not applicable to tax legislation; it only applies to challenges to license fees. *Id.*

In the instant case, the facts are even further distinguishable from those in the *Adams Outdoor Advertising, Ltd.* case in that an incidental purpose of that statute was to limit the size of signs and not solely to generate revenue. The sole purpose of the LE Tax is to generate revenue and not to regulate First Amendment protected behavior. Evidence of this is the fact that nothing in chapter 368A of NRS authorizes the Department to supervise or regulate the PLAINTIFFS' First Amendment activities and the payment of the tax is not a condition precedent to exercise any constitutionally protected act. Further evidence that chapter 368A of NRS is strictly a tax and not a regulatory measure is the fact that the US District Court dismissed the PLAINTIFFS' Complaint on the grounds that the federal court lacked jurisdiction based on the Tax Injunction Act because the issue presented was strictly a taxing measure. That decision was later affirmed by the 9th Circuit Court of Appeals.

Because the LE Tax is strictly a taxing statute, it is subject to rational basis review.

The State May Tax Admission to Taxpayers' Businesses, Therefore PLAINTIFFS are not Exempt from Taxation Pursuant to NRS 368A.200(5)

There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. With respect to taxing statutes, "[a]ny reasonable doubt about the applicability of an exemption must be construed against the taxpayer." *Sierra Pac. Power Co. v. Dep't of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980).

Pursuant to NRS 368A.200(5)(a), "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions" is exempt from the LE Tax. Since the State of Nevada is not prohibited by the Constitution, law or treaties of the Untied States or the Nevada Constitution from taxing the admissions and other charges at issue in this case, the exemption is not applicable.

Nevada's LE Tax Is A Broad-Based, Content-Neutral Generally Applicable Tax And Is Not A Facially Unconstitutional Direct Tax On The Exercise Of Constitutional Freedoms

Where a regulatory measure is a regulation of speech, it may either be content neutral or content based. The U.S. Supreme Court has articulated the following as the test for whether a regulation is content neutral:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . The government's purpose is the controlling consideration. A regulation
> that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added). "In determining whether a governmental regulation of speech is content based, our principal inquiry is whether the government adopted the regulation because of its disagreement with the message to be conveyed by the speech." *Adams Outdoor Adver., Ltd.*, 667 A.2d 21 at 27, *citing Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984). The government's purpose in enacting the legislation is the Court's controlling consideration and if that purpose is unrelated to the content of the speech, then the regulation is content neutral. *Ward*, 491 U.S. 781. If on the other hand, the purpose of the regulation is related to the content of the speech, or if, in determining whether the regulation applies, one must look to the content

of the speech, then, absent a compelling reason offered by the government, it will be found to be unconstitutional. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Pursuant to NRS 368A.200, the LE Tax is imposed on admission to any facility in the state of Nevada where live entertainment is provided regardless of the content of that entertainment and, therefore, the LE Tax is content-neutral.

Taxing Statutes Which Contain Exemptions and Exceptions are Not Per Se Invalid

There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. There is no indication that the classifications set forth in NRS chapter 368A are for purposes other than optimizing tax revenues. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* (citations omitted). In *Madden*, 309 U.S. at 87-88, 60 S.Ct. at 408, the United States Supreme Court announced the following rule:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized...[T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

(citations omitted).

The LE Tax, on its face, is not directed at, nor does it present the danger of, suppressing particular ideas. Nevada's LE Tax was enacted to raise revenues. It cannot be argued that the LE Tax limits the ability of exotic dancers or for that matter any other entertainers, to express themselves. Nor does it prevent patrons from attending.

With regard to the exemptions, the Nevada Legislature has chosen simply to exclude or exempt certain establishments from the LE Tax. Nothing about the choice to exempt certain live entertainment from the tax suggests an interest in censoring the expressive activities of either nude dancing or clothed

entertainment. *See Leathers v. Medlock*, 499 U.S. 439, 453, 111 S.Ct. 1438, 1447 (1991) ("[t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax").

Nevada's LE Tax Classifications Are Not Unconstitutionally Overbroad or Vague

A statute is void for vagueness and therefore in violation of the Due Process Clause of the Fourteenth Amendment if it "(1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited and (2) authorizes or encourages arbitrary and discriminatory enforcement." *City of Las Vegas v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 122 Nev. 1041, 146 P.3d 240, 245 (2006).

The LE Tax does not seek to prohibit any type of conduct and therefore it cannot be argued that taxing statute is void for vagueness because ordinary people can't understand what conduct it prohibits. Nor does the LE Tax authorize or encourage arbitrary or discriminatory enforcement. Moreover, this issue was not raised by the PLAINTIFFS and PLAINTFFS presented no facts or argument that the LE Tax was either overbroad or vague.

The Court finds that because Plaintiffs have not succeeded on the merits, there is no basis for the Court to grant injunctive relief, and the Court makes no findings or conclusions regarding whether, as contended by Plaintiffs, the anti-injunction provision contained in N.R.S. §368A.280(1) is contrary to the authority granted to the district courts by Article 6, Section 6, of the Nevada Constitution or the separation of powers set forth in Article 3, Section 1, of the Nevada Constitution.

The Court hereby orders Defendants' Motion for Summary Judgment is GRANTED and, the matter having been disposed of, the trial date is hereby vacated.

IT IS SO ORDERED.

DATED this 16th day of December, 2011.

DISTRICT COURT JUDGE

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CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

AMENDED ORDER

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K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*;

Plaintiffs,

v.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No. 08A554970
Dept. No. XI

AMENDED ORDER

DEFENDANTS' RE-NOTICED 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 DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

The Court having first requested that Defendants' motion for partial summary judgment and motion to dismiss be re-noticed and having considered the papers and pleadings regarding the re-noticed motion and the motion to compel, as well as the oral argument presented by all parties, hereby orders:

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

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 is granted in part and denied in part.

With regard to Defendants' motion to dismiss and/or motion for partial summary judgment in Case #08A554970 ("Case 2"), this Court finds that the Defendants timely raised the question regarding the procedural posture of the case and based on the Nevada Supreme Court's decision in *Southern California Edison,* 127 Nev.Adv.Op. 22 (2011) all claims are dismissed and Case 2 shall proceed as a petition for judicial review pursuant to Chapter 233B of the NRS. The Court having tolled the statute of limitations for thirty-three (33) days to allow Plaintiffs thirty-three (33) days to file a petition for judicial review, Plaintiffs shall have thirty-three (33) days from August 23, 2011 to file a petition for judicial review pursuant to NRS 233B.130, *et seq.*

With regard to Defendants' motion to dismiss and/or for partial summary judgment in Case #06A533273 ("Case 1"), the motion is granted and all other claims including the "as applied" challenge, the refund claims and the official capacity claim against Michelle Jacobs are dismissed and Case 1 shall proceed as a facial challenge for declaratory relief only. Briefs are to be filed within thirty (30) days.

With regard to Defendants' motion to dismiss and/or for partial summary judgment regarding all 42 U.S.C. §1983 damages claims, the motion is granted and all such damages claims are dismissed from Case 1 and Case 2.

With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied.

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

With regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.

IT IS SO ORDERED.

DATED this 19th day of December, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

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By: BLAKE A. DOERR
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

YOU AND EACH OF YOU will please take notice that an AMENDED ORDER was

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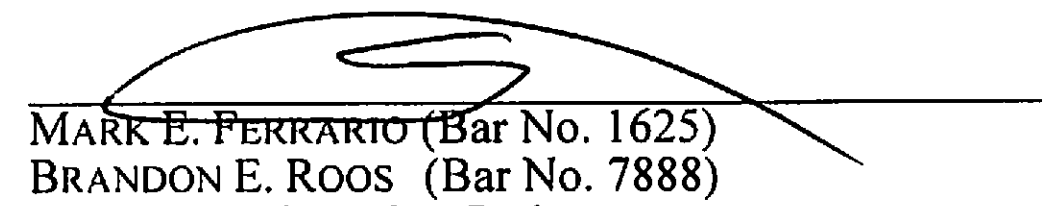
entered on the 19th day of December, 2011, a copy of which is attached hereto.

DATED this 19th day of December, 2011.

GREENBERG TRAURIG, LLP



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I hereby certify that on December 19, 2011, I served a copy of the attached **NOTICE OF ENTRY OF AMENDED ORDER** upon:

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by causing a full, true, and correct copy thereof to be sent by the following indicated method or methods, on the date set forth below:

☒ by mailing in a sealed, first class postage-prepaid envelop, addressed to the last-known office address of the attorney, and deposited with the United States Postal Service in Las Vegas, Nevada.

☐ by hand delivery.

☐ by sending via overnight courier in a sealed envelope.

☐ by faxing to the attorney at the fax number that is the last-known fax number.

☐ by electronic mail to the last known e-mail address.

Valerie Larsen

AN EMPLOYEE OF GREENBERG TRAURIG, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*; Plaintiffs, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

AMENDED ORDER

DEFENDANTS' RE-NOTICED 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 DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

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

The Court having first requested that Defendants' motion for partial summary judgment and motion to dismiss be re-noticed and having considered the papers and pleadings regarding the re-noticed motion and the motion to compel, as well as the oral argument presented by all parties, hereby orders:

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DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 is granted in part and denied in part.

With regard to Defendants' motion to dismiss and/or motion for partial summary judgment in Case #08A554970 ("Case 2"), this Court finds that the Defendants timely raised the question regarding the procedural posture of the case and based on the Nevada Supreme Court's decision in *Southern California Edison,* 127 Nev.Adv.Op. 22 (2011) all claims are dismissed and Case 2 shall proceed as a petition for judicial review pursuant to Chapter 233B of the NRS. The Court having tolled the statute of limitations for thirty-three (33) days to allow Plaintiffs thirty-three (33) days to file a petition for judicial review, Plaintiffs shall have thirty-three (33) days from August 23, 2011 to file a petition for judicial review pursuant to NRS 233B.130, *et seq.*

With regard to Defendants' motion to dismiss and/or for partial summary judgment in Case #06A533273 ("Case 1"), the motion is granted and all other claims including the "as applied" challenge, the refund claims and the official capacity claim against Michelle Jacobs are dismissed and Case 1 shall proceed as a facial challenge for declaratory relief only. Briefs are to be filed within thirty (30) days.

With regard to Defendants' motion to dismiss and/or for partial summary judgment regarding all 42 U.S.C. §1983 damages claims, the motion is granted and all such damages claims are dismissed from Case 1 and Case 2.

With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied.

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With regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.

IT IS SO ORDERED.

DATED this 19th day of December, 2011.

DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
BLAKE A. DOERR
Senior Deputy Attorney General

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