REGISTER OF ACTIONS
CASE NO. 06A533273

Little Darlings Of Las Vegas LLC, K-Kel Inc, et al vs Nevada Dept Of Taxation, Olympus Garden Inc, et al	§	Case Type:	**Other Civil Filing**
	§	Subtype:	**Other Civil Matters**
	§	Date Filed:	**12/19/2006**
	§	Location:	**Department 11**
	§	Conversion Case Number:	**A533273**
	§	Supreme Court No.:	**60037**
	§		

PARTY INFORMATION

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

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

EVENTS & ORDERS OF THE COURT

12/16/2011 **Motion** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Motion to Toll Five-Year Rule Pending Entry of Dispositive Order on Order Shortening Time

Minutes
12/16/2011 9:00 AM
- 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.

Parties Present
Return to Register of Actions

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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

AMOR
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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

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

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

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:

. . .

. . .

. . .

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.

. . .

. . .

. . .

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:

CATHERINE CORTEZ MASTO
Attorney General

By: BLAKE A. DOERR
Senior Deputy Attorney General

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

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CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

LITTLE DARLINGS OF LAS VEGAS LLC, K-KEL INC, ET AL	CASE NO.: 06A533273
VS	DEPARTMENT 11
NEVADA DEPT OF TAXATION, OLYMPUS GARDEN INC, ET AL	

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,

IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Voluntary Dismissal
- ☐ Transferred (before/during trial)
- ☐ Involuntary (statutory) Dismissal
- ☐ Judgment on Arbitration Award
- ☐ Stipulated Dismissal
- ☐ Stipulated Judgment
- ☐ Default Judgment
- ☐ Motion to Dismiss (by Defendant)
- ☒ Summary Judgment
- ☐ Non-Jury (bench) Trial
- ☐ Jury Trial

DATED this 30th day of December, 2011.

ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

RECEIVED
JAN 03 2012
CLERK OF THE COURT

33

NOTC
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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*, et al.,

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Defendants.

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

Coordinated with:

Case No. 08A554970
Dept. No. XI

NOTICE OF APPEAL
(CASE NO. 06A533273)

Notice is hereby given that all the Plaintiffs named above hereby appeal to the Supreme Court of Nevada from the ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS COUNTER-MOTION FOR SUMMARY entered in this action (Case No. 06A533273 only) on the 16th Day of December, 2011. This order appealed from was signed by District Court Judge Elizabeth Gonzalez on December 16, 2011, and was electronically filed (entered) on December 16, 2011. The notice of entry of this order was served on December 19, 2011.

DATED this 9th day of January, 2012

BY: */s/ William H. Brown*
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2012, the foregoing *NOTICE OF APPEAL (CASE NO. 06A533273)* was served on the party(ies) by mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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Attorneys for the Nevada Defendants

/s/ Arleen Viano
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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 (Case No. 06A533273)

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 (Case No. 06A533273)

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, Nevada State Board of Examiners, and Michelle Jacobs (in her official capacity only) 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
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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 appear under SCR 42 by the district Court by an order entered on April 3, 2007 (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 December 19, 2006, the date the Complaint was filed.

10. This appeal arises out of Plaintiff-Appellant's action for declaratory relief, injunctive relief, damages and attorneys fees. Plaintiff-Appellants' Complaint challenges the constitutionality of Nevada's Live Entertainment Tax ("LET"), NRS 368A.010 I. and sets forth claims pursuant to 42 U.S.C. § 1983. Plaintiff-Appellants claim that the LET is unconstitutional under the First and Fourteenth Amendments to the United States Constitution and under Article I, Sections 9 and 10 of the Nevada Constitution, both on its face and as applied; and that the Defendant-Appellees 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 08A554970 and the request for declaratory relief was later consolidated with the request for declaratory relief in Case No. 08A554970. On December 16, 2011, the District Court entered an order denying Plaintiff-Appellants' motion for summary judgment and granting Defendant-Respondents'

counter-motion for summary judgment, as to all claims. The coordinated and partially consolidated Case No. 08A554970 was previously dismissed by the Court by an order entered on Nov. 1, 2011.

11. This case (Case No. 06A533273) has not been previously subject to an appeal or an original writ proceeding in the Supreme Court. However, the coordinated and partially consolidated Case No. 06A533273 has been appealed to the Nevada Supreme Court, is currently pending before the Nevada Supreme Court, and has been assigned Nevada Supreme Court Case No. 59752.

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

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

DATED this 18th day of January, 2012.

BY: /s/ WILLIAM H. BROWN

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Counsel for SHAC, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2012, the foregoing **CASE APPEAL STATEMENT (Case No. 06A533273)** 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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Sr. Deputy Attorney General
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/S/ ARLEEN VIANO
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*Pending Admission *Pro Hac Vice*

FILED
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CLERK OF COURT

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,*

Plaintiff,

vs.

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

Defendants.

Case No.: A533273
Dept. No.: IX

ORDER ADMITTING TO PRACTICE

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CLERK OF THE COURT

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 30th day of March, 2007.

DISTRICT JUDGE

Submitted By:

DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
8861 West Sahara, Suite 120
Las Vegas, NV 89117

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. 60037

District Court Case No. A538270

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OPP

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Case No.: A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date of Hearing: November 8, 2011
Time of Hearing: 9:00 a.m.

Defendants.

COME NOW Plaintiffs, by and through their attorneys of record, William H. Brown of the law firm of LAW OFFICES OF WILLIAM H. BROWN, ESQ., LTD., and Bradley J. Shafer, of the law firm of SHAFER & ASSOCIATES, P.C., and hereby respectfully request that this Honorable Court deny Defendants' Motion for Summary Judgment.

This Opposition is made and based upon the Verified Amended Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs; the exhibits thereof; the following Points and Authorities; the submissions on file in this action, and in particular Plaintiffs' Motion for Summary Judgment on Facial Challenge, for Permanent Injunction, and for Return of Taxes, together with the exhibits and attachments thereto; prior arguments of counsel; and the arguments of counsel to be made at the time of the hearing.

DATED this 28th day of October, 2011

LAW OFFICES OF WILLIAM H. BROWN, LTD.

BY: */s/ William H. Brown*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND, FACTS, AND PROCEDURAL HISTORY

The facts and proceedings to date in this matter are fully set forth in Plaintiffs' Motion for Summary Judgment on Facial Challenge, for Permanent Injunction, and for Return of Taxes ("Plaintiffs' Motion" or "Plnt. Mtn."), which is set for hearing contemporaneously with the Defendants Motion for Summary Judgment ("Defendants' Motion" or "Def. Mtn."). Therefore Plaintiffs hereby rely upon, adopt and incorporate by reference, as through fully set forth herein, Plaintiffs' Motion and all exhibits submitted therewith, including the statement of Background and Facts, Procedural History, and Relevant Provisions of Chapter 368A, set forth in Plnt. Mtn., Sections I-III, pp. 5-11.

II. POINTS AND AUTHORITIES

A. SUMMARY JUDGMENT STANDARDS.

Summary Judgment is appropriate only where there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. **Turner v. Mandalay Sports Ent.**, 124 Nev.Adv.Op. 20, 180 P.3d 1172, 1174 (2008). Whether a law is facially unconstitutional is a question of law. **Flamingo Paradise Gaming, LLC v. Chanos**, 124 Nev.Adv.Op. 39, 217 P.3d 549, 551 (2009).

Nevertheless, whether a law is facially unconstitutional is analyzed by reference to the law's text, legislative history, and practical effect. Plnt. Mtn., Section IV(B), pp. 12-13 (citing **Children's Healthcare Is a Legal Duty, Inc., v. Min De Parle**, 212 F.3d 1084, 1088 (8th Cir. 2000)). For purposes of inquiring into the legislative history and practical effect of the Live Entertainment Tax ("LET"), on August 2, 2011, Plaintiffs noticed the Nev. R. Civ. P. 30(b)(6) deposition of the State of Nevada, and the depositions of Dino Dicianno, Tesa Wanamaker,

and Michelle Jacobs. Deposition Notices are attached as Ex. A. Defendants moved to quash these depositions, but the motion was denied. *See* Minutes of 8/16/2011, 9:00AM, Register of Actions, Case No. 06A533273, Ex. B. However, on August 12, 2010, the Court was presented with a motion to compel discovery submitted by the Defendants, together Defendants' Motion for Partial Summary Judgment on the Plaintiffs' Claims for Refund and Motion to Dismiss the As Applied Challenge to the Live Entertainment Tax and the Claims for Damages Pursuant to 42 U.S.C. § 1983. Over the course of dismissing the as applied challenges and denying the Defendants' motion to compel, the court ruled that "further discovery is inappropriate." Minutes of 8/23/2011, 9:00AM, Register of Actions, Case No. 06A533273, Ex. C. Thus, the parties ceased engaging in discovery and the pending depositions were adjourned.

Thus, the facially validity of the LET will be decided as a question of law on the record to date according to the orders of the Court. Nevertheless, for purposes of appeal only, Plaintiffs maintain, and do not waive the claim, that they were entitled to complete discovery and to present further evidence regarding the legislative history and practical effect of the LET.

B. LEGISLATION IS PRESUMED TO BE UNCONSTITUTIONAL WHEN IT IMPACTS UPON FIRST AMENDMENT RIGHTS.

The Defendants consistently and repeatedly misstate the presumptions and burdens of proof in place when analyzing whether a law passes muster under the First Amendment. The Defendants contend that the LET is presumed valid until the contrary is clearly established. Def. Mtn., p. 7-9. That position is clearly wrong. Defendants' support their flawed position by referencing cases that did ***not*** involve First Amendment speech or expression. When speech and expression are the subject of the law in question,[1] the courts have been clear:

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[1] The LET clearly impacts protected expression, as further supported in Section II(E), *infra*.

> While state supreme court regulations and legislative and congressional acts are generally entitled to a presumption of constitutionality, …the preferred position of the first amendment greatly weakens such a presumption involving that amendment. See, e.g., **Turchick v. United States**, 561 F.2d 719, 724 (8th Cir. 1977); **United States v. Dellinger**, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). *See generally*, Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956). It is also inappropriate to apply such a presumption [of constitutionality] where the practical effect of doing so would be to greatly reduce the burden of proof on the part of the state in justifying its speech restrictions.

Durham v. Brock, 498 F. Supp. 213, 221 (M.D. Tenn. 1980), *aff'd*, 698 F.2d 1218 (6th Cir. 1982) (footnote omitted).

Instead, it is clear under established Supreme Court precedent that laws such as the Live Entertainment Tax are subject to strict constitutional scrutiny, and it is the government's "*heavy burden*" to attempt to justify the validity of such regulations. "***When First Amendment compliance is the point to be proved, the risk of nonpersuasion*** – operative in all trials – ***must rest with the Government***, not with the citizen." **United States v. Playboy Entertainment Group, Inc.**, 529 U.S. 803, 818 (2000) (emphasis added), *quoting* **Speiser v. Randall**, 357 U.S. 513, 526 (1958). *See also* **Clark v. City of Lakewood**, 259 F.3d 996, 1004 (9th Cir. 2001) ("The level of constitutional protection and the type of analysis we apply to nude dancing regulations differs depending on the type and purpose of the restriction. ***In all situations, however, the government has the burden of proof to justify burdening freedom of expression***") (emphasis added). Thus, when laws such as the LET raise First Amendment concerns, "the ***usual presumption of constitutionality*** afforded [legislative] enactments ***is reversed***." **Playboy**, 529 U.S. at 817 (emphasis added).

Indeed, it is the government's ***general*** burden to substantiate the constitutionality of the infringement upon protected speech and expression rights, and not on the taxpayers as the Department contends. **Perry Education Ass'n. v. Perry Local Educator's Ass'n.**, 460 U.S.

37, 45 (1983) (direct infringement requiring application of strict scrutiny); and **Widmar v. Vincent**, 454 U.S. 263, 270 (1981) (incidental infringement requiring application of intermediate scrutiny). More to the point, the ***tax cases*** of the United States Supreme Court cited and quoted at Plnt. Mtn. pp. 13-14 all demonstrate that the burden here is ***clearly and unquestionably on the government***. The Defendants cite no Supreme Court case where the taxation scheme impacts upon First Amendment rights that does not hold as such.

Here, First Amendment compliance is the point to be proven; i.e., whether, pursuant to the relevant authority, the LET: 1) is an unconstitutional direct tax on First Amendment activity, 2) whether the LET has the purpose or effect of applying to a narrowly defined group of speakers; or 3) whether the LET is a content-based tax. *See, e.g.*, **Murdock v. Commonwealth of Pennsylvania**, 319 U.S. 105, 108, 111 (1943); **Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue**, 460 U.S. 575 (1983); **Arkansas Writers' Project, Inc. v. Ragland**, 481 U.S. 221, 231 (1987); and **Leathers v. Medlock**, 499 U.S. 439, 445-446 (1991). It is simply undeniable that the implications on First Amendment expression modify the general burden asserted by the Defendants, and the Defendants have not established, and cannot establish, otherwise.

C. THE TAXPAYERS BILL OF RIGHTS REQUIRES THAT THE LET MUST BE CONSTRUED IN FAVOR OF THE TAXPAYER.

The State of Nevada has a Taxpayers Bill of Rights, which states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto ***construed in favor of the taxpayer*** if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable." N.R.S. § 360.291(1)(o) (emphasis added). The Plaintiffs have made sufficient demonstration of the invalidity of the LET, but there is also the statute provision of the LET that exempts from the tax "live

entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitution." N.R.S. § 368A.200(5)(a). This Court, thus, does not even have to constitutionally invalidate the LET in order to grant the ultimate relief requested by the Plaintiffs (a declaration that the tax does not apply to them, an injunction prohibiting the enforcement against them, and return of all taxes paid with interest). Under the Tax Payers Bill of Rights, this statutory provision should be liberally construed in favor of the Plaintiffs; bringing the live entertainment that they present out of the realm of this taxation scheme.

The Taxpayer Bill of Rights also abrogates any otherwise existing authority holding that tax statutes are to be construed against the taxpayers and in favor of the government. It is well-established that when examining statutes, "[t]he Legislature's intent is the primary consideration. . . ." **Hardy Co., Inc., v. SNMARK, LLC**, 126 Nev.Adv.Op. 49, 245 P.3d 1149, 1153 (2010) (citing **Cleghorn v. Hess**, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993)). A statue must be "construed in line with what reason and public policy would indicate the legislature intended." **McKay v. Board of Sup'rs of Carson City**, 102 Nev. 644, 649, 730 P.2d 438 (1986) (internal quotations omitted). The Legislature has explicitly expressed an intent and a public policy that tax provisions it enacts must be construed ***in favor of taxpayers*** and that the government does not reap the benefit of a tax law that is of "doubtful validity or effect." NRS 360.291(1)(o).

D. THE PRIOR CABARET ENTERTAINMENT AND CASINO TAXES DO NOT RENDER THE LIVE ENTERTAINMENT TAX CONSTITUTIONAL.

Defendants attempt to argue that because constitutionally protected live entertainment that was performed in casinos in the past was taxed via either the former federal Cabaret Tax or the former Casino Entertainment Tax, the LET is not unconstitutional. Def. Mtn., pp. 9-11.

Defendants note the title of Senate Bill 8 ("SB 8") enacted in 2003, was "AN ACT replacing the casino entertainment tax with a tax on all live entertainment." Def. Mtn. p. 9 (citing Act of July 22, 2003, ch. 5, 2003 Nev.Stat 133). Defendants are, in essence, asking this court to ignore the language of the statute and uphold it based on its modifying title.

The Defendants do not, however, and for good reason, discuss the tax burdens under the former Casino Entertainment Tax compared to the LET. The former Casino Entertainment Tax (Ex. D) imposed a tax "equivalent to 10 percent of all amounts paid for admission, food, refreshments and merchandise." **Id**. There is no specific tax upon entertainment protected by the First Amendment (see below). And, unlike the LET, the Casino Entertainment Tax certainly did not contain an array of exemptions/exceptions based upon the ***content*** of the entertainment. Moreover, the portion of the current LET applicable to casinos ("Casino LET") taxes *only* admissions at a rate of 5%, NRS § 368A.200(1)(b). However the portion of the LET directed at gentlemen's clubs ("Adult LET") is 10% on "admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise. . . ." NRS § 368A.200(1)(a). *See also*, Plnt. Mtn., pp. 22-23.

The constitutionality of the LET depends on the tax burdens and targeting contained in the LET; not ***on other former taxes***, the constitutionality of which are simply not before this Honorable Court. Gambling is not protected by the First Amendment; entertainment is. If anything, the comparison that the Defendants ask this Court to make with regard to the previous taxation scheme further demonstrates the unconstitutionality of the LET. The new tax cuts the tax burden by more than half for casinos by reducing the rate from 10% to 5%, and by no longer taxing refreshments at casinos. The higher burden is placed upon expression clearly protected by the First Amendment, and in particular, that presented by these Plaintiffs. Simply

put, the LET taxes Plaintiffs in a much more targeted and discriminatory manner than the former Casino Entertainment Tax.

E. LIVE ENTERTAINMENT, EVEN THAT WHICH MAY CONSIST OF TOPLESS OR NUDE DANCING, IS EXPRESSLY PROTECTED BY THE CONSTITUTION AND MAY NOT BE SINGLED OUT FOR TAXATION.

First and foremost, Defendants fail to acknowledge that this is a tax on live entertainment, and entertainment, in-and-of-itself, is considered protected expression under the First Amendment. **Winters v. New York**, 333 U.S. 507, 510 (1947). "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and ***live entertainment***, such as musical and dramatic works fall within the First Amendment guarantee." **Schad v. Borough of Mount Ephraim**, 452 U.S. 61, 65-66 (1981) (emphasis added). *See also* **Ward v. Rock Against Racism**, 529 U.S. 781, 790 (1989) (Rock music protected); **Zacchini v. Scripts-Howard Broadcasting Co.**, 433 U.S. 562, 578 (1977) (held live human cannonball performance to be protected, holding ". . . entertainment itself can be important news"). As this is a tax on live entertainment, and Plaintiffs' establishments present such absolutely protected live entertainment, the LET is subject to the form of strict scrutiny that the Supreme Court applies to taxation laws directed at First Amendment activities.

Even though the LET has been gerrymandered to apply principally to the type of performance presented at Plaintiffs' establishments, the level of scrutiny does not change due to the nature of the entertainment (Defendants attempt to argue that because exotic dancing is "low value" speech it is not entitled to constitutional protection. Def. Mtn., pp. 11-12).

First, and has often been the case in this very lengthy and convoluted litigation, the Defendants are never satisfied with a victory, and fail to recognize in their motion that the "as

applied" challenge relating solely to Plaintiffs' adult entertainment establishments is no longer part of this case.[2] This is now solely, predicated upon Defendants' motion, and ***facial*** constitutional challenge. And, while it may be inappropriate for the Defendants to have pointed this out in light of the inability of the Plaintiffs to complete discovery in this case, the Defendants acknowledge that the taxation does not *exclusively* fall upon the gentlemen's club. *See*, Senate Committee on Taxation, April 12, 2005, p. 20, Ex. 20 to Plnt. Mtn. (discussing other forms of entertainment unintentionally swept in to the LET such as singers and bands). Consequently, it is nothing short of absurd for the Defendants to assert that the level of constitutional scrutiny must be reduced because *some* of the taxpayers *sometimes* present a form of expression (certainly, Defendants do not argue that entertainers at the Plaintiffs' establishments do not dance fully clothed at times) that may, in *other* circumstances, be applicable to a lower standard of constitutional scrutiny (even though the Supreme Court has ***never*** adopted the same with regard to a tax statute directed at First Amendment expression) is inapplicable because this tax is ***not*** targeted only at establishments that may, in other contexts, warrant a reduced level of exacting scrutiny.

Second, Defendants are simply wrong, even if the LET was directed at ***only*** gentlemen's clubs. While it may not be popular expression, exotic dancing, in the form of

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[2] Clearly, Plaintiffs are entitled to and do challenge the LET for primarily targeting gentlemen's clubs such as Plaintiffs. Nevertheless, the LET (however unintentionally) also captures some other forms of live entertainment. Because these other forms of entertainment also remain despite the content-based exemptions, the nature of those rights must also be considered. Defendants make no argument that the First Amendment activities of these minor "collateral damage" payers are subject to a lower level of scrutiny. *See, e.g.,* Assembly Committee on Commerce and Labor of Nevada, 73rd Sess., p. 19 (May 16, 2005), Ex. 14 to Plnt. Mtn. ("I'm concerned that if we just put ["] live adult entertainment ["] that might be held unconstitutional. …We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than put into our statute the phrase "adult entertainment," which puts a big red flag on it for the courts.").

clothed, "topless," and even fully nude entertainment, falls within the scope of the liberties, including the right to free expressive association, afforded by the First Amendment. *See, e.g.,* **Barnes v. Glenn Theatre, Inc.**, 501 U.S. 506, 565 (1991) (nude dancing receives protections under the Constitution); **City of Erie**, 529 U.S. at 289 (same); **Schad**, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections form official regulation"); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 396 (6th Cir. 2001), *citing* **Roberts v. United States Jaycees**, 468 U.S. 609, 622 (1984) (Court held that "the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a 'collective effort on behalf of shared goals'").[3]

Further, the United Supreme Court has identified that even adult entertainment is entitled to the same protection from financial disincentives and economic hardship as is "core" speech and expression. In the Supreme Court's most recent foray into "adult" entertainment jurisprudence, Justice Kennedy, in his critical concurring opinion, observed that:

> ". . .a city may not regulate the secondary effects of speech by suppressing the speech itself. ***A city may not, for example, impose a content- based fee or tax***."

City of Los Angeles v. Alameda Books, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring) (emphasis added). *See also* **Acorn Investments. Inc. v. City of Seattle**, 887 F.2d 219, 222 (9th Cir. 1989) (invalidating a discriminatory licensing tax involving adult businesses where

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[3] Interestingly, the Sixth Circuit in **Deja Vu of Nashville** determined that the freedom of ***association*** rights related to exotic dancers were subject to ***strict*** scrutiny. *See* 274 F.3d at 396.

the tax was not proved to be related to the costs of regulating such businesses); **TK's Video, Inc. v. Denton County**, 24 F.3d 705, 710 (5th Cir. 1994) (***"Government cannot tax First Amendment rights***, but it can exact narrowly tailored fees to defray administrative cost of regulation").

Justice Kennedy's concurrence in **Alameda Books** is critical because most courts have noted that opinion to be the constitutional "holding" of that plurality decision of the Court pursuant to **Marks v. United States**, 430 U.S. 188 (1977).[4]

Plaintiffs cite no direct authority for the proposition that a content-based (or discriminatory tax) is not subject to strict scrutiny.

F. THE LIVE ENTERTAINMENT TAX IS INVALID REGARDLESS OF THE FACT THAT IT IS A TAX AND NOT A REGULATORY STATUTE.

Defendants completely misunderstand and misstate the significance of cases striking licensing fees on adult businesses. The underlying principle in these cases (*e.g.*, **Acorn**

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[4] **Marks** is the case which describes how to discern the precedence of a plurality decision (the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"). 430 U.S. at 193, *citing* **Gregg v. Georgia**, 428 U.S. 153, 169 n. 15 (1976). Since the ruling in **Alameda Books**, courts have consistently held Justice Kennedy's concurring opinion to, in fact, be the holding of that decision. *See, e.g.*, **Ben's Bar v. Village of Somerset**, 316 F.3d 702, 721-22 (7th Cir. 2003) (challenging ordinance prohibiting the sale, use or consumption of alcohol on premises of "Sexually Oriented Businesses"); **SOB, Inc., v. County of Benton**, 317 F.3d 856, 861-62 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003) (challenging public indecency ordinance); **Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County**, 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) (Justice Kennedy's concurrence applied to both zoning and public nudity ordinances); **GAME Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d. 631, 637-38 (7th Cir. 2003), *cert. denied*, 125 S.Ct. 49 (2004) (the Justice's concurring opinion applying to, among other things, a dancer/patron "buffer zone"); and **World Wide Video of Washington, Inc. v. City of Spokane**, 368 F.3d 1186, 1193 (9th Cir. 2004) (challenging a zoning ordinance). *Cf.*, **Center for Fair Public Policy v. Maricopa County**, 336 F.3d 1153, 1163-64 (9th Cir. 2003) *cert. denied*, 541 U.S. 973 (2004)(a divided Ninth Circuit concluding that Justice Kennedy's "proportionality" test was not relevant to an hours-of-operation restriction),*cert denied*, 541 U.S. 973 (2004).

Investments, *supra*, and **TK's Video**, *supra*) is that "[t]he government may not profit by imposing licensing or permit fees on the exercise of first amendment rights . . . ." **Sentinel Communications v. Watts**, 936 F.2d 1189, 1205 (11th Cir. 1991) (citing **Murdock**, 319 U.S. at 113-114). Hence, in order for those fees to pass First Amendment muster, they must be not greater than necessary to defray administrative costs. *See, e.g.,* **AAK, Inc. v. City of Woonsocket**, 830 F.Supp. 99 (D.R.I. 1993) (fees for "seminude" dancing establishment struck down as unconstitutional).

Plaintiffs have referenced cases involving fees levied against adult businesses to explain to this Court that if a licensing fee exceeds the reasonable cost of administration, it ceases being a "fee" and is considered a blatant tax on constitutionally protected expression. This ***bolsters*** Plaintiffs' contention that the LET, which is ***not*** a mere licensing fee but, rather, is an ***actual tax*** aimed at specific protected expression, is most certainly unconstitutional. The fact that licensing fees on gentlemen's clubs have been struck when they exceed administrative costs further verifies that the government cannot profit by taxing gentlemen's clubs in a discriminatory manner. Or, stated differently, if there were no First Amendment prohibition against singling out gentlemen's clubs for taxation, municipalities would be free to exact whatever license fee they desired. That is clearly not the case.

Further, the case cited by Defendants demonstrates the unconstitutionality of the LET. The court in **Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg**, 667 A.2d 21 (Pa Cmwlth. Ct. 1995), in holding that particular tax constitutional, stated:

> Here, there is nothing in the record or in the Ordinance suggesting that the tax was directed at suppressing any particular ideas or that it is likely to stifle the free exchange of opinions. In fact, the reasons advanced by the Borough for the Ordinance are to the contrary: to off-set the costs associated with increased traffic, to enhance aesthetic values, and to improve vehicular safety. Moreover, because ***that tax was imposed upon all off-premises signs, it does not single***

> ***out one small group of off-premises signs while exempting others from taxation***. Under the reasoning of **Leathers**, therefore, the tax cannot be deemed to be unconstitutional.

Id. at 26 (emphasis added).

Here, the LET does not apply to ***all*** businesses which charge admission. If it did, it would more likely be constitutional. The LET applies, however, only to live entertainment that is clearly protected by the First Amendment, and it singles out mainly exotic dancing for its burden while "exempting others from taxation." It is invalid for the very reasons discussed in the case relied upon by the Defendants.

G. THE LET IS A NOT A BROAD BASED, CONTENT-NEUTRAL, GENERALLY APPLICABLE TAX.

The Department attempts to distinguish **Murdock v. Commonwealth of Pennsylvania**, 319 U.S. 105 (1943), with reference to **Jimmy Swaggart Ministries v. Board of Equalization**, 493 U.S. 378, 385 (1990). Def. Mtn. p. 14-16. First of all, it should be noted that in **Swaggart**, the taxpayer wanted an exemption from "a ***generally applicable*** sales and use tax," which "applies neutrally to ***all*** retail sales of tangible personal property made in California," for the religious materials distributed by his religious ministry. **Id.** at 389 (emphasis added). Here, to the contrary, the Plaintiffs assert the unconstitutionality of a **limited** tax which is solely restricted to expression protected by the First Amendment.

In addition, while reaffirming its holding in **Murdock** that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment," **Swaggart**, at 386, the Supreme Court nevertheless upheld the California *general* sales and use tax, citing to its decision in **Follett v. Town of McCormick**, 321 U.S. 573 (1944):

> We have here something quite different, for example, ***from a tax on the income of one who engages in religious activities*** or a tax on property used or employed in connection with those activities . . .a preacher is not 'free from all

> financial burdens of government, including taxes on income or property' and, 'like other citizens, may be subject to *general* taxation.

Swaggart, at 386-87, *citing* to **Murdock** and **Follett** (internal citations omitted) (emphasis in original and added).

Here, the LET is most certainly ***not*** a generally applicable tax, it is not a general tax on income of an individual, or a general tax on property, nor is it a general tax applied to other citizens, as discussed by the Supreme Court. Indeed, Plaintiffs make no argument that they are exempt from *general* sales, property, and income taxes. If that were the Plaintiffs' argument, **Swaggart** would be applicable. Here, directly to the contrary, Plaintiffs challenge a unique tax that ***only*** applies to First Amendment protected activity. The LET is, thus, akin to the impermissible tax noted by the Supreme Court in **Swaggert** that applied only to "the income of one who engages in religious activities…." The only difference is that here, the tax applies to only those who engage in ***expressive*** activities.

The Defendants then attempt to discredit the Plaintiffs' reliance upon **Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue**, 460 U.S. 575 (1983), by stating that the case is inapplicable because it "only applies to the protections of the institution of the press, not to the more general protections of freedom of expression." Def. Mtn. p. 16. Thus, the Defendants contend, only the press is exempt from differential taxation and all other First Amendment activity is fair game. Obviously, that is not the case. The notion that nude dancing may be targeted for discriminatory taxation is dispelled by Justice Kennedy's concurring opinion in **Alameda Books**, as well as by the established First Amendment jurisprudence requiring licensing fees on nude dancing establishments to be nor greater than necessary to defray administrative costs. *See* Section II (F), *supra*.

Further, in the context of the taxation of First Amendments freedoms, the Court itself has made clear:

> That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this Court . . . .

Grosjean v. American Press Co., 297 U.S. 244 (1936) (string citation omitted).

Moreover, at least one court has directly addressed and rejected the Department's argument that strict scrutiny only applies to selective taxation of the press. *See* **Vermont Society of Association Executives v. Milne**, 779 A.2d 20, 23 (Vt. 2001) ("Because the State questions the general notion of applying heightened scrutiny to a tax directed at lobbyists, as opposed to the press, we first consider the status of lobbying as a protected First Amendment interest"). After determining that the act of lobbying was protected by the First Amendment speech guarantee, the court had no trouble concluding that Supreme Court precedent clearly established that *all* taxes singling out First Amendment rights were subject to strict scrutiny:

> The Court in **Grosjean** [297 U.S. 233 (1936)] emphasized, however, that a tax singling out interests protected by the First Amendment cannot stand. **Id**. at 244, 250, 56 S.Ct. 444 (it is settled law that freedoms of speech and press 'are rights of the same fundamental character' safeguarded against abridgment by state legislation). . . . Accordingly, the Court concluded that the abridgment clause prohibited not only laws that directly censored First Amendment interests, but also laws that singled out those interests for special taxation. **Id**. at 248-250, 56 S.Ct. 444.
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> The United States Supreme Court has consistently adhered to this principle of disallowing special taxes that single out and burden First Amendment interests. For example, in **Minneapolis Star** [460 U.S. at 592], the Court Struck down, on two independent grounds, a special use tax imposed on paper and ink products consumed in the production of publications. The first ground, the one most relevant to the instant case, was that the tax singled out a First Amendment interest for special treatment. While acknowledging that the government can subject First Amendment interests to 'generally applicable' economic regulation without creating constitutional problems, the Court rejected the State's claim that the paper and ink tax was a substitute for the sales tax and thus part of a general scheme of taxation. **Id**. at 581, 103 S.Ct. 1365. The Court noted that its

> previous cases approving such economic regulation 'emphasized the *general applicability* of the challenged regulation *to all businesses*.' **Id**. at 583, 103 S.Ct. 1365 (emphasis added). The court reasoned that there is less concern that 'a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. **Id**. at 585, 103 S.Ct. 1365. When the tax singles out a select group, however, the political constraint is absent, and 'the threat of burdensome taxes becomes acute." **Id**.

779 A.2d at 25-26 (emphasis in original) (parentheticals in original) (clarification added)[5].

Defendants' position was also rejected in **U.S. Satellite Broadcasting Co. v. Lynch**, 41 F.Supp.2d 1113 (E.D.Cal. 1999). In that case, the state had singled out telecasts of boxing contests for special taxation (as opposed to gentlemen's clubs here). **Id**. at 116. The court relied heavily on **Arkansas Writers' Project** and **Leathers** to conclude that the tax was an impermissible content-based tax on First Amendment activity. **Id**. at 1120-1123. The court reasoned:

> As a threshold matter, defendants have not convinced the court that First Amendment protection does not attach to live boxing matches organized, held, and televised for the purpose of entertaining live and remote viewers. The First amendment protects entertainment. **Schad**, 452 U.S. at 65 [ ]. ***It protects live entertainment, including even the expressive content of nude dancing***, **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560 [ ] (1991).
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> * * *
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> Thus, it simply does not matter if the First Amendment protects or even applies to boxing. ***A tax on the dissemination of entertainment based on the content must pass strict scrutiny, regardless of its subject matter***. **Simon & Schuster [inc. v. Members of New York State Crime Victims Board]**, 502 U.S. [105,] 115 [ ][(1991)]; **Arkansas Writers' Project**, 481 U.S. at 230 [ ]. The First Amendment does not protect murder, yet the court feels confident that news broadcasts of the court feels confident that news broadcasts of murder, killing, or war may not be censored to suppress their content. Nor it a hurricane protected by the First Amendment; yet a broadcast with an audience has a right under the First Amendment to broadcast images of a hurricane. ***Defendants' argument, that telecasts of boxing do not enjoy First Amendment protection***

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[5] Even if the Defendants were correct in this argument, the LET would nevertheless unconstitutional because it differentiates based upon the ***content*** of entertainment and, thus, expression.

> ***because boxing is somehow "less valuable" than other subjects, runs contrary to every principle of the Free Speech Clause itself.***
>
> * * *
>
> Because the undisputed facts establish the Boxing Act tax must survive strict scrutiny, defendants would at trial bear the burden of proving the tax to be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." [**Simon & Schuster**, 502 U.S.] at 118 [ ]. . . .
>
> Defendants argue that the state has a general interest in raising revenue. While this interest has been described as "critical" and "important," as a matter of law it does not justify a content-based tax on speech. **Arkansas Writers' Project**, 481 U.S. at 231-232 [ ] ("an alternative means of achieving the same interest [raising revenue] without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally"), *quoting* **Minneapolis Star** [ ] 460 U.S. [at] 586 [ ].

Id. at 1120-21 (parallel citations omitted; clarification in original and added, emphasis added).

The reasoning in **U.S. Satellite Broadcasting** is directly applicable to this action. There, the court identified that "the Boxing Act taxes some telecasts, and not others, based on the content of those telecasts. . . . The Boxing Act thus taxes some speech based on its content. Under **Leathers**, **Arkansas Writers' Project**, and the weight of First Amendment jurisprudence, the tax should be subject to strict scrutiny." 41 F.Supp.2d 111. The same is true here, as the LET taxes some forms of live entertainment based on their content (and, ironically, the type of boxing taxed in **U.S. Satellite Broadcasting** is specifically ***exempted*** from taxation under the LET; *see* N.R.S. 368A.200(5)(c)). The LET is subject to strict scrutiny, which it cannot overcome.

H. THE LET TAXES DIFFERENTIALLY BASED ON CONTENT.

The Defendants argue that the purpose of the LET is to generate revenue and that any burden on speech is incidental, rendering the law content neutral. Def. Mtn. p. 16-17. Defendants contend that the government's purpose in enacting the regulation is the controlling

consideration. **Id**. In other words, the Department argues that the government may single out any First Amendment activity for special taxation, so long as tax is designed to raise revenue. Again, obviously that is not true. In fact, the opposite is true. When the government taxes First Amendment activity in a differential or content-based manner, it must prove that doing so furthers a governmental interest "that it cannot achieve without differential taxation." **Minneapolis Star**, 460 U.S. at 585. More importantly, that governmental interest ***cannot*** be the simple "raising of revenue." **Id**. at 586. As the Supreme Court has noted, that governmental interest "[s]tanding alone, cannot justify the discriminatory tax on First Amendment protected activities." **Id**. at 585-86. The Court has observed that the "state could raise the revenue by ***taxing businesses generally***, avoiding the censorial threat implicit in a tax that singles out" protected expression. **Id**.

In addition, it is clear that even a facially neutral law should be scrutinized to uncover illicit motive or effect, since such a law may discriminate:

> . . . by harboring a discriminatory purpose, *see, e.g.,* **Hunt v. Wash. State Apple Adver. Comm'n**, 432 U.S. 333, 352–53 (1977) (*striking down* facially neutral statute prohibiting state grading from appearing on apple boxes and noting evidence that it was intended to discriminate against Washington apples carrying state grades); **Bacchus Imports, Ltd. v. Dias**, 468 U.S. 263, 269 (1984) (*striking down* facially neutral statute exempting certain locally-produced alcoholic beverages from the excise tax because legislative history showed it was intended to foster local industry); or [ ] by discriminating in its effect, *see, e.g.,* **W. Lynn Creamery, Inc. v. Healy**, 512 U.S. 186, 194 (1994) (*striking down* facially neutral law imposing assessment on all milk sold to Massachusetts retailers because its effect on in-state producers was entirely offset by the subsidy provided exclusively to in-state dairy farmers).

Town of Southhold v. Town of East Hampton, 477 F.3d 38, 48 (2d Cir. 2007) (emphasis added). *See also* **Children's Healthcare**, 212 F.3d at 1090 ("[s]uch discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect").

In this regard, the Defendants' motion completely ignores the damning legislative history and what that history *confirms* about the practical effect of the LET. Plaintiffs have set forth this point in detail in their own motion, and rather than duplicating that briefing here Plaintiffs incorporate by reference pp. 31-40 of Plnt. Mtn. here. There can be no doubt that gentlemen's clubs were targeted for taxation and that the Legislature further "zeroed in" on gentlemen's clubs in 2005, while at the same time other favorable "family-oriented" entertainment was exempted in 2005 and 2007.

I. THE EXEMPTIONS TO THE LET DEMONSTRATE THAT IT IS A DISCRIMINATORY, CONTENT-BASED, TAX.

The Defendants' reliance on **Leathers** is misplaced and must be rejected. The Defendants attempt to utilize **Leathers** to support their claim that all tax legislation enjoys a presumption of validity and that legislatures have broad discretion to differentiate among speakers within those statutes however they may choose. Clearly, **Leathers** does not support such broad propositions.

A proper understanding of **Leathers** begins with its context. **Leathers** is a continuation of **Arkansas Writers' Project**, 481 U.S. 221 (1987) ("**AWP**"), also relied upon by Defendants, and answers a very narrow question left open by **AWP**. Specifically, the **AWP** Court stated:

> Because we hold today that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid, our ruling eliminates the differential treatment of newspapers and magazines. Accordingly, we need not decide whether a distinction between different types of periodicals presents ***an additional basis*** for invalidating the sales tax, as applied to the press.

481 U.S. at 223 (emphasis added).

Leathers simply answers this question left open by **AWP**. To be sure, the **Leathers** Court began its analysis by distinguishing the case at hand from **Grosjean v. American Press**

Co., 297 U.S. 233 (1936), **Minneapolis Star**, 460 U.S. 575 (1983), and **AWP**, *supra*. 439 U.S. 444-449. In this regard, the Court explained: "This is not a tax structure that resembles a penalty for ***particular speakers*** or particular ideas." **Id**. at 449. Hence, the Court determined that the only possible basis to deem the ***generally applicable sales tax***[6] scheme unconstitutional would be via the "additional basis" left unexplored by **AWP**:

> Because the Arkansas sales tax presents none of the First Amendment difficulties that have lead us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents '***an additional basis***' for concluding that the State has violated petitioner' First Amendment rights. See **Arkansas Writers'**, *supra*, 481 U.S. **at 233**....

499 U.S. at 449 (emphasis added) (quotation in original).

In **Turner Broadcasting System, Inc. v. Federal Communications Commission**, 512 U.S. 622 (1994), the Court affirmed that whether strict scrutiny applies to a tax targeting a certain medium of speech can be determined by examining the structure of the tax. **Id**. at 660. Taxes which are structured like those in **Minneapolis Star** and **AWP** to target a certain medium receive strict scrutiny, *even where there is no evidence of illicit motive*. **Id**. On the other hand, ***generally applicable*** taxes that incidentally burden speech receive rational basis review, unless there is evidence of an illicit motive (which is *also* present here). **Id**.

The important questions are thus whether the LET is "differential ***or*** content based on [its] face, such that improper intent could be inferred," or whether "the tax is generally applicable ***and*** content neutral on its face" **Id**. There can be no doubt that the LET is differential on its face like the tax in **Minneapolis Star**, and is not a generally applicable tax like the one in **Leathers**. A comparison of the LET to the tax in **Leathers** removes all doubt. **Leathers** involved a challenge to an Arkansas sales "tax of general applicability." **Leathers**,

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[6] This is why that case is not subject to the general doctrine that laws directed at First Amendment protected rights are ***presumed*** unconstitutional.

199 U.S. at 447. Specifically, "Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services."[7] **Id**. at 441. Nevada has a similar sales and use tax, which is set forth in Chapters 360B and 372 of the Nevada Code. The Plaintiffs have not protested the payment of that ***general*** sale and use tax and are not challenging it. Instead, the Taxpayers are challenging the LET, which impermissibly ***singles out live entertainment for a special tax scheme***.[8]

Defendant's reliance on **Madden v. Commonwealth of Kentucky**, 309 U.S. 83 (1940) is likewise misplaced. **Madden** was decided 3 years before **Murdock** and 43 years before **Minneapolis Star**. It involved not a First Amendment challenge, but an equal protection challenge under the Fourteenth Amendment. **Id**. at 88-89. The tax was not a narrow tax on First Amendment activity with numerous exemptions and an illicit legislative history, but an *ad valorem* tax on bank deposits. **Id**. at 86. Every attempt by the Defendants to compare the LET to *actual* broadly-applicable statutes only further demonstrates and reinforces that the LET is *not* a broadly-applicable tax.

In order to determine whether the numerous exemptions in the LET render it to be a content-based tax, Plaintiffs submit that the Court must examine the actual exemptions and what the Legislature discussed when crafting these exemptions. In **Church of Lukumi Bablu Aye, Inc., v. Haileah**, 508 U.S. 520, 534 (1993), the Court recognized that the First

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[7] "Among the services on which the tax was imposed included natural gas, electricity, water, ice, and team utility services; telephone, telecommunications and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing replacement, and repair services; printing of all kinds; ticket for admission to places of amusement or athletic entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities." **Leathers**, 499 U.S. at 447.

[8] Moreover, while **Leathers** differentiates among *modes* of expression, the LET unconstitutionally differentiates based upon the ***content*** of entertainment.

Amendment prohibits "***subtle*** departures from neutrality." (emphasis added). To determine whether "the object of the law is a neutral one," the Court instructed that "we may determine the City Council's object from both direct and circumstantial evidence."[9]

> Relevant evidence includes, ***among other things***, the historical background of the decision under challenge, the specific series of events ***leading to*** the enactment or official policy in question, ***and the legislative or administrative history, including contemporaneous statements made by members*** of the decisionmaking body.

Id. at 540 (emphasis added) (citing **Arlington Heights v. Metropolitan Housing Development Corp.**, 429 U.S. 252, 266-268 (1977)).

Again, rather than reproducing the detailed analysis already contained in Plaintiffs' Motion for Summary Judgment on Facial Challenge, for Permanent Injunction, and for Return of Taxes, pp. 26-41, Plaintiffs hereby incorporate that briefing here by reference as though fully set forth herein. Moreover, Plaintiffs specifically note that the legislative history "leading to" (**Lukumi**, 508 U.S. at 540) sporting events such as boxing and NASCAR being exempted demonstrates beyond any doubt whatsoever that such exemptions were specifically crafted to promote "family oriented" entertainment, while ratcheting up the burden on gentlemen's clubs.

> **Senator Dina Titus, Clark County Senatorial District No. 7**:
>
> This eliminates seating requirements, which were problematic in the original bill. ***It eliminates sporting events, which are family oriented***. We believe those are attended by local families, and eliminating this would help to get a second NASCAR race, an all-star basketball game, and a baseball team. . . .
>
> * * *
>
> **Senator Titus**:

---

[9] The analysis in **Lukumi** was undertaken specifically under the Free Exercise Clause. 508 U.S. 540. Still, the Court made clear that "[t]he principle underlying the generally applicability requirement has parallels in our First Amendment Jurisprudence." **Id**. at 543 (citing, *inter alia*, **Minneapolis Star**, 460 U.S. at 585; other citations omitted).

> I agree with that. ***The 300-seat requirement has kept a lot of those [Gentlemen's] clubs from paying***. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The fiscal Division in the Senate argued that ***if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue***.

ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 17-19 (May 16, 2005) (emphasis and clarification added), Ex. 14 to Plnt. Mtn. (clarification added).

The Defendants' Orwellian statements that the LET is content-neutral do not make it so. This Court cannot ignore the plethora of legislative history showing the LET was aimed at gentlemen's clubs, especially when the subsequent modifications to the LET track *exactly* what the Legislature believed would better capture gentlemen's clubs. And, of course, the 26 exemptions/exceptions to the tax as contained in the statute render any claim that the LET is content-neutral to be nothing short of frivolous.

Defendants also make the ludicrous argument that the LET is content-neutral because it taxes admissions to see First Amendment activity, but not the motions or works of the speech and expression itself. Nevertheless, the tax on ink and paper was struck in **Minneapolis Star**, 460 U.S. at 592, even though the tax was not on the act of reading or printing the publication. The First Amendment cannot be sidestepped so easily. This is a tax on live entertainment, just as the title implies.

Taken together, Defendants arguments are inconsistent and make no sense. Defendants argue that the LET is only a revenue-generating measure, but fail to explain how all of the exemptions serve the Legislature's purpose of raising revenues. The relevant "evidence" that can be considered in the context of a facial challenge, especially the legislative history and

events leading to the enactment of the LET, is overwhelming. The LET blatantly violates the First Amendment.

III. CONCLUSION

The LET is, without question, a direct tax on First Amendment activity, it is content-based, and it has the purpose and effect of targeting a narrowly defined group of First Amendment actors. Based upon all the foregoing, Plaintiffs respectfully request that this Honorable Court deny Defendants' motion for summary judgment in its entirety, and grant Plaintiffs' Motion.

DATED this 28th day of October, 2011

LAW OFFICES OF WILLIAM H. BROWN, LTD.

BY: */s/ William H. Brown*

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 28nd day of October, 2011, the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was served on the party(ies) by emailing and mailing a copy of same in the United States mail, postage prepaid thereon, addressed as follows:

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

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

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Co-Counsel for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT
CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, et al., Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION, et al. Defendants.	CASE NO.: A533273 DEPT. NO.: XI *Coordinated with* CASE NO.: A554970 DEPT. NO.: XI **SUBPOENA**

TO: DINO DICIANNO

C/O Attorney General Catherine Cortez Masto, Senior Deputy Attorney General David J. Pope, Senior Deputy Attorney General Blake Doerr, Deputy Attorney General Vivienne Rakowsky

YOU ARE COMMANDED to appear at The Nevada Department of Taxation, 1150 College Parkway, Suite 115, Carson City, Nevada 89706, on Monday, August 29, 2011, at 9:00 a.m. local time

to testify at the taking of a deposition in the above case, and said deposition shall continue day-to-day until completed.

This subpoena is issued by the attorney below as an officer of the court, as authorized by Nevada Rules of Civil Procedure 45(a)(3).

Signature of Issuing Officer:

Dated: August 2, 2011

WILLIAM H. BROWN, ESQ. (7623)
Counsel for Plaintiffs

EXHIBIT A
PAGE 2

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Co-Counsel for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT
CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, et al., Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION, et al. Defendants.	CASE NO.: A533273 DEPT. NO.: XI *Coordinated with* CASE NO.: A554970 DEPT. NO.: XI **SUBPOENA**

TO: TESA WANAMAKER

C/O Attorney General Catherine Cortez Masto, Senior Deputy Attorney General David J. Pope, Senior Deputy Attorney General Blake Doerr, Deputy Attorney General Vivienne Rakowsky

YOU ARE COMMANDED to appear at The Nevada Department of Taxation, 1150 College Parkway, Suite 115, Carson City, Nevada 89706, on Friday, August 26, 2011, at 9:00 a.m. local time to

testify at the taking of a deposition in the above case, and said deposition shall continue day-to-day until completed.

This subpoena is issued by the attorney below as an officer of the court, as authorized by Nevada Rules of Civil Procedure 45(a)(3).

Signature of Issuing Officer:

Dated: August 2, 2011

WILLIAM H. BROWN, ESQ. (7623)
Counsel for Plaintiffs

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Co-Counsel for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT
CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, et al.,	CASE NO.: A533273 DEPT. NO.: XI
Plaintiffs,	*Coordinated with*
vs.	CASE NO.: A554970 DEPT. NO.: XI
NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION, et al.	**SUBPOENA**
Defendants.	

TO: MICHELLE JACOBS

C/O Attorney General Catherine Cortez Masto, Senior Deputy Attorney General David J. Pope, Senior Deputy Attorney General Blake Doerr, Deputy Attorney General Vivienne Rakowsky

YOU ARE COMMANDED to appear at The Nevada Department of Taxation, 1150 College Parkway, Suite 115, Carson City, Nevada 89706, on Friday, August 26, 2011, at 9:00 a.m. local time to

testify at the taking of a deposition in the above case, and said deposition shall continue day-to-day until completed.

This subpoena is issued by the attorney below as an officer of the court, as authorized by Nevada Rules of Civil Procedure 45(a)(3).

Signature of Issuing Officer:

Dated: August 2, 2011

WILLIAM H. BROWN, ESQ. (7623)
Counsel for Plaintiffs

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Co-Counsel for Plaintiffs
Admitted Pro Hac Vice

DISTRICT COURT
CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, et al., Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION, et al. Defendants.	CASE NO.: A533273 DEPT. NO.: XI *Coordinated with* CASE NO.: A554970 DEPT. NO.: XI

TO: ***THE STATE OF NEVADA, Attorney General Catherine Cortez Masto, Senior Deputy Attorney General David J. Pope, Senior Deputy Attorney General Blake Doerr, Deputy Attorney General Vivienne Rakowsky***

SUBPOENA AND SUBPOENA DUCES TECUM

YOU ARE COMMANDED to appear at The Nevada Department of Taxation, 1150 College Parkway, Suite 115, Carson City, Nevada 89706, on Friday, August 26, 2011, at 9:00 a.m. local time to

testify at the taking of a deposition in the above case, and said deposition shall continue day-to-day until completed. Pursuant to Nevada Rules of Civil Procedure 30(b)(6), you are to designate on or more officers, directors, or managing agents, or other persons who consent to testify on your behalf regarding the matters described in the Rule 30(b)(6) Deposition Notice below.

YOU ARE COMMANDED to produce and permit inspection and copying of the documents and objects described in the Duces Tecum Notice below at Turco & Draskovich, 815 S. Casino Center Blvd., Las Vegas, Nevada 89101 on or before ***August 19, 2011.***

This subpoena and subpoena duces tecum is issued by the attorney below as an officer of the court, as authorized by Nevada Rules of Civil Procedure 45(a)(3).

Signature of Issuing Officer:

Dated: August 2, 2011

WILLIAM H. BROWN, ESQ. (7623)
Counsel for Plaintiffs

REGISTER OF ACTIONS
CASE NO. 06A533273

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

Case Type: **Other Civil Filing**
Subtype: **Other Civil Matters**
Date Filed: **12/19/2006**
Location: **Department 11**
Conversion Case Number: **A533273**

PARTY INFORMATION

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

EXHIBIT B
PAGE 1

Business As		~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Spearmint Rhino Gentlemen's Club**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Treasures**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Plaintiff	**D I Food And Beverage Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**D Westwood Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Deja Vu Showgirls Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**K-Kel Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Little Darlings Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Olympus Garden Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Power Company Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Shac LLC** *Doing Business As* Sapphire	**William H. Brown** *Retained* 702-474-4222(W)

EXHIBIT B
PAGE 2

EVENTS & ORDERS OF THE COURT

08/16/2011 **Motion to Quash** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Defendants' Objection to Subpoena Duces Tecum and Subpoena, Motion to Quash Subpoenas and Motion for Sanctions Pursuant to NRCP 45(c)(1) On Order Shortening Time

Minutes
08/16/2011 9:00 AM
- After arguments by counsel, COURT STATED ITS FINDINGS AND ORDERED, Motion GRANTED IN PART as fully stated on the record. COURT FURTHER ORDERED, Plaintiff to provide Defendant with last known address of Tessa Wanamaker.

Parties Present
Return to Register of Actions

REGISTER OF ACTIONS
CASE NO. 06A533273

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

Case Type: **Other Civil Filing**
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Location: **Department 11**
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PARTY INFORMATION

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

EXHIBIT C
PAGE 1

Business As		~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Spearmint Rhino Gentlemen's Club**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Doing Business As	**Treasures**	~~**Dominic P. Gentile**~~ ~~*Retained*~~ ~~7023860066(W)~~
Plaintiff	**D I Food And Beverage Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**D Westwood Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Deja Vu Showgirls Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**K-Kel Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Little Darlings Of Las Vegas LLC**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Olympus Garden Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Power Company Inc**	**William H. Brown** *Retained* 702-474-4222(W)
Plaintiff	**Shac LLC** *Doing Business As* Sapphire	**William H. Brown** *Retained* 702-474-4222(W)

EXHIBIT C
PAGE 2

EVENTS & ORDERS OF THE COURT

08/23/2011 **All Pending Motions** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)

Minutes

08/23/2011 9:00 AM

- NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983 AND TO DISMISS CASE 2 FOR FAILURE TO FILE A PETITION FOR JUDICIAL REVIEW OR ALTERNATIVELY FOR AN ORDER THAT CASE 2 PROCEED AS A JUDICIAL REVIEW...DEFENDANTS' MOTION TO COMPEL ON AN ORDER SHORTENING TIME AS TO MOTION FOR SUMMARY JUDGMENT: Arguments by counsel. Court stated its findings, and ORDERED, Motion is GRANTED as to the issue of sole remedy. Counsel has 30 days to file a Petition for Judicial Review and matter to be randomly reassigned. The Court will make no comment on the timeliness of the original filing and will make no comment on the extent of the record any other Judge may decide in making that decision. Opposition to be filed 30 days later. Counsel agreed to one-half day of Argument. Mr. Shafer requested the Court grant alternative relief and remand the case. COURT ORDERED, it was not inclined to do that. Upon inquiry of counsel, COURT ORDERED, further discovery is inappropriate. AS TO DEFTS' MOTION TO COMPEL: COURT ORDERED, it had previously DISMISSED the damages.

Parties Present
Return to Register of Actions

EXHIBIT C
PAGE 3

N.R.S. 463.401

West's Nevada Revised Statutes Annotated Currentness
Title 41. Gaming; Horse Racing; Sporting Events
Chapter 463. Licensing and Control of Gaming (Refs & Annos)
Casino Entertainment Tax (Refs & Annos)

463. 401. Levy; amount; exemptions

1. In addition to any other license fees and taxes imposed by this chapter, a casino entertainment tax equivalent to 10 percent of all amounts paid for admission, food, refreshments and merchandise is hereby levied, except as provided in subsection 2, upon each licensed gaming establishment in this state where music and dancing privileges or any other entertainment is provided to the patrons in a cabaret, nightclub, cocktail lounge or casino showroom in connection with the serving or selling of food or refreshments or the selling of any merchandise. Amounts paid for gratuities directly or indirectly remitted to employees of the licensee or for service charges, including those imposed in connection with use of credit cards or debit cards, that are collected and retained by persons other than the licensee are not taxable pursuant to this section.

2. A licensed gaming establishment is not subject to tax pursuant to this section if:

(a) The establishment is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits;

(b) The entertainment is presented in a facility that would not have been subject to taxation pursuant to 26 U.S.C. § 4231(6) as that provision existed in 1965;

(c) The entertainment is presented in a facility that would have been subject to taxation pursuant to 26 U.S.C. § 4231(1), (2), (3), (4) or (5) as those provisions existed in 1965; or

(d) In other cases, if:

(1) No distilled spirits, wine or beer is served or permitted to be consumed;
(2) Only light refreshments are served;
(3) Where space is provided for dancing, no charge is made for dancing; and
(4) Where music is provided or permitted, the music is provided without any charge to the owner, lessee or operator of the establishment or to any concessionaire.

3. The tax imposed by this section does not apply to merchandise sold outside the facility in which the entertainment is presented, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.

4. The tax imposed by this section must be paid by the licensee of the establishment.

Added by Laws 1965, p. 1468. Amended by Laws 1967, p. 980; Laws 1979, p. 1558; Laws 1983, p. 592; Laws 1985, p. 1244; Laws 1993, p. 1165; Laws 1995, p. 1799; Laws 1999, p. 3175.

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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
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REGISTER OF ACTIONS
CASE NO. 06A533273

Little Darlings Of Las Vegas LLC, K-Kel Inc, et al vs Nevada Dept Of Taxation, Olympus Garden Inc, et al	§	Case Type:	**Other Civil Filing**
	§	Subtype:	**Other Civil Matters**
	§	Date Filed:	**12/19/2006**
	§	Location:	**Department 11**
	§	Conversion Case Number:	**A533273**
	§	Supreme Court No.:	**60037**
	§		

PARTY INFORMATION

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

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

EVENTS & ORDERS OF THE COURT

11/08/2011 **All Pending Motions** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)

Minutes

11/08/2011 9:00 AM

- 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.

Parties Present
Return to Register of Actions

REGISTER OF ACTIONS
CASE NO. 06A533273

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

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

PARTY INFORMATION

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

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

EVENTS & ORDERS OF THE COURT

11/10/2011 **Motion to Strike** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Defendants Motion to Strike and Opposition to 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

Minutes
11/10/2011 9:00 AM
- Court noted matter heard on 11/8/11.

Return to Register of Actions

NOTC

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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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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:

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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

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
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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
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ORIGINAL

16

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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

RECEIVED
APR 23 2008
Clerk Of Court

RECEIVED
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:

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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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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.

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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